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Redefining Efficiency in the DOGE Era: The Value of Equitable Evidence-based Policymaking in Federal Agencies

*Ally Coll**

Abstract

In one of the first actions of his second term, President Donald Trump established the Department of Government Efficiency ("DOGE") and tasked it with the mission of "making government work for the people again." This basic theoretical goal is shared by a growing bipartisan group of policymakers and practitioners who have called for implementing evidence-based policymaking ("EBPM") in federal agencies as a means of creating regulations that are more effective at achieving their stated policy outcomes. By asking agency officials to proactively build and apply evidence throughout the policymaking process, EBPM goes above and beyond the basic administrative law requirement that prohibits agencies from acting in ways that are arbitrary and capricious. Accordingly, various overlapping federal EBPM mandates have emerged over the past several decades, from Executive Orders requiring Cost-Benefit Analysis ("CBA") to statutory mandates embedded in the 1993 Government Performance and Results Act ("GPRA") and the 2018 Foundations for Evidence-Based Policymaking Act ("The Evidence Act"). Ultimately, however, these efforts have failed to codify inclusive, transparent, and trustworthy EBPM practices into the federal policymaking process, resulting in a gap in the law that ultimately led to the creation of DOGE. Despite its focus on government efficiency, DOGE eschewed evidence-based approaches under Elon Musk's leadership during the early days of the second Trump Administration. As the most democratically accountable branch of government, however, Congress is well-positioned to reassert its control over the federal regulatory process by enacting improved EBPM statutory mandates, either in future authorizing statutes or by amending and improving the Evidence Act. In doing so, Congress can respond to evolving public concerns about government efficiency while protecting regulations that are equitable, evidence-based and effective at serving the American people.

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* Associate Professor, City University of New York (CUNY) School of Law. The author gratefully acknowledges helpful comments on earlier versions of this Article from Matthew Stephenson, Kevin Stack, Matthew Weiner, and participants at the University of Pennsylvania Carey Law School's June 2024 International Association on Regulation & Governance conference, and from CUNY Law's Professional Development Committee members. The author would also like to thank the editors of the Harv. L. & Pol'y Rev. for their insightful feedback and edits in preparing the Article for publication.

Introduction

In the early 1980s, Los Angeles Police Department ("LAPD") Chief Daryl Gates proposed creating a new program to educate elementary and secondary school children about how to resist peer pressure to use cigarettes, drugs, and alcohol.[1] The initiative's purported goal was to prevent students from using illegal substances, thereby reducing their drug-related interactions with the punitive criminal justice system.[2] By emphasizing prevention, the effort was framed as a nonpunitive program that would "help students resist drugs by learning how to say no, recognizing the consequences of their choices, and agreeing to the importance of personal responsibility and the moral values of right and wrong."[3]

Administered as a joint project of the LAPD and the Los Angeles School District, the program modeled its curriculum off of a similar initiative underway at the time at the University of Southern California.[4] But Gates and his school district counterparts altered their approach in one key way: rather than being taught by teachers or doctors, their program would be administered by police officers.[5] Gates rooted this decision in his belief that law enforcement officers would be "more credible than a teacher" in administering the curriculum, because police officers, unlike classroom educators, had real-world experience with making drug and alcohol-related arrests.[6] The choice

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[1] *See generally* Rosie Cima, *DARE: The Anti-Drug Program That Never Actually Worked*, Priceonomics (Dec. 19, 2016), https://priceonomics.com/dare-the-anti-drug-program-that-never-actually/ [https://perma.cc/4M4Z-3N5Q].

[2] *See* Jim Newton, *DARE Marks a Decade of Growth and Controversy: Despite Critics, Anti-Drug Program Expands Nationally. But Some See Declining Support in LAPD*, L.A. Times (Sep. 9, 1993), https://www.latimes.com/archives/la-xpm-1993-09-09-mn-33226-story.html [https://perma.cc/QZ6D-RCXD] (quoting Chief Gates as saying that DARE was created because of the "appalling" number of undercover police officers successfully buying drugs from students at schools).

[3] Max Felker-Kantor, *DARE to Say No: Police and the Cultural Politics of Prevention in the War on Drugs*, Modern American History 5, 315 (2022), doi:10.1017/mah.2022.19.

[4] *See* Cima, *supra* note 1.

[5] *See* Newton, *supra* note 2.

[6] *Id.*; *see also* U.S. Dep't of Justice, Fact Sheet, *Drug Abuse Resistance Education Program (D.A.R.E.)* 1 (Sep. 1995) [hereinafter "DOJ Fact Sheet"], https://www.ncjrs.gov/pdffiles/darefs.

was also borne from a desire to reinforce the law-and-order message of the police, "reorient students to accept the mission of law enforcement," and help them develop more positive attitudes toward police.[7]

Gates's program would eventually come to be known nationally as the "Drug Abuse Resistance Education" ("DARE") Program. Launched at the height of President Ronald Reagan's "War on Drugs," DARE became wildly popular. The program's focus on personal responsibility appealed to parents and policymakers who wanted to emphasize the importance of individual choice and divert blame from structural inequality in the context of the War on Drugs. Within a decade, the program had expanded to reach more than 5.5 million students in 5,200 communities in all 50 states.[8] When Congress passed the sweeping Anti-Drug Abuse Act of 1986—the most comprehensive piece of legislation affiliated with the War on Drugs—it included a section called the "Drug-Free Schools and Communities Act" to provide funding to support programs like DARE.[9] Members from both chambers of Congress would go on to introduce an official resolution recognizing DARE "for its contributions to the fight against drug and alcohol abuse."[10] An amendment to the Drug-Free Schools and Communities Act enacted in 1990 subsequently provided additional federal funding to local governments seeking to "replicate a program" like DARE that Congress believed had a "demonstrated record of success at either the State or local level in preventing or eliminating student abuse of drugs or alcohol."[11]

There was just one problem: the statute did not instruct grantees about *how* to go about determining which existing programs were proving to be most effective at achieving the statute's stated goal of preventing or eliminating student abuse of drugs or alcohol. As a result, DARE's popularity became a proxy for effectiveness, and the program continued to expand nationwide, boosted by millions of dollars in federal funding.[12] Many parents and politicians advocated for the proliferation of DARE not because it was proving to be successful at preventing or eliminating drug and alcohol use, but because it aligned with other "broader debates about personal responsibility, family values, support for the police, and respect for law and order."[13] Because the statute provided no framework for evaluating what "success" would look like, DARE's stated goal of preventing drug and alcohol use became secondary to its political purpose "as a means to soften the image of the police forces that had otherwise aggressively pursued scorched-earth policies in communities of color in the name of the drug war."[14]

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pdf [https://perma.cc/XR8W-K99S] ("D.A.R.E. achieves these objectives by training carefully selected law enforcement officers to teach a structured, sequential curriculum in the schools.").

[7] Falker-Kantor, *supra* note 3, at 320.

[8] Newton, *supra* note 2.

[9] *See* Pub. L. No. 99-570, §§ 4101–44, 100 Stat. 3207-125.

[10] *See* H.R. Con. Res. 110, 100th Cong. (1987); S. Con. Res. 60, 100th Cong. (1987).

[11] Crime Control Act of 1990, Pub. L. No. 101-647, § 1504, 104 Stat. 4790, 4839.

[12] *See* DOJ Fact Sheet, *supra* note 6, at 4 (charting five-year growth in DARE's student participation and federal funding).

[13] Falker-Kantor, *supra* note 3, at 315.

[14] *Id.* at 336.

Perhaps because of this lack of focus on the actual effectiveness of the program at achieving its state goals, by the early 1990s, scientific studies evaluating the program began to conclude that DARE had little to no effect in preventing drug and alcohol use among participating students. Worse, the studies even suggested that DARE might be having a "boomerang" effect by *increasing* drug and alcohol use among students who had gone through the program.[15] The studies became so widespread that by 1994 the Department of Justice was forced to conduct a meta-analysis and acknowledge that, although the program was highly popular, especially among parents and law enforcement officers, the DARE curriculum had been "less successful" than other similar programs at achieving its prevention-related goals.[16] At the same time, DARE *was* successful at legitimizing the "get-tough policies and expanded police presence in schools," justifying mass arrests that disproportionately impacted Black and Brown schools.[17]

The DARE program highlights a key risk inherent in federal policymaking: how do public officials who are tasked with achieving a particular policy goal know whether their proposed approach will be effective at solving the problem they are trying to address? And how does the public assess whether the federal government is legitimately pursuing its stated policy goals, as opposed to using its power to achieve other unspoken ends? Suppose politicians had more rigorously tested the theory that police officers would be effective administrators of DARE's curriculum before the program became so widespread. Might such research have generated evidence demonstrating that some students would be *less* receptive to anti-drug programming administered by law enforcement officers as opposed to teachers? This might have proven to be particularly true in Gates's own jurisdiction, where LAPD officers Gates supervised viciously assaulted Black motorist Rodney King in 1991, bringing national attention to systemic racism and misconduct in policing and deepening mistrust between law enforcement officers and community members in Los Angeles and across the country.[18]

If such evidence generation had indicated early on that police officers were in fact *not* effective drug resistance messengers—or that DARE's overall prevention-oriented framework was ineffective at stopping students from using drugs or alcohol—might that have persuaded politicians to stop scaling the program through federal legislation and funding? If so, evidence-based policymaking ("EBPM") could have revealed key biases and incorrect

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[15] *See* Steven L. West and Keri K. O'Neal, *Project D.A.R.E. Outcome Effectiveness Revisited*, 94 Am. J. Pub. Health 1027, 1028 (2004) (highlighting four studies finding that DARE had "no effect . . . relative to control conditions" and one study finding that DARE was less effective than control conditions at achieving its desired outcomes).

[16] Christopher L. Ringwalt et al., *Past and Future Directions of the D.A.R.E. Program: An Evaluation Review*, U.S. Dep't of Justice 9 (Sep. 1, 1994), https://www.ncjrs.gov/pdffiles1/Digitization/152055NCJRS.pdf [https://perma.cc/58LQ-TUKG].

[17] Felker-Kantor, *supra* note 3, at 336.

[18] *See* Joe Domanick, *Daryl Gates' Downfall*, L.A. Times (Apr. 18, 2010), https://www.latimes.com/archives/la-xpm-2010-apr-18-la-oe-domanick18-2010apr18-story.html [https://perma.cc/7XCH-ZUBQ] (explaining that the Rodney King riots eventually led to Gates's forced resignation as Chief of the LAPD).

assumptions about the DARE program early on, allowing its administrators to make programmatic adjustments or by eliminating the program entirely. Instead, DARE allowed lawmakers to appear as though they were taking important steps to address the alleged drug crisis while actually "absolving the federal government of responsibility for robust social policy" to address the underlying systemic factors at play,[19] while also doing nothing to effectively prevent drug and alcohol use. Worse, it legitimized an approach that "solidified the drug crisis as a problem to be solved by law enforcement rather than social policy or public health experts,"[20] justifying the expansion of policing and incarceration.

Recognizing the value evidence can provide in the policymaking process, presidential administrations on both sides of the aisle have for several decades now embraced the use of EBPM "in systems as varied as education, human services, criminal justice, and international development."[21] Despite their differing views on most major policy areas, for example, both the first Trump Administration and the Obama Administration incorporated EBPM principles into agency guidance during the 2010s.[22] The subsequent Biden Administration took an even stronger approach, declaring that evidence should be at "the core of how we operate" as a government and society[23] and more formally incorporating EBPM into regulatory guidance. President Trump appeared to champion some of the ideals underlying EBPM again during the 2024 presidential campaign by announcing his plan to create a "government efficiency commission tasked with conducting a complete financial and performance audit of the entire federal government"[24] if elected to a second term. As discussed

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[19] Felker-Kantor, *supra* note 3, at 336.

[20] *Id.*

[21] Vivian Tseng, *Democratizing Evidence*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 408, 408 (Kelly Fitzsimmons & Tamar Bauer eds., 2024). While CBA first gained traction in the 1980s under the Reagan administration, as discussed *infra* Part III(A), the implementation of more holistic EBPM practices in federal agencies began in earnest in the early 2000s, when the U.S. Department of Education controversially established a department-wide incentive to use randomized control trials ("RCTs") to evaluate education programs. *See* Notice of Final Priority, Scientifically Based Evaluation Methods, 70 Fed. Reg. 3586 (Jan. 25, 2005).

[22] *Compare* Off. of Mgmt. & Budget, Exec. Office of the President, President's Management Agenda 4 (2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/04/ThePresidentsManagementAgenda.pdf [https://perma.cc/M3RF-5HQA] (describing the first Trump Administration's endorsement of the "use of data and evidence . . . to orient decisions and accountability"), *with* Memorandum from Sylvia Burwell et al. to Heads of Executive Departments & Agencies (July 26, 2013), http://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-17.pdf [https://perma.cc/9R7R-V3ZL] (encouraging agencies to "draw on existing credible evidence in formulating their budget proposals and performance plans" and "propose new strategies to develop additional evidence relevant to addressing important policy challenges").

[23] Memorandum from Shalanda D. Young to Heads of Executive Departments & Agencies 17 (June 30, 2021) [hereinafter OMB M-21-27], https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-27.pdf [https://perma.cc/HD32-HMM6].

[24] Helen Coster & Gram Slattery, *Trump Says He Will Tap Musk to Lead Government Efficiency Commission If Elected*, Reuters (Sep. 6, 2024), https://www.reuters.com/world/us/trump-adopt-musks-proposal-government-efficiency-commission-wsj-reports-2024-09-05/ [https://perma.cc/VB9W-3399]. While Democratic candidate Kamala Harris did not make government reform a cornerstone of her presidential campaign, she did indicate an intention to generally continue the policies of the Biden Administration, which presumably would have included

infra in Part III(D), however, the subsequent creation of the Department of Government Efficiency ("DOGE"), and the approach taken by its inaugural leader, Elon Musk, during the first hundred days of the administration,[25] in fact represented a stark departure from EBPM, despite sharing many of its theoretical goals.

The Obama, Trump, and Biden Administrations' EBPM efforts come against the backdrop of Congress's 2018 enactment of the Foundations for Evidence-Based Policymaking Act ("the Evidence Act"), which passed with overwhelming support from legislators on both sides of the aisle. Congress's enactment of the Evidence Act demonstrates that, even in today's highly polarized climate, "Democrats and Republicans actually can agree on" the benefits of EBPM.[26] The Evidence Act took important initial steps to codify a framework for requiring federal agencies to incorporate EBPM into their policymaking processes. Yet the Evidence Act lacks important enforcement mechanisms and has failed to create EBPM mandates that are sufficiently inclusive, transparent, or trustworthy. The ultimate inefficacy of the Evidence Act has left a gap in the law that is now being filled by DOGE's non-evidence-based approach.

This problem is compounded by the fact that the Administrative Procedure Act ("APA") fails to sufficiently require agencies to rely on evidence during the regulatory process. In the administrative law context, the role of evidence is most frequently considered in the context of § 706(2)(A) of the APA, which requires reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27] As expanded upon by the Supreme Court in *Motor Vehicle Manufacturer's Ass'n v. State Farm Insurance*, this standard requires agencies to examine available evidence and articulate a satisfactory explanation for their actions, demonstrating that they have made a "rational connection between the facts and the choice made."[28] Yet while *State Farm* requires agencies to rationally consider available evidence during the policymaking process, it stops short of requiring them to proactively engage in evidence-building activities to inform their policy decisions and priorities. While agencies therefore cannot make a

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maintaining its new, more rigorous commitment to EBPM. *See* Ebony Davis et al., *Harris Says There's Not Much She'd Have Done Differently Than Biden Over the Last 4 Years*, CNN (Oct. 8, 2024), https://www.cnn.com/politics/harris-2024-campaign-biden/index.html [https://perma.cc/D5BZ-J8A3].

[25] On May 28, 2025, Elon Musk announced his departure from the federal government and thanked President Trump for the "opportunity to reduce wasteful spending" as the leader of DOGE. *See* Elon Musk, X, https://x.com/elonmusk/status/1927877957852266518?lang=en [https://perma.cc/JQ88-M3VT] (last visited Aug. 13, 2025). While Musk reiterated his belief in the DOGE mission and called for it to "strengthen over time as it becomes a way of life throughout the government," this Article focuses on the early actions taken by DOGE under Musk's leadership, primarily during the first hundred days of the second Trump Administration.

[26] Colleen V. Chien, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, 104 Iowa L. Rev. 2313, 2318 (2019).

[27] 5 U.S.C. § 706(2)(A).

[28] 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

policy decision that "runs counter to the evidence before the agency"[29] under § 706(2)(A), *State Farm* does not require agencies to adopt EBPM.

Part I of this Article provides a definition of evidence in the policymaking context and defines the term EBPM. Part II explains the limited extent to which administrative law already requires agencies to utilize evidence in policymaking and contrasts the APA's arbitrary and capricious standard as interpreted by the Supreme Court in *State Farm* with EBPM. Part III describes the additional overlapping EBPM-related mandates that have emerged over the past several decades to fill this gap and argues that, despite its invocation of EBPM principles, the approach taken by Musk's DOGE during the early days of the Trump Administration represented a departure from these evidence-based approaches. Part IV details fairness-related concerns with the current EBPM approach codified by Congress in the Evidence Act and proposes solutions to create EBPM processes that are more inclusive, transparent, and trustworthy. Part V concludes that Congress should codify these practices, either in future authorizing statutes or by amending the Evidence Act, to create equitable EBPM processes that are trusted by—and therefore most effective at serving—individuals and communities impacted by federal regulations. The Article concludes that Congress can reassert its constitutionally vested power over the agency regulatory process in the wake of DOGE's unprecedented cuts to federal programs by codifying improved evidence-based policymaking practices. As the most democratically accountable branch of government, Congressional action is necessary both to counteract DOGE's distinctly non-evidence-based approach to government reform and to restore public confidence in the federal policymaking process.

I. Defining Evidence-Based Policymaking

A. Defining Evidence

Anyone engaged in the practice of law is undoubtedly already familiar with the concept of evidence. While the term most often invokes images of crime scene photographs or witnesses on the stand, "[e]vidence matters outside the courtroom as well" and is frequently used by "[t]ransactional lawyers, dealmakers, negotiators, lobbyists, in-house corporate counsel, and attorneys of all stripes . . . to analyze and advance their clients' causes."[30] This is true also of government officials and policymakers, who frequently deploy evidence as "a set of techniques for advancing knowledge about particular questions."[31] In both the litigation and policymaking contexts, evidence "is the essential counterweight to abstract legal rules"[32] and technical government policies,

[29] *Id.*

[30] Deborah Jones Merritt & Ric Simmons, Learning Evidence 2 (5th ed. 2022).

[31] Brian Scholl, *The Unfinished Business of Evidence Building: Directions for the Next Generation*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 243, 244 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[32] Jones & Simmons, *supra* note 30, at 2.

providing lawyers and policymakers with the ability to "explain and persuade" others of the value inherent in a chosen approach.[33] The use of evidence recognizes that people—whether they be members of a jury or of the voting public—respond better to "examples, details, and stories" than to "abstract, theoretical arguments" about legal standards or policy objectives.[34]

In the courtroom context, the Federal Rules of Evidence ("FRE") define "relevant evidence" as evidence having "any tendency to make a fact more or less probable than it would be without the evidence."[35] In other words, a given piece of evidence is merely a "brick" and not a "wall,"[36] meaning that it "need not prove the ultimate fact conclusively; it can simply be a component of a larger whole that supports a finding."[37] In the policymaking context, the Office of Management and Budget ("OMB") has defined evidence "as the available body of facts or information indicating whether a belief or proposition is true or valid."[38] This definition is more expansive than the limited one Congress provided in the Evidence Act, which states simply that evidence is "information produced as a result of statistical activities conducted for a statistical purpose."[39]

Congress's narrow definition of evidence in the Evidence Act fails to recognize, as the FRE's broader definition does, that relevant evidence can have "not only statistical but also practical significance."[40] Practitioners have drawn upon the FRE's "brick and not a wall" analogy to argue that, in the policymaking context, evidence is best viewed as a "flashlight" rather than "a road map."[41] Instead of providing foolproof statistical validation about which policy choice is best, evidence "alone does not guide us to where we need to go but, rather, illuminates our path" in the policymaking context.[42] Evidence in the context of EBPM must not be narrowly defined as statistical data, but thought of broadly as encompassing other forms of expertise, "such as that emanating from lived experience and qualitative, community-focused methodologies."[43] Only then

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[33] *Id.*

[34] *Id.* at 1.

[35] Fed R. Evid. 401.

[36] Fed R. Evid. 401 advisory committee's note (quoting Charles T. McCormick, Handbook of the Law of Evidence § 152 (1st ed. 1954)).

[37] Erin Murphy, *No Room for Error: Clear-Eyed Justice in Forensic Science Oversight*, 130 Harv. L. Rev. F. 145, 146 (2017).

[38] OMB M-21-27, *supra* note 23, at 24.

[39] 5 U.S.C. § 311(4) (incorporating the definition as set forth in 44 U.S.C. § 3561(6)). Statistical activities, in turn, are defined as "the collection, compilation, processing, or analysis of data for the purpose of describing or making estimates concerning the whole, or relevant groups or components within, the economy, society, or the natural environment," including "the development of methods or resources that support those activities, such as measurement methods, models, statistical classifications, or sampling frames." 44 U.S.C. § 3561(10).

[40] Tamar Bauer et al., *Introduction: Why This Book and What You'll Learn*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 1, 13 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[41] Michael McAfee, *Reimagining Evidence as Justice*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 89, 93 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[42] *Id.*

[43] Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48:2 BYU L. Rev. 403, 410 (2022).

will evidence inform federal policymaking in ways that can actually lead to a more just and equitable society.

The definition promulgated by OMB during the Biden Administration better encapsulates this broader view. The guidance explains that evidence may be "quantitative or qualitative and may come from a variety of sources, including foundational fact finding . . . performance measurement, policy analysis, and program evaluation."[44] In line with the "brick and not a wall" theory, OMB acknowledges that "the strongest evidence generally comes from a portfolio of high-quality, credible sources rather than a single source."[45] If the purpose of evidence in the policymaking context is to help ensure that "efforts are not just well-intentioned but effective,"[46] it is important to expand beyond Congress's narrow statistical definition and "reimagine evidence to consider context, confidence level, size of impact, speed to insight, and cost of implementation."[47] OMB's definition thus provides the best available definition of evidence in the policymaking context, where evidence is employed not to prove a particular point in litigation, but because it is "critical to getting our work to work and keeping our democracy democratic."[48]

B. Defining Evidence-Based Policymaking

As important as it is to define evidence in the policymaking context, it is equally critical to clarify how it should be used and to what ends. For the past several decades, a growing bipartisan consensus has emerged around the value of adopting an evidence-based approach to policymaking, such that even in today's highly partisan political environment the idea "presents a rare opportunity for agreement."[49] So what, exactly, does evidence-based policymaking entail? The concept stems from an understanding that agency officials across the political spectrum face a "knowledge problem" that hinders their ability to achieve a given administration's desired policy outcomes.[50] These gaps in understanding about the impact and effectiveness of a given administrative program leave policymakers uncertain about what choices to make, what the impact of those choices will be, and which policy choices are most likely to achieve the agency's ultimate policy goals or fulfill its statutory mandate from Congress.[51]

The economist Brian Scholl posits that government agencies are generally tasked with "trying to make something good happen for a number of

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[44] OMB M-21-27, *supra* note 23, at 24.

[45] *Id.*

[46] Betina Jean-Louis, *Engaging the Full Arc of Evidence Building*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 28, 28 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[47] Bauer et al., *supra* note 40, at 13.

[48] Scholl, *supra* note 31, at 244; *see also* Jean-Louis, *supra* note 46, at 28 (describing evidence as our "strongest weapon *to ensure that do-gooders are* ***actually*** *doing good*") (emphases in original).

[49] Chien, *supra* note 26, at 2317.

[50] *Id.* at n.11 (citing Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 Yale L.J.F. 263, 263–64 (2015)).

[51] *See id.* at 2316.

people," such as feeding the hungry, sheltering the unhoused, or reducing unemployment.[52] While Congress typically states its policy objectives in such socially desirable terms, it is important to acknowledge that the government may at times also be acting upon other implicit motivations. For example, in the context of DARE, although the statutory language focused on the program's success at preventing drug and alcohol use, historical evidence makes clear that many who promoted the program also favored its use for other purposes. In 1991, for example, Assistant Attorney General Jimmy Gurulé told then-Attorney General William Barr that a "very important part" of the DARE program was its ability "to provide an environment in which children will develop a positive attitude toward law enforcement,"[53] a goal that is nowhere stated in Congress's statutory language.

Stated policy goals have related outcomes (which Scholl deems "Y" for shorthand), such as the number of people who are not hungry, the number of people who have found housing, or the number of people who have a job.[54] To achieve these goals, agencies implement various policies (which Scholl deems "p" for shorthand). Because the outcome Y changes when agencies implement different policy approaches, Y is a function of p. In other words, "change the mix of levers and we get different outcomes for our beneficiaries" (a relationship Scholl denotes as "Y(p)").[55] Given limited resources, all agencies, regardless of their specific policy goals, typically aim to identify the best possible outcome ("Y*") the agency can facilitate with an ideal combination of policies ("p*"). Evidence helps policymakers achieve their policy goals by giving them the information necessary to get "closer to figuring out Y* and p*" by "understand[ing] the relationship between Y and p."[56] Evidence-based policymaking draws upon Scholl's framework by asking policymakers to engage in "both the generation and use of empirical evidence at several time points"[57] to facilitate the use of evidence in achieving Y*p* in the way Scholl describes. In this way, EBPM can help provide the public with a means of holding the government accountable to its stated policy goals and outcomes.

Rather than making policy decisions based on political preferences or instincts about which course of action is best, EBPM in the agency context asks policymakers to engage in "the systematic use of empirical research . . . when making government decisions."[58] As discussed further *infra* in Part III(C), in 2016 Congress took a significant step toward exploring the use of EBPM in the federal government by creating a fifteen-member commission ("the EBP Commission") to study the government's capacity for more formally engaging

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[52] Scholl, *supra* note 31, at 244.
[53] Felker-Kantor, *supra* note 3, at 319-20.
[54] *See id.*
[55] *Id.* at 245.
[56] *Id.*; *see also* Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 Yale L. & Pol'y Rev. 150, 216 ("When there is a shared view that a problem exists, evidence can identify the scope and causes thereof . . . [, and] [w]hen there is a shared agreement on a set of appropriate and politically palatable solutions to a problem, evidence can identify the feasibility and likely effectiveness of solutions in that set.").
[57] Underhill, *supra* note 56, at 153.
[58] *Id.*

such a framework in agency decision-making.[59] In its resulting 2017 report to Congress, the EBP Commission defined evidence-based policymaking as "the application of evidence to inform decisions in government,"[60] and recognized that in order for agencies to do so, "a supply of evidence must first exist."[61] EBPM therefore inherently involves not only the application of existing evidence to policy decision-making, but also the proactive "generation of evidence"[62] to ensure that agencies have all the information necessary to create well-informed evidence-based policy decisions.

This process of generating evidence for agencies to use in decision-making is a key feature of EBPM and typically begins with the creation of an "evidence-building plan." Evidence-building plans serve as roadmaps for "identifying and addressing priority questions relevant to the programs, policies, and regulations of an agency."[63] Rather than starting from scratch, agencies typically begin by consulting existing research evidence, to the extent it exists. Where such data is missing or inadequate, however, EBPM asks agencies to "fund or allow research that will evaluate the impacts"[64] of a particular policy decision, rather than simply acting on the best available evidence. Evidence-building processes typically begin with identifying a set of questions to answer, such as diagnostic questions (to assess the current status quo); policy development questions (to assess the impact of a specific policy design); long-term outcome questions (to assess the correlation between policies and outcomes); and policy implementation questions (to assess different methods of policy execution).[65] Successful evidence-building plans will result in "a framework to use data in service of addressing the key questions an agency wants to answer to . . . develop appropriate policies and regulations to support successful mission accomplishment."[66]

Once a plan exists, agencies typically proceed to the foundational fact-finding stage, during which they conduct exploratory studies and engage in basic research to better understand the problem they are trying to solve.[67] In the context of DARE, for example, this could have included pilots comparing the efficacy of having police officers administer the program as opposed to schoolteachers. EBPM is not particular about the methodology that should

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[59] Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317.

[60] Comm'n on Evidence-Based Policymaking, The Promise of Evidence-Based Policy Making 11–12 (2017) [hereinafter Commission Report], https://www2.census.gov/adrm/fesac/2017-12-15/Abraham-CEP-final-report.pdf [https://perma.cc/WH9G-FZJE].

[61] *Id.* at 12.

[62] *Id.*

[63] Diana Epstein, *Beyond the Evidence Act*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 381, 383 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that practitioners in the EBPM field often refer to evidence-building plans as "learning agendas" and that the "two terms are synonymous").

[64] Underhill, *supra* note 56, at 153.

[65] Chien, *supra* note 26, at 2339–40.

[66] Epstein, *supra* note 63, at 384.

[67] Memorandum from Russell T. Vought to Heads of Executive Departments & Agencies 13 (July 10, 2019) [hereinafter OMB M-19-23], https://www.whitehouse.gov/wp-content/uploads/2019/07/m-19-23.pdf [https://perma.cc/DA2V-RNM4] (defining "foundational fact finding" as one of the four core "components of evidence").

be used in evidence generation, and evidence-building plans can include a "range of methods and types of evidence,"[68] which can be weighed according to their methodological quality at the end of the evidence-building process.[69] Once data exist, the agency typically moves onto a policy analysis phase in which generated evidence is applied to inform policy decisions by estimating regulatory impacts and other relevant effects.[70] In the DARE example, evidence generated from initial pilots could have been applied to inform policy decisions about who should administer DARE's curriculum, and whether a prevention-oriented framework was effective at achieving its stated goals. After a set of policy decisions are made, EBPM asks the agency to continue generating evidence and applying data to conduct program evaluations and performance measurement activities to assess the effectiveness and efficiency of the agency's chosen path.[71]

These intertwined steps ensure that the EBPM process is a continuous lifecycle, rather than a set of threshold activities that must occur before a program can be implemented. Once sufficient evidence has been generated, EBPM instructs policymakers to use it not only to inform initial policy decisions, but also to assess the impact of those decisions once made, and to guide the agency in changing course if necessary.[72] Viewing EBPM as an ongoing and ever-evolving process is critical to ensuring that agencies do not use evidence (or a lack thereof) to justify eliminating or halting critical government programs. Such an understanding of EBPM also ensures that policymakers can quickly adjust to newly generated evidence that indicates that they have made a less-than-optimal policy choice. These subsequent responsive programmatic changes are not viewed as a failure of EBPM, but rather as a natural and desirable part of a process that is working as it should.[73] If evidence had indicated early on that police officers were not effective messengers of DARE's curriculum, for example, policymakers could have adapted the program's approach. Or if evidence had demonstrated that DARE's prevention-oriented framework was ineffective, it could have provided the public with a mechanism through which to question the federal government's motivations for continuing to scale the program. As explained in the following section, however, while existing administrative law requirements account for the use of evidence in policymaking to a limited extent, the current doctrine fails to impose true EBPM requirements on federal agencies.

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[68] *Id.* at 35.
[69] Underhill, *supra* note 56, at 158.
[70] OMB M-19-23, *supra* note 67, at 13.
[71] *Id.*
[72] Underhill, *supra* note 56, at 158.
[73] For more on the importance of embracing failure as part of the EBPM process, see Ryan Martin, *Building More Haystacks, Finding More Needles*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 391, 393–94 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that government needs to "fail with more certainty, more frequently, more cheaply, and much faster than ever before" given that "[m]ost things won't work and that is ok").

II. The Role of Evidence in Administrative Law

As explained in the previous section, EBPM asks agencies to "start with the question" the agency seeks to answer, rather than with the data that already exists about a particular problem. EBPM thereby ensures that agencies engage in proactive evidence-building activities that are tethered to their defined policy goals, rather than asking them to simply review existing data before proposing a given regulation. By contrast, the legal standards governing review of agency action under existing administrative law principles do not require agencies to engage in proactive goal-setting or evidence-building activities before proposing a new regulation. Rather, the APA's arbitrary and capricious standard, as interpreted by the Supreme Court in *State Farm*, asks only whether the agency rationally considered existing available evidence during its decision-making process. This standard is an insufficient substitute for EBPM because it asks the agency only to consider an existing body of evidence that was built by, and is often supplied by, external third parties who have policy priorities that may not align with those of the agency. To account for this dynamic, arbitrary and capricious review therefore ultimately permits agencies to reach conclusions that contradict the evidence before it, as long as the agency rationally explains its choice. As a result, arbitrary and capricious review as interpreted by *State Farm* fails to require agencies to engage in evidence-based policymaking as defined *supra* in Part I.

A. The APA's Arbitrary and Capricious Standard

Since 1946, § 706(2)(A) of the APA has required reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[74] A closer look at the meaning of the terms "arbitrary" and "capricious" makes clear that the concepts are inherently connected to evidence. According to dictionary definitions,[75] an action is "arbitrary" if it is "existing or coming about seemingly at random or by chance,"[76] and "capricious" if it is characterized by[77] "a sudden, impulsive, and seemingly unmotivated notion or action."[78] In other words, an action is arbitrary or capricious if it is untethered to evidence or inexplicable given the facts and circumstances.

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[74] 5 U.S.C. § 706(2)(A).

[75] While reviewing courts have appropriately interpreted the APA's statutory terms over the years through the lens of the statute's legislative history, straightforward dictionary definitions are illustrative here for the purposes of understanding the connection between arbitrary and capricious review and evidence-based policymaking.

[76] *Arbitrary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/arbitrary [https://perma.cc/SQB4-RL7G] (last visited June 21, 2025).

[77] *Capricious*, Merriam-Webster, https://www.merriam-webster.com/dictionary/capricious [https://perma.cc/S4VC-PLJ4] (last visited June 21, 2025).

[78] *Caprice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/caprice [https://perma.cc/7VRP-S7VZ] (last visited June 21, 2025).

In the context of the APA, the arbitrary and capricious standard is intended to provide reviewing courts with the authority to strike down agency action that, even if procedurally sufficient, is nonetheless "so unreasonable as to be arbitrary."[79] The Supreme Court's interpretation of the standard has evolved over the past several decades, mutating from an extremely deferential requirement to one that now imposes somewhat more rigor on agencies. The original standard, derived from the pre-APA case *Pacific States Box & Basket v. White*,[80] directed reviewing courts to uphold agency action so long as "any state of facts reasonably can be conceived" to support the decision.[81] In stark contrast to EBPM processes, this standard did not require an agency to find or even articulate any facts to support its conclusion. Rather, so long as the reviewing court could conceive of any facts that could have supported the agency's decision, the court would uphold the action under arbitrary and capricious review.[82]

As the administrative state's power grew in the ensuing decades, however, the Court began imposing a more stringent version of the arbitrary and capricious test known as "hard look review." This standard required reviewing courts to evaluate whether the agency "has taken a hard look at the issues with the use of reasons and standards."[83] Reviewing courts vehemently debated whether "hard look" review required agencies to engage in an EBPM-like process in the years leading up to the Supreme Court's 1983 decision in *State Farm*. Though the term EBPM was not in the popular lexicon in the 1970s to the extent it is today, D.C. Circuit Judge Bazelon advocated for agencies to employ certain evidence-related processes. Judge Bazelon believed that such an approach would provide a more objective framework for reviewing courts to assess whether agency action is arbitrary and capricious, arguing that "the best way for courts to guard against unreasonable or erroneous administrative decisions is . . . to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."[84] Judge Bazelon believed that such a process should involve not only the agency's preparation of "a record compiling all the evidence it relied upon for its action" but also a requirement that the agency "organize and digest it . . . [and] clearly disclose when each piece of new information is received and when and how it was made available for comment" during the rulemaking process.[85]

By requiring agencies to adhere to "a framework for principled decision-making"[86] using the evidence before them, Judge Bazelon hoped to avoid circumstances in which non-technical judges would make their own "de novo

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[79] Matthew C. Stephenson & John F. Manning, Legislation and Regulation 985 (4th ed. 2021).

[80] 296 U.S. 176 (1935).

[81] *Id.* at 185.

[82] Stephenson & Manning, *supra* note 79, at 989.

[83] Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

[84] Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

[85] Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring).

[86] *Int'l Harvester Co.*, 478 F.2d at 651 (Bazelon, C.J., concurring).

evaluation of the scientific evidence."[87] His proposal, however, was unanimously rejected by the Court in 1978 in *Vermont Yankee v. NRDC*.[88] Concluding that the APA provides the maximum procedural requirements Congress was willing to have courts impose on agencies, the *Vermont Yankee* Court made clear that any requirements related to the procedural use of evidence in policymaking would have to be mandated separately by Congress or employed by agencies at their own discretion.[89] Yet while reviewing courts cannot impose their own evidence-related procedural requirements on agencies under *Vermont Yankee*, the Court's decision five years later in *State Farm* clarified that evidence still plays an important role in judicial review under the APA's arbitrary and capricious standard.

B. The Evidence That State Farm Requires

In an effort to regulate the growing interstate highway system in the United States, Congress in 1966 enacted the Highway Safety Act, which created the new National Highway Traffic Safety Administration ("NHTSA"). On the same day, Congress also enacted the National Traffic and Motor Vehicle Safety Act ("NTMVSA"), which tasked the NHTSA and the Secretary of Transportation with "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents"[90] by issuing new motor vehicle safety standards. As is relevant to our discussion of EBPM, the NTMVSA instructed the NHTSA to consider "relevant available motor vehicle safety data" in the process of promulgating new regulations under the Act.[91]

After several earlier failed attempts to fulfill this mandate, in 1977 the Carter Administration issued a modified version of a regulation titled "Standard 208," which required vehicle manufacturers to install one of two kinds of "passive restraint" devices: either automatic seatbelts or airbags.[92] The Secretary of Transportation justified the regulation based on "available experimental data and limited field experience" demonstrating that passive restraints could prevent approximately 9,000 deaths and over 100,000 injuries."[93] In January 1981, however, Ronald Reagan assumed the presidency and, in a sharp departure from the Carter Administration's pro-regulatory approach, declared in his

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[87] *Ethyl Corp.*, 541 F.2d at 66 (Bazelon, C.J., concurring).

[88] 435 U.S. 519 (1978).

[89] *Id.* at 523 (holding that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies" and that while "[a]gencies are free to grant additional procedural rights in the exercise of their discretion . . . reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

[90] 15 U.S. Code § 1381 [hereinafter NTMVSA] (repealed by Pub. L. 103–272, § 7(b), July 5, 1994). While the statute delegated regulatory authority to the Secretary of Transportation, the Secretary in turn delegated the authority to promulgate motor vehicle safety standards to the Administrator of the NHSTA.

[91] *Id.* The statute also instructed the NHTSA to consider whether its proposed standards would be "reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.*

[92] Federal Motor Vehicle Safety Standards, 21 Fed. Reg. 15935 (March 24, 1977).

[93] P. Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1342 (D.C. Cir. 1979) (citing 34 Fed. Reg. 11148 (proposed July 1, 1969)).

inaugural address that "government is not the solution to our problem; government is the problem."[94] The following month, Reagan's new Secretary of Transportation reopened the NHTSA rulemaking, citing "changed economic circumstances," and proceeded to rescind the passive restraint requirement.[95]

In justifying its decision to rescind the regulation, the agency did not call into question any of the above-mentioned evidence demonstrating the effectiveness of passive restraints in preventing injury when used. Rather, the agency questioned the likelihood that such restraints would in fact be used by passengers and the automobile industry. While NHTSA had initially assumed that airbags would be installed in 60 percent of vehicles, and automatic seatbelts in the remaining 40 percent, it had since become clear that manufacturers planned to install automatic seatbelts in 99 percent of new vehicles. Because these seatbelts *could be* detached by the user if desired,[96] the agency concluded, without supporting evidence, that passengers *were in fact likely* to detach the automatic seatbelts. The agency therefore concluded the new passive restraint requirement provided no discernable benefit over existing manual seatbelts.[97]

Applying §706(2)(A)'s arbitrary and capricious standard, the Supreme Court struck down the Reagan Administration's decision to rescind Standard 208 and, in the process, clarified the extent to which agencies must consider evidence in decision-making.[98] Acknowledging that the scope of arbitrary and capricious review is narrow, the Court nonetheless concluded that the agency must, at a minimum, "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[99] The Court concluded that Reagan's NHTSA failed to do so by, *inter alia*, (1) failing entirely to acknowledge the possibility of requiring the automobile industry to install airbags in lieu of automatic seatbelts, and (2) failing to explain why it believed that individuals would detach automatic seatbelts at such a high rate as to effectively render them useless.[100]

The *State Farm* Court clarified that agency action fails to satisfy arbitrary and capricious review if it "entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[101] This framework remains the governing standard for arbitrary and capricious review of agency action today. Importantly, however, this standard can be satisfied even if evidence in the record contradicts the agency's conclusion, as long as the agency

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[94] Ronald Reagan, President of the United States, Inaugural Address 1981 (Jan. 20, 1981), https://www.reaganlibrary.gov/archives/speech/inaugural-address-1981 [https://perma.cc/9EZY-6QTG].

[95] Motor Vehicles Mfrs. Ass'n v. State Farm, 463 U.S. 29, 38 (1983).

[96] *Id.* at 47.

[97] *Id.* at 29–30.

[98] The Court also clarified that the arbitrary and capricious standard applies both when an agency first promulgates a rule and when it decides to rescind an existing regulation. *Id.* at 42.

[99] *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[100] *Id.* at 51.

[101] *Id.* at 43.

explains why it chose to make a decision that runs counter to that evidence. Indeed, the *State Farm* Court made clear that an agency's decision about how much weight and veracity to give a particular body of evidence "is precisely the type of issue which rests within the expertise [of an agency] and upon which a reviewing court must be most hesitant to intrude."[102]

The fact that no evidence exists in the record to support an agency's conclusion is likewise not fatal under the *State Farm* standard. Rather, the Court acknowledged that often "available data does not settle a regulatory issue and the agency must then exercise its judgment"[103] without access to relevant evidence. In such cases, however, the agency must generally explain why it is choosing to act "before engaging in a search for further evidence."[104] The NHSTA's rescission of Standard 208 thus failed arbitrary and capricious review not because it ran counter to evidence in the record, nor because it failed to seek out additional relevant evidence, but because it failed to properly explain its decision on either count.

To contrast this requirement with a true EBPM process, it is helpful to view the decision within Scholl's framework. Congress in the NTMVSA tasked the NHSTA with a particular goal: to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[105] The goal's measurable outcomes (Scholl's "Y") are the number of vehicles that do not experience a traffic accident, or the number of people who do not experience death or injury resulting from an accident they are involved in. Standard 208 focused on the second outcome: reducing the number of injuries or fatalities resulting from traffic accidents. It aimed to do so through a particular policy lever (Scholl's "p") by requiring all vehicles to install a passive restraint mechanism, either in the form of an airbag or an automatic seatbelt. In its various deliberations over the proper formulation of Standard 208, the NHSTA theoretically was attempting to achieve the least number of motor vehicle-related injuries or fatalities (Scholl's "Y*") by identifying an ideal combination of policies (Scholl's "p*").

The evidence in the record demonstrated clearly that the use of passive restraints would significantly help the agency achieve Y. The policy mechanism chosen in Standard 208 to achieve that outcome was to require motor vehicles to install either automatic seatbelts ("p1") or airbags ("p2"). Subsequent evidence developed after Standard 208 went into effect, but before the Reagan Administration rescinded the rule, demonstrated that, given the choice between p1 and p2, manufacturers were overwhelmingly choosing p1. The Reagan Administration thus reasoned, without evidence in the record to support its conclusion,[106] that because automatic seatbelts are detachable, p1 would not lead to Y at all, let alone Y*. The *State Farm* court rejected the agency's rescission of Standard 208 as arbitrary and capricious because the

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[102] *Id.* at 53.
[103] *Id.* at 52.
[104] *Id.*
[105] NTMVSA, *supra* note 90.
[106] *State Farm*, 463 U.S. at 52 ("… there is no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage.").

agency's decision to rescind *both* p1 and p2 "apparently gave no consideration whatever to"[107] modifying Standard 208 to focus on p2, and because the agency failed to explain its decision not to seek additional evidence about the lack of correlation between p1 and Y.

An EBPM approach would ask more of the agency's decision-makers: at a minimum, it would require them to engage in additional evidence-building to determine whether individuals would in fact detach automatic seatbelts at high rates. In a world in which an EBPM process had been engaged from the beginning of the NHSTA's efforts to fulfill its statutory objective under the NTMVSA, the agency would have begun by identifying a set of policy-relevant questions to answer, including diagnostic questions (to what extent do individuals detach automatic seatbelts when such a function is available?); policy development questions (how could the agency incentivize car manufacturers to install airbags in lieu of automatic seatbelts, given their proven tendency to favor the former?); long-term outcome questions (does the installation of airbags alone prevent injuries and fatalities to a significant degree without supplemental seatbelt usage?); and policy implementation questions (what is the feasibility of requiring manufacturers to install airbags instead of automatic seatbelts?).[108] Such questions would prompt the agency to proactively assess the existing landscape of relevant evidence, as opposed to waiting for interested parties to present their own studies and data as part of notice-and-comment proceedings. Moreover, when available evidence failed to answer policy relevant questions, such as the frequency at which individuals would detach automatic seatbelts, the agency would have engaged in proactive evidence-building efforts to try to ascertain the answer before acting.

By contrast, the *State Farm* standard permits the agency to reach a decision that runs counter to the evidence before it without engaging in a search for further evidence, provided that the agency rationally explains its decision-making process. In some cases, a decision not to seek additional evidence may not be rational—in which case arbitrary and capricious review could require the agency to "adduce empirical evidence that can be readily obtained."[109] The Court has made clear, however, that reviewing courts may not "insist upon obtaining the unobtainable" by requiring agencies to engage in proactive evidence-building simply to prove assumptions that "make sense" to them without evidence to back up their conclusions.[110] In the years since *State Farm*, the Court has generally rejected the suggestion that agencies have an affirmative obligation under § 706(2)(A) to proactively build evidence, concluding that "[t]he APA imposes no general obligation on agencies to commission their own empirical or statistical studies."[111]

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[107] *Id.* at 46.

[108] *See* Chien, *supra* note 26, at 2339–40 (listing the different categories of policy-relevant questions to consider).

[109] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

[110] *Id.*

[111] FCC v. Prometheus Radio Project, 592 U.S. 414, 415 (2021) (upholding a decision by the FCC in circumstances where the agency did "not have perfect empirical or statistical data" because "that is not unusual in day-to-day agency decisionmaking within the Executive Branch").

The *State Farm* standard thus falls short of requiring agencies to engage in EBPM in at least two important ways. First, while *State Farm* requires agencies to make a "rational connection" between their decisions and the available evidence, it does not require them to methodologically "apply" that evidence in their decision-making processes. Rather, the *State Farm* standard functions as a "rule of reason," allowing an agency to make policy decisions that run counter to the evidence before it, "provided its reasons for doing so are disclosed and rational."[112] Second, because *State Farm* does not require agencies to proactively build evidence, reviewing courts are confined to considering the record that was before the agency. This limits a reviewing court's ability to assess the extent to which agencies have properly engaged with available evidence because "where evidence is not introduced in the administrative record, such as through notice-and-comment rulemaking," it is difficult for "courts to identify its absence, and therefore fault agencies for lack of consideration."[113]

III. The Rise of Evidence-Based Policy Mandates

A. Cost-Benefit Analysis

Formal efforts to integrate EBPM-like processes across federal agencies began in earnest around the same time as the *State Farm* decision. The Reagan Administration's decision to rescind Standard 208 reflected the president's overall view that too many government programs were spending taxpayer money on initiatives that yielded insufficient benefits to society.[114] The government's requirement that a struggling automobile industry install automatic seatbelts that could readily be detached (and therefore rendered useless) by users was a prime example of agency overreach in the eyes of Reagan's Transportation Secretary. Although the decision to rescind Standard 208 did not follow an EBPM-like process, the underlying goals of the decision—and its roots in cost-benefit analysis—mirror the aims of EPBM.

Cost-benefit analysis was first introduced across the federal government two years before the Supreme Court issued its decision in *State Farm*, through Reagan's Executive Order ("E.O.") 12291. The E.O. was the first to require agencies to conduct a "Regulatory Impact Analysis" for all "major rules," meaning any regulation likely to result in an annual effect on the economy of $100 million or more, or a major economic impact on consumers, industries, or government.[115] In such circumstances, agencies were required to conduct an empirical analysis of the rule's potential costs and benefits, and instructed not to proceed with regulatory action "unless the potential benefits to society

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[112] WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222, 1233 (10th Cir. 2017).
[113] Underhill, *supra* note 56, at 225.
[114] Phillip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. Times (Nov. 7, 1981), https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html [https://perma.cc/D6BD-G5VK].
[115] Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

for the regulation outweigh the potential costs to society."[116] The E.O. faced backlash from members of the public and Congress, who expressed skepticism over the approach's objectivity and voiced concerns that CBA would be used "to reach decisions that will favor business and industry . . . rather than the public."[117] These valid concerns arose from the fact that CBA "reserves the determination of 'value' exclusively for individual economic agents in a market," rather than considering other, non-economic, societal preferences as legitimate factors in the policymaking process.[118]

Despite CBA's faults, subsequent administrations have continued to use CBA, perhaps in part because cost-benefit analysis and EBPM share a similar, and rather unobjectionable, theoretical purpose: to ensure that government action, and thereby taxpayer resources, are used wisely to fund policies that will achieve their desired outcomes. But CBA is not "in itself evidence-based practice" because it is "not necessarily *used* to drive policy choices."[119] EBPM, on the other hand, initiates an evidence-building cycle that begins with identifying policy-relevant questions, and asks policymakers to proactively build evidence to guide agencies toward a particular course of action. The original formulation of CBA instead involved reviewing a developed idea for regulatory action to assess the extent to which it is necessary and beneficial, rather than an attempt to proactively create an evidence-based process by which agencies create those regulations in the first place.

President Clinton's follow-up 1993 Executive Order 12866 provides the governing framework for CBA today and comes closer to EBPM by encouraging agencies to design their regulations "in the most cost-effective manner to achieve the regulatory objective" at the outset. Moreover, E.O. 12866 asks agencies to "base [their] decisions on the best reasonably obtainable scientific, technical, economic, and other information" related to the proposed regulation.[120] In 2003, OMB finalized Circular A-4 on Regulatory Analysis to further define the process by which agencies should engage in CBA. The 2003 Circular A-4 focused agencies on identifying desired "final outcomes, such as injuries reduced, lives saved, or life-years saved," as opposed to "intermediate outputs" such as "crashes avoided."[121] The Obama Administration's 2011 issuance of Executive Order 135653 attempted to address lingering fairness concerns about the use of CBA by requiring agencies to "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[122]

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[116] *Id.*

[117] Shabecoff, *supra* note 114. For a more recent criticism of CBA's impact on marginalized communities, see Michael McAfee, *supra* note 41, at 90 (explaining that "policies that uplift Black and brown people" are more often subject to "some cold cost-benefit analysis completely removed from the real lives and lived experiences of the people affected by the policies").

[118] Mark Silverman, *The 'Value of a Statistical Life': Reflections from the Pandemic*, Law and Political Economy Blog (Oct. 18, 2021), https://lpeproject.org/blog/the-value-of-a-statistical-life-reflections-from-the-pandemic/ [https://perma.cc/8CMP-FTZB].

[119] Underhill, *supra* note 56, at 170 (emphasis in original).

[120] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[121] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis (Oct. 10, 2003) [hereinafter 2003 Circular A-4].

[122] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

In 2023, twenty years after Circular A-4's enactment, the Biden Administration overhauled the guidance document and made additional significant changes to the regulatory analysis process. In line with the movement toward embracing EBPM processes in the federal government, the revised Circular A-4 explained that, regardless of the motivations behind a particular regulation, "all regulations can benefit from evidence-based qualitative and (when applicable) quantitative analysis of their effects."[123] In addition to making significant changes to methodological elements such as the discount rate and distributional analysis, the revised Circular A-4 also instructed agencies to conduct regulatory analysis that reflects "the highest quality evidence (including scientific, technical, economic, and indigenous knowledge) and analytical methods, as feasible and appropriate, and consistent with Federal policies for evidence building and informational quality."[124] This changed language reflected not only an evolution in the belief in EBPM on the federal level, but also the growth of EBPM mandates created through Congressional legislation since the initial enactment of CBA.

In early 2025, however, President Trump reversed course by issuing Executive Order 14193, which directed OMB to rescind the 2023 version of Circular A-4 and reinstate the old 2003 version.[125] The E.O. also contains a provision mandating that "for each new regulation issued, at least 10 prior regulations be identified for elimination"[126]—a significant ratcheting up of the nearly identical requirement Trump put in place during his first term requiring that "for everyone one new regulation issued at least two prior regulations be identified for elimination."[127] Despite his vehement embrace of the concept of government efficiency, Trump's directives in E.O. 14192 undermine EBPM principles. As Professor Kristen Underhill pointed out about Trump's 2017 "two-for-one" rescission-to-regulation ration requirement, such directives are essentially arbitrary and thus represent "a strategy far from an ideal EBPM playbook."[128] Likewise, the decision to revoke the 2023 version of Circular A-4 and reinstate a version that is now more than twenty years old increases the risk that the government will act on outdated economic formulas and data, rather than the best evidence that is currently available to agency policymakers.[129]

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[123] Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-4, Regulatory Analysis (Nov. 9, 2023) [hereinafter 2023 Circular A-4].

[124] *Id.* at 84.

[125] Exec. Order No. 14192, 90 Fed. Reg. 9065 (Jan. 31, 2025) [hereinafter E.O. 14192]. Legal scholars have pointed out that federal law requires OMB to engage in a lengthy peer review process before it can do so, a fact which could potentially delay the E.O.'s effectiveness. *See* Max Sarinsky & Jason A. Schwartz, *The Legal Dynamics of Rescinding the Circular A-4 Update*, Inst. for Pol'y Integrity (Feb. 2025), https://policyintegrity.org/publications/detail/the-legal-dynamics-of-rescinding-the-circular-a-4-update [https://perma.cc/9BCY-UH58] (pointing out that it took the Biden Administration OMB seven months to go from a draft of revised Circular A-4 in 2023 to the final version due to the required peer review process).

[126] E.O. 14192, *supra* note 125.

[127] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[128] Underhill, *supra* note 56, at 176.

[129] Importantly, one critical update contained in the 2023 version of Circular A-4 was its modernization of "the discount rates used in regulatory analysis . . . to reflect recent economic

As Professors Max Sarinsky and Jason Schwartz recently pointed out, "[u]sing outdated economic practices from a superseded guidance document" not only runs counter to EBPM principles but may also violate agencies' legal obligation "to rely on reasonable and evidence-based analysis in their decision-making" under *State Farm*.[130] Because *State Farm* requires agencies to examine relevant data and make a "rational connection" between their decisions and available evidence, courts have held that "a serious flaw undermining [CBA] analysis can render [an agency's] rule unreasonable" under *State Farm* and the APA's arbitrary and capricious standard.[131] Requiring agencies to revert to an outdated version of Circular A-4 may also violate additional independent legal obligations agencies have pursuant to statutory mandates outlined in the Government Performance and Results Act ("GPRA") and the Evidence Act.

B. The Government Performance and Results Act

The same year that the Clinton Administration issued E.O. 12866, Congress enacted the GPRA to require executive branch agencies to develop strategic and operating plans.[132] Like CBA, the GPRA was born out of a concern about "waste and inefficiency in Federal programs" that threatened to undermine public confidence in government regulations.[133] The GPRA recognized that agencies are "seriously disadvantaged in their efforts to improve program efficiency and effectiveness, because of insufficient articulation of program goals and inadequate information on program performance."[134] The GPRA thus embraced CBA's goal of "improv[ing] the confidence of the American people in the capability of the Federal Government" and proposed to do so by asking agencies to be more proactive in "setting program goals, measuring program performance against those goals, and reporting publicly on their progress."[135]

Specifically, the GPRA required agencies to submit to OMB and Congress a strategic plan outlining "outcome-related goals and objectives" and a performance plan outlining "performance goals" in an "objective, quantifiable, and measurable form" to create a "basis for comparing actual program results with the established performance goals."[136] While the word "evidence" does not appear in the statute, the GPRA established an early framework for the use of EBPM in federal agencies by directing them to assess "metrics that

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data and scholarship" with the goal of making CBA more evidence-based and effective. *See* Sarinsky & Schwartz, *supra* note 125, at i.

[130] *Id.*

[131] *Id.* at 7 (quoting Nat'l Ass'n of Home Builders v. EPA, 683 F.3d 1032, 1040 (D.C. Cir. 2012) (citations omitted); *see also id.* at n.36 (citing *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007), for the proposition that courts will not "tolerate rules based on arbitrary and capricious cost-benefit analyses" under *State Farm* analysis).

[132] Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in various sections of 5 U.S.C. and 31 U.S.C.).

[133] *Id.* § 2(a)(1).

[134] *Id.* § 2(a)(2).

[135] *Id.* §§ 2(b)(1)–(2).

[136] *Id.* §§ 306(a)(2), 1115(a)(1)–(2), 1115(a)(5).

count the real-world impacts of government programs that serve their agency's mission."[137] In 2010, Congress attempted to improve this process in the GPRA Modernization Act ("GPRAMA") by, *inter alia*, creating a stronger role for OMB, requiring agencies to publish strategic plans on publicly available websites, and designating a Chief Operating Officer within each agency to oversee the implementation of the GPRA's requirements.[138] Although these laws did not fully realize their intended effects due to a lack of enforcement and oversight from Congress,[139] they set an important EBPM precedent by attempting to create an objective and transparent way for Congress and the public to know whether the federal government "is improving American society to the extent promised."[140]

C. The Evidence Act

In 2016, Congress expanded upon the requirements of the GPRAMA and moved toward a formal incorporation of EBPM by passing the Evidence-Based Policymaking Commission Act ("EBPMCA").[141] The EBPMCA established the bipartisan Commission on Evidence-Based Policymaking ("the EBP Commission") and tasked it with studying the federal government's existing capacity for and current approach to evidence-based policymaking.[142] In its resulting report, the EBP Commission offered a set of recommendations that illustrated "both the challenges and enormous possibilities that a greater focus on evidence could bring in service of improving government effectiveness."[143] The report created a first-of-its-kind blueprint for how to "strengthen the evidence-building capacity within the Federal government."[144] For example, the EBP Commission suggested that each agency establish a Chief Evaluation Officer and develop "learning agendas" (another term for "evidence-building plans") to identify and address priority questions relevant to the agency's mission, policies, and programs.[145] It also recommended that OMB play a significant role in coordinating cross-agency evidence-building efforts and called for sufficient resources to support evidence-building activities across the federal government.[146]

In response to the EBP Commission's report, Congress in 2018 enacted the Evidence Act, which "addressed about half of the commission's

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[137] Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. Va. L. Rev. 987, 993 (2015); *see also id.* at 1005 (explaining that agencies "were able to get away with poor performance and pro forma . . . compliance because they knew Congress was not paying attention").

[138] *Id.* at 995–98.

[139] *See generally id.* at 992–98.

[140] *Id.* at 993.

[141] Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317 (2016).

[142] *Id.* §§ 2, 4.

[143] Epstein, *supra* note 63, at 381.

[144] *See* Commission Report, *supra* note 60, at 1–3.

[145] *Id.* at 3.

[146] *Id.*

recommendations, and served as a strong marker that the improved use of evidence must be a priority" for the federal government.[147] Modeled after and building upon the requirements of the GPRA and GPRAMA, the Evidence Act requires the head of each agency[148] to include "a systematic plan for identifying and addressing policy questions relevant to the programs, policies, and regulations of th[at] agency" in their GPRA-mandated strategic plans.[149] These evidence-building plans must include the identification of "policy-relevant questions for which the agency intends to develop evidence to support policymaking," as well as relevant data, methods, and analytical approaches it intends to use in answering the identified questions.[150]

In addition, each agency must issue an "evaluation plan" including "key questions for each significant evaluation study" the agency plans to undertake, along with "key information collections or acquisitions" the agency plans to begin.[151] Finally, the statute adopted the EBP Commission's recommendation to create an Evaluation Officer within each agency to "continually assess the coverage, quality, methods, consistency, effectiveness, independence, and balance of the portfolio of evaluations, policy research, and ongoing evaluation activities of the agency" and the agency's "capacity to support the development and use of evaluation."[152] In the years since the Evidence Act became law in 2018, OMB has issued several rounds of guidance clarifying agencies' responsibilities under the statute.[153] Rather than creating boilerplate evidence-building templates for agencies to adopt, these documents attempt to "allow agencies to drive this work themselves and do it in a way that makes sense for them."[154] Overall, the Evidence Act, as interpreted by both the Trump and Biden Administrations, focuses on two key priorities: developing comprehensive evidence-building plans within each agency and expanding upon the requirements of the GPRA by elevating program evaluation as a key agency function.[155]

The implementation of CBA, the GPRA, and the Evidence Act have gradually begun to impose on agencies the types of procedural evidence-related requirements championed by Judge Bazelon in the lead up to the *State Farm* decision. While the Court rejected the incorporation of EBPM-like processes

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[147] Epstein, *supra* note 63, at 381–82.

[148] The Evidence Act applies to most major federal agencies, as defined in 31 U.S.C. § 901(b). 5 U.S.C. § 311(1).

[149] 5 U.S.C. § 312(a).

[150] 5 U.S.C. §§ 312(a)(1)–(3). The statute also requires agencies to identify "challenges to developing evidence to support policymaking" and outline specific steps the agency will take to implement an evidence-based approach to policymaking in the agency. 5 U.S.C. §§ 312(a)(4)–(5).

[151] 5 U.S.C. § 312(b).

[152] 5 U.S.C. §§ 313(d)(1)–(2). The Evidence Act also calls for the creation of an Advisory Committee on Data for Evidence Building, 5 U.S.C. § 315(a), and the publication of a Government Accountability Office ("GAO") Report to continue assessing the effectiveness of the federal government's evidence-based policymaking efforts, *see* Pub. L. No. 115-435, § 101(d)(1)–(2), 132 Stat. 5529, 5533–34.

[153] *See, e.g.*, OMB M-21-27 *supra* note 23 (reaffirming and expanding on previous Evidence Act guidance, including OMB M-19-23,3 OMB M-20-12,4 and OMB Circular A-11).

[154] Epstein, *supra* note 63, at 383.

[155] *See id.* at 382.

into arbitrary and capricious review as an improper form of a "federal common law of administrative procedure" in *Vermont Yankee*,[156] these subsequent evidence-based mandates serve as a reminder that such procedures can still properly be imposed on agencies by the executive and legislative branches of government. The Evidence Act represents the most structured and formalized effort to date to impose EBPM processes on federal agencies, although it does not require agencies to do so in connection with specific proceedings like notice-and-comment rulemaking. The Evidence Act nonetheless demonstrates Congress's desire to see agencies engage not only in the application of evidence that already exists, but to also build evidence proactively in the way proponents of EBPM have long recommended. The Evidence Act also improves upon CBA as a method of assessing and implementing government programs, because, when done properly, EBPM incorporates elements of democratic participation and allows for the consideration of "other important social values, such as justice and fairness," as opposed to centering "maximized economic growth" as the government's prime objective.[157]

Early actions indicate that the second Trump Administration's deregulatory approach is in tension with Congress's desire to embrace EBPM as codified in the Evidence Act. The Administration has made clear its position that "[o]verregulation chokes the American economy and stifles personal freedom," and has begun taking steps to rescind existing regulations.[158] As discussed *supra*, one early example is the Trump Administration's decision to rescind the 2023 version of Circular A-4 (which called on agencies to conduct regulatory analysis using "the highest quality evidence" available), and replace it with the earlier 2003 version, which not only omits this specific evidence-based language, but also relies on outdated discount rates that may undermine the accuracy of basic CBA. Moreover, while the rhetoric surrounding the creation of DOGE relied on the same unobjectionable theoretical purpose that underlies EBPM—namely, to ensure that government regulations are effective at achieving their objectives and serving the American people—DOGE's stated objectives and actions to date in fact represent a significant retreat from the type of EBPM that Congress embraced in its passage of the Evidence Act.

D. The Department of Government Efficiency

President Trump began assembling DOGE even before assuming office, issuing a statement from his transition team in November 2024 appointing the

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[156] Stephenson & Manning, *supra* note 79, at 1023.

[157] James Goodwin, *A Post-Neoliberal Regulatory Analysis for a Post-Neoliberal World*, Law and Political Economy Blog (Oct. 14, 2021), https://lpeproject.org/blog/a-post-neoliberal-regulatory-analysis-for-a-post-neoliberal-world/ [https://perma.cc/KT84-EFUA].

[158] Exec. Order No. 14264, 90 Fed. Reg. 15619 (Apr. 9, 2025); *see also* Memorandum from President Donald J. Trump to Heads of Executive Departments and Agencies (Apr. 9, 2025) [hereinafter Directing Repeal of Unlawful Regulations Memo], https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/ [https://perma.cc/H9C7-JXF2] (lamenting that "onerous regulations" impede American innovation and economic growth); Exec. Order No. 14267, 90 Fed. Reg. 15629 (Apr. 9, 2025) (taking steps to eliminate regulations that "reduce competition, entrepreneurship, and innovation").

business leaders Elon Musk and Vivek Ramaswamy to run the new entity.[159] Trump's framing of the purpose of DOGE invoked some of the ideals underlying EBPM, but it also made clear his intention to go well beyond EBPM's measured and deliberate approach. In keeping with EBPM principles, the November statement expressed Trump's desire to "cut wasteful expenditures," to "partner with the White House and Office of Management and Budget," and to "make the U.S. Government accountable to 'WE THE PEOPLE.'"[160] Yet while EBPM calls for a deliberate and careful approach to policymaking that requires gathering information and setting intentions before taking action, Trump's statement made clear that he envisioned DOGE taking a more drastic approach. Describing the new entity as "potentially[] 'The Manhattan Project' of our time," the announcement called for "drastic change" that would "send shockwaves through the system."[161]

An article authored eight days later by Musk and Ramaswamy in the *Wall Street Journal* clarified that DOGE's "North Star for reform" would not be the use of evidence, but rather "the U.S. Constitution."[162] More specifically, they explained that DOGE's process for identifying which regulations to rescind would be guided by the Supreme Court's recent holdings in *West Virginia v. EPA*[163] and *Loper Bright Enterprises v. Raimondo*.[164] Setting forth the "major questions doctrine" and the rollback of *Chevron* deference respectively, these cases together require Congress to be more specific when drafting authorizing statutes that delegate regulatory power to agencies. Despite Musk and Ramaswamy's implications otherwise in their article, however, the holdings did not overrule existing legal precedents upholding statutory delegations of agency power.[165] Nevertheless, Musk and Ramaswamy misleadingly opined that "[t]ogether, these cases suggest that a plethora of current federal regulations exceed the authority Congress has granted under the law."

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[159] Statement by President-elect Donald J. Trump Announcing That Elon Musk and Vivek Ramaswamy Will Lead the Department of Government Efficiency ("DOGE") (Nov. 12, 2024) [hereinafter DOGE Statement], The Am. Presidency Project, https://www.presidency.ucsb.edu/documents/statement-president-elect-donald-j-trump-announcing-that-elon-musk-and-vivek-ramaswamy [https://perma.cc/J9F9-C7CT]. While Ramaswamy was involved in the initial tone-setting of DOGE, he left the entity during the first few days of the administration and was not involved in its implementation. *See* Thomas Beaumont & Jonathan J. Cooper, *Ramaswamy Won't Serve on Trump's Government Efficiency Commission as He Mulls Run for Ohio Governor*, Assoc. Press (Jan. 20, 2025), https://apnews.com/article/vivek-ramaswamy-doge-ohio-governor-musk-trump-328400a5cc47adde8dd97eb628d18164 [https://perma.cc/3JW5-AU77].

[160] DOGE Statement, *supra* note 159.

[161] *Id.*

[162] Elon Musk & Vivek Ramaswamy, *The DOGE Plan to Reform Government*, Wall St. J. (Nov. 20, 2024), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020 [https://perma.cc/MFV7-8FP3].

[163] 597 U.S. 697 (2022).

[164] 603 U.S. 369 (2024).

[165] *See id.* at 376 (explaining that the Court's holding did "not call into question prior cases that relied on the *Chevron* framework" and that prior holdings specific agency actions as lawful "are still subject to statutory *stare decisis* despite our change in interpretive methodology"); *see also West Virginia*, *supra* note 163, at 724 (explaining that the Court was applying an approach it had already recognized in cases like *FDA v. Brown & Williamson*, 59 U.S. 120 (2000), and *King v. Burwell*, 576 U.S. 473 (2015), rather than creating a new doctrine).

Thus, they explained, DOGE would proceed by identifying existing regulations that supposedly violate the Supreme Court's holdings in *West Virginia v. EPA* and *Loper Bright* and "present this list of regulations to President Trump, who can, by executive action, immediately pause the enforcement of those regulations and initiate the process for review and recission."[166] On April 9, 2025, the Trump Administration began formally implementing this plan by issuing an Executive Order entitled "Directing the Repeal of Unlawful Regulations," which directs agency heads to evaluate each existing regulation's lawfulness under *West Virginia v. EPA*, *Loper Bright*, and eight other identified U.S. Supreme Court rulings.[167]

This approach has likely disappointed proponents of EBPM who might have hoped that DOGE would instead evaluate existing regulations against the best available evidence, and, in keeping with its moniker, identify *inefficient* regulations to present to President Trump for rescission. Instead, Trump subsequently codified the approach outlined by Musk and Ramaswamy in Executive Order 14219, which outlined the Administration's intent to "focus the executive branch's limited enforcement resources on regulations squarely authorized by constitutional Federal statutes."[168] The word "evidence" appears nowhere in the order, and, highlighting DOGE's departure from its own nomenclature, the concept of "efficiency" appears only in the context of referring to the entity. While § 2(a)(v) of the order incorporates basic CBA principles by calling on DOGE to identify regulations that "impose significant costs upon private parties that are not outweighed by public benefits,"[169] the vast majority of the E.O. instructs DOGE to focus on "restoring the constitutional separation of powers"[170] by rescinding regulations that appear to be in tension with the Supreme Court's holdings in *West Virginia v. EPA* and *Loper Bright*.[171]

The Trump Administration further eschewed EBPM principles during its first hundred days in its efforts to eliminate virtually all activities of certain federal agencies without evaluating the importance or effectiveness of their programs. On March 28, 2025, for example, the Trump Administration notified Congress of its intent to discontinue all functions of the U.S. Agency for International Development ("USAID") that do not align with the Trump Administration's priorities.[172] While Secretary of State Marco Rubio issued a general CBA-inspired statement opining that the "gains were too few and

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[166] Musk & Ramaswamy, *supra* note 162.

[167] Directing Repeal of Unlawful Regulations Memo, *supra* note 158.

[168] Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 19, 2025).

[169] *Id.* § 2(a)(v). The order also instructs DOGE to prioritize major rules as defined by President Clinton's 1993 CBA-related E.O. 12866. *See id.* § 2(b).

[170] *Id.* § 1.

[171] *See id.* § 2(a)(iii) (asking DOGE to identify regulations that are "based on anything other than the best reading of the underlying statutory authority or provision," echoing the *Loper Bright* holding); *id.* § 2(a)(iv) (asking DOGE to identify "regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority," echoing the holding in *West Virginia v. EPA*).

[172] Sara Cook, Camilla Schick, & Graham Kates, *Trump Administration Takes Steps to Formally Shutter USAID*, CBS News (Mar. 28, 2025), https://www.cbsnews.com/news/trump-administration-takes-steps-formally-shutter-usaid-doge/ [https://perma.cc/K82D-PLKA].

the costs were too high"[173] to justify USAID's continued existence, the speed with which this change was enacted makes clear that the Administration did not engage in a methodical, evidence-based assessment of USAID's functions before deciding to dismantle the agency in its entirety. The same is true of Trump's March 2025 issuance of an Executive Order calling for the complete closure of the Department of Education without any evidence-based assessment regarding the efficacy of the agency's existing programs and activities in achieving its goals.[174]

These early Trump Administration actions thus represented a significant departure from the governmental movement toward EBPM that began in earnest in the 1980s with Reagan's embrace of CBA and eventually led to Congress's bipartisan enactment of the Evidence Act in 2018. As the most democratically accountable branch of government, and the branch that both vests agencies with regulatory authority and defines the scope of that authority, Congress can play a powerful role in counteracting the Trump Administration's recent departure from EBPM. As described in the next section, however, the approach Congress codified in the Evidence Act suffers from shortcomings that threaten to hamper federal agencies' abilities to best serve the individuals and communities most impacted by federal regulations. Understanding and addressing these deficiencies is a critical prerequisite to Congress's ability to draft and enact the types of effective evidence-based statutory mandates proposed *infra* in Part V.

IV. Evidence-Based Policymaking's Shortcomings

The rise of EBPM and the sentiments that led to the creation of DOGE stem from a shared understanding that ineffective federal programs create opportunity costs—both for the individuals who participate in the program at the expense of pursuing other avenues for assistance, and for the funds that could have instead been used on an effective program.[175] In the context of programs like DARE, the case for adopting an evidence-based policy approach across federal agencies seems clear: it is a way for the executive branch to simply "[f]und more of what works and less of what doesn't,"[176] and to provide public accountability for government action. The reality, however, is that evidence-based policymaking is susceptible to the same institutional problems that characterize other existing agency policymaking processes like notice-and-comment rulemaking.

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[173] Press Statement, Marco Rubio, Secretary of State, On Delivering an America First Foreign Assistance Program (Mar. 28, 2025), https://www.state.gov/on-delivering-an-america-first-foreign-assistance-program/ [https://perma.cc/E6PV-XBPX].

[174] *See* Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025).

[175] *See* Martin, *supra* note 73, at 393 ("A program funded for a decade with the intention of helping low-wage workers move up the economic ladder is not benign if it doesn't work. Those who participated likely passed up other opportunities. They could have pursued a different education or training path, taken a new job, or even just stayed with the one they had.").

[176] Tseng, *supra* note 21, at 408.

A. Institutional Bias and (Lack of) Inclusion

Administrative law principles call for judicial deference to the executive branch in part because, even without sophisticated evidence-building practices in place, it is still considered to be "the most knowledgeable branch."[177] Agency officials are typically specialists in their field with significant experience in their area of work and unique policy-related knowledge about "how various substantive areas and questions relate to one another, and which deserves attention first."[178] Yet the source of their expertise—such as previous private or public sector employment, educational training, or research exposure—renders them susceptible to dynamics such as regulatory capture, confirmation bias, and political pressures. These are subjective problems that evidence, as an ostensibly objective measure, aims to reduce. Evidence-based policymaking is not immune to these forces, however, and efforts to explicitly incorporate the approach into agency decision-making must therefore be intentional about addressing these concerns.

As explained in more detail *supra* in Part I(B), EBPM typically begins with evidence-building activities that start with identifying a set of questions to answer.[179] At this stage of the process, the question designers—who, in the agency context, are typically comprised of experts of the kind described above—are inevitably making choices "about whose lived experience to center; choices about whose worldviews get prioritized; choices about who gets reflected in the work."[180] Underlying these choices is the overarching question of how the decision makers will define policy success.[181] Because "[w]here we stand determines what we see,"[182] agency experts are inherently susceptible to making this determination based on their own subjective experiences, beliefs, or objectives. Like other stakeholders, agency officials have a built-in tendency to "interpret evidence in the manner that advances their interests,"[183] whether those be personal, political, or professional. Given the expert-driven nature of agency policymaking, this leads to a risk that EBPM, like other agency policymaking processes, will center the views of an elite minority, rather than the diverse voting public—a view that Musk has reinforced by referring to agency officials as an "unelected, fourth unconstitutional branch of government."[184]

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[177] Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. Pa. L. Rev. 1607, 1610 (2016).
[178] *Id.* at 1609.
[179] *See* Chien, *supra* note 26, at 2339–40.
[180] Heather Krause, *All Data is Biased*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 94, 94 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).
[181] *Id.* at 99 (describing a time the author sought to address high expulsion rates among Black and Latinx boys and the policymakers problematically "defined success as the rate of white boys" being expelled).
[182] Introduction to Section 1: Centering on Practitioners and the Communities They Serve, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 19, 19 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).
[183] Chien, *supra* note 26, at 2335.
[184] Forbes Breaking News, *Musk Outlines DOGE Goal: Bureaucracy Is An 'Unelected, Fourth Unconstitutional Branch of Government'*, YouTube (Feb. 11, 2025), https://www.youtube.com/watch?v=5ItfBmfJIpQ [https://perma.cc/W6J4-7T5D].

Confirmation and institutional biases can affect policymakers' assessments at various steps of the EBPM process, from identifying the agency's desired outcomes, to risk tolerance, to the weight the agency might give to a particular body of evidence.[185] In other cases, more explicit conscious political biases may prompt agency officials to interpret evidence in ways that serve the interests of their administration (and often, relatedly, their personal career trajectories). In the federal agency context, it is thus important to recognize that all evidence "may be vulnerable to political agendas"[186] and that some degree of "[m]obilization, distortion, and selective production of evidence is to be expected."[187] To some degree, this is a desired function of the agency process that could serve to address concerns about agency officials' lack of democratic accountability. Yet these biases can veer beyond the political and into the personal, since all human beings inevitably tend to "interpret social science in ways that are consistent with their beliefs, embracing work that supports them and rejecting work that does not."[188]

By failing to incorporate steps to counteract these dynamics, the current federal approach to developing and using evidence remains "an enterprise shaped by elites: evidence for the public, shaped by the few."[189] Just as processes like notice-and-comment suffer from "dynamics of capture and the nonparticipation of impacted entities,"[190] so too have evidence-based approaches failed to meaningfully incorporate the perspectives of the communities directly impacted by the policies they create. Instead, federal evidence-based policymaking has often been "top down, driven by the objectivity (and bias) of the expert" rather than "predicated on trust or learning" from impacted individuals.[191] This creates a related concern about the use of "evidence as a double standard," whereby some communities (typically those with less institutional power) are required to show evidential proof in order to justify the need to implement certain policies or programs, while others (typically those with greater institutional power) are not.[192] The use of evidence as a double standard can lead to underfunding or under developing much-needed policies in areas that require significant change, since there is generally "plenty of evidence for the status quo," but less evidence to support policies that "would

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[185] *See* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 Admin. L. Rev. 491, 496 (2019) (explaining that individual perspectives are "often clouded by cognitive biases and a form of 'motivated' reasoning that leads people to reject valid science when it challenges core cultural values and identities.").

[186] Marika Pfefferkorn, *Data Justice and the Risks of Data Sharing*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 194, 197 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[187] Underhill, *supra* note 56, at 155.

[188] Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 Cornell L. Rev. 901, 922–23 (2011).

[189] Tseng, *supra* note 21, at 408.

[190] Chien, *supra* note 26, at 2321.

[191] Kelly Fitzsimmons & Archie Jones, *Constructive Dissatisfaction*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 21, 21–22 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[192] *See, e.g.*, McAfee, *supra* note 41, at 89 ("No one ever asks a white school what evidence they have for expanding an afterschool program or varsity sports . . . All those investments are seen as self-evidently good for the community, so we skip right past the evidence phase to the implementation phase.").

create a different world than the one in which we currently live."[193] This concern is compounded by the fact that agencies often have more evidence about the costs of a particular regulation than about the benefits, particularly in emerging scientific areas like those under the purview of the Environmental Protection Agency ("EPA").[194]

Concerns about institutional bias and insufficient public participation aren't abstract—they threaten regulatory effectiveness by creating a lack of alignment between the people impacted by policy and those building the evidence to drive agency decisions.[195] These failures have led some scholars to call for the abolishment of the evidence-based paradigm altogether, at least in the context of the criminal justice system.[196] The lack of alignment in existing agency policymaking process has also led others to embrace the drastic "chainsaw" approach to slashing government regulations that has been carried out by DOGE.[197] If done properly, however, EBPM processes can help address these issues by using evidence-based practices that are "more driven by, inclusive of, and responsive to communities,"[198] and by heeding Professor Erin Collins's call to "re-envision what information 'counts' as data, what we ask data to do, and—crucially—whose voices matter in setting the research agenda."[199]

For example, EBPM processes should be intentional about involving impacted community members throughout the evidence-building process, "from defining questions to gathering, interpreting, and applying data, to sharing results."[200] Such an approach would address the problem that "research questions often arise from researchers' conversations with each other" and instead lead to policies that "arise from vibrant back-and-forth exchanged between researchers, practitioners, *and communities*."[201] While community input will not be valuable in all aspects of policymaking—for example, non-expert

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[193] *Id.* at 91.

[194] *See* Amy Sinden, *The Shaky Legal and Policy Foundations of Cost-Benefit Orthodoxy in Environmental Law*, Law and Political Economy Blog (Oct. 19, 2021), https://lpeproject.org/blog/the-shaky-legal-and-policy-foundations-of-cost-benefit-orthodoxy-in-environmental-law/ [(explaining that in an assessment of the EPA's major rulemakings over a 13-year period spanning most of the George W. Bush and Obama administrations, "the agency left significant categories of benefits unquantified 80 percent of the time" because only a "small subset [of chemicals] have undergone sufficient toxicity testing to support regulation.").

[195] Chien, *supra* note 26, at 2345.

[196] *See* Collins, *supra* note 43, at 410–11 (challenging the entire EBPM paradigm as one that "presumes that the existing system is sound in principle, if not in application" and incorrectly "suggests that if we collect more data about its impact and refine reforms accordingly, we can fix its dysfunctional and unjust outcomes.")

[197] *See* Adriana Gomez Licon, *Musk Waves a Chainsaw and Charms Conservatives Talking Up Trump's Cost-Cutting Efforts*, AP News (Feb. 21, 2025), https://apnews.com/article/musk-chainsaw-trump-doge-6568e9e0cfc42ad6cdcfd58a409eb312 [https://perma.cc/A52E-4SZZ].

[198] Carrie S. Cihak, *Building Evidence and Advancing Equity*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 144, 145 (Kelly Fitzsimmons & Tamar Bauer eds., 2024); *see also* Daniel J. Cardinali, *The Power of Community Voice*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 189, 192 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (recognizing that "methodologies and tools that hard and social sciences have to offer" should be part of EBPM and used in connection with "the trust of people in communities").

[199] Collins, *supra* note 43, at 411.

[200] Bauer et al., *supra* note 40, at 8.

[201] Tseng, *supra* note 21, at 409 (emphasis added).

individuals may not have helpful insights on scientific questions concerning safe levels of certain pollutants or chemicals—they can be critical in addressing areas of policymaking that involve behavioral choices and in assessing the potential impact of government regulations on specific communities once implemented.[202]

In the context of DARE, for example, including community members from the beginning of the program's development could have addressed the institutional and confirmation biases of the program's creators, thereby either making DARE's curriculum more effective or making the case for abandoning a prevention-oriented framework altogether. As proposed *supra* in Part II(B), program pilots could have asked both teachers and police officers to administer the curriculum in separate classrooms and then evaluated which of the two administrators were better received by students and parents. Such an approach might have led DARE's creators to question their initial assumption that police officers would be credible messengers and could have allowed for adjustments to the program or to its elimination before it grew to a national scale. The Evidence Act incorporates the concept of community engagement to a small extent by directing heads of agencies to "consult with stakeholders, including the public, agencies, State and local governments, and representatives of non-governmental researchers."[203] Yet while the Act requires public engagement generally, it says nothing about intentionally engaging affected stakeholders or communities throughout the EBPM process. Without a more deliberate approach, EBPM processes are likely to experience the same "turnout problem" that affects notice-and-comment rulemaking, resulting in a lack of meaningful public participation from the people and communities that are most impacted by government regulations.[204]

OMB guidance issued by the first Trump Administration reiterated the Evidence Act's statutory public consultation requirement and urged agencies to also engage in "broader consultation with additional stakeholders, including: the Office of Management and Budget, Federal grant recipients, Congress, and industry and trade groups,"[205] but did not mention engaging with the public. The Biden Administration took a stronger approach to public participation, both in its Evidence Act guidance and through Executive Orders. On his first day in office, for example, President Biden issued an Executive

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[202] For example, in the context of the regulation at issue in *Industrial Union Dept, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 624 (1980) ("the Benzene case"), community inclusion might have been less useful in helping the Occupational Safety and Health Administration ("OSHA") determine exactly how much benzene is safe for people to be exposed to in the workplace. Their input, however, could have guided the agency's understanding of how implementation of such a standard, once promulgated, might disproportionately impact certain types of industries or workers. Likewise, in the context of *State Farm*, community inclusion would have been less useful in helping the NHTSA determine the technical effectiveness of air bags in preventing injury or death but could have generated important data about how a resulting increase in car prices might have disproportionately affected certain socioeconomic groups, and how the agency might have mitigated such impacts through the use of subsidies.

[203] 5 U.S.C. § 312(c).

[204] Chien, *supra* note 26, at 2321 (attributing the problem to the "dynamics of capture and the non-participation of impacted entities in the process").

[205] OMB M-19-23, *supra* note 67, at 16.

Order calling on agency heads to "study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals." The E.O. required agencies to "consult with members of communities that have been historically underrepresented in the Federal Government" in the process of formulating agency policy recommendations.[206] The E.O. also established an "Equitable Data Working Group" tasked with "identifying inadequacies in existing Federal data collection" in order to "expand and refine the data available to the Federal Government to measure equity and capture the diversity of the American people."[207]

The Biden Administration's Evidence Act guidance also called on federal policymakers to conduct "[r]obust stakeholder engagement" through "intentional interactions with diverse stakeholders" during the EBPM process. The guidance recognized explicitly that the "exchange of perspectives, ideas, and information that this process provides allows agency staff to better understand how its policies, programs, and procedures are experienced by recipients, the challenges those recipients face, and suggestions for improvement."[208] It thus instructed agencies to consult affected community members "throughout the lifecycle of evidence-building regardless of the methodological approach," including at the question-setting, evidence-generation, and analysis and application phases of EPBM. This was the first, and so far only, acknowledgment in federal EBPM guidance that "[e]arly, active, and consistent engagement with stakeholders who can represent a diverse set of perspectives and experiences is critical so that evidence-building activities can yield high-quality insights and do not inadvertently perpetuate underlying biases."[209] Importantly, the guidance recognized that such efforts should be intentional, understanding that "high-quality stakeholder engagement cannot be accomplished solely by issuing a formal Request for Information in the Federal Register," but must instead include efforts such as "participatory research methods, listening sessions or focus groups . . . and a thorough consideration of the lived experiences of those affected by agency policies in order to determine how they can best engage."[210]

In 2022, the Biden Administration's Office of Science and Technology Policy ("OSTP") and Council on Environmental Quality ("CEQ") also issued first-of-its-kind guidance recognizing the "valuable contributions of Indigenous Knowledge." Defined as information that "Tribal Nations and Indigenous Peoples have gained and passed down from generation to generation," the guidance directed agencies to apply Indigenous Knowledge "in decision making, research, and policies across the Federal Government."[211] Although the guidance was not tied directly to the requirements of the Evidence Act,

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[206] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).
[207] *Id.*
[208] OMB M-21-27, *supra* note 23, at 8.
[209] *Id.* at 13.
[210] *Id.* at 8.
[211] Memorandum from Arati Prabhakar to Heads of Federal Departments and Agencies 3 (Nov. 30, 2022), https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf [https://perma.cc/4AGD-52YJ].

it was rooted in "the understanding that multiple lines of evidence or ways of knowing can lead to better-informed decision making"[212] and thus represents one of the most explicit acknowledgments yet by the federal government that it should adopt a broad definition of evidence that includes the perspectives and methodologies of those who have historically been excluded from the federal policymaking process.

Some municipal, state, and federal agencies have implemented community outreach programs that can serve as a model for future EBPM processes in the regulatory context. In 2008, for example, Seattle Mayor Greg Nickels issued an Executive Order on "Inclusive Outreach and Public Engagement" which required all city departments to "develop and implement outreach and public engagement processes inclusive of people of diverse races, cultures, gender identities, sexual orientations and socio-economic status" to inform government decision-making processes.[213] The order led to the creation of an outreach and public engagement liaison from each city department, tasked with helping community members with "the translation and interpretation of policies using data and with understanding study specifics."[214] Along similar lines, under the Biden Administration, the federal Equal Employment Opportunity Commission ("EEOC") implemented the REACH initiative, a multi-year program to engage "workers who often are the least likely to seek the agency's assistance, despite their great need."[215] The program consisted of in-person and virtual listening sessions across the country, aimed at understanding the barriers that exist to facilitating communication between workers and the EEOC's anti-discrimination and harassment resolution mechanisms.[216]

These efforts to include diverse stakeholder voices[217] in the EBPM process acknowledge that evidence-building practices have often excluded the very individuals and communities that are most impacted by federal regulatory

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[212] *Id.*

[213] *Inclusive Outreach and Public Engagement Guide*, City of Seattle 4 (Oct. 2009), https://www.seattle.gov/Documents/Departments/Neighborhoods/PPatch/Inclusive-Outreach-and-Public-Engagement-Guide.pdf [https://perma.cc/2VTZ-AXXH].

[214] Amy O'Hara & Stephanie Straus, *De-Risking Data: Equitable Practices in Data Ethics and Access*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 126, 130 (Kelly Fitzsimmons & Tamar Bauer eds., 2024).

[215] *Enhancing OutREACH to Vulnerable Workers and Underserved* Communities, Equal Employment Opportunity Comm'n, https://www.eeoc.gov/initiatives/enhancing-outreach-vulnerable-workers-and-underserved-communities [https://perma.cc/ZB4Y-PWXA] (last visited Apr. 10, 2025).

[216] *Id.*

[217] While the Trump Administration has recently used the word "diversity" to refer to alleged preferential treatment of certain groups or individuals on the basis of race, gender, or other protected statuses, *see generally* Fact Sheet, President Donald J. Trump Removes DEI From the Foreign Service (Mar. 18, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-removes-dei-from-the-foreign-service/ [https://perma.cc/632V-BEAV], the author uses the term in this Article in its ordinary meaning, as encapsulated by Cambridge Dictionary's definition of the term: "including many different types of people or things." *See Diverse*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/diverse [https://perma.cc/AUS3-VRW6] (last visited Apr. 10, 2025). Efforts to include diverse groups of individuals and communities in the EBPM process should thus aim to include people of all races, genders, geographies, education levels, and socioeconomic statuses, prioritizing those who are most likely to be impacted by a given regulation and centering voices that have typically been left out of the federal policymaking process.

policies. This includes not only individuals and groups that have been historically discriminated against on the basis of race, national origin, gender, or religion, but also those who simply have not had access to the regulatory process, perhaps because of geography (*e.g.*, rural communities) or socioeconomic status (*e.g.*, those who receive welfare benefits but have had no input into how such programs are crafted). Correcting for this dynamic is important not only to building community support for government regulations, but also to ensuring that regulations are more effective at serving everyone they intend to benefit.

In the context of the NHTSA's efforts to reduce safety incidents on the highways, for example, community inclusion could have helped the agency assess how affected parties might respond behaviorally to the use of automatic seatbelts or a potential increase in car prices. Public participation could have helped the agency determine the rate at which people would detach automatic seatbelts, and whether those rates varied across different populations (*e.g.*, whether younger drivers would be more or less prone to detach an automatic seatbelt than older drivers). Or, if the agency was concerned that the auto industry would pass along costs to the consumer in the form of higher car sales prices, it could have conducted research to determine the impact of such an eventuality on different communities (*e.g.*, whether lower-income families would be more likely to forego new car purchases) and come up with policy solutions (*e.g.*, income-driven subsidies) to mitigate the likely impact. Yet, while such research has the potential to yield informative evidence, questions about who gathers this data, from whom, by what means, and to what ends are equally critical to creating transparent and trustworthy EBPM processes.

B. Transparency and Trust

For EBPM to be truly effective, it must have what Professor Amy O'Hara refers to as "social license," which exists "when the public trusts that data will be used responsibly and for societal benefit."[218] This is particularly critical in the context of agency decision-making, given the heightened concerns that exist when the government collects data about the public, especially when collection efforts involve communities who have been harmed by the government in the past.[219] In order to create social license and effective EBPM procedures, evidence-building methods must move away from "treating the generation of evidence as an extractive industry" and "allow citizens to participate in decisions that shape their lives."[220]

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[218] O'Hara & Straus, *supra* note 214, at 128.

[219] *See* Dallas M. Nelson et al., *Lakota Perspective on Indigenous Data Sovereignty*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 137, 141 (Kelly Fitzsimmons & Tamar Bauer eds., 2024) (explaining that "Indigenous people have not been in a position to be able to control the information that has been collected from them since European contact."); *see also* Underhill, *supra* note 56, at 208 ("When the government is acting as experimenter, either by itself or by contracting with researchers, the ethical basis for experimentation may deserve special scrutiny.").

[220] O'Hara & Straus, *supra* note 214, at 126.

While related to the issue of inclusion, the need to create social license in EBPM requires addressing distinct concerns about trust and transparency. Engaging impacted individuals and communities in the EBPM process is a necessary component of creating social license because when policymakers' work "does not match the lived reality of the very people the data comes from, people do not buy it, and they are right not to."[221] Inclusion in the EBPM process without accompanying commitments to transparency around how data will be collected, employed, and protected, however, threatens to undermine "the public's trust that the data will be used for greater good."[222] By contrast, increasing transparency about the data collection process (*i.e.*, explaining *why* information is being gathered) and allowing affected communities to access the resulting evidence allows them to "participate in decisions that shape their lives, to influence the way those in power make decisions, and to hold them accountable for those decisions."[223]

In the context of DARE, for example, if administrators had launched the type of pilot program proposed *supra* in Part II(B), it would have been critical for them to be transparent (especially with the children's parents) about the type of data being collected and the purposes for which such information would be used. Existing EBPM mandates have increasingly sought to address these transparency-related concerns, while also tackling the often-competing interest in data privacy and security. For example, whereas the 2003 version of Circular A-4 called for regulatory analysis to be "transparent" such that "a *qualified* third party reading the report [can] see clearly how you arrived at your estimates and conclusions,"[224] the updated 2023 version more directly addressed public accessibility by requiring regulatory analysis to be "transparent in its methods, data sources, and analytic choices" in order to inform "policymakers, other government stakeholders, *and the public*."[225] The 2023 guidance also instructed agencies to follow best practices around providing public electronic access to the details of their regulatory analysis and supporting documents.[226]

Likewise, OMB guidance on implementing the Evidence Act has increasingly focused on the importance of transparency in EBPM. The first Trump Administration's guidance took important steps in the right direction by emphasizing the need for agencies to make their evidence-building plans

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[221] Heather Krause, *supra* note 180, at 100.

[222] O'Hara & Straus, *supra* note 214, at 126.

[223] Robert Newman et al., *Stop Extracting: Our Data, Our Evidence, Our Decisions*, *in* Next Generation Evidence: Strategies for More Equitable Social Impact 119, 124 (Kelly Fitzsimmons & Tamar Bauer eds., 2024); *see also* Bauer et al., *supra* note 40, at 8–9 (highlighting that this is particularly important when data collection efforts involve communities that have historically been "disproportionately injured by bad data practices"). For examples of organizations working to improve data collection practices within communities that have been harmed by problematic data collection practices in the past, *see* Tseng, *supra* note 21, at 410 (highlighting the work of Data for Black Lives, which aims to counteract discriminatory practices such as redlining, and the Discriminology Initiative, which enables Black and brown communities to use school data to advocate for educational equity).

[224] 2003 Circular A-4 (emphasis added).

[225] 2023 Circular A-4 at 83 (emphasis added).

[226] *Id.* at 85.

transparent[227] in order to "enable accountability and help ensure that aspects of an evaluation are not tailored to generate specific findings."[228] The Biden Administration's guidance built on these commitments and more explicitly tied the need for transparency to the concept of social license by asking agencies to engage stakeholders "using methods that are transparent, generate trust, and advance equity."[229] The Biden Administration guidance also recognized that agencies "need[] partners to solve the big problems we face, and posting [EBPM] documents publicly in a transparent way offers an opportunity for external partners to use their skills and expertise to help find solutions."[230] An EBPM approach to developing DARE, for example, could have adopted these best practices by publicly sharing administrators' plans to pilot different classroom leaders, or soliciting feedback on the prevention-oriented framework, thereby gaining community buy-in for not only the program but also the process by which it would be developed.

While EBPM processes must promote transparency, they also need to address related concerns around privacy and data security. Although U.S. federal EBPM mandates and other similar international efforts have made strides toward establishing best practices in this space, there are currently "no adequate, widely accepted guardrails for responsible data use in a big data world focused on evidence building."[231] This is problematic because public faith that data collection efforts are safe and secure is important to building social license.[232] The EBP Commission's report included a variety of recommendations for improving secure, private, and confidential data access, some (but not all) of which were incorporated into the final text of the Evidence Act.[233] One recommendation that was not included in the Evidence Act was the creation of a National Secure Data Service ("NSDS") to "facilitate access to data for evidence building while ensuring privacy and transparency in how those data are used."[234] In 2022, Congress finally authorized the creation of an NSDS pilot in the Creating Helpful Incentives to Produce Semiconductors ("CHIPS") Act, providing funding to explore the creation of such a system through at least 2027.[235]

Congress's authorization of an NSDS pilot in the CHIPS Act highlights a critical shortcoming of the recent strides toward incorporating community inclusion, transparency, and trust-building efforts into federal EBPM

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[227] *See* OMB M-19-23, *supra* note 67, at 14.

[228] Memorandum from Russell T. Vought 16 (March 10, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-12.pdf [https://perma.cc/Q4XE-TQ2V].

[229] *See* OMB M-21-27, *supra* note 23, at 8.

[230] *Id.* at 12.

[231] O'Hara, *supra* note 214, at 127.

[232] *Id.* at 127–28 (explaining that, according to the Administrative Data Research Network in the United Kingdom ("ADRN-UK"), the "public is broadly supportive of their data being used as long as: 1) the work is in the public interest; 2) data privacy and security needs are being met; and 3) there is trust and transparency").

[233] *Compare* Commission Report, *supra* note 60, at 40–47, *with* 44 U.S.C. §§ 3561–83 (the "Confidential Information Protection and Statistical Efficiency Act of 2018").

[234] Commission Report, *supra* note 60, at 1.

[235] *See The National Secure Data Service Demonstration*, National Center for Science and Engineering Statistics, https://ncses.nsf.gov/initiatives/national-secure-data-service-demo [https://perma.cc/2L3B-EU6R] (last visited Apr. 10, 2025).

processes: whereas the NSDS now has explicit statutory authorization from Congress, the other commitments to creating more inclusive, transparent, and trustworthy EPMB processes discussed in this section lie solely in OMB guidance and Executive Orders that can be dispensed of by future administrations. This vulnerability has already been exploited by the Trump Administration's recent directive to revert to the 2003 version of Circular A-4 and its rescission of almost 100 Biden-era Executive Orders, including some of the E.O.s discussed in this section.[236] Without these additional measures to ensure inclusion, transparency, and trust, the requirements currently outlined by the GPRA and the Evidence Act risk losing social license and becoming ineffective. Congress, however, has the power to remedy this shortcoming either by codifying EBPM best practices into future authorizing statutes delegating regulatory authority to agencies or by amending the Evidence Act.

V. Enacting Improved Evidence-Based Statutory Mandates

While the Evidence Act formally incorporated EBPM into federal policymaking, Congress's decision to model the statute after the requirements of the GPRA has left it vulnerable to some of the same shortcomings discussed *supra* in Part III(B). As with the GPRA, the Evidence Act says little about Congress's oversight role in ensuring agencies comply with the EBPM processes laid out in the statute. The Evidence Act requires the Government Accountability Office ("GAO") to summarize agency findings and trends and, if appropriate, recommend actions to Congress to "further improve agency capacity to use evaluation techniques and data."[237] Yet, like the GPRA, the Evidence Act could have included more robust enforcement mechanisms, such as a requirement that Congress "hold at least one annual hearing on agencies' compliance with" the statute.[238] Alternatively, Congress could have required the GAO or each agency's Inspector General to "conduct annual audits of every agency's compliance and performance" with the statute's requirements.[239] Instead, as with the GPRA, "Congress chose to require nothing of itself."[240]

A. Evidence-Based Authorizing Statutes

While these issues could be fixed by amending the Evidence Act to include both greater Congressional oversight and steps to create more social

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[236] *See* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025) (rescinding seventy-eight of President Biden's executive orders, including E.O. 13985 discussed *supra*); *see also* Exec. Order No. 14236, 90 Fed. Reg. 13037 (March 14, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/additional-recissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/V57Q-4C8G] (rescinding an additional nineteen executive actions).

[237] 5 U.S.C. § 315(d).

[238] Harris, *supra* note 137, at 118.

[239] *Id.*

[240] *Id.* The same can be said of efforts to improve the GPRA in the GPRAMA, which likewise "did not aggressively assert congressional oversight of the GPRA process." *Id.* at 123.

license for EBPM, as proposed *infra* in Part V(B), another option is for Congress to incorporate EBPM requirements into future authorizing statutes. When Congress drafts an authorizing statute delegating regulatory power to agencies and charges them with achieving a particular set of goals, it has the opportunity to set forth processes to which the agency must adhere in fulfilling its statutory mandate, above and beyond the default provisions provided by the APA. Congress already often does this. For example, in the context of *State Farm*, the NTMVSA instructed the Secretary of Transportation to "consider relevant available motor vehicle safety data"[241] and to "conduct research, testing, development, and training necessary"[242] to develop regulations. In the process of doing so, the NTMVSA specifically asked the agency to "collect[] data from any source"[243] and even to procure experimental motor vehicles and equipment for research and testing purposes.[244]

Other similar authorizing statutes today likewise require agencies to engage in evidence-related practices, such as by including performance-based mandates[245] or by asking agencies to evaluate potential policy choices based on specific evidentiary requirements.[246] But while the NTMVSA's statutory mandate incorporated EBPM-like principles, it failed to require the kinds of proactive and intentional EBPM processes that have now been codified in the Evidence Act. Moreover, existing evidence-based statutory mandates generally do not incorporate emerging best practices around employing processes that are inclusive, transparent, and trustworthy, and thus risk losing public faith in the regulations they produce.

An improved version of the NTMVSA, for example, could have required the Secretary of Transportation to not only "consider" and "collect" existing available data about motor vehicle accidents and related injuries and deaths, but to begin by developing a "list of policy-relevant questions for which the agency intends to develop evidence to support"[247] its decision-making. It could have gone further by also requiring the agency to include affected stakeholders in that process. Likewise, in the context of DARE, an amended version of the Drug-Free Schools and Communities Act could have defined "success" by asking program administrators to engage in EBPM activities—such as foundational fact finding, policy analysis, program evaluation, and performance measurement—and to include affected parents and students in the process. This relatively open-ended approach would allow key policymakers to make

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[241] *See* NTMVSA, *supra* note 90, § 101(f)(1).
[242] *Id.* § 106(a).
[243] *Id.* § 106(a)(1).
[244] *Id.* § 106(a)(2).
[245] *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. Chi. L. Rev. 1309, 1311 (2015) (defining performance-based statutes as those wherein "rather than the law dictating that a factory smokestack must incorporate a particular scrubber, the law sets limits on a firm's emissions and the firm can then determine how to meet those limits").
[246] *See* Martin, *supra* note 73, at 395–96 (highlighting examples such as The Every Student Succeeds Act (P.L. 114-95) (which ranks potential programs as having strong, moderate, or promising evidence); The Family First Prevention Services Act (P.L. 115-123) (which similarly rates programs on a scale based on a rigorous review of evidence); and § 551 of the Social Security Act (which requires funding to be spent on programs that meet certain evidence requirements)).
[247] *See* 5 U.S.C. § 312(a)(1) (requiring the same of agencies in their strategic plans).

determinations about the program's goals and the evidence required to inform implementation. It also would have allowed the public to question why the federal government continued to scale the program if it was proving to be ineffective at achieving Congress's stated prevention goals, perhaps exposing the law and order-related motivations behind the program earlier on.

Alternatively, Congress could take the additional step of identifying a set of policy-relevant questions itself and codify them in the authorizing statute. In the context of the NHTSA, for example, Congress could have done so by making clear that it wanted the agency to consider relevant behavioral trends (such as the extent to which different groups of people would use or benefit from certain safety features) and the impact of any policy choice on various communities (such as the extent to which an increase in vehicle sales prices might disproportionately impact certain socioeconomic groups). In authorizing federal funding for programs like DARE, Congress could have specified the outcomes it wanted to see such programs achieve, rather than using a vaguely defined term such as "success" without further elaboration. This approach has the added benefit of creating greater specificity about Congress's intent in an era in which the Court is increasingly demanding more from authorizing statutes under the Major Questions Doctrine.[248] Congress should be careful, however, to explicitly delegate further definition or interpretation of relevant statutory terms to the agency to ensure policymakers have the necessary flexibility and discretion in the post-*Loper Bright* era.[249]

While either approach to implementing EBPM statutory mandates could have tremendous value, Congress must also be mindful of potential pitfalls of such efforts and address them explicitly by statute. For example, while EBPM provides an ideal framework for intentionally developing policies that deliver desired results, it is by nature a lengthy process that is not always well-suited to the kind of rapid policy decision-making that justifies congressional delegation of authority to agencies in the first place. Congress should thus begin by incorporating EBPM mandates into authorizing statutes in circumstances where a long-term policy development process is desired, rather than situations demanding rapid response to an emerging threat. In the context of Artificial Intelligence ("AI") regulation, for example, Congress could mandate EBPM processes for long-term development of AI policies while creating an exception for circumstances demanding more swift agency action to respond to an immediate problem.

As with any additional requirements imposed on agencies by authorizing statutes, Congress should also be mindful about the risks of creating additional grounds for invalidation of agency action under the APA. Asking

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[248] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 766 (2022) (holding that in cases of major economic, political, or social significance, agencies must point to "clear congressional authorization" for the power they claim Congress intended them to exercise) (internal quotation marks and citations omitted).

[249] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 n.5 (2024) (explaining that reviewing courts should give discretion to agency interpretations where the statute is clear that Congress intended to expressly delegate to an agency the authority to give meaning to a particular statutory term) (internal quotation marks, citations, and alterations omitted).

agencies to engage in inclusive EBPM processes that include public input is important, but so too is preserving a role for agency expertise and judgment in crafting its ultimate regulation. Authorizing statutes can address this concern by including specific language addressing how reviewing courts should assess arbitrariness and capriciousness in the context of EBPM. For example, a revised NTMVSA that required the agency to use EBPM processes could also have also stated that the agency's ultimate action should not be deemed "arbitrary and capricious" under § 706(2)(A) of the APA so long as the agency acts rationally and discloses its reasoning considering the (presumably now improved body of) evidence before it.

Including such an explicit statutory provision reiterating and specifying how the arbitrary and capricious standard should be applied in the context of EBPM could be useful in clarifying congressional intent in early stages of incorporating EBPM processes into authorizing statutes. The result would be to impose a heightened requirement on agencies with respect to the methodology used to create and implement regulations, while also retaining the desired degree of discretion intended by § 706(2)(A) of the APA and the *State Farm* standard. Returning to the example of *State Farm* itself, had the agency been operating under this proposed "enhanced EBPM" version of the NTMVA, it would have been required to set forth the policy-relevant questions proposed *supra* in Part II(B) and to build evidence about the rate at which individuals would be likely to detach automatic seatbelts before rescinding Standard 208. Yet the agency would still have discretion to take such an action if it could rationally explain its decision given the improved body of evidence before the agency resulting from its EBPM processes.

Finally, it is important to ensure that the implementation of EBPM in federal policymaking does not unduly prevent agencies from promulgating important regulations. This is particularly true considering DOGE's ongoing efforts to implement a "drastic reduction in federal regulations"[250] without any apparent plan to assess the effectiveness of such policies. In addressing this problem, lawmakers drafting EBPM-related statutory mandates, or policymakers implementing EBPM processes, can benefit from considering the distinction between type I (false positive) and type II (false negative) errors in the scientific fields. In policymaking, a type I error occurs when agency officials implement a policy to address a problem they believe exists, or implement a solution they think will work, but data subsequently proves that no such problem exists, or the solution is not effective. The implementation of DARE is an example of a type I error: the program's creators, and their champions in Congress, believed that the program would reduce drug abuse among program participants when, in fact, no such positive result occurred. While this type of error can result in wasted federal dollars and opportunity costs for the program's participants, it is overall less harmful than type II errors, which

[250] Musk & Ramaswamy, *supra* note 162.

could result in a complete failure to implement needed government solutions to address pressing problems.[251]

B. An Improved Evidence Act

While incorporating EBPM processes into authorizing statutes has the benefit of allowing Congress to tether its EBPM preferences to specific agency goals, such an approach may not always be desirable nor feasible given timing and political constraints. Thus, at a minimum, Congress should take action to amend the Evidence Act to establish a more effective and inclusive framework for incorporating EBPM in federal agencies. For example, Congress should create greater accountability mechanisms so that agencies actually comply with the Evidence Act's EBPM mandates. As suggested above, this could include creating a more significant role for the GAO or agency IGs, or for Congress itself, by asking agencies to report on a more regular basis to their authorizing congressional committees. This could occur in the form of more frequent written reports, annual hearings, or ideally as part of the appropriations process, so that Congress could more directly condition an agency's program funding to its willingness to engage in proactive evidence-building activities to ensure policy effectiveness.

Such steps to enforce the use of EBPM more rigorously in agencies should only be implemented alongside corresponding measures to ensure that EBPM processes are inclusive, trustworthy, and transparent. As Professor Underhill points out, if "the government acts with invidious intent to disadvantage particular groups, greater efficiency can amplify the harm caused by legislative and regulatory action."[252] Even if the government is not acting invidiously, EBPM processes that fail to intentionally center inclusion, trust, and transparency will not lead to better policy outcomes. This is particularly true given that programs that fail to address these considerations will lack social license, and therefore the buy-in and faith of the communities the policies intend to serve. Federal regulations that benefit from claiming the framework of EBPM to enhance their validity but fail to "assess outcomes of importance for the individuals who experience the policy" lack the "democratic legitimacy" central to their ultimate effectiveness.[253]

An improved version of the Evidence Act could address these problems by incorporating language from recent OMB guidance and the Executive Orders described *supra* in Part IV(A). For example, the Evidence Act's requirement that agencies "consult with stakeholders, including the public, agencies, State and local governments, and representatives of non-governmental

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[251] To ensure that a lack of evidence does not prevent important government action, an amended Drug-Free Schools and Community Act could have directed local governments to use an EBPM process to define the term "success" while stipulating that they could still proceed with programming while the EBPM process is underway.

[252] Underhill, *supra* note 56, at 162 (describing EBPM as "an agnostic tool to promote efficiency, which is desirable only insofar as one supports the ends of governmental action").

[253] *Id.* at 183.

researchers"[254] could be enhanced by drawing upon the Biden Administration's suggestion to conduct listening sessions or focus groups with those who are most likely to be impacted by the regulation.[255] The Evidence Act could also codify into statute the requirements of the now-rescinded Executive Order 13985, which required agency heads to "consult with members of communities that have been historically underrepresented in the Government" throughout the lifecycle of evidence building.[256] Legislators could also consider codifying recent federal initiatives, such as the EEOC's REACH initiative or OSTP's Indigenous Knowledge guidance, to ensure agencies include as many voices in both the evidence-building processes as possible.

Finally, the Evidence Act could also codify recent OMB guidance by directing agencies to engage in EBPM processes that use methods that are transparent and that generate trust.[257] For example, legislators could reexamine the recommendations in the EBP Commission's report and consider codifying additional privacy and transparency-related provisions that were not included in the Evidence Act. Congress should also ensure that the EBP Commission's vision for the use of the NSDS for evidence-building purposes comes to fruition under the CHIPS Act. An amended Evidence Act could ensure, for example, that as the NSDS is piloted and established, it "facilitates data access for evidence building" not only to produce semiconductors, but also in federal policymaking efforts more broadly.[258]

Conclusion

Echoing President Reagan's justifications for rescinding Standard 208 and enacting CBA, President Trump created DOGE with the mission of "making government work for the people again."[259] This basic premise appeals to proponents of EBPM, who believe that regulators can better serve the public and avoid wasteful government spending by using an evidence-based approach. Under Musk's early leadership, however, DOGE eschewed EBPM principles, instead adopting the chainsaw-based approach favored by Musk in his private sector companies. To the extent DOGE committed to undertaking any kind of methodological assessment of existing regulations to identify priorities for rescission during the first hundred days of the Trump Administration, it made clear that its "North Star" would not be the presence or

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[254] 5 U.S.C. § 312(c).

[255] OMB M-21-27, *supra* note 23, at 8.

[256] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). While this Executive Order was rescinded by President Trump as an example of the Bident Administration's use of what it calls "illegal" DEI, including diverse stakeholders in the regulatory process need not include preferences on the basis of race, gender, or any other legally protected status. Rather, as discussed *supra* in Part IV, such a process can and should include people of all races, genders, education levels, geographies, and socioeconomic statuses to ensure they are as inclusive as possible.

[257] *See* OMB M-21-27, *supra* note 23, at 8.

[258] Commission Report, *supra* note 60, at 5.

[259] *See ICYMI: DOGE's Mission to Make Government Work Again*, The White House (Mar. 28, 2025), https://www.whitehouse.gov/articles/2025/03/icymi-doges-mission-to-make-government-work-again/ [https://perma.cc/4DFL-X3AC].

lack of evidence that might justify preserving those regulations, but rather the extent to which such regulations were in line with the Supreme Court's recent holdings in cases like *West Virginia v. EPA* and *Loper Bright v. Raimondo*.[260] The Administration's announcement of an arbitrary "ten-for-one" rescission-to-regulation ratio rule further demonstrated the extent to which President Trump and DOGE strayed from any definition of "efficiency" that might also have been embraced by proponents of EBPM during Musk's tenure as the leader of DOGE.

While a myriad of policy issues ranging from inflation to immigration undoubtedly impacted the way people voted in the 2024 election, President Trump is claiming a broad public mandate for his current efforts to drastically curtail federal agency power.[261] To the extent that Trump is correct that the American people voted for these efforts, the extremity of DOGE's current approach exposes the dangers inherent in enacting government-backed policies and programs that are not evidence-based. When programs like DARE, which initially benefitted from widespread popular support, become discredited by subsequent evidence that they are ineffective or even harmful at achieving their stated objectives, the public loses faith in both the agencies and the processes that created them, leading to at least increased (if not majoritarian) buy-in for the drastic government-reduction measures currently underway.

While DOGE's current direction is a missed opportunity to employ an evidence-based approach to make the government more efficient, it also exposes a gap in administrative law that Congress has the power to remedy. As the most democratically accountable branch, Congress is in a better position than DOGE to respond to purported public distrust in federal agency policymaking. Doing so requires rethinking the EBPM paradigm to ensure that it codifies a broad definition of evidence that properly centers lived experiences, community input, and values non-quantifiable benefits as much as those backed by statistical or empirical data.

Moreover, as the branch tasked with vesting federal agencies with regulatory power, Congress has a unique opportunity to shape the processes agencies employ through statutory mandates. Long before the existence of DOGE, lawmakers on both sides of the aisle and in both chambers of Congress had already begun to address concerns about the public's lack of confidence in government regulations by codifying EBPM processes in the Evidence Act. This was an important step in the right direction, but, as the rise of DOGE has shown, the Evidence Act's shortcomings have left a gap in federal law that is

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[260] *See, e.g.*, Directing Repeal of Unlawful Regulations Memo, *supra* note 158 (opining that the Supreme Court has recently issued a "series of decisions that recognize appropriate constitutional boundaries" on agency power and directing agencies to evaluate "each existing regulation's lawfulness" in light of ten listed U.S. Supreme Court decisions, including *West Virginia v. EPA* and *Loper Bright*).

[261] *See, e.g.*, Department of Government Efficiency, https://doge.gov/ [https://perma.cc/76DH-JXW5] ("The people voted for major reform.").

now being filled by the executive branch. Congress, however, can still reassert its constitutionally vested power over the agency regulatory process by enacting improved EBPM statutory mandates, either in future authorizing statutes or in an amended Evidence Act, to respond to evolving public concerns about the efficiency and effectiveness of the federal government, and to ensure that it acts in ways that advance justice and equity.

The Rhetoric of Neutrality and The Reality of Disparity: Unmasking Judicial Opinions in the Wake of *Dobbs*

*Susan Tanner**

Abstract

This Article examines how the Supreme Court's rhetoric in Dobbs v. Jackson Women's Health Organization masks profound disparate impacts through ostensibly neutral legal reasoning. Through analysis of the enthymemes—arguments with unstated premises—in Dobbs, I demonstrate how the Court's opinion naturalizes controversial value judgments while presenting them as objective legal principles. The Article identifies four key enthymematic structures: the historical rights enthymeme, the categorical choice enthymeme, the stare decisis enthymeme, and the public controversy enthymeme. These rhetorical devices allow the Court to present the elimination of abortion rights as the natural outcome of neutral legal analysis rather than a significant shift in constitutional interpretation. I argue that this masked reasoning has particularly severe consequences for women from marginalized communities. The Article proposes strategies for rhetorical resistance, including exposing unstated premises, centering affected communities in legal discourse, and developing alternative narratives that highlight abortion's intersection with economic and racial justice. This analysis contributes to scholarly understanding of how judicial rhetoric can perpetuate inequality while maintaining an appearance of neutrality.

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* Associate Professor of Law, University of Louisville, Brandeis School of Law. This article builds upon my chapter, *Deciphering Dobbs: Syllogism and Enthymeme in Contemporary Legal Discourse*, in Rhetorical Traditions & Contemporary Law (Cambridge University Press, 2025), edited by Brian N. Larson and Elizabeth C. Britt. I am deeply grateful to Brian and Elizabeth for their thoughtful guidance throughout the development of that chapter and for their dedication to advancing interdisciplinary scholarship at the intersection of law and rhetoric.

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Introduction

In the aftermath of *Dobbs v. Jackson Women's Health Organization*, I find the legal community at a critical juncture, confronting not only the immediate consequences of a landmark decision overturned, but also the deeper implications of how judicial opinions shape—and often obscure—the real-world impacts of the law. In this paper, I argue that to truly understand and effectively resist regressive legal decisions, we must move beyond traditional modes of legal analysis and embrace a more rhetorically conscious, impact-focused approach to examining judicial opinions. By doing so, we can expose the often-hidden disparities created by facially neutral laws and decisions, and work towards a more just and equitable legal system.

The Supreme Court's decision in *Dobbs*, which effectively overturned *Roe v. Wade* and eliminated the federal constitutional right to abortion, provides a stark illustration of the disconnect between the rhetoric of judicial neutrality and the reality of disparate impact. Justice Alito's majority opinion, cloaked in the language of historical analysis and constitutional interpretation, presents itself as a neutral application of legal principles. Yet beneath this veneer of objectivity lies a complex web of unstated premises, selective historical narratives, and ideological commitments that have profound, and profoundly unequal, consequences for different segments of society.

I contend that to effectively resist such decisions and their impacts, legal scholars, practitioners, and activists must develop and deploy new tools of rhetorical analysis and resistance. We must learn to read between the lines of judicial opinions, to expose the enthymemes—the unstated premises and assumed values—that undergird legal reasoning. Moreover, I argue that we must

refocus our attention on whom the law affects, centering the voices and experiences of marginalized communities in our legal discourse and scholarship.

Drawing on critical legal studies, feminist legal theory, and rhetorical analysis, I offer a framework for engaging in this type of resistant reading and writing. Using *Dobbs* as a central case study, I will examine how the opinion's facially neutral language masks its disparate impact on women, particularly women of color and those from lower socioeconomic backgrounds. By unpacking the rhetorical strategies employed in the majority opinion and contrasting them with the lived realities of those most affected by the decision, I aim to bridge the gap between abstract legal principles and concrete social impacts.

The rhetoric of judicial opinions, as exemplified by *Dobbs*, raises important questions about the nature of legal reasoning and the role of the judiciary in a democratic society. While the myth of neutral legal reasoning persists, a close examination of the rhetorical strategies employed in judicial opinions reveals a more complex reality.[1] Judges, even at the highest levels of the judiciary, are engaged in a process of persuasion, using various rhetorical tools to justify their decisions and shape public understanding of the law.

This recognition of the rhetorical nature of judicial opinions does not necessarily undermine their authority or legitimacy. Rather, it invites us to engage more critically with legal texts, to unpack the unstated premises and assumptions that underlie judicial reasoning,[2] and to consider the broader implications of legal decisions beyond their immediate doctrinal effects.

For legal scholars and practitioners, this perspective suggests the need for a more rhetorically informed approach to legal analysis. Rather than taking judicial opinions at face value, we must learn to read them as rhetorical artifacts, attentive to the ways in which language, narrative, and argumentative structure shape legal outcomes.[3] This approach can help us to identify potential points of critique and resistance, even in the face of seemingly unassailable legal logic.[4] The recognition of judicial opinions as rhetorical constructs invites a more nuanced understanding of legal reasoning, one that acknowledges the interplay between logic, persuasion, and societal context.

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[1] Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1560–62 (1990).

[2] Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 Mich. L. Rev. 2008, 2009–10 (2002).

[3] *Id.*

[4] *See* Barbara A. Biesecker, *Rethinking the Rhetorical Situation from Within the Thematic of Différance,* 22 Phil. & Rhetoric 110, 110–30 (1989). Biesecker's work on rhetorical situations provides a theoretical framework for understanding judicial opinions as rhetorical artifacts. While her focus is not specifically on legal texts, her insights into the constitutive nature of rhetoric and the importance of différance in shaping meaning are highly relevant to legal discourse. Her approach can be productively extended to the study of judicial opinions and legal argumentation. The recommendation to read legal texts as rhetorical artifacts builds on Biesecker's emphasis on the contextual and performative aspects of rhetoric, while the focus on identifying points of critique and resistance aligns with her interest in the transformative potential of rhetorical analysis. *See also*, James Boyd White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression 758 (1973). White's seminal work on law as a rhetorical and cultural practice provides additional support for this approach, emphasizing the importance of understanding legal texts as part of a broader cultural conversation.

By examining the enthymematic structures embedded within legal texts, scholars can uncover the unstated premises and value judgments that underlie judicial decision-making. This rhetorical lens allows for a critical examination of how legal arguments are constructed, how they create identification with certain audiences, and how they navigate complex social and political issues. And it highlights the ways in which legal discourse both reflects and shapes societal norms, revealing the law as a dynamic, interpretive practice rather than a set of fixed, objective rules. For practitioners, this perspective emphasizes the importance of crafting arguments that not only adhere to logical structures but also resonate with the values and assumptions of their intended audience. It underscores the need for lawyers to be adept not just in formal logic, but in the art of persuasion and the nuances of rhetorical strategy. This approach can lead to more effective advocacy, as well as a deeper understanding of how legal change occurs through the gradual shift of shared premises and the reframing of legal issues.

Moreover, recognizing the rhetorical nature of judicial opinions[5] underscores the importance of diverse voices in the legal profession.[6] If judges are engaged in a process of persuasion rather than purely objective analysis, then the perspectives and experiences brought to bear on legal questions become crucially important. This recognition lends support to efforts to increase diversity in the judiciary and legal academia, as well as to amplify marginalized voices in legal discourse.[7]

For the broader public, understanding the rhetorical dimensions of judicial opinions can foster a more informed and engaged citizenry. By demystifying legal reasoning and exposing its persuasive elements, we can encourage more robust public debate about the role of the judiciary and the content of our laws.[8] This is particularly important in an era of increasing political polarization and declining trust in institutions, including the Supreme Court.[9] Scholars have argued that transparency in judicial decision-making processes can help rebuild public trust and legitimacy in the legal system.[10]

As we move forward in our analysis of *Dobbs* and its implications, it is crucial to keep this rhetorical perspective in mind. The opinion's seemingly neutral language and formalist reasoning should not obscure the profound moral and political choices embedded within it. By unpacking the rhetorical strategies at play, we can begin to engage more critically with the decision and its consequences, opening up new avenues for resistance and change.

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[5] Chemerinsky, *supra* note 2, at 2010–11.

[6] *See generally* Richard Delgado & Jean Stefancic, Critical Race Theory, Fourth Edition: An Introduction (2023).

[7] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 410–11 (2000).

[8] *See* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. & Human. 201, 204–05 (1990).

[9] *See e.g.* Claudia Deane, *Americans' Deepening Mistrust of Institutions*, Pew (Oct. 17, 2024), https://www.pew.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions [https://perma.cc/KEV9-PV5H].

[10] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 286 (2003).

Ultimately, I argue that such rhetorical resistance is not merely an academic exercise, but a crucial component of the broader struggle for social justice and liberation. By exposing the ways in which seemingly neutral legal language can perpetuate and exacerbate existing inequalities, we can begin to imagine and work towards a legal system that truly serves all members of society. In doing so, I take up the challenge posed by critical legal scholars to not only interpret the law, but to actively participate in its transformation.[11]

In the sections that follow, I will first examine the rhetorical strategies employed in the *Dobbs* opinion, paying particular attention to its use of enthymematic argumentation and historical narrative. I will then explore the concept of facially neutral laws and their disparate impacts, using *Dobbs* as a lens through which to view this broader phenomenon. Next, I will propose strategies for rhetorical resistance, emphasizing the importance of centering affected communities in legal discourse. Finally, I will consider the implications of this approach for legal education and practice, arguing for a fundamental shift in how we teach, study, and engage with the law.

Through this analysis, I aim to contribute to a growing body of scholarship that seeks to bridge the gap between critical legal theory and practical advocacy, between the ivory tower and the streets. By developing more sophisticated tools for analyzing and resisting judicial rhetoric, I hope to equip scholars, practitioners, and activists with new weapons in the ongoing struggle for justice and liberation.

I. The Rhetoric of Judicial Opinions

In examining the rhetoric of judicial opinions, particularly in the context of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, we confront the persistent myth of neutral legal reasoning. This myth, deeply ingrained in legal education and practice, posits that judicial decisions are the product of objective analysis, untainted by personal bias or ideological commitments. Yet, as legal scholars have long recognized, judicial opinions are inherently rhetorical constructs, carefully crafted to persuade their audiences through various argumentative strategies and devices.[12] Gerald Wetlaufer argues compellingly that "law is rhetoric" and that legal discourse is inherently persuasive rather than purely descriptive or analytical.[13] This rhetorical nature of legal reasoning is often obscured by the law's claims to objectivity and neutrality, creating a tension between the law's rhetorical practices and its professed ideals.

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[11] As I embark on this analysis, I remain cognizant of my own positionality within the legal academy and the broader social hierarchy. I grapple with the paradox of engaging in activism from within the privileged confines of legal scholarship. Yet it is precisely this tension that drives my inquiry and fuels my commitment to using the tools at my disposal to support and amplify the voices of those engaged in liberation struggles on the ground.

[12] Wetlaufer, *supra* note 1.

[13] *Id.* at 1555.

James Boyd White has shown that law is fundamentally a "branch of rhetoric," and that it constructs meaning through language and argumentation.[14] But legal rhetoric serves a profound constitutive function that extends far beyond mere persuasion or argumentation, actively shaping both doctrinal development and broader sociocultural understandings of law's role in society.[15] Legal discourse does not simply describe or reflect existing social realities, but rather participates in their very construction through complex processes of meaning-making and cultural negotiation.[16] This constitutive power manifests not only in formal legal outcomes, but in the way legal language and reasoning come to structure social relationships, institutional arrangements, and cultural narratives about justice, rights, and civic obligation.[17] The situated and contextual nature of legal argumentation is readily apparent to practicing attorneys, who must constantly modulate their rhetorical strategies based on audience, forum, and circumstance—whether arguing before a trial court, drafting an appellate brief, or negotiating with opposing counsel.[18] This unavoidable dialectical dimension of legal practice suggests that legal reasoning cannot be reduced to formal logic or abstract rules, but must be understood as fundamentally embedded within particular social, institutional, and cultural frameworks that shape both its operation and effects. The recognition of law's rhetorical and constitutive dimensions thus opens up crucial questions about power, legitimacy, and the relationship between legal discourse and social change that purely formalist accounts tend to obscure or ignore.[19]

Within the complex landscape of legal rhetoric, the enthymeme stands as perhaps the most subtle yet powerful persuasive device employed in judicial reasoning, deriving its unique force not from explicit logical chains but from the unstated premises and shared assumptions between judicial authors and their diverse audiences. While conventional approaches to legal analysis tend to focus primarily on surface-level arguments and explicitly stated rationales, enthymematic reasoning operates in a more nuanced register, shaping doctrinal development through premises that remain formally unstated yet prove essential to the argument's coherence and persuasive effect.[20] This implicit dimension of legal argumentation has been notably understudied in traditional legal scholarship, which often privileges more readily apparent forms of judicial reasoning while overlooking the crucial role that unstated premises

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[14] James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 684 (1985).

[15] James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism 23 (1990).

[16] *Id.*

[17] *See* Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4–5 (1983).

[18] Wetlaufer, *supra* note 1, at 1560.

[19] Austin Sarat & Thomas R. Kearns, The Rhetoric of Law: A Project in Historical Interpretation 7 (Legal Stud. F. 3, 5–6 1983).

[20] Susan Tanner, *Deciphering Dobbs: Syllogism and Enthymeme in Contemporary Legal Discourse*, *in* Rhetorical Traditions & Contemporary Law 102, 102–03 (Elizabeth Britt et al. eds., 2024); *see also* Richard A. Posner, How Judges Think 106–08 (2008).

play in guiding legal conclusions.[21] The prevalence of enthymemes in judicial opinions suggests that legal reasoning depends as much on shared background assumptions and implicit value judgments as it does on formal logic or explicit doctrinal rules.[22] Understanding how enthymemes function in legal discourse thus becomes essential for fully appreciating both the rhetorical strategies employed by courts and the deeper structures of legal argumentation that shape doctrinal development. This recognition of the enthymeme's central role challenges traditional models of legal reasoning that emphasize only explicit logical structures while ignoring the implicit premises that often do the real work of legal justification and persuasion.[23]

A. The Enthymeme in Legal Reasoning

The enthymeme, as conceptualized by Aristotle, represents a form of rhetorical syllogism where one or more premises remain unstated.[24] Unlike formal syllogisms that require explicit articulation of all premises and conclusions, enthymemes derive their persuasive power precisely from what remains unsaid. In his *Rhetoric*, Aristotle characterizes the enthymeme as the "substance of rhetorical persuasion," recognizing its unique ability to engage audiences in the construction of meaning.[25] This engagement occurs when audiences supply missing premises based on shared cultural knowledge, values, or assumptions.

Consider a simple everyday example. Imagine a friend telling you, "John is a great employee—he always arrives early." This statement contains an implicit enthymeme with unstated premises. The unstated major premise might be "People who arrive early are good employees." The conclusion—"John is a great employee"—appears logical and self-evident precisely because the audience is invited to supply these unspoken assumptions. Most listeners would not even pause to examine these hidden premises, which is exactly how enthymemes work. They derive their persuasive power from the audience's unconscious acceptance of unstated assumptions, making the argument seem natural and beyond dispute. This seemingly simple rhetorical move demonstrates how enthymemes operate in everyday reasoning: by leaving crucial premises unspoken, they engage the audience in constructing the argument's logic, thereby making the conclusion feel more compelling and intuitive.

In legal discourse, enthymemes serve several crucial functions that distinguish them from pure logical syllogisms. First, they allow judges to present

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[21] Wetlaufer, *supra* note 1, at 1568 (observing that "*the legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain*," thereby privileging the most overt forms of doctrinal reasoning).

[22] Tanner, *supra* note 20, at 106–07.

[23] João Maurício Adeodato, *The Rhetorical Syllogism (Enthymeme) in Judicial Argumentation*, 12 Int'l J. for the Semiotics of L. 135, 135 (1999) ("the judicial discursive structure seems to be rather enthymematic than syllogistic, because not all the effectively used norms are revealed, many of them staying not only out of question but also hidden.").

[24] *See generally* Aristotle, Rhetoric (W. Rhys Roberts trans., Dover Publications 2004) (c. 350 B.C.E.).

[25] *Id.*

controversial value judgments as natural or self-evident by leaving them unstated. Second, they create identification between the court and its audience by relying on shared premises that need not be explicitly defended. Third, they provide flexibility in legal reasoning by allowing for the distortion of arguments and the strategic omission of premises that might prove problematic if directly stated.[26]

The power of enthymemes in legal argumentation stems from their ability to make arguments appear more persuasive than they might if all premises were explicitly stated. The force of argument often depends on the unstated premises that the audience is called upon to supply.[27] This observation proves particularly relevant in constitutional interpretation, where courts must navigate complex—and sometimes controversial—questions of rights, liberties, and governmental powers.

B. Enthymematic Structure in Constitutional Interpretation

Constitutional interpretation provides particularly fertile ground for enthymematic reasoning due to the fundamental tension between the document's fixed text and the need to apply its principles to continuously evolving societal circumstances. The inherent ambiguity and open-textured nature of many constitutional provisions create interpretive spaces that courts necessarily fill through reliance on unstated premises and shared understandings when determining the scope of constitutional rights and the limits of governmental authority.[28] This endemic ambiguity extends beyond mere textual uncertainty to encompass deeper questions about the nature of constitutional meaning itself, requiring courts to engage in complex acts of translation between past and present that inevitably draw upon unstated assumptions about constitutional purpose, structure, and values.[29]

The prevalence of enthymematic reasoning in constitutional jurisprudence reflects both practical necessity and theoretical sophistication in judicial decision-making. Courts must somehow bridge the temporal gap between eighteenth-century text and twenty-first-century problems while maintaining

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[26] *See generally* Fabrizio Macagno & Giovanni Damele, *The Dialogical Force of Implicit Premises: Presumptions in Enthymemes*, 35 Informal Logic 365 (2013) (discussing the effect of hidden premises in arguments).

[27] *Id.* at 367.

[28] Bobbitt's work on constitutional interpretation provides insight into this dynamic. *See* Philip Bobbitt, Constitutional Interpretation 12–14 (1991). Bobbitt identifies six modalities of constitutional argument, each of which relies heavily on unstated premises about the nature of constitutional meaning and authority. His analysis reveals how the open texture of constitutional language necessarily invites interpreters to employ enthymematic reasoning when bridging historical text and contemporary application. This observation aligns with more recent scholarship examining how courts navigate the tension between textual fixity and evolving circumstances. *See also* Jack M. Balkin, Living Originalism 3–5 (2011) (arguing that constitutional interpretation inherently involves translation between past and present); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1171–73 (1993) (developing a theory of how courts maintain interpretive fidelity while adapting constitutional meaning to new contexts).

[29] *See* Lessig, *supra* note 28, at 1171–73.

the fiction of constitutional continuity and coherence.[30] This interpretive challenge becomes particularly acute when courts confront novel issues that the Constitution's framers could not have anticipated, from electronic surveillance to artificial intelligence. In such cases, enthymematic reasoning allows courts to draw upon unstated premises about constitutional purposes and principles to fashion doctrinally coherent responses to unprecedented challenges.[31] The unstated premises in these constitutional enthymemes often reflect deeply held cultural and legal values about the proper relationship between individual liberty and government power, the nature of democratic self-governance, the rule of law, and the role of the judiciary in the constitutional order.[32]

Moreover, the multi-layered nature of constitutional interpretation particularly lends itself to enthymematic reasoning because courts must simultaneously address multiple audiences with varying levels of legal sophistication and different stakes in constitutional outcomes. When writing constitutional opinions, courts must speak to other judges, practicing lawyers, legal scholars, political actors, and the broader public, each bringing different background assumptions and interpretive frameworks to their reading of constitutional texts.[33] Enthymematic reasoning allows courts to craft arguments that operate at multiple levels simultaneously, with unstated premises that might be obvious to legal specialists while remaining opaque to general readers, thus preserving both technical precision and rhetorical flexibility. This multi-vocal quality of constitutional enthymemes serves important institutional purposes, allowing courts to maintain their legitimacy across diverse constituencies while gradually evolving constitutional doctrine to meet changing social needs.[34]

The use of enthymematic reasoning in constitutional interpretation also reflects deeper truths about the nature of constitutional meaning and authority. By leaving crucial premises unstated, constitutional enthymemes invite their audiences to participate in the construction of constitutional meaning, fostering a form of democratic constitutionalism that extends beyond mere

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[30] *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165, 169–72 (2008) (arguing that today, different interpretive methods are best suited for some categories of cases but not for others, and that methods should be used on a case-by-case basis).

[31] *See* David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 Marq. L. Rev. 979, 981–82 (2019). ("Precedent, for example, even if limited to judicial precedent and certainly if conceived more broadly, does not dictate a single direction for the law. Among the possible paths that precedent leaves open, a judge—or another official or a citizen—has to choose on the basis of a moral judgment of some kind. Sometimes it might even be necessary to depart from the path that precedent identifies, because, even giving the lessons of the past full credit, they are simply unacceptable."); David A. Strauss, *Do We Have a Living Constitution?*, 59 Drake L. Rev. 973, 984 (2011) ("The important point is that moral judgments are not the only factor. In the common law approach, the role of those judgments is limited by the demand that decisions be justified by reference to precedent. This is, I believe, the way the Constitution changes-or, if you prefer, the way constitutional law or the requirements imposed by the Constitution change-in our system.").

[32] Robert Post, *Theories of Constitutional Interpretation*, 30 Representations 13, 18–20 (1990).

[33] *See* White, *supra* note 14, at 691 (arguing that the law is constitutive and that "[t]he law is not merely a bureaucracy or a set of rules, but a community of speakers of a certain kind: a culture of argument, perpetually remade by its participants").

[34] Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 367–70 (2009).

textual exegesis to encompass shared cultural understandings about fundamental values and principles.[35] This participatory dimension of constitutional interpretation helps explain why certain unstated premises in constitutional arguments can become so contentious—they often reflect competing visions of the constitutional order itself.[36] The heated debates over originalism versus living constitutionalism, for instance, often turn less on explicit interpretive arguments than on unstated assumptions about the nature of constitutional authority and the proper role of courts in a democratic society.[37]

The reliance on enthymematic reasoning in constitutional interpretation highlights the inherently conservative nature of constitutional change. By leaving crucial premises unstated, courts can gradually shift constitutional meaning while maintaining an appearance of doctrinal consistency and historical continuity.[38] This rhetorical strategy allows courts to respond to evolving social needs and values while preserving the legitimacy that comes from apparent adherence to established constitutional principles. The unstated premises in constitutional enthymemes thus serve as crucial bridges between past and present, enabling courts to maintain what Bruce Ackerman has called the "myth of rediscovery"—the notion that constitutional innovation represents not change but merely the recognition of principles that were always implicit in the constitutional order.[39] This rhetorical strategy proves particularly powerful in constitutional adjudication because it allows courts to adapt constitutional meaning to contemporary circumstances while maintaining the fiction of interpretive consistency and historical continuity.[40] When courts employ enthymemes in determining the scope of constitutional rights, they frequently leave unstated crucial premises about the nature of rights, the role of historical practice, and the proper approach to constitutional interpretation itself, allowing these fundamental assumptions to shape outcomes without explicit acknowledgment or defense.[41] This implicit dimension of constitutional reasoning becomes particularly evident in cases involving unenumerated rights or novel applications of established principles, where courts must somehow reconcile innovation with tradition, change with continuity. The power of constitutional enthymemes in these contexts stems from their ability to present doctrinal evolution as discovery rather than creation, allowing courts to

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[35] *See* White, *supra* note 14, at 690) ("Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity . . . for oneself, for one's audience . . . One creates, or proposes to create, a community of people, talking to and about each other.").

[36] Balkin, *supra* note 28, at 3–5.

[37] *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 69–70 (2009).

[38] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA – 2005-06 Brennan Center Symposium Lecture*, 94 Calif. L. Rev. 1323, 1328–30 (2006).

[39] Bruce Ackerman, We the People: Foundations 17–18 (1991).

[40] *See, e.g.*, Siegel, *supra* note 38, at 1328–30. (Courts often shape precedent gradually, responding to and anticipating political considerations so as to appear consistent. "The pragmatic political considerations that shaped development of the unique physical characteristics argument also shaped its practical reach. Practices said to be covered by the unique physical characteristics qualification fluctuated over time, as debate shifted ground.")

[41] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 879–80 (1996).

maintain their institutional legitimacy while gradually adapting constitutional law to meet evolving social needs and values.[42]

The enthymematic nature of constitutional reasoning becomes particularly apparent in cases involving fundamental rights, where courts must often navigate between competing conceptions of liberty, equality, and governmental power.[43] By leaving crucial premises unstated about the proper level of generality at which to define rights or the relevant historical traditions to consider, courts can maintain flexibility in constitutional interpretation while appearing to engage in straightforward application of established principles.[44] This rhetorical strategy allows courts to respond to changing social circumstances and evolving understandings of constitutional values without explicitly acknowledging the extent to which they are engaging in constitutional innovation.[45] The "myth of rediscovery" thus operates as a kind of necessary fiction in constitutional law, enabling courts to maintain the paradoxical task of preserving constitutional meaning while adapting it to meet the needs of a changing society.[46]

Courts frequently employ enthymemes when determining the scope of constitutional rights, often leaving unstated crucial premises about the nature of rights, the role of historical practice, and the proper approach to constitutional interpretation itself. For instance, in cases involving the right to privacy, courts often rely on unstated assumptions about the relationship between privacy and other constitutional values, such as liberty or autonomy.[47] These assumptions shape the court's analysis and the ultimate scope of the right, even though they are rarely made explicit in the court's reasoning. Similarly, when courts consider the extent of the government's power to regulate economic activity, they often rely on unstated premises about the proper role of government in the economy and the balance between individual liberty and collective welfare. These premises, deeply rooted in political and economic theory, exert a powerful influence on the court's decision-making, even though they remain beneath the surface of the court's explicit reasoning.[48]

The Supreme Court's use of enthymemes in constitutional cases often serves to naturalize particular interpretive approaches while obscuring their controversial nature. For instance, when the Court employs originalist methodology, it frequently relies on unstated premises about the relevance of historical practices to modern constitutional meaning. These premises, such as the idea that the original understanding of the Constitution should be the

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[42] Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 57–59 (1997).

[43] Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 73–75; *see* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1491–92 (2002) (analyzing the historical and theoretical tensions between liberty and equality and arguing that the judicial role in protecting both requires courts to navigate the limits of governmental power).

[44] *See* Michael H. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 669–72 (1997).

[45] *See generally* Wetlaufer, *supra* note 1.

[46] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 459 (1989).

[47] Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev 1410, 1410–11 (1974).

[48] *See generally* Strauss, *supra* note 41.

primary guide for interpretation, are often left undefended in the Court's reasoning.[49] This reliance on unstated premises allows the Court to present its interpretive approach as a neutral, almost inevitable application of the Constitution's true meaning, rather than as a contested methodological choice. By leaving these premises unstated, the Court can avoid directly engaging with critiques of originalism or alternative interpretive approaches, such as living constitutionalism or pragmatism.

Similarly, when the Court applies the tiers of scrutiny framework in equal protection cases, it often relies on enthymematic reasoning to justify its choice of the level of scrutiny to apply. The Court's decisions about whether to apply strict scrutiny, intermediate scrutiny, or rational basis review frequently depend on unstated assumptions about the nature of the classification at issue and its relationship to legitimate government interests.[50] These assumptions, which often involve complex judgments about social reality and the effects of government classifications, are rarely fully articulated in the Court's opinions. Instead, the Court often simply announces its choice of the level of scrutiny, leaving the underlying reasoning unstated. This enthymematic structure allows the Court to present its equal protection analysis as a straightforward application of established doctrine, obscuring the complex value judgments and empirical assessments that underlie its reasoning.

The use of enthymemes in constitutional interpretation is not limited to the Supreme Court. Lower federal courts and state courts also frequently rely on enthymematic reasoning when interpreting both the federal and state constitutions.[51] This reliance on unstated premises and shared understandings is often necessary for courts to make sense of the broad, often ambiguous

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[49] *See generally* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013).

[50] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996), which illustrates how unstated premises shape the selection of scrutiny levels. In this case challenging the male-only admissions policy of the Virginia Military Institute (VMI), the Court applied intermediate scrutiny to gender-based classifications. The underlying enthymematic reasoning reveals several crucial unstated premises: first, that gender classifications are not as inherently suspect as racial classifications (hence not triggering strict scrutiny), but are nonetheless problematic enough to warrant more than minimal rational basis review; second, that gender classifications often reflect outdated stereotypes that merit heightened judicial skepticism; and third, that intermediate scrutiny can effectively address systemic gender discrimination without completely prohibiting all gender-based distinctions. The Court's opinion leaves these premises largely unexamined, presenting the choice of intermediate scrutiny as a neutral, almost self-evident approach. Justice Ginsburg's majority opinion asserts that gender-based classifications must serve "important governmental objectives" and be "substantially related" to those objectives—a standard that appears neutral but actually embeds profound assumptions about gender equality. The unstated premise is that while absolute equality might not be required, significant disparities demand judicial intervention. This enthymematic structure allows the Court to strike down VMI's male-only policy without explicitly declaring gender a suspect classification, demonstrating how courts can reshape social norms through carefully constructed legal reasoning that leaves key assumptions unspoken.

[51] *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006) (surveying strict scrutiny decisions in the lower federal courts and finding that nearly one-third of challenged laws survive, thereby demonstrating that these courts, no less than the Supreme Court, resolve constitutional questions through context-dependent judgements that rely on shared but unstated premises—i.e., enthymemes—even though the article itself never uses that term).

language of constitutional provisions.[52] For instance, when a state court interprets its state constitution's due process clause, it often relies on unstated assumptions about the nature of the rights protected by due process and their relationship to other constitutional values. These assumptions, which may be rooted in the state's particular constitutional history or in broader theories of constitutional interpretation, shape the court's analysis and the ultimate scope of the rights protected.

The enthymematic structure of constitutional interpretation[53] has significant implications for the legitimacy and transparency of judicial decision-making. On one hand, the use of enthymemes allows courts to draw on shared understandings and cultural values in interpreting the Constitution, potentially increasing the public's acceptance of their decisions. Shared assumptions, social norms, and cultural values provide a common language through which the court can engage with the public's collective constitutional understandings.[54] By tapping into this collective understanding, courts can potentially ground their decisions in a sense of shared constitutional meaning, increasing their legitimacy and persuasive power.

However, the reliance on unstated premises in constitutional interpretation also raises significant concerns about transparency and accountability. When courts leave key aspects of their reasoning unstated, it becomes more difficult for the public, litigants, and other branches of government to evaluate the soundness and coherence of their decisions.[55] This opacity can undermine the public's trust in the judiciary and raise questions about the legitimacy of judicial review. Moreover, the use of enthymemes can allow courts to obscure the value judgments and policy choices that inevitably inform constitutional interpretation. By presenting their decisions as the straightforward application of neutral principles and declining to defend their assumptions, courts

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[52] *See generally* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987) (confronting the problem of ambiguous text and arguing that the distinct methods of constitutional interpretation are interconnected and can point towards, or at least not be inconsistent with, the same result).

[53] In addition to constitutional interpretation, statutory interpretation is another area of law where enthymematic reasoning plays a significant role. When courts interpret statutes, they often rely on unstated premises and shared understandings about the purpose of the law, the intentions of the legislature, and the role of the judiciary in the interpretive process. These unstated premises shape the court's analysis and the ultimate meaning given to the statutory language, even though they are rarely made explicit in the court's reasoning. *See generally* William N. Eskridge, *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

One common enthymeme in statutory interpretation involves the use of canons of construction. These canons, such as the plain meaning rule, the rule against surplusage, and the ejusdem generis rule, are often applied by courts as if they were neutral, quasi-scientific tools for discerning the meaning of statutory language. *See generally* Scott J. Shapiro, Legality (2011). However, the application of these canons often involves unstated assumptions about the proper role of the judiciary, the relative importance of text and purpose in statutory interpretation, and the appropriate tools for discerning legislative intent. By presenting these canons as neutral interpretive principles, courts can obscure the value judgments and policy choices that inform their statutory analysis.

[54] *See generally* Richard A. Primus, *Public Consensus as Constitutional Authority*, 78 Geo. Wash. L. Rev. 1207 (2010).

[55] *See generally* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 Yale L.J. 449 (1989).

can avoid directly engaging with the contested moral and political questions that often underlie constitutional disputes.

The enthymematic structure of constitutional interpretation also has implications for the role of precedent and the development of constitutional doctrine over time. When courts rely on unstated premises in their constitutional decisions, those premises can become embedded in the fabric of constitutional law, shaping future cases even though they were never explicitly articulated.[56]

This process of implicit constitutional change can lead to the gradual evolution of constitutional meaning, as new unstated premises and shared understandings replace old ones. However, it can also lead to doctrinal confusion and inconsistency, as different courts rely on different unstated premises in interpreting the same constitutional provisions.

Moreover, the reliance on enthymematic reasoning in constitutional interpretation can make it difficult for courts to respond to changing social and political realities. When constitutional doctrine is built on a foundation of unstated premises and shared understandings, it can be difficult for courts to adapt that doctrine to new circumstances without explicitly acknowledging and defending the underlying assumptions.[57] This can lead to a kind of constitutional ossification, as outdated assumptions and understandings continue to shape constitutional law long after they have lost their persuasive power or descriptive accuracy.

Despite these challenges, the use of enthymemes in constitutional interpretation is likely to remain a central feature of judicial reasoning. The broad, open-textured language of many constitutional provisions, combined with the need to apply them to ever-changing social and political realities, makes some reliance on unstated premises and shared understandings inevitable. The key, then, is for courts to be more transparent about the role of enthymemes in their reasoning, explicitly acknowledging the unstated premises and value judgments that inform their decisions.[58] Robust public debate on constitutional interpretation is not merely an academic exercise, but a fundamental democratic practice that serves several critical functions. First, it challenges the notion that constitutional meaning is the exclusive domain of judges and legal experts, instead recognizing the Constitution as a living document that derives its legitimacy from the ongoing engagement of the people it governs. Popular constitutionalism—the idea that constitutional interpretation is a collective enterprise involving not just courts but also social movements, political actors, and ordinary citizens—provides a crucial counterweight to judicial supremacy.[59] By inviting broader public scrutiny, we create a more dynamic constitutional dialogue that can expose hidden assumptions, challenge

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[56] *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997 (1994).

[57] *See generally* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995).

[58] *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

[59] Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027, 1028–31 (2012); *see generally* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

entrenched power structures, and ensure that constitutional interpretation reflects the lived experiences of diverse communities. This participatory approach recognizes that the Constitution's meaning evolves through ongoing social negotiations, not through the unilateral pronouncements of a single institution. Moreover, public debate can surface perspectives that might otherwise be marginalized in formal legal discourse, bringing to light the real-world implications of constitutional interpretations. As Robert Post argues, constitutional meaning is not simply declared but is continuously constructed through complex interactions between courts, political institutions, and the broader public.[60] By opening up constitutional reasoning to wider scrutiny, we create a more inclusive and responsive constitutional framework—one that can adapt to changing social realities while maintaining a connection to fundamental principles of justice and equality.

Moreover, a greater recognition of the enthymematic structure of constitutional interpretation can help to demystify the process of constitutional decision-making, highlighting the ways in which courts draw on shared understandings and cultural values in interpreting the Constitution. This recognition can help to bridge the gap between the courts and the public, fostering a greater sense of shared ownership and participation in the process of constitutional interpretation.[61]

The use of enthymemes in constitutional interpretation is a central feature of judicial reasoning, reflecting the inherent challenges of applying broad constitutional principles to complex social and political realities. While the reliance on unstated premises and shared understandings can raise concerns about transparency and accountability, it also allows courts to tap into the collective constitutional understandings of the public, potentially increasing the legitimacy and persuasive power of their decisions. By explicitly acknowledging the role of enthymemes in their reasoning and opening up their decisions to greater public scrutiny and debate, courts can help to foster a more inclusive and participatory process of constitutional interpretation. Ultimately, a greater recognition of the enthymematic structure of constitutional interpretation can help to deepen our understanding of the complex interplay between law, politics, and culture in shaping the meaning of the Constitution over time.

II. *Dobbs* and the Power of Enthymematic Reasoning

In examining the rhetoric of judicial opinions, particularly in the context of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, I am confronted with the persistent myth of neutral legal reasoning.

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[60] *See e.g.,* Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 10–11 (2003); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.–C.L. L. Rev. 373, 379 (2007) ("Democratic constitutionalism observes that adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.")

[61] *See generally* Siegel, *supra* note 38.

This myth, deeply ingrained in legal education and practice, posits that judicial decisions are the product of objective analysis, untainted by personal bias or ideological commitments. But this myth is just that—an ideal that few, if any legal scholars think reflect reality, a reality where rhetorical strategies play a crucial role in shaping legal outcomes and public perception. This insight is not novel; legal scholars have long recognized the profound influence of rhetoric in judicial decision-making and legal discourse. Gerald Wetlaufer, argues that "law is rhetoric" and that legal discourse is inherently persuasive rather than purely descriptive or analytical.[62] Wetlaufer contends that the rhetorical nature of legal argumentation is often obscured by the law's claims to objectivity and neutrality, creating a tension between the law's rhetorical practices and its professed ideals.[63]

This is not a bug, but a feature of legal discourse. As James Boyd White posits, law is fundamentally a "branch of rhetoric." that constructs meaning through language and argumentation.[64] White emphasizes the constitutive power of legal rhetoric, arguing that it shapes not only legal outcomes but also social realities and cultural understandings.[65] Any practicing attorney will be quick to agree about the importance of audience and context in legal argumentation, suggesting that legal reasoning is inherently dialectical and situated within particular social and cultural frameworks.[66]

Often the rhetoric of the law is analyzed through the arguments that are made.[67] And yet, potentially more important to audience reception are the arguments that are not made—the quasi-logical arguments through the use of the enthymeme—the rhetorical cousin to the syllogism. The relative neglect of the enthymeme in legal scholarship represents a missed opportunity to fully grasp the subtle ways in which judicial opinions shape legal doctrine and public understanding of the law. By leaving crucial premises unstated, enthymemes can make arguments appear more persuasive and self-evident than they might otherwise be, potentially masking contestable assumptions or value judgments[68] and reinforcing the mythos of neutrality and objectivity.

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[62] Wetlaufer, *supra* note 1, at 1554.

[63] *Id.* at 1555.

[64] White, *supra* note 14, at 684.

[65] *Id.* at 688–691.

[66] For an extended discussion of the importance of audience to all writing, *see* Chaïm Perelman, The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications 1–8 (1979).

[67] While scholars have made significant contributions to our understanding of legal rhetoric, there remains a critical gap in the literature regarding specific rhetorical devices employed in judicial opinions. In particular, the enthymeme—a form of syllogism in which one premise is implied rather than explicitly stated—has been understudied as a rhetorical tool in legal discourse. Although Aristotle identified the enthymeme as the "substance of rhetorical persuasion," Aristotle, *supra* note 24, at 3, its role in shaping judicial opinions and legal arguments has not received sufficient attention from legal scholars. This oversight is particularly striking given the enthymeme's potential to obscure underlying assumptions and ideological commitments within seemingly neutral legal reasoning.

[68] *See* Jeffrey Walker, *The Body of Persuasion: A Theory of the Enthymeme*, 56 College English 46, 51–53 (1994) (discussing the persuasive power of enthymemes in general rhetorical contexts). A more thorough examination of enthymematic reasoning in judicial opinions could provide valuable insights into the rhetorical strategies employed by courts and the implicit values and assumptions that underlie legal decision-making.

The notion of judicial neutrality has long been a cornerstone of American legal theory. The ideal of "neutral principles" in constitutional law suggests that judicial decisions should be based on reasoning that transcends the immediate result.[69] This concept has been influential in shaping the self-perception of the judiciary and the public's understanding of the legal system. However, critical legal scholars have convincingly argued that true neutrality in legal reasoning is not only unattainable but may also serve to obscure the inherently political nature of judicial decision-making.[70]

In the context of Supreme Court opinions, the myth of neutrality takes on particular significance. These decisions, which often have far-reaching consequences for millions of Americans, are presented as the product of dispassionate legal analysis. Yet, as I will demonstrate through an examination of the *Dobbs* opinion, they are deeply imbued with rhetorical strategies that serve to justify particular ideological positions while maintaining the appearance of objectivity.

One of the most potent rhetorical tools employed in judicial opinions is enthymematic argumentation. An enthymeme, as conceptualized by Aristotle, is the quasi-logical counterpart to the syllogism in which one of the premises is implied rather than explicitly stated.[71] In the context of legal reasoning, enthymemes allow judges to present their arguments as logically sound while leaving crucial assumptions unstated. This technique is particularly effective because it engages the audience in the process of argument construction, making them more likely to accept the conclusion.[72]

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* serves as a compelling case study in the use of enthymematic reasoning to reshape constitutional rights. The opinion employs several interconnected enthymemes that work together to justify its dramatic departure from established precedent while maintaining an appearance of logical inevitability. By dissecting these enthymemes, we can uncover the unstated premises that significantly influence the Court's reasoning and assess their implications for constitutional law.

In *Dobbs*, Justice Alito's majority opinion employs enthymematic argumentation to great effect. Consider, for instance, his historical argument against the recognition of abortion as a constitutional right. Alito writes, "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[73]

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[69] *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[70] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, (1976).

[71] *See* Aristotle, *supra* note 24, at 101–04.

[72] Walker, *supra* note 68, at 53.

[73] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250 (2022).

This statement contains several enthymemes.[74] First, there is the unstated premise that rights must be "deeply rooted in the Nation's history and traditions" to be constitutionally protected.[75] While the test itself, derived from *Washington v. Glucksberg*, is explicitly stated, its application to abortion rights relies on enthymematic argumentation that shapes the Court's analysis in significant ways.[76] Let's unpack the main enthymemes in the opinion.

A. The Historical Rights Enthymeme

The cornerstone of Justice Alito's majority opinion is an enthymematic argument about the relationship between historical practice and constitutional rights. We can reconstruct this argument as follows:

1. **Major Premise (Stated):** Rights not explicitly mentioned in the Constitution must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" to receive constitutional protection under the Due Process Clause of the Fourteenth Amendment.
2. **Minor Premise (Unstated):** A right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time.
3. **Additional Unstated Premise:** Historical practices during periods of explicit discrimination provide legitimate guidance for determining modern constitutional rights.
4. **Conclusion:** Therefore, abortion is not a constitutionally protected right.

This enthymematic structure allows the Court to frame its decision as a natural outcome of historical analysis, presenting the revocation of abortion rights as a restoration of constitutional fidelity rather than a substantive change. However, this reasoning masks several controversial assumptions embedded in the unstated premises, which, if brought to light, might challenge the validity of the Court's conclusion.

The major premise is explicitly stated and draws from the "deeply rooted" standard articulated in *Washington v. Glucksberg*.[77] In that case, the Court held

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[74] For a more robust analysis of the enthymematic structure in *Dobbs*, *see generally* Tanner, *supra* note 20.

[75] *Dobbs*, 597 U.S. at 231. Note that the distinction here is that Alito seems to be arguing that *Glucksberg* must be applied to all rights, not just to determine whether a new right should be acknowledged.

[76] *Id.* at 237–39; *see also Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

[77] In *Glucksberg*, 521 U.S. 702 (1997), the Supreme Court considered whether the Due Process Clause of the Fourteenth Amendment protects a right to assisted suicide. The Court employed a two-step analysis to determine whether an asserted right qualifies as a fundamental liberty interest deserving of substantive due process protection. First, it requires a "careful description of the asserted fundamental liberty interest." *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Second, it examines whether that interest is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty

that for a right to be protected under substantive due process, it must be deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty. By applying this standard, the Court seeks to anchor constitutional protections in historical precedent, thereby limiting judicial discretion and purportedly adhering to original constitutional meanings.

However, the application of this standard to abortion rights raises questions. The Constitution does not explicitly mention many rights that are nonetheless considered fundamental, such as the right to marry, to use contraception, or to raise one's children. These rights have been recognized through the Court's interpretation of the Constitution's broad principles, particularly those related to liberty and privacy. By emphasizing a strict historical test, the Court potentially narrows the scope of rights protected under the Due Process Clause.

The unstated minor premise ("A right is deeply rooted in our nation's history only if it has been legally recognized in all circumstances across all time.") asserts that a right is deeply rooted only if it has been consistently legally recognized throughout American history in all circumstances. This premise imposes a stringent standard that few rights could meet, especially those that have evolved over time or were previously suppressed due to societal norms or discriminatory laws. For example, the right to interracial marriage recognized in *Loving v. Virginia* was not historically accepted; laws prohibiting such

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nor justice would exist if [it] were sacrificed." *Id.* at 721–22 (internal quotation marks omitted) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

In *Glucksberg*, the Court concluded that the asserted right to assisted suicide was not a fundamental liberty interest because "more than 700 years of Anglo-American common-law tradition" condemned suicide and assisted suicide as criminal acts. *Id.* at 711. The Court emphasized that this historical approach ensures that substantive due process does not become a mechanism for judges to impose their own moral convictions under the guise of constitutional interpretation. *Id.* at 720–21.

The "deeply rooted" standard articulated in *Glucksberg* has been influential but also controversial. Some scholars argue that this standard is overly restrictive and fails to account for the dynamic nature of constitutional rights. *See* Laurence H. Tribe, The Invisible Constitution 32–33 (2008) (asserting that a rigid historical approach neglects the Constitution's capacity to adapt to contemporary values). For instance, rights such as interracial marriage, recognized in *Loving v. Virginia*, 388 U.S. 1 (1967), and same-sex intimate conduct, recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), were not historically protected but were nonetheless deemed fundamental as societal understandings evolved. *See Loving*, 388 U.S. at 6–7 (overturning anti-miscegenation laws despite their historical prevalence); *Lawrence*, 539 U.S. at 571–72 (noting that historical condemnation of same-sex relations does not justify infringing on personal liberty).

Furthermore, the Court's reliance on historical traditions has been criticized for potentially entrenching outdated and discriminatory practices. *See* Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 380–81 (2011) (discussing how reliance on historical practices can perpetuate past injustices). In *Dobbs*, the application of the *Glucksberg* standard to abortion rights has been contested on the grounds that it ignores the broader context of women's rights and the historical marginalization of women in legal and political spheres. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1735–36 (2008) (arguing that historical abortion regulations were rooted in patriarchal views that should not dictate contemporary rights). Critics argue that strict adherence to historical practices may reinforce injustices that the Constitution aims to remedy. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1503–04 (1999) (contending that substantive due process must evolve to protect rights essential to liberty and justice in modern society).

marriages were prevalent for much of American history.[78] Similarly, the right to same-sex intimacy, affirmed in *Lawrence v. Texas*, and the right to same-sex marriage, recognized in *Obergefell v. Hodges*, lacked historical legal recognition.[79] These rights were acknowledged by the Court as fundamental despite their absence from historical legal acceptance, reflecting an understanding that constitutional protections can and should evolve with societal progress. By insisting on continuous historical recognition, the Court's unstated premise effectively excludes rights that have emerged as society's understanding of liberty and equality has expanded. This approach overlooks the dynamic nature of constitutional interpretation, which allows for the development of rights in response to changing societal values and norms.

The additional unstated premise ("Historical practices during periods of explicit discrimination provide legitimate guidance for determining modern constitutional rights.") assumes that historical practices during periods of explicit discrimination are legitimate guides for determining modern constitutional rights. This is particularly problematic when considering that, for much of American history, women were denied basic political and legal rights. They could not vote, own property independently, or participate fully in civic life. Legal systems and societal structures were explicitly patriarchal, marginalizing women's autonomy and agency.[80]

Relying on legal traditions established during such times to define contemporary rights raises significant concerns. It risks perpetuating outdated and discriminatory norms that the Constitution has since been interpreted to reject. The Fourteenth Amendment's Equal Protection Clause and the Nineteenth Amendment's extension of voting rights to women reflect a constitutional commitment to overcoming past injustices and expanding the promise of equality.

By treating historical discrimination as a neutral or authoritative basis for constitutional interpretation, the Court's reasoning fails to account for the evolution of societal values and the progress made toward gender equality. This reliance on discriminatory historical practices undermines the legitimacy of using history as the sole determinant of modern rights and ignores the Constitution's role as a living document designed to promote justice and liberty for all.

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[78] *See Loving*, 388 U.S. at 6 n.5 (1967) (noting that "[a]t least 41 States and the District of Columbia have at one time or another enacted statutes prohibiting interracial marriages").

[79] *See Lawrence*, 539 U.S. at 568 (2003) (acknowledging that laws prohibiting same-sex relations have "ancient roots"); *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) ("[I]t was not until the mid-20th century that federal and state courts began to question and strike down laws that imposed criminal penalties for private consensual same-sex conduct.").

[80] *See generally* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 952–63 (2002) (describing how, well into the twentieth century, women were denied the franchise, barred from independent property ownership, and excluded from full civic participation under a legal order that constitutionally entrenched the family as a patriarchal institution); *see generally* Linda K. Kerber, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship 9–12 (1998) (detailing pervasive legal disabilities—including coverture, disenfranchisement, and exclusion from jury service—that marginalized women's autonomy and agency in the United States before the twentieth century reform era).

The Court's historical approach, as framed by the enthymeme, has significant implications for the recognition and protection of constitutional rights. By anchoring rights exclusively in historical acceptance, the Court limits the Constitution's ability to address contemporary issues and adapt to societal changes. This rigid interpretation contrasts with a more flexible understanding of the Constitution as a living document that can accommodate new understandings of rights and liberties.

Furthermore, the historical approach may inadvertently entrench past injustices. Many rights now considered fundamental were once suppressed or unrecognized due to prevailing prejudices and discriminatory laws. If the Court were to apply the same stringent historical test to other rights, protections against racial discrimination, gender inequality, and violations of personal autonomy could be jeopardized.

A nuanced examination of the history of abortion laws reveals that the legal status of abortion has varied significantly over time.[81] In the early years of the United States, abortion before "quickening" (the first detectable fetal movement) was generally not criminalized.[82] It was not until the mid-19th century that states began enacting more restrictive abortion laws, influenced by a combination of medical advancements, social attitudes, and professionalization efforts within the medical community.[83]

These restrictive laws were often intertwined with discriminatory attitudes toward women and efforts to control reproductive autonomy.[84] The criminalization of abortion served to reinforce traditional gender roles and limit women's participation in public life.[85] By the time the Fourteenth Amendment was adopted, restrictive abortion laws were becoming more common, but this historical context reflects a period of explicit discrimination rather than a consensus on the moral or legal status of abortion.[86] Understanding this history challenges the notion that there is an unbroken tradition of prohibiting

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[81] *See generally* James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900 (1978) (providing a comprehensive history of abortion laws in the United States).

[82] *See id*. at 3–4 (noting that early American abortion laws did not criminalize abortion before quickening); *see also* Commonwealth v. Bangs, 9 Mass. (8 Tyng) 387, 388 (1812) (indicating that pre-quickening abortion was not indictable under common law).

[83] *See* Mohr, *supra* note 81, at 200–05 (discussing the rise of restrictive abortion laws in the mid-19th century); Kristin Luker, *Abortion and the Politics of Motherhood* 23–25 (1984) (examining the influence of medical professionals on abortion legislation); *see also* Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (acknowledging the historical shift in abortion laws during the 19th century).

[84] *See* Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 277–78 (1992) (arguing that 19th-century abortion laws were influenced by discriminatory attitudes toward women); Linda Gordon, Woman's Body, Woman's Right: Birth Control in America 41–42 (1976) (discussing societal efforts to control women's reproductive autonomy).

[85] *See* Siegel, *supra* note 84, at 278–79 (explaining how criminalization reinforced traditional gender roles); Rosalind P. Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* 89–90 (rev. ed. 1990) (analyzing the impact of abortion laws on women's societal roles).

[86] *See* Mohr, *supra* note 81, at 209–10 (noting the proliferation of restrictive abortion laws by the 1860s); Siegel, *supra* note 84, at 277 (highlighting the discriminatory context during the adoption of the Fourteenth Amendment).

abortion that can legitimately inform contemporary constitutional interpretation. It suggests that historical practices were shaped by discriminatory beliefs and social structures that the Constitution now seeks to dismantle.[87]

The Court's reliance on history in *Dobbs* thus raises concerns about selective interpretation. Historical records are complex and often contradictory, reflecting a diversity of views and practices. By emphasizing certain historical periods or legal traditions while ignoring others, the Court may present a skewed narrative that supports a predetermined conclusion. And the interpretation of historical practices without considering their context can lead to misguided conclusions. Laws and societal norms from the past were influenced by factors that may no longer be relevant or acceptable, such as racism, sexism, and other forms of discrimination. A critical approach to history recognizes these limitations and avoids treating historical practices as infallible guides for contemporary constitutional interpretation. It requires an acknowledgment of the evolving nature of societal values and the role of the Constitution in promoting justice and protecting individual rights against outdated norms.

An alternative to the strict historical approach is the doctrine of "living constitutionalism," which interprets the Constitution as a dynamic document that must be understood in the context of present-day realities. This perspective allows for the recognition of new rights and the expansion of existing ones as society progresses. Under this approach, the principles enshrined in the Constitution—such as liberty, equality, and justice—are applied to contemporary issues in a way that honors the document's enduring values while adapting to modern circumstances. This method acknowledges that the framers could not have anticipated all future developments and that the Constitution's broad language is designed to be flexible. Justice Brennan argued that the genius of the Constitution lies in its adaptability and its capacity to meet the needs of a changing society.[88] By embracing a more expansive interpretation, the Court can ensure that constitutional protections remain relevant and effective.

In *Dobbs*, the Court's insistence on continuous historical recognition as a prerequisite for constitutional protection imposes a rigid and exclusionary

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[87] The Constitution has been interpreted over time to expand the protection of individual rights, often in response to societal changes and growing recognition of injustices. The Court has played a crucial role in this evolution, recognizing rights that promote liberty and equality even when they lack deep historical roots. For instance, the right to privacy, although not explicitly mentioned in the Constitution, has been recognized as fundamental in cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), which protected the use of contraception by married couples. This right was extended in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), to unmarried individuals, reflecting an evolving understanding of personal autonomy. Similarly, the Court has recognized rights related to personal identity and relationships, as in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), which acknowledged the rights of LGBTQ+ individuals despite historical legal prohibitions against same-sex relationships and marriage.

These developments illustrate that the Constitution's protection of rights is not static but responsive to contemporary understandings of liberty and justice. A strict historical approach, as employed in *Dobbs*, risks freezing constitutional protections in a bygone era, ignoring the progress made toward a more inclusive and equitable society.

[88] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986) ("The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in its adaptability to the crises of human affairs.").

standard that disregards the evolution of rights and societal values. It overlooks the Constitution's capacity to adapt and expand to meet the needs of a changing society. Moreover, relying on historical practices from periods of explicit discrimination undermines the legitimacy of using history as the sole guide for constitutional interpretation. It perpetuates outdated norms and ignores the progress made toward equality and justice.

B. The Public Controversy Enthymeme

The opinion's opening declaration that "abortion presents a profound moral issue on which Americans hold sharply conflicting views"[89] sets up another significant enthymematic structure. This reasoning suggests that moral disagreement diminishes the constitutional protection of a right and that such matters should be left to the democratic process.

Reconstructed Argument:

1. **Major Premise (Stated):** Abortion involves profound moral disagreement among Americans.
2. **Unstated Premise:** The existence of moral disagreement suggests the absence of constitutional protection for the right in question.
3. **Additional Unstated Premise:** Constitutional rights should be determined by reference to public consensus rather than protecting individual liberties against majority views.
4. **Conclusion:** Therefore, abortion regulation should be left to the democratic processes of the states.

This enthymematic structure proves powerful because it presents a contentious philosophical position about the relationship between moral disagreement and constitutional rights as if it were self-evident. The unstated premises about how moral controversy should affect constitutional interpretation remain unexamined yet fundamentally shape the Court's approach.

The major premise acknowledges that abortion is a morally divisive issue.[90] This is an observable fact, as public opinion on abortion has been polarized for decades.[91] However, the presence of moral disagreement alone does not inherently inform the constitutional analysis of a right. In constitutional jurisprudence, many rights protect individuals from the tyranny of the majority, particularly in areas where moral views are contested.[92] The First Amendment, for example, safeguards freedom of speech and religion precisely

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[89] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022). The Court begins its opinion by acknowledging the moral controversy surrounding abortion, framing it as a central issue in the case.

[90] *Id.*

[91] *See, e.g.*, Pew Research Center, *America's Abortion Quandary*, 11 (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/5C66-VBYX] (noting persistent divisions in public opinion on abortion over the years).

[92] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (protecting individual rights against majority rule).

because these areas often involve unpopular or controversial expressions and beliefs.[93]

The unstated premise implies that moral disagreement undermines the existence of a constitutional right.[94] This notion is not supported by constitutional principles, which often function to protect minority rights against majority preferences.[95] The Court has historically recognized that constitutional rights are not subject to public consensus.[96] In *West Virginia State Board of Education v. Barnette*, the Court upheld the right of Jehovah's Witnesses to refuse to salute the flag, despite widespread public support for compulsory participation.[97] Justice Jackson famously stated, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . [and] to place them beyond the reach of majorities and officials."[98] By suggesting that moral controversy diminishes constitutional protection, the Court's reasoning contradicts this fundamental principle.[99]

The additional unstated premise posits that constitutional rights should be determined by public consensus rather than by safeguarding individual liberties.[100] This premise shifts the role of the Court from protecting rights to reflecting popular opinion.[101] This approach undermines the judiciary's function as a check on majoritarian impulses.[102] The framers designed the Constitution to establish enduring principles that protect individual rights, even when they conflict with the will of the majority.[103] Allowing moral disagreement to dictate the scope of rights risks eroding these protections.[104]

The Public Controversy Enthymeme, if accepted, could have far-reaching consequences for constitutional rights. Issues such as free speech, religious

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[93] U.S. Const. amend. I; *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) (protecting flag burning under the First Amendment despite its offensiveness to many).

[94] The unstated premise suggests that moral disagreement affects the existence of constitutional rights, a notion not explicitly addressed in the opinion.

[95] *See Barnette*, 319 U.S. at 638 (emphasizing that fundamental rights are not subject to the outcome of elections).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] By implying that abortion should be left to the states due to moral disagreement, the Court departs from the principle that constitutional rights protect individuals irrespective of public opinion.

[100] The premise that rights depend on public consensus contradicts the Constitution's role in safeguarding minority rights against majority preferences.

[101] *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (highlighting the judiciary's role in interpreting the Constitution independently of popular will).

[102] *See* The Federalist No. 78 (Alexander Hamilton) (stressing the judiciary's role as a barrier against legislative overreach).

[103] *See* U.S. Const. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (establishing the principle of judicial review to uphold constitutional limits).

[104] Allowing moral disagreement to define constitutional rights undermines the judiciary's responsibility to protect fundamental liberties.

freedom, and equal protection[105] often involve deep moral disagreements.[106] If moral controversy were sufficient to negate constitutional protection, many fundamental rights could be jeopardized.[107] Further, relying on democratic processes to resolve rights issues ignores the reality that legislatures are subject to political pressures and may not adequately protect minority interests.[108] The judiciary plays a crucial role in upholding constitutional principles against such pressures.[109]

An alternative approach recognizes that moral disagreement necessitates a robust protection of rights. In *Lawrence v. Texas*, addressing the issue of same-sex intimacy, Justice Kennedy emphasized that the Constitution protects personal decisions relating to marriage, procreation, and family relationships from unwarranted government intrusion, regardless of moral disagreement.[110] This perspective aligns with the view that constitutional rights serve as a bulwark against the imposition of majority morality on individuals' personal choices.

The Public Controversy Enthymeme in *Dobbs* illustrates how the Court's unstated premises can subtly shift the foundational principles of constitutional law. By implying that moral disagreement diminishes constitutional protection, the Court alters the traditional understanding of judicially-enforced rights as safeguards against majority rule. Unpacking this enthymematic reasoning

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[105] The formalist objection that abortion restrictions do not violate equal protection because "men typically cannot get abortions" exemplifies the enthymematic reasoning central to this analysis. This counterargument contains an unstated premise that equal protection requires exact physiological equivalence between classes—a premise that feminist legal theory has systematically dismantled. As MacKinnon persuasively argues, the "sameness" approach to equality fundamentally misapprehends how sex-based subordination operates: "Pregnancy and abortion are specific to women not because the sexes are different in reproductive capacity, but because of the way men relate to women with respect to that difference." Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 Buff. L. Rev. 11, 22–24 (1985). The enthymeme of biological difference thus conceals the social construction of inequality beneath a veneer of natural distinction.

As I discuss more fully in Part C, reframing abortion within the broader category of medical decision-making exposes yet another enthymeme at work in the *Dobbs* reasoning—the unstated premise that abortion can be categorically isolated from other bodily autonomy and medical choice protections, rather than recognized as part of an interconnected web of liberties. This enthymematic structure enables the Court to treat abortion as an anomaly rather than a coherent extension of established autonomy rights, thereby obscuring the gendered dimensions of reproductive healthcare regulation. When viewed within its proper medical decision-making context, the Court's "dissociation of concepts" becomes evident as a powerful rhetorical move that redefines the parameters of constitutional protection to exclude rights primarily affecting women, without explicitly acknowledging the equal protection implications of this categorical exclusion.

[106] *See Obergefell v. Hodges*, 576 U.S. 644, 656–57 (2015) (recognizing same-sex marriage amid moral disagreements); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 621–25 (2018) (addressing conflicts between religious freedom and anti-discrimination laws).

[107] Fundamental rights could be compromised if moral controversy were deemed sufficient to negate constitutional protection.

[108] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that more exacting judicial scrutiny is appropriate when legislation appears to conflict with specific prohibitions of the Constitution).

[109] The judiciary serves as a guardian of constitutional rights, particularly for minorities who may lack political power.

[110] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law.").

reveals the importance of critically examining the underlying assumptions in judicial opinions. It underscores the need for the Court to remain vigilant in protecting individual liberties, particularly in areas of profound moral disagreement.

C. The Categorical Choice Enthymeme

A third crucial enthymematic structure in *Dobbs* concerns how the Court frames the right at issue. This framing represents a powerful rhetorical choice that shapes the entire analysis by categorizing abortion rights in isolation from broader rights of bodily autonomy or medical decision-making.

Reconstructed Argument:

1. **Major Premise (Stated):** Each claimed right must be analyzed independently based on its specific characteristics.
2. **Unstated Premise:** Abortion rights should be analyzed in isolation from broader rights of privacy, bodily autonomy, or medical decision-making.
3. **Additional Unstated Premise:** Rights unique to women should be evaluated differently than rights affecting all people.
4. **Conclusion:** The right to abortion is fundamentally different from other recognized privacy rights and thus does not warrant constitutional protection.

This enthymematic structure is particularly powerful because it naturalizes a specific way of categorizing rights while obscuring its contested nature. By framing abortion as categorically distinct from other medical decisions or bodily autonomy rights, the Court engages in what philosopher Chaïm Perelman terms a "dissociation of concepts"—a rhetorical move that redefines the parameters of the debate to favor a particular outcome.[111]

The major premise asserts that each claimed right must be analyzed independently based on its specific characteristics.[112] This approach suggests a disaggregation of rights, treating each as an isolated entity rather than part of an interconnected web of liberties. While specificity can be valuable in legal analysis, over-fragmentation risks neglecting the broader principles underlying constitutional protections. In previous cases, the Court has recognized that certain rights, though not explicitly mentioned in the Constitution, emerge from the penumbras and emanations of other guaranteed rights.[113] For example, the right to privacy articulated in *Griswold v. Connecticut* encompassed

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[111] *See* Chaïm Perelman & Lucie Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation 412–15 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958) (introducing the concept of "dissociation of concepts" in argumentation).

[112] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 235–36 (2022) (emphasizing the need to analyze rights specifically and not to extend them beyond their historical recognition).

[113] *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (recognizing that certain rights are implied by the explicit guarantees of the Bill of Rights).

decisions about contraception within marriage, drawing from various amendments that collectively protect personal autonomy.[114] By insisting on analyzing abortion independently, the Court departs from this holistic approach, setting the stage to exclude abortion from the umbrella of protected privacy rights.[115]

The unstated premise that abortion rights should be analyzed in isolation from broader rights of privacy or bodily autonomy is a critical rhetorical move. This premise is not self-evident and requires justification, yet such justification remains unarticulated in the majority opinion.[116] Historically, the Court has linked abortion rights to the right of privacy and bodily autonomy. In *Roe v. Wade*, the Court situated the right to choose abortion within the realm of personal liberty protected by the Due Process Clause.[117] Similarly, *Planned Parenthood v. Casey* reaffirmed this connection, emphasizing the importance of autonomy and the ability to define one's own concept of existence.[118] By isolating abortion from these broader rights, the Court effectively narrows the scope of constitutional protection.[119] This move allows the Court to treat abortion as an anomaly rather than a natural extension of established liberties, facilitating its conclusion that abortion does not merit constitutional safeguarding.

An additional unstated premise suggests that rights unique to women should be evaluated differently than rights affecting all people. This premise raises significant equal protection concerns. By treating a right that primarily affects women as distinct and less deserving of protection, the Court risks perpetuating gender discrimination.[120] The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person the equal protection of the laws.[121] The Court has previously recognized that laws discriminating based on gender are subject to heightened scrutiny.[122] By implicitly suggesting that rights affecting women can be treated differently without explicitly addressing the equal protection implications, the Court sidesteps a crucial aspect of constitutional analysis.[123]

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[114] *Id*. at 485–86 (finding that the right to marital privacy is protected by the Constitution).

[115] *See Dobbs*, 597 U.S. at 255–57 (distinguishing abortion from other privacy rights recognized by the Court).

[116] The majority opinion does not explicitly justify why abortion should be isolated from broader privacy rights, leaving this premise unstated. *See generally id.*

[117] Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of privacy encompasses a woman's decision to terminate her pregnancy).

[118] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (affirming the central holding of *Roe* and emphasizing personal autonomy).

[119] *See Dobbs*, 597 U.S. at 255–57 (rejecting the notion that the right to abortion is part of a broader right to privacy).

[120] *See* Siegel, *supra* note 84, at 350–51 (arguing that abortion restrictions can perpetuate gender inequality).

[121] U.S. Const. amend. XIV, § 1.

[122] For example, in *United States v. Virginia*, the Court applied heightened scrutiny in invalidating the male-only admissions policy of the Virginia Military Institute, emphasizing that gender-based classifications must serve important governmental objectives and be substantially related to achieving those objectives. 518 U.S. 515, 533 (1996).

[123] The majority opinion in *Dobbs* does not address the Equal Protection Clause in its analysis.

In *Dobbs*, the Court dissociates[124] abortion from other privacy and autonomy rights, presenting it as fundamentally different due to its impact on "potential life" or the "unborn human being."[125] The Court states:

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being."[126]

By emphasizing this distinction, the Court redefines the right to abortion not as a matter of personal autonomy but as an issue involving the state's interest in protecting potential life.[127] This reframing shifts the analytical focus away from the woman's rights and towards the fetus, altering the balance that *Roe* and *Casey* sought to strike.[128]

The categorical isolation of abortion rights has significant implications. It undermines the coherence of privacy and bodily autonomy jurisprudence by creating exceptions based on contested moral views.[129] This approach opens the door for states to regulate or prohibit practices that some groups find morally objectionable, even when they implicate fundamental personal liberties.[130] Moreover, isolating abortion from other rights erodes the principle that constitutional protections should not be contingent upon the popularity or moral acceptability of the exercise of those rights.[131] Rights often protect minority interests against majority sentiments.[132] By allowing moral disagreement to

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[124] Perelman's concept of dissociation involves separating elements that are traditionally linked to redefine a concept in a way that supports a particular argument. *See* Perelman & Olbrechts-Tyteca, *supra* note 111, at 413 (explaining how dissociation separates linked concepts to redefine them).

[125] *Dobbs*, 597 U.S. at 257.

[126] *Id.* (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

[127] *See Dobbs*, 597 U.S. at 262–63 (emphasizing the state's interest in protecting fetal life).

[128] *Compare Roe*, 410 U.S. at 162–64 (balancing the woman's rights with the state's interests), *with Dobbs*, 597 U.S. at 292 (prioritizing the state's interest).

[129] *See* Laurence H. Tribe, American Constitutional Law 1343–44 (2d ed. 1988) (discussing the dangers of allowing moral views to dictate constitutional rights).

[130] *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (discussing why moral disapproval is not a sufficient justification for infringing on individual liberties).

[131] The *Dobbs* majority's reliance on the Public Controversy Enthymeme—that moral disagreement signals the absence of constitutional protection—is contradicted by the Court's reasoning in *Obergefell v. Hodges*, 576 U.S. 644 (2015). In *Obergefell*, the Court recognized profound moral disagreement over same-sex marriage but expressly held that such controversy cannot justify denying constitutional rights, emphasizing that fundamental liberties exist precisely to shield individual freedoms from majoritarian opposition. *Id.* at 677 ("It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry."); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

[132] *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 135–36 (1980) (emphasizing the role of constitutional rights in protecting minorities).

justify the denial of constitutional protection, the Court weakens the safeguard that rights provide against majoritarian oppression.[133]

The Court's approach also raises concerns about gender equality.[134] By treating a right that exclusively affects women as less deserving of protection, the decision may perpetuate systemic gender discrimination.[135] It ignores the reality that denying access to abortion disproportionately impacts women's health, economic status, and social equality.[136] Justice Ginsburg, in her jurisprudence, emphasized the interconnectedness of reproductive autonomy and gender equality.[137] Limiting women's control over reproductive decisions constrains their ability to participate fully and equally in society.[138] By failing to acknowledge these gendered dimensions, the Court's reasoning neglects a critical aspect of constitutional equality.[139]

An alternative to the Court's categorical isolation is a more integrative approach that recognizes the interrelated nature of constitutional rights.[140] This method acknowledges that rights often overlap and reinforce one another, contributing to a comprehensive protection of individual liberty.[141] For instance, the right to bodily integrity has been recognized in cases prohibiting forced medical treatment and upholding the right to refuse life-saving interventions.[142] These cases highlight the principle that individuals have autonomy over their bodies, a principle that logically extends to decisions about pregnancy. By situating abortion within this broader framework, the Court could have engaged in a more nuanced analysis that balances the state's interests with the individual's rights without isolating abortion as an exception.[143]

The Categorical Choice Enthymeme in *Dobbs* illustrates how rhetorical framing and unstated premises can shape constitutional interpretation. By categorically isolating abortion from other privacy and autonomy rights, the Court constructs an argument that appears logical but rests on contested

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[133] *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7–12 (1996) ("The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights" . . . arguing that these provisions are meant to incorporate "moral principles . . . as limits on government's power," thereby shielding vulnerable groups from the preferences of electoral majorities.).

[134] *See Dobbs*, 597 U.S. at 360–61 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (noting the impact on women's rights).

[135] *See* Siegel, *supra* note 84, at 371–72 (discussing how abortion restrictions can reinforce gender stereotypes).

[136] *See* Lisa C. Ikemoto, *Abortion, Contraception, and the ACA: The Realignment of Women's Health*, 55 How. L.J. 731, 748–49 (2012) (examining the disproportionate effects on women).

[137] *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 382–83 (1985).

[138] *See id*. at 385–86 (arguing that reproductive choice is essential to women's equality).

[139] *See Dobbs*, 597 U.S. at 364 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (criticizing the majority for ignoring gender equality concerns).

[140] *See* Tribe, *supra* note 77, at 31–33 (advocating for an interpretive approach that considers the Constitution's underlying principles).

[141] *See Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015) (recognizing that rights relating to personal identity and autonomy are interconnected).

[142] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990) (acknowledging a competent person's right to refuse medical treatment).

[143] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion) (emphasizing the need to balance state interests with individual rights).

assumptions.[144] This approach obscures the interconnectedness of rights and the implications for gender equality, allowing the Court to sidestep critical constitutional questions.[145] Unpacking these enthymematic structures reveals the underlying choices that influence judicial reasoning and highlights the importance of transparency and critical examination in constitutional discourse.[146]

D. The Stare Decisis Enthymeme

The Court's treatment of precedent in *Dobbs* represents another significant enthymematic structure.[147] Stare decisis, the doctrine of adhering to established precedent, is a foundational principle that promotes legal stability and predictability.[148] The Court's reasoning in overturning *Roe v. Wade*[149] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[150] relies on enthymematic logic that allows it to depart from precedent while presenting the decision as a principled correction of past errors.[151]

Reconstructed Argument:

1. **Major Premise (Stated):** Stare decisis is not an inexorable command; precedents may be overruled when they are egregiously wrong.[152]

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[144] *Cf.* Cass R. Sunstein, The Partial Constitution 99–100 (1993) (highlighting how framing affects constitutional interpretation).

[145] *See Dobbs*, 597 U.S. at 369–72 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[146] *See* Richard H. Fallon Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107, 1162 (2008) (contending that stare decisis gives Justices "a power . . . to determine which initially erroneous precedents to enforce and which to overrule," so their case-by-case judgments lay bare the normative choices embedded in constitutional reasoning).

[147] *See generally Dobbs*, 597 U.S. The Court's decision in *Dobbs* represents a pivotal moment in constitutional law, particularly concerning the application of stare decisis.

[148] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles."). Thus, stare decisis is not merely a reflection of the correctness of prior decisions but as an institutional commitment to legal stability, predictability, and legitimacy. The doctrine serves as a safeguard against judicial arbitrariness and preserves continuity, ensuring the law does not fluctuate with changing court majorities. Justice Alito's approach in *Dobbs* departs significantly from this understanding, suggesting instead that stare decisis can be overridden primarily because a prior decision is deemed incorrect. *See, e.g.*, 597 U.S. at 231. This perspective diminishes the independent value stare decisis holds in the judicial system. For example, in *Planned Parenthood v. Casey*, the Court recognized that reliance interests—specifically women's reliance on abortion rights to structure their lives—should weigh heavily in maintaining established precedent. *See* 505 U.S. 833, 855–56 (1992). By contrast, *Dobbs* minimizes these reliance interests, prioritizing historical practices that themselves emerged in periods of explicit gender discrimination. *See, e.g.*, *Dobbs*, 597 U.S. at 231. Thus, Justice Alito's conception not only breaks from precedent but also disrupts the very rationale underpinning stare decisis.

[149] 410 U.S. 113 (1973).

[150] 505 U.S. 833 (1992).

[151] In *Dobbs*, the majority frames its overruling of *Roe* and *Casey* as correcting a profound constitutional error. *See Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Casey* must be overruled . . . *Roe* was egregiously wrong from the start.").

[152] *Dobbs*, 597 U.S. at 218 ("stare decisis is not an inexorable command . . .") (internal quotation marks omitted) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

2. **Unstated Premise:** The *Glucksberg* test, developed for recognizing *new* rights, can be used to eliminate previously recognized rights.[153]
3. **Additional Unstated Premise:** Fifty years of reliance on a constitutional right can be outweighed by historical practices predating that right's recognition.[154]
4. **Conclusion:** Therefore, *Roe* and *Casey* must be overruled.

This enthymematic structure allows the Court to present its departure from precedent as a straightforward application of established principles while masking the revolutionary nature of its approach.[155]

The major premise acknowledges that stare decisis is not absolute.[156] The Court has overruled precedents in the past when they were deemed incorrect or unworkable, as in *Brown v. Board of Education*, which overturned *Plessy v. Ferguson*.[157] The Court sets forth factors to consider when deciding whether to overrule a precedent, including the quality of reasoning, workability, consistency with other decisions, reliance interests, and changes in law or facts.[158] It argues, "proper application of stare decisis required an assessment of the strength of the grounds on which *Roe* was based."[159]

This is a different understanding of stare decisis than I teach my law students. Stare decisis is generally understood as an independent reason to be consistent with prior rulings, one that does not depend on the strength of those prior rulings. Yes, if those rulings were wrong, there are reasons independent of stare decisis to overrule them – but stare decisis does not take this into account. In *Dobbs*, the Court argues that *Roe* and *Casey* were egregiously wrong from the start, lacked solid reasoning, and have proven unworkable due to the contentious nature of abortion jurisprudence.[160] In this sense, the Court abandoned its "precedent about precedent": it did not apply the precedent the Court established in *Casey* regarding how to think about stare decisis.[161] In arguing that *Roe* and *Casey* were wrong from the start, the Court sidestepped the question of whether it should be bound by its prior rulings by relitigating *Roe*.[162]

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[153] The Court applies the *Glucksberg* test, traditionally used for recognizing new fundamental rights, to assess the validity of the abortion right established in *Roe* and reaffirmed in *Casey*. *See id.* at 238–40.

[154] The majority minimizes the reliance interests developed over nearly five decades, emphasizing historical practices instead. *See id.* at 287–90.

[155] By presenting its decision as a routine application of legal principles, the Court masks the transformative impact of overturning long-standing precedent.

[156] *See Payne*, 501 U.S. at 828 ("Stare decisis is not an inexorable command; rather, it is a principle of policy . . .") (internal quotation marks omitted) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

[157] Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896), which had established the "separate but equal" doctrine.

[158] *See Dobbs*, 597 U.S. at 268 (listing factors relevant to stare decisis analysis).

[159] *Id.* at 234.

[160] *Id.* at 268 (asserting that *Roe* was "egregiously wrong and deeply damaging").

[161] Note, *The Paradox of Precedent About Precedent*, 138 Harv. L. Rev. 797, 801 (2025).

[162] The majority's reliance on a historically selective and problematic narrative directly supports their narrowed interpretation of stare decisis. The Court's thin historical account—characterized by omissions and distortions, such as neglecting the nuances of early common

The unstated premise involves the application of the *Glucksberg* test, which requires that a right be "deeply rooted in this Nation's history and tradition" to be recognized under substantive due process.[163] *Glucksberg* dealt with whether the Due Process Clause protected the right to physician-assisted suicide, a right not previously recognized.[164] By applying the *Glucksberg* test to eliminate an existing right, the Court takes an unprecedented step.[165] Traditionally, the test is used to evaluate claims for new rights, not to reassess rights that have been established and relied upon for decades.[166] This application transforms the test into a tool for retracting rights, a move that remains unstated and unexplored in the opinion.[167]

The assumption that the *Glucksberg* test, originally designed to evaluate whether to recognize new fundamental rights, is the appropriate framework for reassessing a long-established constitutional right is a fraught one.[168] This application invites the audience to accept, without explicit justification, that a test developed for identifying previously unrecognized rights should be used to potentially eliminate a right that has been recognized and reaffirmed by the Court for nearly half a century.[169] As Reva Siegel notes, this approach obscures the significant shift in jurisprudential approach that this application represents, masking it in originalism[170] Essentially, Alito treats Roe as if the case were a matter of first impression.

The Court's use of the Glucksberg test also involves an unstated assumption about the nature of constitutional interpretation itself.[171] It implicitly argues for a form of originalism that prioritizes historical practices at the time of the Constitution's ratification or the Fourteenth Amendment's adoption,

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law approaches to abortion—enables the majority to present Roe as egregiously erroneous. This incomplete historical framework thus provides the rhetorical justification for overruling established precedent under the guise of correcting historical error, rather than openly acknowledging the drastic shift in legal interpretation. Consequently, the weak historical analysis is not merely incidental but essential to the Court's redefinition of stare decisis, serving as a critical tool to obscure the radical nature of their decision. See Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 Sup. Ct. Rev. 111, 176 (2022); see also Polina Shvanyukova, *Writing History in a Supreme Court Ruling: Evaluative Language in the Majority Opinion Concerning Dobbs v. Jackson*, 63 HERMES – J. Language & Commc'n Bus. 19, 19–20 (2023) (using Appraisal Theory to demonstrate how the majority's selective evaluative wording constructs a partisan historical narrative that rhetorically legitimates overruling *Roe*).

[163] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (requiring that a fundamental right be "deeply rooted in this Nation's history and tradition.") (internal quotation marks omitted) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[164] *Id*. at 705–06 (addressing whether the Due Process Clause includes a right to physician-assisted suicide).

[165] The application of *Glucksberg* to negate an existing right is unprecedented, as the test has traditionally been used to evaluate new claims. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331–32 (2022) (Thomas, J., concurring) (suggesting reevaluation of substantive due process precedents).

[166] *Cf.* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (noting that history and tradition guide but do not set the outer boundaries of substantive due process).

[167] The majority does not explicitly address the novel use of *Glucksberg* to overturn established rights, leaving the move unexplored.

[168] *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 142–43 (2022).

[169] *Id*. at 143–44.

[170] *Id*. at 144.

[171] *Dobbs*, 597 U.S. at 236–41.

rather than considering evolving understandings of liberty and privacy.[172] This methodological choice is not explicitly defended in the opinion, but rather presented as a natural approach to constitutional interpretation.[173] This enthymematic structure allows the Court to sidestep direct engagement with competing theories of constitutional interpretation that might give greater weight to evolving societal norms or the practical consequences of overturning long-established precedents.[174]

Furthermore, the Court's historical analysis contains several enthymematic elements. The majority opinion states, "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[175] This assertion contains multiple unstated premises. First, there is the implicit assumption that the relevant historical period for determining these traditions ends before the recognition of abortion rights in *Roe v. Wade*.[176] This temporal framing effectively excludes half a century of legal precedent and social change from consideration and allows the Court to present its analysis as comprehensive while engaging in a highly selective reading of American legal history.[177]

The additional unstated premise suggests that historical practices predating a right's recognition can outweigh significant reliance interests developed over half a century.[178] This premise minimizes the importance of reliance on constitutional rights in structuring personal and societal expectations.[179] In *Casey*, the Court emphasized the importance of stare decisis and the reliance interests at stake with abortion rights.[180] Women had organized their lives around the availability of abortion as a fallback in case of unintended pregnancy.[181] Overturning *Roe* would disrupt those expectations and undermine

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[172] *Id.*

[173] *Id.*

[174] The strategy also allows the court to side-step engagement with the disparate effect the decision will have on racial groups. *See*, Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 2025, 2092–93 (2021).

[175] *Dobbs*, 597 U.S. at 250.

[176] *See id.* at 248–50.

[177] *See* Siegel, *supra* note 168, at 1130 (noting that the majority "defined women's liberties in terms of nineteenth-century norms" and thereby "upended a half-century of abortion law"), 1135 (observing that although *Dobbs* is "full of 'history and tradition' talk," it pointedly omits "the history and traditions of the last half-century"), 1180 (characterizing the Court's choice of a "history-and-traditions" test as "a dramatic shift in governing law" that bypasses fifty years of precedent), 1184 (explaining that the opinion "did not focus on . . . the last half-century . . . but instead focused on the mid-nineteenth century"), 1191 (concluding that *Dobbs* rests on a "whitewashed and selective account" of American legal history that excludes modern social change).

[178] *See Dobbs*, 597 U.S. at 287–89 (downplaying reliance interests in favor of historical analysis).

[179] Reliance interests are crucial in stare decisis because they reflect how individuals and society organize their lives based on legal frameworks. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (plurality opinion).

[180] *Id.* at 856 (emphasizing that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives").

[181] *Id.* (recognizing that people have organized intimate relationships and made choices in reliance on the availability of abortion).

the Court's legitimacy because it disrupts established expectations and may undermine the perceived legitimacy of the Court as an impartial arbiter. By dismissing these reliance interests, the Court in *Dobbs* shifts the weight back to historical practices, even when those practices reflect outdated or discriminatory norms.[182] This approach raises concerns about the stability of constitutional rights and the potential for other established rights to be undermined.[183]

The Court's reasoning in *Dobbs* departs from the traditional application of stare decisis.[184] Overruling a precedent requires more than a belief that the prior decision was wrong; it necessitates a compelling justification that considers the societal impact and reliance interests.[185] Justice Kagan, in her dissent in *Janus v. American Federation of State, County, and Municipal Employees*, warned against the dangers of discarding precedent without strong justification, noting that such actions threaten the Court's role as a stable and neutral arbiter.[186] The decision in *Dobbs* risks eroding public confidence in the Court by appearing to be driven by changing judicial philosophies rather than principled legal reasoning.[187]

The approach taken in *Dobbs* raises concerns about the security of other substantive due process rights.[188] If historical practices can override established rights, protections for contraception (*Griswold v. Connecticut*),[189] interracial marriage (*Loving v. Virginia*),[190] and same-sex intimacy (*Lawrence v. Texas*)[191] could be vulnerable.

Justice Thomas, in his concurring opinion, explicitly calls for reconsideration of these precedents, suggesting that they lack a basis in the Constitution's text and history.[192] This prospect underscores the far-reaching implications of the Court's reasoning and the importance of the unstated premises in its

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[182] By prioritizing historical practices over contemporary reliance interests, the Court risks reinstating outdated norms. *See Dobbs*, 597 U.S. at 287–88. (dismissing the "novel and intangible" reliance interests that *Casey* had recognized and stating that courts are better suited to guard "concrete" interests such as property and contract rights, thereby redirecting constitutional analysis away from contemporary lived realities and back toward historical practice).

[183] This shift raises concerns about the potential erosion of other rights that lack deep historical roots but have become integral to modern society.

[184] Traditionally, the Court exercises caution in overruling precedent, particularly when significant reliance interests are at stake. *See Payne*, 501 U.S. at 827.

[185] *See Dobbs*, 597 U.S. at 262–64 (discussing the factors for overruling precedent but focusing on the perceived errors in *Roe* and *Casey*).

[186] Janus v. AFSCME, 585 U.S. 878, 955–56 (2018) (Kagan, J., dissenting) ("The majority overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to. Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate.").

[187] The appearance of decisions driven by judicial philosophy rather than legal necessity can undermine trust in the judiciary. Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 Colum. L. Rev. 821, 835 (1961) (observing that when judges elevate their own ideological preferences over "principled reasoning," they risk undermining the separation of powers and threatening the judiciary's credibility and public confidence).

[188] *See Dobbs*, 597 U.S. at 330–32 (Thomas, J., concurring) (calling for reconsideration of all substantive due process precedents).

[189] 381 U.S. 479 (1965) (recognizing the right to privacy in marital relations, including the use of contraception).

[190] 388 U.S. 1 (1967) (striking down laws prohibiting interracial marriage).

[191] 539 U.S. 558 (2003) (invalidating laws criminalizing consensual same-sex intimacy).

[192] *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (suggesting that these precedents are "demonstrably erroneous").

enthymematic structure.[193] But, application of Glucksberg could have even further reaching ramifications. Thomas discusses forced sterilization, which could potentially be brought back under this regime. As could a denial of fertility treatments.

The Stare Decisis Enthymeme in *Dobbs* demonstrates how the Court's unstated premises facilitate a departure from established precedent while maintaining an appearance of adherence to legal principles Because the argument rests on unstated premises, the Court facilitates a significant shift in legal doctrine without fully addressing the implications. By applying the *Glucksberg* test in a novel way and minimizing reliance interests, the Court reshapes the doctrine of stare decisis to justify overturning *Roe* and *Casey*.[194]

Unpacking this enthymematic reasoning reveals the significant shifts in legal interpretation and the potential consequences for constitutional rights.[195] It highlights the need for transparent and rigorous analysis when considering the weight of precedent and the stability of the legal system.[196]

E. Enthymeme, Syllogism and Formalism

In addition to these specific rhetorical strategies, the *Dobbs* opinion employs a broader rhetorical framework that I would characterize as "formalist." Legal formalism, with its emphasis on rule-based decision-making and the internal logic of legal doctrine, has long been a dominant mode of legal reasoning in American jurisprudence.[197] While pure formalism has been widely critiqued in legal academia,[198] its rhetorical power remains strong, particularly in judicial opinions. The formalist rhetoric in *Dobbs* manifests in several ways. First, there is the opinion's insistence on a strict textual and historical approach to constitutional interpretation. By emphasizing the absence of an explicit right to abortion in the Constitution and the purported lack of historical support for such a right, the opinion presents its conclusion as the result of a straightforward application of legal principles rather than a value judgment.[199]

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[193] The potential reevaluation of fundamental rights underscores the profound impact of the Court's reasoning in *Dobbs*.

[194] The novel application of the *Glucksberg* test and the minimization of reliance interests reshape stare decisis to support the Court's outcome *See* Siegel, *supra* note 168, at 1137, 1182.

[195] This shift may signal a new approach to constitutional interpretation that could affect a range of established rights.

[196] Transparent and thorough analysis is essential to ensure that changes in legal doctrine are grounded in sound reasoning and maintain the judiciary's integrity.

[197] *See* Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 544 (1988) (defining formalism as a commitment to decide cases by authoritative rules whose validity does not depend on the decisionmakers' moral or policy judgments).

[198] *See, e.g.*, *id.* at 511–12 (explaining that judges often invoke formalist language to signal neutrality and reinforce institutional legitimacy); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 199–206 (1992) (documenting the rise of classical formalism in late-nineteenth-century American law and its enduring influence even after realist critiques).

[199] The formalist rhetorical framework employed by the *Dobbs* majority, characterized by its strict adherence to textual and historical methodologies, is not unique to this decision. Rather, formalism pervades many judicial opinions, particularly those addressing contentious constitutional questions. *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of*

Second, the opinion employs what legal scholar Pierre Schlag calls "normative legal thought"—a branch of legal theory in which arguments that appear to describe what the law is are shot through with unacknowledged value-laden claims about what the law should be, so that the line between description and prescription all but disappears.[200] Normative legal theorists like Schlag argue that law and other social sciences are inherently normative.[201] This approach combines normative assertions about what the law should be with analytical claims about what the law is, often blurring the distinction between the two.[202] In *Dobbs*, this manifests in the seamless transition from historical analysis to normative claims about the proper scope of constitutional rights.

Finally, the opinion's formalist rhetoric is evident in its treatment of precedent. While acknowledging the importance of stare decisis, the opinion presents its overruling of *Roe* and *Casey* as the correction of a legal error rather than a shift in constitutional interpretation. This framing allows the Court to present its decision as a return to proper legal reasoning rather than a departure from established law.

The formalist rhetoric employed in *Dobbs* serves several purposes. It lends an air of objectivity and inevitability to the opinion's conclusions, potentially deflecting criticism of the Court as engaging in "judicial activism." It also provides a framework for dismissing arguments based on the real-world impacts of the decision, framing these concerns as outside the proper scope of constitutional analysis. However, this formalist approach comes at a cost. By focusing narrowly on textual interpretation and historical analysis,[203] the opinion largely sidesteps engagement with the complex social, ethical, and public health dimensions of abortion rights. This rhetorical strategy allows the Court to present its decision as a matter of legal technique rather than a profound shift in the constitutional landscape with far-reaching consequences for millions of Americans.

In the next section, I will explore how the rhetorical strategies employed in *Dobbs* intersect with the broader phenomenon of facially neutral laws and their disparate impacts. By examining how the opinion's language and reasoning mask the unequal effects of overturning *Roe*, we can begin to develop strategies for exposing and challenging the hidden disparities created by judicial decisions.

This analysis of the rhetoric of judicial opinions, particularly as exemplified in *Dobbs*, sets the stage for a broader discussion of how legal language can

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Collapse), 95 Iowa L. Rev. 195, 199–204 (2009); Schauer, *supra* note 197, at 510–11 (discussing the prevalence and persistence of formalist reasoning in American jurisprudence). Recognizing the ubiquity of formalism in judicial discourse underscores the broader necessity for rhetorical resistance—namely, exposing and interrogating enthymematic reasoning to reveal underlying assumptions and value judgments concealed by purported neutrality.

[200] Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801, 812–814 (1991).

[201] *Id.* at 811.

[202] *Id.* at 811–13.

[203] And a narrow historical analysis at that. One that selectively omits the Founding era and the last fifty years and ignores the history of marginalized people and a history of oppression and domination. *See* Siegel, *supra* note 168, at 1187–91.

perpetuate or challenge existing power structures. By developing our capacity to critically engage with legal texts, we can work towards a more just and equitable legal system—one that recognizes the inherently rhetorical nature of law while striving for outcomes that serve all members of society.

As we proceed, it is important to acknowledge that this rhetorical approach to legal analysis is itself not neutral. It is rooted in critical perspectives on law and society, and it aims explicitly at challenging existing power structures and advancing the cause of social justice.[204] However, I argue that this perspective is necessary if we are to fully grapple with the complex realities of law in society and work towards meaningful change. By embracing a rhetorically informed approach to legal analysis, we open up new possibilities for understanding and engaging with the law. We move beyond the constraints of formalist legal reasoning to consider the broader social, political, and ethical implications of judicial decisions. In doing so, we take an important step towards a more critical, engaged, and ultimately more just legal practice.

F. The Formal Gender Equality Enthymeme

A further critical enthymeme underpinning the reasoning in *Dobbs* revolves around an unstated and problematic conception of gender equality rooted in a "sameness" framework. Feminist legal scholars have long critiqued the limitations of formal equality doctrines, particularly as they relate to biological differences and reproductive capacities.[205] The *Dobbs* majority opinion implicitly invokes an equality framework predicated on treating men and women identically, disregarding essential biological and social differences—most notably, the reality of pregnancy and reproductive autonomy—and thus dismisses equal protection concerns.[206]

This Gender Equality enthymeme can be reconstructed as follows:

Reconstructed Argument:

1. **Major Premise (unstated):** Gender equality requires that men and women be treated identically under the law ("sameness" conception).
2. **Additional Unstated Premise:** In evaluating equality, when one group (men) does not have or require a particular right, their absence of that right becomes the normative baseline for assessing equal treatment.
3. **Conclusion:** Because men do not and cannot need abortions, denying abortion rights to women constitutes equal, neutral, and fair treatment under the law.

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[204] *See*, e.g. Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Problematizing Aristotle: Renovating and Remodeling Traditional Legal Rhetoric*, in Critical and Comparative Rhetoric 44 (2023).

[205] *See*, *e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175 (1982).

[206] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext to 'effect an invidious discrimination against members of one sex or the other.'") (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n. 20 (1974)).

This enthymematic structure is especially pernicious because it disguises inequality behind a veneer of formal neutrality. By setting men's lack of a need for abortion as the standard of equality, the Court implicitly positions women's biological differences as legally irrelevant or as a disadvantage that women alone must bear. Such reasoning ignores how substantive gender equality necessarily involves consideration of women's unique reproductive capacities and the societal burdens that accompany them.[207]

Feminist critiques, articulated by scholars such as Catharine MacKinnon, Wendy Williams, and Reva Siegel, have consistently demonstrated that this "sameness" conception of equality systematically disadvantages women by failing to account for biological and social realities.[208] Instead of promoting genuine equality, the sameness standard normalizes male experiences as the default legal standard, effectively rendering women's distinct experiences and needs invisible or deviant. In the abortion context, this standard inevitably imposes disparate burdens upon women—particularly women of color and those in lower socioeconomic strata—who disproportionately bear the physical, social, economic, and emotional costs of pregnancy and childbearing.[209]

This formalist approach further ignores the Court's own precedent recognizing that laws may violate equal protection even when they target conditions unique to one sex. In *Frontiero v. Richardson*, Justice Brennan acknowledged how ostensibly neutral classifications can perpetuate "romantic paternalism" that, "in practical effect, put women, not on a pedestal, but in a cage.[210] The unstated premise in abortion restrictions—that the state may regulate female reproductive capacity in ways unimaginable for male bodies—reveals not natural difference but rather what Ann Scales identifies as the use of biological differences as a justification for inequality.[211] The enthymematic structure of this argument functions precisely by obscuring its most contestable premise: that biological difference legitimates differential treatment, rather than demanding heightened scrutiny of laws that uniquely burden one sex's bodily autonomy and economic freedom.[212] The Court accomplishes this sleight of hand first by implicitly assuming that laws cannot violate equal protection if they operate on conditions unique to only one sex, and then by assuming that one group's (men's) lack of needing a right to an abortion is the baseline standard against which all groups' rights should be judged.

By relying implicitly on the Gender Equality enthymeme, the *Dobbs* Court evades addressing the real, gendered impacts of eliminating abortion protections. This rhetorical choice masks the inherently unequal consequences under a formally neutral legal standard. In doing so, the Court exemplifies

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[207] Siegel, *supra* note 84, at 377.

[208] MacKinnon, *supra* note 205, at 1281–85; Williams, *supra* note 205, at 377–78.

[209] *See generally* Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood (2020); Khiara M. Bridges, Poverty of Privacy Rights, (2017).

[210] 411 U.S. 677, 685 (1973).

[211] *See* Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375, 435–36 (1981).

[212] *See generally* Christine Littleton, *Reconstructing Sex Equality*, 75 Cal. L. Rev. 1279 (1987); Siegel, *supra* note 84.

precisely the rhetorical maneuvering that facially neutral laws often use to conceal disparate impacts—a topic explored more fully in the subsequent section.

Thus, by recognizing and exposing this unstated Formal Gender Equality enthymeme, we more clearly see how judicial rhetoric can obscure profound inequalities behind claims of neutrality, directly setting the stage for the analysis of facially neutral laws and their disparate impacts in Section IV.

IV. Facially Neutral Laws and Disparate Impact

The concept of facially neutral laws—those that appear nondiscriminatory on their surface but may have disproportionate effects on certain groups—is central to understanding the subtle ways in which legal systems can perpetuate inequality. In this section, I will explore the phenomenon of facially neutral laws and their disparate impacts, using the *Dobbs* decision as a lens through which to examine this broader issue. I will also delve into how the opinion's focus on fetal interests, rather than maternal impacts, represents a significant shift from the more balanced approach in *Roe*.

A. Definition and Examples of Facially Neutral Laws

Facially neutral laws are those that do not explicitly discriminate against any particular group but may nonetheless may have a disproportionate impact on certain populations.[213] These laws maintain an appearance of equality while potentially reinforcing or exacerbating existing social disparities. The concept of facial neutrality is closely tied to the Equal Protection Clause of the Fourteenth Amendment, which prohibits states from denying any person within their jurisdiction the equal protection of the laws.

Examples of facially neutral laws with disparate impacts abound in American legal history. In the realm of voting rights, for instance, literacy tests, poll taxes, and grandfather clauses were ostensibly neutral measures that disproportionately disenfranchised African American voters.[214] In the

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[213] *See*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322–24 (1987) (Facially neutral laws and practices may result in discriminatory effects due to unconscious biases, leading to a disproportionate impact on certain racial groups.); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 Cal. L. Rev. 77, 83 (2000) (Even without explicit discriminatory intent, laws that are neutral on their face can perpetuate inequality by disproportionately affecting marginalized populations.); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1725–27 (2000) (Facially neutral policies can produce racially disparate outcomes due to systemic biases embedded within institutions, affecting certain populations more than others.). But *see*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . . the denial of equal justice is still within the prohibition of the Constitution.").

[214] Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727, 735–36 (1998).

criminal justice system, sentencing guidelines for crack and powder cocaine, while facially neutral, resulted in significantly harsher penalties for Black defendants.[215]

The challenge posed by facially neutral laws lies in their ability to maintain systems of inequality while appearing to conform to principles of equal treatment. This phenomenon has been extensively studied in the context of racial discrimination, but it applies equally to other forms of systemic inequality, including those based on gender, disability, and other protected characteristics.

B. The Problem of Disparate Impact

The disparate impact doctrine, which emerged from the Supreme Court's decision in *Griggs v. Duke Power Co.* (1971), recognizes that practices that are facially neutral but result in disproportionate effects on protected groups can constitute unlawful discrimination. However, the application of this doctrine has been limited, particularly in constitutional law. *Washington v. Davis* (1976) established that, for the purposes of the Equal Protection Clause, plaintiffs must prove discriminatory intent rather than merely demonstrating disparate impact.

This focus on intent rather than effect has made it increasingly difficult to challenge facially neutral laws that perpetuate systemic inequalities. As legal scholar Reva Siegel has argued, this approach fails to account for the ways in which discriminatory attitudes can be encoded in ostensibly neutral policies and practices.[216]

The problem of disparate impact is particularly acute in the context of reproductive rights. Policies that restrict access to abortion and other reproductive health services, while often framed in neutral terms of fetal protection or medical regulation, disproportionately affect women, especially those from marginalized communities.[217] These impacts extend beyond the immediate question of abortion access to encompass broader issues of economic opportunity, educational attainment, and public health.[218]

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[215] Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime. Crime & Delinquency*, 40 Sage J. 475, 488 (1994).

[216] Siegel, *supra* note 168, at 1130.

[217] Laws restricting access to reproductive care disproportionately affect women, especially those from marginalized communities. Recent data reveals the complex demographics of abortion patients: Black and Latinx individuals each represent 29–30 percent of abortion patients, highlighting the significant impact on communities of color. Guttmacher Institute, *Reasons for Abortion*, Fact Sheet (June 2024). Critically, 41 percent of people obtaining abortions had an income below the federal poverty level, with an additional 30 percent having incomes between 100–199 percent of the federal poverty level. *Id.* The Turnaway Study provides crucial insight into the long-term consequences of abortion denial, demonstrating that women denied abortions were three times more likely to be below the federal poverty line and four times more likely to be unemployed compared to those who obtained abortion care. Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 407, 412–15 (2018).

[218] The socioeconomic consequences of restricted reproductive choices are profound. The abortion landscape has shifted dramatically since the Dobbs decision, with the number of clinician-provided abortions increasing by 11 percent from 2020 to 2023, reaching an estimated 1,037,000 procedures. Guttmacher Institute, *supra* note 217. More than half of those

C. How Dobbs Exemplifies This Issue

The *Dobbs* decision, in overturning *Roe v. Wade*, provides a stark illustration of how facially neutral legal reasoning can mask profoundly unequal impacts. While the majority opinion frames its analysis in terms of constitutional interpretation and historical tradition, the practical effects of the decision fall disproportionately on women, particularly those from disadvantaged backgrounds.

The opinion's emphasis on the lack of explicit constitutional protection for abortion rights, coupled with its historical analysis of abortion regulation, presents a facade of neutrality. Justice Alito writes, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[219] This framing suggests that the Court is simply applying neutral principles of constitutional interpretation, rather than making a value judgment about the relative rights of women and fetuses.

However, this ostensibly neutral approach obscures the gendered nature of the abortion question. By treating abortion as a gender-neutral medical procedure, the opinion makes men's lack of needing abortions the baseline against which equality is measured and fails to grapple with the unique burdens that unwanted pregnancies and forced childbirth impose on women. This elision of gender is particularly striking given the opinion's acknowledgment of the "modern developments" that have changed the context of abortion, including "the development of adoption laws and procedures, and the growth of foster care and family leave." These developments, while important, do not fundamentally alter the gendered nature of pregnancy and childbirth.

Moreover, the opinion's historical analysis, while presented as an objective inquiry into legal traditions, fails to account for the historical context of abortion restrictions. Many of the laws cited in the opinion were enacted during periods when women lacked basic political and economic rights, including the right to vote. By treating these historical prohibitions as evidence of a longstanding tradition against abortion rights, the opinion implicitly endorses a legal framework that was deeply rooted in gender inequality.

The disparate impact of the *Dobbs* decision extends beyond its immediate effect on abortion access. By removing federal constitutional protection for abortion rights, the decision opens the door to a patchwork of state regulations that will disproportionately affect low-income women and women of color. These groups, who already face significant barriers to healthcare access,

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obtaining abortions (55 percent) had previously given birth, underscoring the complex personal circumstances driving these decisions. *Id.* The Turnaway Study provides critical evidence of the long-term economic impacts, revealing that women denied abortions experienced significant economic hardship, with reduced educational attainment and increased likelihood of remaining in poverty. Foster et al., *supra* note 217, at 412–15. The out-of-state travel burden has intensified, with the proportion of abortion patients traveling to other states increasing from 9 percent in 2020 to 17 percent in 2023—representing over 166,000 patients. Guttmacher Institute, *supra* note 217.

[219] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 231 (2022).

will be most impacted by the need to travel across state lines for abortion services or to carry unwanted pregnancies to term.[220]

Furthermore, the decision's potential implications for other privacy-based rights, including contraception and same-sex marriage, suggest that its disparate impacts may extend far beyond the immediate question of abortion. While the majority opinion attempts to cabin its reasoning to the specific issue of abortion, the underlying logic—that rights must be deeply rooted in history and tradition to receive constitutional protection—could potentially be applied to other areas of personal autonomy that disproportionately affect marginalized groups. Justice Thomas's concurrence in Dobbs explicitly demonstrated this potential for broader rights erosion, through reconsideration of other substantive due process precedents, including those protecting contraception (*Griswold*), same-sex intimacy (*Lawrence*), and same-sex marriage (*Obergefell*).[221] Reva Siegel argues that such reasoning can rapidly transform from a seemingly narrow legal principle to a broad mechanism of social control, particularly targeting women's reproductive capabilities,[222] which threatens not just abortion rights, but the fundamental principle of bodily autonomy, potentially subjecting women to heightened surveillance and legal scrutiny throughout pregnancy and potentially even beyond. Thomas's concurrence underscores the vulnerability of established privacy rights, suggesting a judicial willingness to systematically dismantle protections for personal and intimate decisions that have been considered settled law for decades.

D. The Shift in Focus: Fetal Interests vs. Maternal Impact

A crucial aspect of the *Dobbs* decision that warrants closer examination is its marked shift in focus from the balanced approach of *Roe v. Wade* to a heightened emphasis on fetal interests at the expense of maternal impacts. This shift represents not only a change in legal reasoning but also a profound realignment of how the Court conceptualizes the abortion issue.

In *Roe*, the Court explicitly acknowledged the competing interests at stake in the abortion debate. Justice Blackmun's opinion recognized both the woman's right to privacy, which it found encompassed the abortion decision, and the state's interests in protecting potential life and maternal health.

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[220] By removing federal constitutional protection for abortion rights, the decision opens the door to a patchwork of state regulations that will disproportionately affect low-income women and women of color. The impact is stark: as of March 2024, fourteen states have total abortion bans, eliminating the sixty-three clinics that previously existed in those states. Guttmacher Institute, *supra* note 217. Medication abortions have become increasingly critical, accounting for 63 percent of clinician-provided abortions in states without total bans in 2023, up from 53 percent in 2020. *Id.* The Turnaway Study demonstrates the profound economic consequences of abortion denial, showing that women forced to carry pregnancies to term experience long-term economic setbacks, including reduced earning potential and increased likelihood of poverty. Foster et al., *supra* note 217, at 412–15. Moreover, payment challenges persist, with 53 percent of patients paying out of pocket and only 30 percent using Medicaid for abortion care. Guttmacher Institute, *supra* note 217.

[221] *Dobbs,* 597 U.S. 215 (Thomas, J., concurring)

[222] Siegel, *supra* note 77, at 1641–45.

The trimester framework established in *Roe* was an attempt to balance these competing interests, allowing for greater state regulation as the pregnancy progressed and the state's interest in potential life became more compelling.

The Court in *Roe* stated: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[223] This approach recognized the complex nature of the abortion issue and attempted to craft a solution that respected both women's autonomy and the state's interest in fetal life.

In contrast, the *Dobbs* opinion largely sidesteps the question of women's bodily autonomy and the real-world impacts of forced pregnancy and childbirth. Instead, it focuses heavily on the state's interest in protecting fetal life, which it presents as the primary consideration in abortion regulation. Justice Alito writes, "What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"[224]

This shift in focus has several important implications. By emphasizing fetal interests over maternal impacts, the *Dobbs* opinion implicitly devalues women's bodily autonomy and right to make decisions about their own healthcare. This represents a significant departure from the recognition of women's privacy rights in *Roe*. The focus on fetal life presents abortion as a simple moral question rather than a complex issue involving bodily autonomy, public health, and social equity. This framing ignores the multifaceted reasons why women seek abortions and the diverse contexts in which these decisions are made.

By concentrating on fetal interests, the opinion pays insufficient attention to the physical and mental health risks associated with forced pregnancy and childbirth. This oversight is particularly glaring given the United States' high maternal mortality rates, especially among women of color.[225] The opinion's focus on fetal life also fails to adequately consider the socioeconomic impacts of unwanted pregnancies on women, including effects on education, career advancement, and economic stability. The Court's intensified focus on fetal interests directly exacerbates the disparate impacts on women, particularly marginalized women, by subordinating maternal health, economic stability, and social equality to the abstract state interest in potential life. This rhetorical shift, by positioning fetal rights as paramount, masks and deepens existing gendered inequalities—compounding the disproportionate burdens borne by women who already face significant barriers to reproductive healthcare access.

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[223] Roe v. Wade, 410 U.S. 113, 154 (1973).

[224] *Dobbs*, 597 U.S. at 257.

[225] *Data from the Pregnancy Mortality Surveillance System*, Ctrs. For Disease Control & Prev., (Jan. 30, 2025), https://www.cdc.gov/maternal-mortality/php/pregnancy-mortality-surveillance-data/index.html?cove-tab=1 [https://perma.cc/ZT4D-546K] (showing that maternal mortality rates for Black women are more than twice as high as the national average, and more than three times as high as those of White women).

Moreover, by prioritizing fetal interests, the opinion opens the door for states to impose expansive restrictions on abortion, potentially including in cases of rape, incest, or serious health risks to the mother. This potential for far-reaching limitations on abortion access underscores the profound shift in legal reasoning represented by the *Dobbs* decision, moving away from the more balanced approach of *Roe* and towards a framework that could significantly curtail reproductive rights.

The contrast between *Roe*'s balanced approach and *Dobbs*'s fetal-centric focus is stark. In *Roe*, the Court recognized that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[226] This recognition allowed for a nuanced approach that weighed fetal interests against women's rights. *Dobbs*, on the other hand, seems to elevate fetal interests to a status that potentially outweighs all other considerations. This shift is not merely a matter of legal doctrine; it represents a fundamental reframing of the abortion issue that has profound implications for women's rights and public health policy. By focusing primarily on fetal interests, the *Dobbs* opinion provides a legal framework that could justify wide-ranging restrictions on abortion access, potentially including in cases where continued pregnancy poses serious health risks to the mother.[227]

Moreover, this fetal-centric approach fails to grapple with the complex realities of pregnancy and childbirth in contemporary society. It does not account for the diverse reasons why women seek abortions, including financial instability, lack of partner support, existing childcare responsibilities, or health concerns. By reducing the abortion question to a matter of fetal protection, the opinion overlooks the myriad ways in which forced pregnancy and childbirth can impact women's lives, health, and futures.

The focus on fetal interests also raises troubling questions about the status of pregnant women under the law. If fetal interests can override women's fundamental rights to bodily autonomy and medical decision-making, what other restrictions on pregnant women's behavior might be justified? This line of reasoning could potentially lead to increased surveillance and regulation of pregnant women's activities, further eroding their autonomy and privacy rights.

Furthermore, the emphasis on fetal interests in *Dobbs* represents a departure from the Court's typical approach to balancing competing rights and interests. In other areas of constitutional law, the Court has generally been reluctant to allow speculative state interests to override established individual rights. The willingness to do so in the context of abortion suggests an exceptionalism that is difficult to reconcile with broader principles of constitutional interpretation.

The shift from *Roe*'s balanced approach to *Dobbs*'s fetal-centric focus also has implications for how we understand the role of the Court in adjudicating

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[226] *Roe*, 410 U.S. at 158.

[227] And in fact, the lack of distinction between a fetus—which, under most definitions, has not achieved personhood—and a woman—who has lived a life; made plans for her future; and upon whom some may rely for love, affection, and financial resources—does a disservice to the idea of personhood.

complex social issues. *Roe*'s trimester framework, while criticized for its specificity, represented an attempt to craft a nuanced solution to a contentious social problem.[228] *Dobbs*, in contrast, adopts a more absolutist approach that leaves little room for balancing competing interests or adapting to changing social circumstances.

This change in focus underscores the importance of critically examining the rhetorical strategies employed in judicial opinions. The *Dobbs* majority presents its fetal-centric approach as a neutral application of constitutional principles, but a closer examination reveals it to be a significant departure from previous approaches to abortion rights that carries profound implications for women's autonomy and equality.

The *Dobbs* decision's shift in focus from a balanced consideration of maternal and fetal interests to a primary emphasis on fetal protection represents a significant and troubling development in abortion jurisprudence. This change not only undermines women's reproductive rights but also sets a precedent for privileging speculative state interests over established individual rights. As we grapple with the implications of *Dobbs*, it is crucial to recognize and critically examine this shift in focus, understanding it as part of a broader pattern of facially neutral reasoning that can mask profoundly unequal impacts.

The analysis of *Dobbs* through the lens of facially neutral laws and disparate impact reveals the complex ways in which legal reasoning can perpetuate systemic inequalities. While the opinion presents itself as a neutral application of constitutional principles, its practical effects fall disproportionately on women, particularly those from marginalized communities. This disparity is further exacerbated by the opinion's focus on fetal interests at the expense of maternal impacts, representing a significant departure from the more balanced approach of *Roe v. Wade*.

As we move forward, it is crucial to develop strategies for exposing and challenging the disparate impacts of facially neutral laws and judicial opinions. This requires not only a critical examination of legal texts but also a broader consideration of the social, economic, and health impacts of legal decisions. By centering the experiences of those most affected by these laws and decisions, we can work towards a more equitable and just legal system.

In the next section, I will propose strategies for rhetorical resistance to judicial opinions like *Dobbs*, emphasizing the importance of centering affected communities in legal discourse and developing new frameworks for understanding and challenging facially neutral laws with disparate impacts.

IV. Strategies for Rhetorical Resistance

In light of the analysis of the *Dobbs* decision and its exemplification of how facially neutral laws can have disparate impacts, it is crucial to develop

[228] Trimesters may seem like an odd choice from a legal perspective, but that is the point. They were rooted in real-life consequences. There is a difference in viability that, at the time of the *Roe* decision, mapped broadly onto trimesters. Viability may not be an important legal concept, but it is an important practical one.

effective strategies for rhetorical resistance. This section will explore various approaches to challenging and reframing judicial opinions, with a particular focus on centering the voices and experiences of affected communities.

A. Exposing Unstated Premises in Judicial Opinions

One of the most potent tools for rhetorical resistance is the systematic exposure of unstated premises in judicial opinions. As discussed earlier, enthymemes—arguments with unstated premises—are frequently employed in legal reasoning to make arguments seem more persuasive and inevitable than they actually are. By bringing these hidden assumptions to light, we can challenge the seeming neutrality and objectivity of judicial opinions.

In the context of *Dobbs*, a critical approach to exposing unstated premises requires careful examination and questioning of several key assumptions underlying the Court's reasoning. One such assumption is the idea that rights must be "deeply rooted in history and tradition" to be constitutionally protected. This premise, central to the Court's application of the *Glucksberg* test in *Dobbs,* merits rigorous scrutiny. It raises fundamental questions about the nature of constitutional rights and the Court's role in interpreting them. If we accept this premise, how do we account for the evolution of societal norms and values over time? Does this approach effectively freeze constitutional interpretation at a particular historical moment, potentially enshrining outdated prejudices and inequalities? Moreover, whose history and whose traditions are we considering? The history of legal rights in the United States is largely a history of gradual expansion, often in the face of entrenched opposition. Many rights we now consider fundamental were not "deeply rooted in history and tradition" at the time they were recognized. Consider the right to marry across racial lines, which was explicitly prohibited in numerous states until *Loving v. Virginia* in 1967.[229] Prior to this landmark decision, interracial marriage was banned in forty-one states, reflecting a deeply entrenched historical tradition of racial segregation and discrimination. Yet the Supreme Court recognized the fundamental right to marry as transcending these historical limitations, holding that marriage is a basic civil right essential to individual liberty. Similarly, the right to use contraception, first recognized in *Griswold v. Connecticut*, challenged long-standing legal and social prohibitions.[230] Before 1965, many states criminalized the use of contraceptives, even within marriage, based on moral and religious grounds that were deeply rooted in historical practice. The Court's decision to protect this intimate personal choice demonstrated that constitutional rights are not frozen in historical amber but can evolve to recognize individual autonomy. Similarly, the right to raise one's children, articulated in *Pierce v. Society of Sisters*, protected parents' liberty to

[229] 388 U.S. 1, 6–7 (1967) (striking down laws prohibiting interracial marriage and noting that such laws were widespread across the United States).

[230] 381 U.S. 479, 485–86 (1965) (recognizing a constitutional right to privacy that protects the use of contraception).

direct their children's education against state-mandated schooling.[231] These judicially recognized rights illustrate how fundamental liberties often emerge by challenging, rather than conforming to, prevailing historical traditions. The Court's role is not to calcify past practices but to interpret and incorporate the Constitution's broad principles of liberty and equality in ways that respond to changing social understandings and protect individual dignity.

Another critical assumption underlying the *Dobbs* decision is that historical prohibitions on abortion reflect a societal consensus rather than the imposition of particular moral or religious views. This premise deserves careful examination and challenge. A nuanced historical analysis reveals that attitudes towards abortion have been far more complex and varied than the Court's opinion suggests. Early American common law, for instance, generally did not prohibit abortion before "quickening" (the point at which fetal movement could be felt), and many of the stricter abortion laws in the 19th century were driven by specific professional and religious interests rather than broad societal consensus. By questioning this assumption, we can highlight the Court's selective use of history and argue for a more comprehensive understanding of the historical context surrounding abortion regulation. This approach could involve bringing to light historical evidence of women's efforts to control their fertility, the varied religious and cultural attitudes towards abortion throughout American history, and the complex social and economic factors that have shaped abortion practices and policies over time.

A third crucial premise that demands scrutiny is the notion that fetal interests should take precedence over women's bodily autonomy and health. This assumption, while not explicitly stated in the *Dobbs* opinion, underpins much of its reasoning. By prioritizing the state's interest in protecting potential life over women's fundamental rights to privacy and bodily autonomy, the Court effectively subordinates women's constitutional rights to fetal interests. This premise raises profound questions about gender equality under the law and the extent to which the state can compel individuals to use their bodies in service of others. Challenging this assumption involves highlighting the unique physical, emotional, and social burdens of pregnancy and childbirth, and arguing for a legal framework that fully recognizes women's autonomy and equality. It also requires addressing the broader implications of this premise for women's status under the law. If the state can compel women to carry pregnancies to term, what other impositions on bodily autonomy might be justified? By exposing and questioning this underlying assumption, we can argue for a more balanced approach that fully considers the rights and interests of women alongside any state interest in fetal life.

By exposing these unstated premises, we create space for critical engagement with the opinion's reasoning. This approach allows us to challenge not just the conclusion of the opinion, but the very framework within which it operates. Unpacking the unstated premises in legal argument can reveal the ideological commitments that underlie seemingly neutral legal principles.

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[231] 268 U.S. 510, 534–35 (1925) (protecting parents' right to direct their children's education as a fundamental liberty interest).

B. Centering Affected Communities in Legal Discourse

A crucial strategy for resisting the disparate impacts of facially neutral laws is to center the voices and experiences of affected communities in legal discourse. This approach, rooted in critical race theory and feminist legal theory, seeks to challenge the law's claims to neutrality by highlighting its real-world effects on marginalized groups.

In the context of abortion rights, centering affected communities in legal discourse involves several crucial strategies. One key approach is amplifying the stories of women who have sought or been denied abortions, particularly those from low-income backgrounds or communities of color. These narratives provide powerful, firsthand accounts of the real-world impacts of abortion restrictions, humanizing what can often become an abstract legal debate. By bringing these experiences to the forefront, legal arguments can be grounded in lived realities rather than theoretical constructs. This approach not only strengthens the persuasive power of legal advocacy but also helps to counteract the often decontextualized and depersonalized nature of judicial opinions. These narratives can offer a means of testing the excluded experience of the socially marginalized against the assertions of conventional legal doctrine and can illuminate the complex decision-making processes women undergo, the varied circumstances that lead to seeking abortion care, and the profound consequences of being denied such care. They can reveal how abortion restrictions intersect with other forms of systemic inequality, demonstrating that the right to abortion is not just about individual choice but about broader issues of social justice and equity.

Another critical strategy is incorporating empirical research on the socioeconomic impacts of abortion restrictions into legal arguments. This approach brings rigorous, data-driven analysis to bear on legal reasoning, providing a solid evidentiary basis for arguments about the effects of abortion restrictions. Such research can demonstrate the wide-ranging consequences of limiting abortion access, from economic impacts on women and families to broader societal effects on poverty rates, educational attainment, and workforce participation.[232] As a 2018 study has shown, women who are denied abortions face significant economic hardships and are more likely to live in poverty years later.[233] By integrating this empirical evidence into legal arguments, advocates can challenge the often narrow focus of judicial reasoning on abstract legal principles, forcing a consideration of the concrete, measurable impacts of abortion restrictions. This strategy can be particularly effective in countering arguments that downplay the significance of abortion rights or that frame abortion solely as a moral issue rather than a complex social and economic one. Moreover, empirical research can help to expose the disparate impacts of abortion restrictions on different communities, strengthening arguments

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[232] *See* Anna Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence* 2 (Inst. for Women's Pol'y Rsch., Working Paper No. C486, 2019).

[233] Foster et al., *supra* note 217, at 407–13.

based on equal protection and highlighting the intersectional nature of reproductive rights issues.

Engaging with community organizations and advocacy groups is another crucial element in centering affected communities in legal discourse around abortion rights. This engagement ensures that legal strategies align with the needs and priorities of those most impacted by abortion restrictions. By collaborating closely with grassroots organizations, legal advocates can gain invaluable insights into the on-the-ground realities of accessing reproductive healthcare, the specific barriers faced by different communities, and the most pressing concerns of those directly affected by abortion laws. This approach embodies what Gerald López terms "rebellious lawyering," which "grounds its work in the lives and in the communities of the subordinated themselves."[234] Such engagement can lead to the development of more comprehensive and nuanced legal arguments that address the full spectrum of issues surrounding abortion access, from healthcare disparities to economic justice. Furthermore, this collaborative approach can help to build broader coalitions and movements around reproductive rights, linking legal advocacy with grassroots organizing and community empowerment efforts. As Mari Matsuda argues, "[t]hose who have experienced discrimination speak with a special voice to which we should listen."[235] By centering these voices, we can challenge the abstract, decontextualized reasoning often found in judicial opinions and bring attention to the concrete harms caused by seemingly neutral legal doctrines.

C. Reframing Legal Issues to Highlight Disparate Impacts

Another key strategy is to reframe legal issues in ways that make disparate impacts more visible and central to the analysis. This involves shifting the focus from abstract legal principles to the concrete effects of laws and judicial decisions on real people's lives.

In the case of abortion rights, reframing legal issues to highlight disparate impacts involves several key strategies. One crucial approach is to frame abortion restrictions not just as a matter of privacy rights, but as an issue of gender equality and economic justice. This framing recognizes that restrictions on abortion disproportionately affect women, particularly those from marginalized communities, and have far-reaching implications for their social and economic well-being. As Ruth Bader Ginsburg argued, "[t]he conflict . . . is not simply one between a fetus' interests and a woman's interests . . . Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."[236] By situating abortion rights within the broader context of gender equality and economic justice, advocates can

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[234] Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice 38 (1992).

[235] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987).

[236] Ginsburg, *supra* note 137, at 383.

challenge the narrow, privacy-based framing that has dominated much of the legal discourse around abortion and highlight the systemic inequalities that abortion restrictions perpetuate.

Another important strategy is highlighting the interconnections between abortion access and other social issues, such as poverty, racial discrimination, and healthcare disparities. This approach recognizes that abortion rights do not exist in isolation but are deeply intertwined with other forms of social inequality. For instance, research has shown that women who are denied abortions are more likely to experience economic hardship and insecurity.[237] Moreover, restrictions on abortion access often disproportionately affect women of color, exacerbating existing racial disparities in healthcare. By drawing these connections, legal advocates can present a more comprehensive picture of the impacts of abortion restrictions and challenge the tendency to treat abortion as a standalone issue divorced from broader social contexts.

Emphasizing the public health implications of abortion restrictions is another critical aspect of reframing the legal discourse around abortion rights. This includes highlighting increased maternal mortality rates and the health risks associated with unsafe abortions. As the World Health Organization has reported, restrictive abortion laws are associated with higher rates of unsafe abortions and increased maternal mortality.[238] By focusing on these public health impacts, advocates can shift the discussion from abstract moral debates to concrete issues of life and health. This framing also allows for the incorporation of medical and scientific evidence into legal arguments, potentially countering politically motivated restrictions that lack a sound public health basis. Furthermore, emphasizing the public health dimension of abortion access can help to situate reproductive rights within the broader context of healthcare policy and access, highlighting the interconnections between abortion rights and other aspects of women's health and well-being.

This reframing can help to counter the tendency in legal discourse to treat issues in isolation, divorced from their broader social context. As Kimberlé Crenshaw's work on intersectionality has shown, understanding how different forms of oppression intersect is crucial for developing effective legal and policy responses.[239]

D. Employing Interdisciplinary Approaches

Effective rhetorical resistance often requires moving beyond traditional legal analysis to incorporate insights from other disciplines.[240] This interdisciplinary approach can help to expose the limitations of purely doctrinal legal

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[237] Foster et al., *supra* note 217, at 407–13.

[238] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2–3 (2012), https://iris.who.int/bitstream/handle/10665/173586/?sequence=1 [https://perma.cc/9L6W-J9EY].

[239] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140 (1989).

[240] Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 849-50 (1990).

reasoning and provide a more comprehensive understanding of the impacts of legal decisions.[241] The recognition of law's embeddedness in broader social contexts necessitates engagement with a range of disciplinary perspectives.[242]

For instance, public health insights are crucial for understanding the health implications of abortion restrictions and other reproductive health policies.[243] Research in this field can demonstrate the tangible health consequences of limiting access to safe and legal abortions, including increased maternal mortality rates and the risks associated with unsafe abortions.[244] Incorporating such public health data into legal arguments can provide a robust empirical foundation for challenging restrictive abortion laws.[245]

Economic analysis is equally vital for comprehending the far-reaching impacts of reproductive health policies.[246] Economic perspectives can help to frame abortion rights not just as a matter of individual choice, but as a critical factor in women's economic empowerment and societal progress.[247] Such analysis can illuminate the complex interplay between reproductive rights and broader economic outcomes.[248]

Sociological perspectives are essential for examining how abortion restrictions interact with existing social inequalities.[249] This sociological framing helps to situate abortion rights within broader discussions of social equity and justice.[250] It provides a framework for understanding how reproductive rights intersect with other forms of systemic inequality.[251]

Historical analysis provides crucial context for understanding the evolution of abortion rights and regulations over time.[252] By examining the

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[241] White, *supra* 15. *See also* Matyas Bodig, *Legal Doctrinal Scholarship and Interdisciplinary Engagement*, 6 Erasmus L. Rev. 91, 94–95 (2015) (contending that certain "concepts and ideas built into the doctrinal structures of law" cannot be fully understood or critiqued without insights drawn from other disciplines and empirical methods).

[242] Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* Law in Everyday Life 21, 25 (Austin Sarat & Thomas R. Kearns eds., 1993).

[243] *See generally* Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (2012).

[244] World Health Organization, *supra* note 238, at 23.

[245] Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 Hum. Rts. Q. 1, 3 (2003).

[246] *See* Berenstein & Jones, *supra* note 232, at 2.

[247] Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. Pol. Econ. 730, 731 (2002).

[248] *See e.g.,* Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, 18 Rsch. Lab. Econ. 75, 76 (1999).

[249] Katrina Kimport & Tracy A. Weitz, *Abortion as a Sociological Case*, 39 Socio. F. 7, 7-8 (2024) (reviewing scholarship that treats abortion as an excellent sociological case study and encouraging more research, arguing that questions of access must be analyzed through lenses of gender, race, political-economy, and other structural inequalities); *see also* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1243–44 (1991) (using intersectionality to show how overlapping systems of race, gender, and class shape legal vulnerability—an analytic framework that sociological studies now apply to abortion restrictions and their disparate effects).

[250] Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 228 (2d ed. 2000).

[251] Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 328 (2013).

[252] Siegel, *supra* note 84, at 263–64.

historical development of abortion laws and societal attitudes towards reproductive rights, legal scholars can challenge ahistorical arguments that present current restrictions as longstanding traditions.[253] This historical perspective can reveal the complex and often contradictory nature of attitudes towards abortion throughout American history.[254]

By bringing these diverse perspectives to bear on legal issues, we can challenge the narrow framing often employed in judicial opinions and highlight the complex, multifaceted nature of issues like abortion rights. This interdisciplinary approach allows for a more nuanced and comprehensive understanding of the law's impacts, potentially leading to more just and equitable legal outcomes.[255] As Julie Novkov argues, "Interdisciplinary work in law and social sciences can provide important insights into the operation of law and legal institutions in society." [256] By embracing this interdisciplinary perspective, legal scholars and advocates can develop more robust and persuasive arguments for protecting and advancing reproductive rights.

E. Developing Alternative Narratives

The power of interdisciplinary approaches is significantly amplified when combined with narrative reframing, a potent tool for rhetorical resistance. This strategy extends beyond mere critique of existing legal narratives; it involves the active construction of new narratives that center the experiences of marginalized groups and illuminate the real-world impacts of legal decisions.

Stories, parables, chronicles, and narratives serve as powerful instruments for dismantling entrenched mindsets—the collection of presuppositions, received wisdoms, and shared understandings that form the backdrop of legal

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[253] N.E.H. Hull & Peter Charles Hoffer, Roe v. Wade: The Abortion Rights Controversy in American History 12 (2d ed. 2010).

[254] Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973, 8 (1997).

[255] Incorporating interdisciplinary analysis into judicial reasoning can legitimize rhetorical resistance by grounding legal decisions in empirical data and broader societal considerations. For instance, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court famously relied on sociological and psychological studies highlighting the detrimental effects of segregation on children to conclude that separate educational facilities were inherently unequal and thus unconstitutional. Similarly, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court considered extensive scientific evidence regarding public health impacts and climate change to establish standing and ultimately direct the Environmental Protection Agency to regulate greenhouse gas emissions.

One of the most notable historical examples of interdisciplinary rhetorical resistance in litigation is the "Brandeis Brief," first presented by Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908). Rather than focusing solely on traditional legal arguments, Brandeis's brief extensively cited sociological data, economic analysis, public health studies, and other empirical evidence to demonstrate the harmful effects of long working hours on women's health and well-being. By successfully persuading the Court to uphold protective labor laws through an interdisciplinary evidentiary approach, the Brandeis Brief established a precedent for integrating broader societal impacts into judicial decision-making, legitimizing empirical evidence as a powerful rhetorical tool in legal advocacy.

[256] Julie Novkov, *Toward a Legal Genealogy of Color Blindness*, 35 Law & Soc. Inquiry 565, 566 (2010).

and political discourse. These narrative forms possess a unique capacity to challenge and restructure the fundamental frameworks through which we interpret and engage with legal and social realities.

In the context of abortion rights, narrative reframing offers a vital avenue for reshaping public and legal understanding. Crafting stories that emphasize the role of reproductive autonomy in women's full participation in social, economic, and political life can profoundly impact how abortion rights are conceptualized. These narratives can powerfully illustrate that access to abortion transcends individual choice; it is fundamentally about women's ability to shape their own destinies and contribute fully to society.

The decision to bear a child occupies a central position in a woman's life, intimately tied to her well-being and dignity. It is a deeply personal decision that she must make for herself. When the government assumes control over this decision, it effectively treats women as less than fully adult humans capable of making their own choices. This perspective underscores the profound implications of reproductive rights for women's autonomy and equal standing in society.

Another crucial aspect of narrative development involves telling stories that illustrate the intersectional nature of abortion access, showing how restrictions disproportionately affect women who are already marginalized due to race, class, or other factors. These narratives can highlight how abortion restrictions intersect with and exacerbate existing social inequalities. The problem with identity politics is not its failure to transcend difference, as some critics charge, but rather its tendency to conflate or ignore intragroup differences. By telling stories that capture these intersectional realities, advocates can challenge overly simplistic legal narratives and highlight the complex ways in which abortion restrictions impact different communities.

Developing narratives that challenge the fetal-centric focus of many anti-abortion arguments is another crucial strategy. These narratives can highlight the complex realities of women's lives and the multifaceted reasons why women seek abortions. The conversation must shift from fetal life to women's lives. Such narratives can emphasize the diverse circumstances that lead women to seek abortions, including economic hardship, health concerns, and personal aspirations. By centering women's lived experiences, these stories can counteract the tendency to reduce abortion to an abstract moral issue, instead framing it as a complex decision embedded in the realities of women's lives.

Through the development of these alternative narratives, legal advocates can challenge dominant legal discourses and create space for more nuanced and inclusive understandings of reproductive rights. Law indeed is a powerful storyteller, but it is not the only storyteller in our culture. By crafting compelling counter-narratives, advocates can reshape the legal and cultural conversation around abortion rights, potentially influencing both judicial decision-making and public opinion.

The power of stories, parables, chronicles, and narratives in destroying mindsets—the bundle of presuppositions, received wisdoms, and shared understandings against which legal and political discourse takes place—cannot

be overstated. These narrative forms serve as potent tools for challenging and reshaping the fundamental frameworks through which we interpret and engage with legal and social realities.

An important strategy for rhetorical resistance involves engaging in what scholars have termed "popular constitutionalism"—the idea that constitutional meaning should be shaped not just by courts, but by the people themselves through various forms of political and social action. This approach recognizes the dynamic nature of constitutional interpretation and the crucial role that public engagement plays in shaping legal norms.

By organizing at the grassroots level, advocates can create pressure for legal change and contribute to evolving interpretations of constitutional rights. Public education efforts can contribute to ongoing societal conversations about constitutional values and rights. By focusing on electoral politics and policy-making, advocates can work to create a legal and political environment more conducive to protecting and advancing reproductive rights.

Conclusion

Throughout this Article, I have examined how judicial opinions employ enthymematic reasoning to mask value judgments behind a veneer of neutral legal analysis. In *Dobbs*, we see this rhetorical strategy at work through multiple enthymemes—the historical rights enthymeme that selectively privileges certain traditions while ignoring others; the public controversy enthymeme that transforms moral disagreement into a rationale for diminishing constitutional protection; the categorical choice enthymeme that isolates abortion from other bodily autonomy rights; the stare decisis enthymeme that reconfigures precedential weight. These rhetorical structures are powerful precisely because they leave crucial premises unstated, inviting audiences to fill these gaps with seemingly common-sense assumptions that often reflect dominant ideologies rather than critical examination. The result is a facially neutral opinion that nonetheless produces profoundly unequal impacts, particularly on women from marginalized communities who bear the heaviest burdens when reproductive healthcare is restricted. By exposing these enthymematic structures and their disparate effects, we can begin to develop more effective strategies for rhetorical resistance that challenge not just the conclusions of judicial opinions, but the very frameworks within which they operate.

Through these various forms of popular engagement, advocates can work to shape constitutional understanding from the ground up, potentially influencing both judicial decision-making and the broader legal and political landscape surrounding reproductive rights. Successful social movements have produced some of the most significant expansions of constitutional liberty and equality in American history. By embracing popular constitutionalism, reproductive rights advocates can contribute to this ongoing process of constitutional evolution and contestation.

The Supreme Court is not the highest authority in the land on constitutional law; the people are. By engaging in popular constitutionalism, we

can challenge the notion that constitutional interpretation is the exclusive domain of courts and work towards a more democratic and inclusive process of shaping constitutional meaning. Effective rhetorical resistance to judicial opinions like *Dobbs* requires a multifaceted approach that combines rigorous legal analysis with strategies for centering marginalized voices, reframing issues, and engaging with broader social and political movements. By employing these strategies, we can work towards a legal discourse that is more attuned to the real-world impacts of judicial decisions and more responsive to the needs and experiences of all members of society.

As we move forward, it is crucial to recognize that rhetorical resistance is not just about winning legal arguments, but about transforming the very terms of legal and political debate. By challenging the underlying assumptions and frameworks that shape judicial opinions, we can work towards a more just and equitable legal system—one that truly serves the needs of all members of society, not just those with the most power and privilege.

Kill 1L

*Prentiss Cox**

Table of Contents

* Professor of Law at University of Minnesota Law School. The author thanks Scott Dewey for his assistance and dedication to making law school a better place. The article was written with the excellent research help of Evan Dale and Jaxon Hill. This article and the successful reforms to the 1L year at the University of Minnesota would not have happened without years of work and support by Bill McGeveran, Alex Klass, Brett McDonnell, Mitch Zamoff, Randall Ryder, Lisa Burtch, Diana Witt, and other faculty and staff at the University of Minnesota.

Introduction

There has been no shortage of critiques of U.S. legal education. A prominent study published in 1992—the American Bar Association (ABA) "MacCrate" Report—was followed by the influential Carnegie Report in 2007, and then the "Best Practices" Report, also in 2007.[1] These studies begat a vast literature criticizing legal education and proposing changes. The result of this deluge of analysis and prescription is that U.S. legal education budged.[2]

This Article argues that meaningful change requires directing our attention to the central pillar on which law school education rests—the first year of law school, the "1L" experience. The scholarship on legal education is prolific, and much of it is brilliant. Very little of it, however, focuses comprehensively on the critical role of 1L in shaping law school. Major studies of legal education either laud 1L or assume it immovable. The most influential of the legal education studies, the Carnegie Report, was sharply critical of legal education, yet generally enthused about the first year. A Summary of the Carnegie Report states that the "research team found unmistakable evidence of the pedagogical power of the first phase of legal education," leading the report authors to conclude that 1L "is an accomplishment of the first order."[3]

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[1] Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, Report Of The Task Force On Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter MacCrate Report]; William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007) [hereinafter the Carnegie Report]; Roy Stuckey et al., Best Practices for Legal Education (2007) [hereinafter Best Practices]. Another ABA study preceded these reports, Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency (1979).

[2] L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 Utah L. Rev. 837, 839–40 (2022) ("[T]he 2014 amendments to the ABA Standards on the Program of Legal Education . . . portended seismic changes, but the results have been underwhelming . . . . Law school committees convened, they studied, they reported, they tinkered. Yet, by and large, law school curricula remained stuck in the roundabout, particularly the 1L year."); Martin J. Katz, *Facilitating Better Law Teaching – Now*, 62 Emory L.J. 823, 828-29 (2013) (noting the broad acceptance of the Carnegie Report in the legal academy, but concluding that "surprisingly, American law schools have been slow to implement the recommendations of the Carnegie Report in a broad way."); *see infra* Part I.A (identifying the changes in the 1L curricula since 2010).

[3] William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law: Summary 5 (2007).

The Carnegie Report was thorough and insightful, but it erred on this key point. The first year of law school teaches students habits of thought that they must unlearn to use law effectively in any form of practice or professional application of law. 1L conveys to law students, often explicitly and always implicitly, that they are being presented the key knowledge and skills required in the profession. Even if the upper level courses theoretically could fill the gaps and correct the misdirection of 1L, law student time, attention and shared experience decline sharply after the first year, making 1L reform the predicate to any other restructuring of legal education.

The Article proceeds in five parts. Part I examines what law schools teach by providing an empirical look at current 1L curricula. It also examines what law schools say in their learning outcome statements. Part II uses a comparison between the current 1L curricula and the learning objectives to reveal seemingly obvious reforms in what and how we should be teaching.

Part III tackles the bottom line defense of the status quo—that law students, and especially 1L students, are learning to "think like a lawyer." This part identifies the disconnect between the specific habits of thought inculcated in 1L and how attorneys, judges, and lawmakers actually engage with the law. It explains why this disconnect is unlikely to be overcome by reforms to upper level courses that leave the 1L year intact. The need to abolish or fundamentally reform the current 1L presents anew each year as I watch students struggle with their initial clinic case or project, including students who I taught civil procedure in the first year. The transition from classroom to practice is bumpy in any profession. Interviewing a potential client with a problem, drafting a regulation or the like are not tasks for which a student can be fully prepared by classroom instruction, or by a simulation. The 1L year, however, makes this tough transition much more difficult.

Part IV presents one version of a redesigned first year of law school, the "New 1L," as an exemplar counterpoint to the current curriculum. Most traditional 1L courses are eliminated, condensed, or absorbed in a course with a larger context. The civil common law doctrine courses (contract, torts, and property) combine to form a single course. Statutory and regulatory law, and legal research and analysis, are presented on par with common law. Civil procedure or criminal law are taught by integrating classroom instruction with a simulation and writing course.

Many judges and practicing attorneys likely would nod heartily in agreement with the above analysis, and then tell you law school will never change. Part V offers an argument of hope because 1L reform is more practical and achievable than ever before. The coming reforms to the Bar exam and the changes to the dominant if contentious law school ranking process suggest a window is opening for fundamental law school reform that did not previously exist. The oft-repeated opinion that faculty resistance makes law school reform impossible probably is correct if change depends on a national vote of tenured professors, but that is not how fundamental reform will occur. A few successful models of small-scale 1L reform could point the way to a better education for the next generation of law students.

I. The Current Curricula: 1L Courses and Learning Objectives

This Part lays the groundwork for exploring 1L curriculum reform. Subpart A summarizes our empirical study of the 1L curricula in U.S. law schools.[4] Subpart B categorizes the learning outcomes adopted by each law school for insight into what law schools promise students about their legal education.

A. Survey of 1L Curricula

It has been stated that 1L is unchanged over the last century.[5] Our empirical study data qualifies this generally correct observation in two respects. Subpart 1 explains a long-term trend in the 1L curriculum to reduce credits for four traditional courses and allocate them to legal writing and elsewhere. Subpart 2 shows that the last decade has seen a marked increase in new 1L introductory courses that respond to the concerns raised in the Carnegie Report and other studies, and the introduction at a few schools of a required 1L course on legislation and regulation.

1. Evolution of the Traditional 1L Curriculum

Surveys of the 1L curricula in the early twentieth century reveal many of the same courses in today's first year list, but also a variety of other subjects that have disappeared or evolved. A. Z. Reed surveyed seventy-five law schools in 1925-1926.[6] The core of today's curriculum were also common one hundred years ago, with contract and torts almost universally offered, although criminal law was the third most common course. About 92 percent of law schools offered property and 78 percent offered "pleading," a forerunner of civil procedure. Interestingly, 73 percent of law schools had a course in agency law and 33 percent offered a family law course known as "domestic relations." A legal research course and moot court were not unusual, and other courses not common today were offered by most law schools.[7]

In 1950, William Agnor used course catalogs from one hundred law schools to set out the following courses as the "average" first year curriculum: "Agency 2 hours; Contracts 6 hours; Criminal Law 3 hours; Introduction to Law 2 hours; Legal Bibliography 1 hour; Procedure 4 hours; Property 6 hours;

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[4] Prentiss Cox, *1L Curricula in the United States: 2023 Data and Historical Comparison*, Minnesota Legal Studies Research Paper No. 23-08 (May 16, 2023) (available at https://ssrn.com/abstract=4450371 [https://perma.cc/V7VK-6AWK]).

[5] Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 Vand. L. Rev. 339, 349 (2007) ("The required first-year courses are largely the same today as in 1871 . . . ."); David A. Hyman, Jing Liu & Joshua C. Teitelbaum, *Does the 1L Curriculum Make a Difference?*, 21 J. Empir. Leg. Stud. 375, 376 (2024) ("Leaders in the legal academy often talk about experimenting with the 1L curriculum, but hardly anyone does it."); Erwin Chemerinsky, *The Challenges Facing Legal Education*, 75 Ala. L. Rev. 555, 555 (2024) ("In many ways, law schools are the same as when I began law school in the fall of 1975.").

[6] Alfred Zantzinger Reed, Present-Day Law Schools in the United States and Canada 536–37 (1928).

[7] *Id.*

and Torts 6 hours."[8] By 1975, Donald Jackson and Gordon Gee produced a survey showing further evolution of the 1L curriculum. They set forth "the almost consensus first year curriculum" consisting of seven 1L courses: four courses taught over two semesters each for six credits (contracts, torts, property and civil procedure); two one-semester, three-credit courses (criminal law and constitutional law); and a two-credit legal research and writing course.[9]

Fast-forward to the twenty-first century and the ABA produced data on law school curricula based on survey responses from law schools in 2002 and again in 2010. The ABA surveys found the same seven courses identified by Gee and Jackson remain the center of the 1L curriculum, but that credit allocation for the four six-credit courses shrunk while legal writing increased substantially in number of required credits.[10]

In our survey, three of the four courses identified by Gee and Jackson—contracts, torts and civil procedure—remain almost universally required, with 99 percent or more of law schools putting these courses and legal writing in 1L. Property and criminal law are required by about 94 percent of schools in 1L, while constitutional law is part of 1L in about two-thirds of law schools. Table #1 presents our findings on the percentage of law schools that require the traditional seven courses and the credits allocated for these courses when the course is required by the law school.[11]

Table 1: Median Credits and Mean Credits for Seven 1L Courses

	%1L Required	Median # Credits	Mean # Credits
Contracts	100%	4.0	4.7
Torts	99.5%	4.0	4.2
Civil Procedure	99.5%	4.0	4.5
Property	93.7%	4.0	4.3
Criminal	94.2%	3.0	3.3
Constitutional	68.1%	4.0	3.6
Legal Writing & Research	99.0%	5.0	5.3

The same credit allocation trends noted in the ABA surveys continue in our findings. The mean number of credits once again decreased for contracts,

[8] William H. Agnor, *A Survey of Present Law School Curricula*, 2 J. Legal Educ. 510, 513 (1950).

[9] E. Gordon Gee & Donald W. Jackson, Following the Leader: The Unexamined Consensus in Law School Curricula 15 (1975).

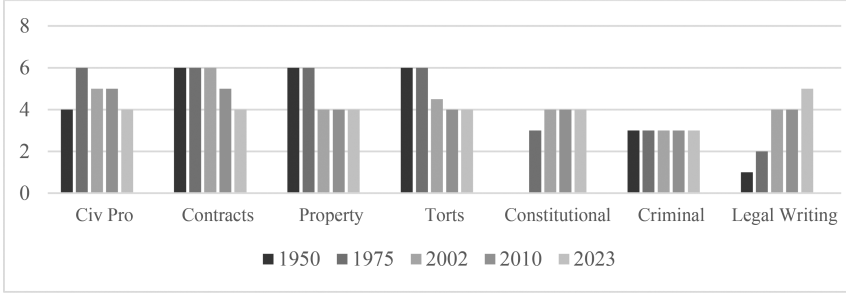
[10] Am. Bar Ass'n, A Survey of Law School Curricula: 1992-2002 (2004) [hereinafter ABA 2002]; Am. Bar Ass'n, A Survey of Law School Curricula: 2002-2010 (Catherine Carpenter ed., 2012) [hereinafter ABA 2010]. The remainder of this article refers to these ABA reports by the year of data collection—"ABA 2002" and "ABA 2010"—rather than the year of publication of the report.

[11] Cox, *supra* note 4, at 5–6.

torts, property and civil procedure. Mean credits for legal writing increased substantially. Legal writing now has the highest median and highest mean number of credits of any course in the 1L curricula of U.S. law schools.[12]

Longer-term trends are harder to pinpoint because older surveys lack precise data. Yet, the available long-term data are consistent with the above finding. Figure 1 compares the "average curriculum" stated by Agnor in 1950, the Gee and Jackson "consensus curriculum" of 1975, the median number of credits in the ABA surveys, and our study. A pattern of shrinking credits for the four high-credit courses, stable credits for constitutional law and criminal, and rising credits for legal writing holds.[13]

Figure 1: Credits in the typical curriculum by course type (1950–2023)



2. The Changing Periphery of the 1L Curriculum

While the bulk of the typical 1L curriculum has been the above seven courses, the periphery of the curriculum has changed noticeably since the 2010 ABA survey. In the 2010 survey, only 17 percent of law schools offered a non-doctrinal introductory course. Our survey found that ninety law schools, or 47.1 percent, now have such a course. These are typically low-credit offerings. When these introductory courses are required, the median credit was 1.0 and the mean credit was 1.8. The courses divide into five types, as noted in Table 2 below.[14]

[12] *Id.* at 18. Credits for constitutional law and criminal law show little change between the ABA surveys and our data. Constitutional law was required for a median of four credits in all three surveys, and criminal law was required at a median of three credits in all three surveys. The mean credits for these courses were only slightly different comparing the ABA 2002 results and our data, dropping from 3.8 to 3.6 credits for constitutional law and rising from 3.2 to 3.3 credits for criminal law. *Id.*

[13] *Id.* at 19.

[14] *Id.* at 7–10.

Table 2: Required Introductory Non-doctrinal Courses

	% 1L Required	Median # Credits	Mean # Credits
Professionalism	15.7%	1.0	1.4
Preparatory	13.1%	1.0	1.1
Practice Skills	11.0%	2.0	2.4
Legal Method	11.0%	2.0	1.6
Perspectives	3.1%	1.0	1.3
Overall[15]	47.1%	1.0	1.8

Many of these changes appear to be a direct response to the Carnegie Report, which included as a key recommendation that "[t]he existing common core of legal education needs to be expanded to provide students substantial experience with practice as well as opportunities to wrestle with the issues of professionalism."[16] The professionalism and practice introductory 1L courses that directly address the concerns raised in the Carnegie Report have increased significantly. Professionalism courses, the most common type of 1L introductory course, teach professional identity formation, a concern at the center of deficiencies noted in the Carnegie Report.[17] Practice skills are usually higher-credit offerings that include simulations introducing students to the skills needed to represent clients, such as interviewing, counseling and negotiation.

Preparatory courses explain the teaching and examination practices students will encounter, and prepare students for successful participation in law school. An introductory course in legal methods is the one introductory course that has long been present in the 1L curricula of many law schools.[18] Legal methods courses examine various sources of law and the process of analyzing law. A few schools offer a perspectives course that frames the teaching of law through a particular social or religious construct.[19]

There also has been strong growth in 1L legislation and regulation courses. These courses introduce law students to statutory construction, rulemaking, and the basics of the administrative state. The 2002 and 2010 ABA surveys did not show any law school requiring such a course in the first year.[20]

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[15] The "overall" category is based on combining all the introductory nondoctrinal courses offered by each law school and thus the numbers in the overall row do not reflect a total of the above five categories. Thus, 47.1 percent of all law schools surveyed require at least one of the above courses during 1L. *See* id. at 7 n.24 for a detailed explanation.

[16] Sullivan, *supra* note 3, at 9.

[17] Carnegie Report, *supra* note 1, at 126–61.

[18] Approximately 23 percent to 46 percent of law schools offered a legal methods course in the 1L year from the 1919 curricula surveys to the ABA 2002 survey. *See* Cox, *supra* note 4, at 16–17.

[19] For a description of the five types of 1L introductory courses, see *id.* at 8–9.

[20] *Id.* at 18 n.61. The addition of a 1L course on legislation and regulation began, unsurprisingly, with a change to the 1L curriculum at Harvard. Ethan J. Leib, *Adding Legislation Courses*

Our study found 15 percent of law schools now require a course in legislation-regulation in the first year at a median and a mean of three credits. This is a substantially higher percentage than the 9 percent of law schools that require any other subject beyond the traditional seven courses or an introductory course.[21]

B. Law School Learning Outcomes

In this subpart, we examine what law schools aspire to teach their students by looking at the "learning outcomes" each law school has created under a 2014 ABA mandate. Subpart 1 provides the background on the development of this requirement. Subpart 2 provides a categorization of the learning outcomes adopted by law schools into three types, or variants thereof. In Part II, we contrast the existing 1L curriculum identified in Subpart I.A with the learning outcomes identified in this Subpart I.B.

1. ABA Mandate for Learning Outcomes

The Carnegie Report also led to an important change in the ABA accreditation standards in 2014.[22] ABA Standard 301 requires that law schools "establish and publish learning outcomes" that demonstrate how the school is preparing students "for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[23] ABA Standard 302 mandates that these learning outcomes include competency goals in four areas:

> (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.[24]

It may not seem revolutionary to suggest an educational venture identify learning outcomes, but few law schools had done so at the time the ABA adopted the requirement.[25]

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to the First-Year Curriculum, 58 J. Legal Educ. 167–70 (2008). Leib lauds the move, arguing among other things that it will "help cure students of their excessive attention to appellate arguments and judge-made common law in their first-year coursework." *Id.* at 170.

[21] Cox, *supra* note 4, at 7.

[22] Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. Legal Educ. 376, 378–80 (2018) (citing the importance of the Carnegie Report in the development of the Standards).

[23] Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2022-2023 17 [hereinafter ABA Standards] (listing Standard 301).

[24] *Id.* (listing Standard 302).

[25] *See* Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing A Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 Clev. St. L. Rev. 661, 667 (2016).

Steven Bahls, who led the drafting committee of the ABA's Standards Review Committee when it began to devise the new standards, stated that:

> The first imperative identified by the Drafting Committee was a matter of consumer protection. Law schools should satisfy student expectations by being clear about what learning outcomes students should expect, construct a curriculum to enable students to achieve those outcomes, measure whether students are achieving the outcomes, and work to increase the number of students achieving them.[26]

Commentators have provided a roadmap for schools to use in identifying outcomes, although these methods assume 1L would look the same at the end of the process.[27]

2. Three Models for Learning Outcomes Adopted by Law Schools

Individual law schools adopt learning outcomes to meet their own interpretation of ABA Standard 301(a), which requires each school to "maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[28] Variation was inevitable. The vast majority of law school learning objectives, however, fit loosely within one of the three models described in this Subpart: the "302," the "descriptive," or the "comprehensive."[29] No model dominates, and many schools combine the approach of more than one of the three models.

a. The 302 Model

The first model, the 302, refers to the four competencies required under ABA Standard 302. Law schools that adopt the 302 model simply repeat these four items, usually with slightly amended wording or structure.

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[26] Bahls, *supra* note 22, at 381.

[27] *See* Niedwiecki, *supra* note 25, at 661, 665–67 (suggesting a three-step process for creating learning outcomes, assessment, and curricular mapping); Debra Moss Vollweiler, *Don't Panic! The Hitchhiker's Guide to Learning Outcomes: Eight Ways to Make Them More Than (Mostly) Harmless*, 44 U. Dayton L. Rev. 17 (2018) (emphasizing curricular mapping).

[28] ABA Standards, *supra* note 23, at 17 (Standard 301(a)). The Holloran Center at the University of St. Thomas Law School has helpfully collected all available learning outcomes, current as of November 2023. Holloran Center, *Learning Outcome Database*, St. Thomas Sch. of L., https://law.stthomas.edu/about/centers-institutes/holloran-center/learning-outcomes-database [https://perma.cc/8W9L-G53L] (last visited Jan. 5, 2025).

[29] A few schools do not have learning outcomes well-described by any of the three models, including a small number of schools with a particular focus, such as Loyola-New Orleans Law School (teaching the civil law of Louisiana), *Learning Outcomes*, Loy. Univ. New Orleans Coll. of L., https://law.loyno.edu/student-resources/learning-outcomes [https://perma.cc/X4XK-4A5L] (last visited Jan. 10, 2025), and University of St. Thomas-Minnesota (concentrating on professional identity formation), *Student Learning Outcomes: School of Law*, Univ. of St. Thomas, https://www.stthomas.edu/academics/accreditation/learning-outcomes/law/ [https://perma.cc/8Q7G-WHV8] (last visited Jan. 10, 2025).

These statements often are a paragraph long. Harvard Law School follows this model, for example, stating its learning objectives as:

> 1. Knowledge and understanding of substantive and procedural law, and the domestic, international, and transnational institutions that make and apply law; 2. Aptitude for legal analysis and legal reasoning; 3. Appreciation of and commitment to the values and responsibilities of members of the legal profession; 4. Proficiency in the use of professional skills including: research as to law and fact, communication, presentation, and problem solving.[30]

Schools with a 302 model make little effort to state specific obligations for student learning or provide performance criteria or an ascertainable plan for legal education.[31]

b. The Descriptive Model

The key characteristic of the second approach, the Descriptive model, is that learning outcomes are shaped to reflect the existing course load and teaching method. Schools with this model promise to meet the ABA requirements by identifying the 1L curriculum, often specifying the teaching of torts, contracts, property, criminal law and civil procedure as a key learning objective.

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[30] *Harvard Law School Handbook of Academic Policies 2024–2025*, Harv. Law Sch. 15, https://hls.harvard.edu/wp-content/uploads/2022/07/HLS_HAP.pdf [https://perma.cc/7KVR-EJRP] (last visited April 14, 2025). For an example of the longer version of the 302 Model, see *UHLC Mission*, Univ. of Hous. L. Ctr., https://www.law.uh.edu/about/Mission [https://perma.cc/5WY2-TP8H] (last visited Jan. 7, 2025) (stating learning objectives as: "1. Knowledge and understanding of substantive law 2. Knowledge and understanding of procedural law 3. Skill in legal analysis and reasoning 4. Skill in problem solving for situations presented in the practice of law 5. Skill in legal research 6. Skill in written legal communication 7. Skill in oral legal communication 8. Understanding of an attorney's professional and ethical responsibilities 9. Professional self-development.").

[31] Several schools that employ this barebones model add one or two bullet points or clauses generally stating other goals. Florida State University, University of California-Berkeley, and Rutgers simply list the requirements of Standards 302(a) through 302(c) per the 302 model, but then elaborate Standard 302(d) with a phrase listing practice skills drawn directly from ABA Standard Interpretation 302-1. *See, e.g.*, *Mission and Learning Outcomes*, Univ. Cal. Berkeley L., https://www.law.berkeley.edu/about-us/mission-learning-outcomes [https://perma.cc/F8EY-KJM7] (last visited Jan. 7, 2025) (Berkeley also states that its students will learn "[u]sing the law to solve real-world problems and to create a more just society."); *Learning Outcomes*, Fla. St. Univ. Coll. of L., https://law.fsu.edu/academics/academic-resources/learning-outcomes [https://perma.cc/UP8E-78NE] (last visited Jan. 7, 2025); *Student Learning Objectives and Competency Goals*, Rutgers L. Sch., https://law.rutgers.edu/academics/jd-program/curriculum/student-learning-objectives-and-competency-goals [https://perma.cc/F7BR-JPCB] (last visited Jan. 7, 2025). In a few cases, the additions to the ABA list of objectives in Standard 302 may be critical to the law school's program of instruction, but that is difficult to discern only from the learning objectives. For instance, George Mason simply adds that "[g]raduates will be able to apply basic economic concepts to enhance their understanding of the law and legal outcomes," and Loyola-Los Angeles states that "students will understand the law's relationship to systemic inequality based on race, gender, gender identity, sexual orientation, religion, national origin, disability, immigration status and/or socioeconomic status." *JD Curriculum*, Geo. Mason Antonin Scalia L. Sch., https://www.law.gmu.edu/academics/degrees/jd/#JD_Program_Learning_Outcomes_3 [https://perma.cc/54WG-A5AB] (last visited Jan. 7, 2025); J.D. Program Learning Outcomes, LLS, https://www.lls.edu/academics/officeoftheregistrar/jdprogramlearningoutcomes [https://perma.cc/V78J-WZ4A] (last visited Jan. 7, 2025).

These courses are commonly referred to as the "foundational common law subjects" (e.g., Idaho), or "core substantive law" (e.g., Duke), or the like.[32]

Descriptive model learning outcomes for Section 302(b) often include statements that learning will occur through use of the Langdellian case class.[33] The University of Massachusetts Law School provides an example of this part of the Descriptive model, identifying performance criteria that reflect a summary of what the case method is designed to achieve, including that "[g]raduates will analogize to and distinguish from the facts of relevant cases; [g]raduates will apply the pertinent rules and standards to the relevant facts; [g]raduates will assess the policy implications of the applicable rules and standards to the relevant facts; [g]raduates will identify and evaluate potential counterarguments."[34]

c. The Comprehensive Model

The Comprehensive model promises something different. These learning outcome statements are lengthy, sometimes several pages long, and they usually contain multiple goals with sub-objectives. The key characteristic of the Comprehensive model is that the law school promises to train students in a wide range of skills and knowledge. The Comprehensive model includes a commitment to at least two and often all three of the following learning outcomes:

(1) *Teaching a variety of sources of law*. For example, the University of Illinois Law School identifies five "performance criteria" for its goal that "[g]raduates will use legal reasoning and legal analysis effectively," including the skill of "[a]nalyzing and synthesizing principles, doctrines, and arguments from a diverse body of legal materials, including statutes, regulations, judicial opinions, and transactional documents."[35]

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[32] *Mission and Learning Outcomes*, Univ. of Idaho Coll. of L., https://www.uidaho.edu/law/about/mission-and-learning-outcomes [https://perma.cc/RT2E-YH8G] (last visited Jan. 7, 2025); *Duke Law School Mission and Learning Outcomes*, Duke L. Sch., https://law.duke.edu/sites/default/files/news/March%202019%20-_Approved_learning_outcomes.pdf [https://perma.cc/P3S8-2P5P] (last visited Jan. 7, 2025). The Descriptive Model often includes a mention of meeting the knowledge of law requirement in Standard 302 by learning in 1L required courses, upper-level required courses and electives; i.e., a description of the existing curriculum. *See, e.g.*, *Assessment: Ahead of the Curve*, Tex. Tech Sch. of L., https://www.depts.ttu.edu/opa/networkingandawards/ie_award/winnerapplications/2021-2022_IE_Application.pdf [https://perma.cc/WNL8-CY6M] (last visited Jan. 8, 2025) (stating that knowledge of law includes the following outcomes: "Criterion 1: Identify and describe key legal concepts and rules in the required curriculum. Criterion 2: Identify and describe key legal concepts and rules in the elective curriculum.").

[33] *See* Part II.B (explication of the Langdellian teaching method that has long dominated legal education).

[34] *Learning Outcomes*, UMass L., https://www.umassd.edu/law/about/learning-outcomes [https://perma.cc/ZLK5-Y5NJ] (last visited Jan. 7, 2025).

[35] *Mission & Learning Outcomes*, Ill. Coll. of L., https://law.illinois.edu/about/mission-learning-outcomes [https://perma.cc/G32F-JEFW](last visited Jan. 7, 2025). *See also Learning Outcomes*, Case W. Rsrv. Univ. Sch. of L., https://case.edu/law/our-school/aba-disclosures/learning-outcomes [https://perma.cc/W2Q3-W5ZD] (last visited Jan. 7, 2025).

(2) *The ability to recognize and manage factual uncertainty, and to complete fact investigations*. The fourth sub-objective of the twelve objectives in the first goal of the Loyola-Chicago Law School statement provides this example:

> Graduates should be able to plan, direct, and (where applicable) participate in factual investigations. a. They are able to determine when a factual investigation is needed. b. They are able to plan a factual investigation. c. They are able to implement an appropriate investigative strategy. d. They are able to memorialize and organize information gathered in an accessible form. e. They are able to evaluate the information that has been gathered.[36]

(3) *Fundamental legal practice skills, including the capacity for developing legal strategies and drafting legal documents to resolve client problems*. For example, Baylor law graduates should be able to "identify workable alternative legal and equitable, or if appropriate, extra-legal strategies, considerations, and solutions,"[37] while Case Western Reserve law students are to be trained in "[c]oncisely drafting contract provisions using a common vocabulary, avoiding ambiguity, and devising provisions and details that the parties had not specifically addressed but that are needed to protect the client," among a variety of other drafting skills.[38] Schools with the Comprehensive model usually include the teaching of key practice skills, such as interviewing and counseling clients, and negotiating with opposing parties.[39]

II. The Twin Pillars of the 1L Problem

The 1L year fails law students by what it teaches and how it teaches. Subpart A presents the case for changing what we teach in the first year. It compares the learning outcome models with the subjects actually taught in the first year. The 1L year, as portrayed in the broadly accurate Descriptive model, teaches courses that are disconnected from most of the actual knowledge employed by attorneys in any form of legal practice or lawmaking. The Comprehensive model, which lays out a legal education consistent with the vision here, exists alongside curricula that can't possibly deliver on that promise. The notion that the 1L curriculum need not consist of subjects central to learning outcomes is addressed in Part III.B.

Subpart B focuses on how we teach. It observes that appellate case reading—the Langdellian case class—is a useful education device, but

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[36] *Learning Outcomes and Competencies*, Loy. Univ. Chi. Sch. of L., https://www.luc.edu/law/about/abarequireddisclosures/learningoutcomesandcompetencies/ [https://perma.cc/4ZZ8-PQY2] (last visited Jan. 7, 2025) (emphasis omitted).

[37] *Learning Outcomes*, Baylor Univ. L. Sch., https://law.baylor.edu/why-baylor-law/about/learning-outcomes [https://perma.cc/C5YP-DJR5] (last visited Jan. 7, 2025).

[38] *Learning Outcomes*, Case W. Rsrv. Univ. Sch. of L., https://case.edu/law/our-school/aba-disclosures/learning-outcomes [https://perma.cc/PXK5-FQGV] (last visited Jan. 7, 2025).

[39] *E.g.*, *JD Program*, Pace Univ. Elisabeth Haub Sch. of L., https://www.pace.edu/law/academics/jd-program [https://perma.cc/KS9H-ZTYP] (last visited Jan. 7, 2025).

overreliance on this single method suffocates all the other knowledge that should be transmitted and results in an inefficient system of learning.

A. Law in 1L Versus Law in Practice

The Descriptive model is laudable for its honesty. It promises that the law school will teach what it teaches—the well-known 1L courses and upper level electives. Subpart 1 discusses the obvious challenge for this model, which is that law school as it now exists doesn't remotely reflect the reality of how law is used in courts, in transactional practice, in crafting legislation or regulation, in business or personal planning, or in any other professional pursuit involving law. Subpart 2 looks at the distorting effect of organizing 1L around selected doctrinal subjects rather than sources of law. Subpart 3 argues that law school reliance on legal writing and the alternative courses that have proliferated recently on the curricular periphery of 1L cannot accomplish the task of teaching law as it presents to judges, attorneys, legislators and others engaged in law.

1. The Unjustified Dominance of Common Law Courses

Over forty years ago, Guido Calabresi declared "we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes enacted by legislatures, have become the primary source of law."[40] Even when this was written in the 1980s, the notion that statutory law had displaced common law was hardly new. For instance, a 1955 study of New Jersey judicial decisions showed interpretation of legislation was three times more common than cases dealing wholly with common law.[41] Nothing in the passing decades has lessened this conclusion. As J. Lyn Entrikin puts it, "[f]or the legal academy to claim that the American legal system of today is a common law system is to perpetuate a legal fiction."[42]

Consider the practice sections of state bar associations. The list of topical sections reads like the headings of the U.S. Code or a collection of state statutes, with committees for taxation, administrative law, antitrust, intellectual property, family law, labor and employment, bankruptcy, consumer law, environmental law and more. [43] Almost every subject on the list is a field of legal practice with a controlling statutory regime, often with a strong regulatory

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[40] Guido Calabresi, A Common Law for the Age of Statutes 1 (1982). Calabresi adds in a footnote that "[a]ll agree that modern American law is dominated by statutes." *Id.* at 183 n.1.

[41] Dallas Sands, *Developments in the Field of Legislation*, 10 Rutgers L. Rev. 2, 14–15 (1955).

[42] J. Lyn Entrikin, *The Death of Common Law*, 42 Harv. J.L. & Pub. Pol'y 351, 361 (2019).

[43] *See, e.g.*, *Our Sections*, Cal. Laws. Ass'n, https://calawyers.org/cla/our-sections/ [https://perma.cc/UVW4-RXY8] (last visited Jan. 7, 2025) (listing practice sections in California); *Sections*, Minn. State Bar Ass'n, https://mnbars.org/?pg=sections [https://perma.cc/38HB-SALS] (last visited Jan. 7, 2025) (listing practice sections in Minnesota); *see also* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241, 242 (1992) ("statutory interpretation [is] . . . what a great many lawyers did for a good deal of their time.").

component. Even the ostensibly common law doctrine subjects that shape 1L exist alongside statutory schemes that govern conduct in the field.[44] This doesn't make common law doctrine irrelevant, but it makes it at best co-equal, depending on the specific field of law.

A curriculum dominated by common law doctrine doesn't even square with what law professors teach beyond the first year. The upper-level courses in which most law professors spend most of their teaching time include mostly courses structured around statutory schemes.[45] Not surprisingly, legal scholarship reflects these topical interests and examination of the legal issues that arise under these statutory schemes more than traditional common law doctrine concerns.[46] The claim in the Descriptive model that the subject matter of common law courses is the foundation of law in the United States, and thus should form the basis of key learning outcomes and the 1L curriculum, is hard to square with the reality that attorneys no longer are primarily common law practitioners, and law professors are no longer primarily common law theorists.

Remarkably, none of the Descriptive Model learning outcomes include a justification for the commitment to a particular set of common law courses that overwhelm the first year. Because the traditional common law courses have been in place for more than one hundred years, and the law clearly has massively shifted toward concerns of public law, it seems incumbent on the proponents of the Descriptive Model to provide a rationale for teaching a 19th century curriculum in the 21st century.

This reliance on tradition alone to defend the antiquated 1L curricula is pervasive in legal education. In 2025, the ABA Standards Committee proposed doubling the number of required experiential learning credits from six to twelve, yet excluding any experiential credits earned in the first year. The ABA gave short shrift to its explanation of this seemingly important

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[44] Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 Iowa L. Rev. 91, 135 (2015) ("Because the common law has been increasingly subsumed as a minor subset of the constitutional, administrative, and statutory rules governing land, modern property theory should focus on how those rules are shaped by the institutions and processes that govern legislatures, courts, and agencies."); *see* Gerald T. McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 Loy. L.A. L. Rev. 691 (1993) (explaining the evolution of the UCC into a national commercial code); Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 Iowa L. Rev. 957 (2014) (analyzing the relationship of tort law to statutory law).

[45] *See, e.g.*, ABA 2010, *supra* note 10, at 70 (describing upper level specializations that include international law, business law, tax law, environmental law, and other areas of law defined by statutory-regulatory schemes); *see also* Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 Vand. L. Rev. 609, 610 (2007) (observing that courses on more recent developments in the law "rarely have penetrated the sacrosanct first year.").

[46] Rubin, *supra* note 45, at 640–43 (arguing that public law concerns dominate legal research and that "legal scholarship has largely, if not fully, come to perceive social science as the most relevant analogy for law and the most productive source of methodological tools for its investigation."); Hills & Schleicher, *supra* note 44, at 135 ("The most promising work in property scholarship already has taken that turn, merging private- and public-law concepts to focus on how different institutions and processes from overlapping jurisdictions, public and private, govern land."); Gregory Scott Crespi, *The Influence of A Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. Rev. 9, 9–11 (2000) (noting the "significant increase in the number of scholarly articles published that examine basic principles of statutory interpretation" and concluding in an empirical study that these articles are more likely to be cited by courts).

restriction, invoking only the usual bromides that "the traditional first-year doctrinal courses and legal writing courses – lay the foundation for lawyering work."[47]

It doesn't bolster the argument for continuing to exclude intensive study of statutory and regulatory law that the Langdellian course alignment was used by its early Twentieth century proponents to ward off attempts to have law school teach the content of social reform movements of the Progressive era. James Barr Ames, Dean of Harvard Law School from 1895 to 1910, referred to common law doctrine courses as "pure law" in contrast to the "polluting presence" of public law concerns, and worked to exclude from law school study the social and intellectual reforms of the period.[48] That law schools produce young attorneys with an understanding of the law amenable to the work of law firms representing corporate interests can be seen as the likely result of teaching "foundational" common law courses that have a "tendency to favor the status quo and conservative interests."[49]

Nor is it obvious that the particular subject matters selected for inclusion in the 1L curriculum should be favored and labelled as "foundational." Surveys of the 1L curricula at law schools in 1919, 1925 and 1939 showed between 62 percent and 73 percent of law schools required a 1L course in agency law and the "average" 1L curriculum of 1950 included an agency course.[50] Knowing the basics of a breach of fiduciary claim against an agent likely would be more useful for most attorneys today than learning the intricacies of the Rule

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[47] Memorandum, American Bar Association Standards Committee 9 (May 14, 2025), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may25/25-may-experiential-learning-memo-notice-comment.pdf [https://perma.cc/96D4-ZPLU] (last visited August 8, 2025). The ABA later retreated and proposed allowing 1L experiential courses to count for three of the required 12 experiential learning credits. Memorandum, American Bar Association Standards Committee 3 (August 15, 2025) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2025/council-meeting/2025-august-experiential-learning-standards-notice-comment-memo-to-council.pdf [https://perma.cc/E87X-N8LM].

[48] Gordon, *supra* note 5, at 346–50 (2007). *Id.* at 347 ("Ironically then, just as Progressivism was beginning to provide careers and motivation for 'social' lawyers, and as an ancillary discipline in institutional economics was starting to give their work intellectual content, the law schools were seized by internal reform movements that sought to expel or exclude all of those ideas as irrelevant to the study of 'pure law.'"); *see also* Robert W. Gordon, *The Case for (and Against) Harvard,* 93 Mich. L. Rev. 1231, 1259 (1995) (observing that "the decision of Harvard and schools like it to remain in their bare cell of 'technical' appellate doctrine, while all around them leading lawyers were busily transforming law practice and legal institutions, was a decision to avoid teaching and writing about all the great issues of the time—labor-capital warfare, the administrative revolution in government, the regulation of common carriers and public utilities, the 'trust' problem, the doomed attempt at Reconstruction of the defeated South, the populist agrarian revolts, and the progressive institution-building and regulatory responses to industrialization, urbanization, and immigration.").

[49] Brian H. Bix, *George W. Liebmann, the Common Law Tradition: A Collective Portrait of Five Legal Scholars*, 48 Am. J. Legal Hist. 457, 458 (2006) (book review); *accord* J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law The Economic Structure of Tort Law*, 87 Colum. L. Rev. 1447, 1457–58 (1987) (describing in book review how common law generally supports property rights and is favored by those with a conservative ideology who view majoritarian legislation suspiciously); *see* Asad Rahim, *The Legitimacy Trap*, 104 B.U. L. Rev. 1, 29 (2024) (explaining how the Langdellian approach of common law study used Darwinism as an inspiration).

[50] Cox, *supra* note 4, at 2–3.

Against Perpetuities in a property course.[51] The same could be said for remedies, corporate governance, evidence and a range of other topics not in the 1L curricula.

2. The Organization of Learning by Doctrinal Subject

A second problem with the enshrinement of particular common law doctrine courses as foundational law is the organization of the curriculum by particular common law subjects. Even if we imagine that the first year of law school should primarily be devoted to the study of common law doctrine, organization by doctrine prioritizes selected doctrinal knowledge over an understanding of the common law process. Common law doctrine courses focused on doctrinal content teach only implicitly how common law functions. Judicial opinions enunciate the topic of the law for a given class, but the theory of when courts are (or should) be constrained in elaborating new doctrines, the limits of using judicial opinions to reshape statutory commands, the role of intermediate courts in common law development, or the like is rarely presented at a conceptual level. Similarly, law students leave the first year, and often law school, with no understanding of the distinction between a common law system based on the accrual of judge-made law and code-based civil law regimes that dominate global law in non-Anglophone nations.

Organizing courses by doctrinal subject teaches students to see their 1L mission as mastering the details of these doctrines. In courses segregated by subject, students learn (slowly) the elements of various claims and how they are applied, but typically do not learn how the law of torts, contracts, property and other common law developed similarly or differently, or how they relate to each other. For example, studying causation in torts and causation as a limiting principle for damages in contract law can illuminate how this concept is applied similarly and differently in various contexts.[52]

Goal-oriented law students will ascertain fairly quickly that grading on the almost inevitable issue-spotting exam in a doctrinal subject matter course

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[51] Interestingly, the T14 law schools (*the fourteen highest law schools in the U.S. News rankings*) show a unique propensity to shun a first year property course. Only eight of the fourteen T14 schools require property, or 57.1 percent, whereas 96.6 percent of all other schools require property in 1L. *Id.* at 11.

[52] Contract damages based on expectation of gain from the contract differ from loss compensation in torts, but a claim for breach of contract requires showing the alleged damages were caused by the breach just as a claim sounding in tort law requires showing proximate causation to damages, as generations of law students have learned for negligence claims by studying Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). Yet the causation doctrines differ in important ways and in subtle ways. "Courts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort." Restatement (Second) of Contracts § 352 cmt. a (Am. L. Inst. 1981). And, "the principle that a party's liability is not reduced by payments or other benefits received by the injured party from collateral sources is less compelling in the case of a breach of contract than in the case of a tort." Restatement (Second) of Contracts § 347 cmt. e (Am. L. Inst. 1981). Unlike tort law, nominal damages are awarded for a breach of contract even in the absence of damage causation. Restatement (Second) of Contracts § 346 (Am. L. Inst. 1981). Exploring the many similarities and differences in causation would reveal conceptual differences in the underlying doctrines in ways not readily apparent by studying common law in doctrinal silos.

follows from application of the elements of the substantive doctrine rather than from a broader understanding of how common law functions. A look through law school 1L preparation guides will remedy any confusion on this point.[53]

Law students first need to understand how common law does, and does not, shape the law that resolves disputes and controls society. Leslie Bender describes this problem as follows:

> Because the courses are named in ways that focus on categories of law, particularly categories of private civil law, those categories seem definitive, fixed, and crucial to any analysis. . . . The hidden messages of the first year curriculum about categories of organizing legal problems and doctrinal analysis probably limit our students' creative impulses more than anything else we do.[54]

Of course, all common law doctrine courses teach somewhat, and some common law doctrine courses teach substantially, how common law develops and the interrelationship of the various doctrines. Yet any such learning is necessarily haphazard, unless the school coordinates across courses, which is antithetical to the nature of law school education. Students may see two or three examples of the development of common law over time, or none; they may see two or three developed cross-course comparisons, or none.[55]

Note the contrast between common law doctrine courses separated into subject matters versus other 1L subjects organized by the skill or sources of law being taught. Legal writing is about the skills of legal research, reasoning and writing across all subjects.[56] Legislation and regulation ("leg-reg"), for the relatively few schools where this course is required in the first year, introduces students to the entirety of statutory and regulatory law in one course.[57] The clear message is that meaningful law is the designated common law subjects, plus perhaps these ancillary sources of law that may or may not be studied in the crucial first year.

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[53] For example, one of the best 1L guides, *Open Book*, describes how to succeed on the usual law school "issue-spotting" exam. The authors tell 1Ls that the key preparation item is a list of subjects studied in the course that the student then compares to the fact pattern, leading the student to ask: "Do these facts call for the application of this rule, or that principle, that was on my subject list?" They provide examples from a contracts class, such as issue spotting a contract formation issue that requires application of the elements of offer, acceptance and consideration. Barry Friedman & John Goldberg, Open Book: The Inside Track to Law School Success 111–12 (2016).

[54] Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 Clev. St. L. Rev. 387, 392 (1992).

[55] Ronald Chester & Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward A New Pedagogical Jurisprudence*, 25 U.C. Davis L. Rev. 21, 25 (1991) (describing the 1L common law courses as "based on the nineteenth century model, the courses are taught as doctrinally separate areas of study, each with its peculiar set of black letter rules and exceptions, to be memorized and spouted back at a superficial level on a high-pressure test at the end of the semester.").

[56] *See, e.g.*, Andrew McClurg, 1L of a Ride 59–60 (2017) (describing legal writing as a "different- and important-beast" from the doctrinal courses).

[57] Cox, *supra* note 4, at 7.

The focus on specific types of common law doctrine in 1L is a disservice regardless of one's view of the purpose of law school. While most actors with a stake in law school agree that it exists to prepare students for the practice of law, there has long been disdain among many law professors for practice education as a déclassé program to teach a trade.[58] The argument here sidesteps this debate and the related dispute about the relative balance legal education should strike between teaching law and teaching practice. Even if law school is meant primarily to study law conceptually, there is no reason to organize that study around a particular set of common law doctrines rather than how various sources of law are interpreted and used in our courts as a means of governing our society.

3. The Comprehensive Model and Curricular Reality

The Comprehensive model promises something much more than the traditional 1L course line-up. These schools emphasize the importance of understanding the interrelationship between these various sources of law. Law students should "be able to analyze, synthesize, and apply legal principles drawn from judicial, statutory, administrative, and other sources" (e.g., Connecticut); they should "understand the relationship between statutes, case law, and regulations in terms of the formation and development of rules" (e.g., Santa Clara); and they should be able to draft documents for administrative proceedings in addition to courts and transactional matters (e.g., Kentucky).[59] All the Comprehensive model law schools that use the phrase "common law" do so only in connection with all other forms of law, often including not just statutory law and constitutional law, but also administrative regulations and treatises.

The existence of the Comprehensive model bodes well for reform efforts. The problem, of course, is that the Comprehensive model has little in common with the actual 1L curricula of law schools, even those schools adopting the model. The 1L curricula includes five courses (contracts, torts, property, criminal law, and civil procedure) at a mean of 21.0 credits in our

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[58] A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1956–58 (2012) (describing the competing visions for the purpose of law school and aversion to skills training in legal education); Jason G. Dykstra, *Keeping Up with A Kardashian: Shedding Legal Educations' Vestigial Trade School Anxiety and Replacing the Dated Casebook Method with Modern Case-Based Learning*, 48 HOFSTRA L. Rev. 81, 119–25 (2019) (discussing the "vestigial trade school anxiety" in legal education); Carnegie Report, *supra* note 1, at 91–93 (discussing the "stigma of trade school"). For an excellent series of articles on the pernicious effect of the doctrine-skills and theory-practice dichotomies on legal education, *see* Linda Edwards, The Doctrine-Skills Divide: Legal Education's Self-inflicted Wound (2017).

[59] *Learning Outcomes*, UConn L., https://law.uconn.edu/academics/learning-outcomes [https://perma.cc/6PBH-8F6R] (last visited Jan. 7, 2025); *Learning Objectives*, Santa Clara Univ. Sch. of L., https://law.scu.edu/academics/laraw/laraw-learning-objectives/ [https://perma.cc/XZM4-5Q5S] (last visited Jan. 7, 2025); *Learning Outcomes - ABA Standard 302*, Univ. of Ky. Rosenberg Coll. of L., https://law.uky.edu/current-students/academic-resources/learning-outcomes-aba-standard-302 [https://perma.cc/B68H-UW7M] (last visited Jan. 7, 2025).

survey, or 70 percent of the typical 30 credits in the 1L year.[60] It is difficult to see where the above-stated learning in the rich and interrelated sources of law occurs here.

Leg-reg courses were non-existent in every 1L law school curricula survey through the 2010 ABA report.[61] The increase from no 1L leg-reg courses to 15 percent of schools requiring leg-reg in our survey is a welcome sign of interest for diversifying the sources of law taught in 1L.[62] When required, leg-reg is offered at a mean, median and mode of three credits, or about one-seventh of the twenty-one credits for the common law doctrinal courses that dominate the 1L curriculum. A three-credit course dealing with the whole of statutory and regulatory law stacked up against multiple subjects that usually have four to five credits each conveys a clear message about the relative importance of the sources of law employed in courts and governing our society. Constitutional law fares better than statutory law, but it lags way behind the standard curriculum courses in both uptake and credits.[63]

Consider an example of the contrast between the Comprehensive model of learning outcomes and an actual 1L curriculum. The University of Missouri Law School has established the following learning outcome as to "knowledge and understanding of substantive and procedural law…by: (a) [i]dentifying and applying foundational concepts in a variety of areas of legal practice; (b) [g]rasping the organization, hierarchy, and relationships of legal systems; [and] (c) [i]dentifying the sources of law, the ways they relate to one another, and how the law evolves."[64] The 1L curriculum at Missouri consists of 30 credits as follows: twenty-two credits in contracts, torts, property, criminal law and civil procedure; six credits of legal research-writing, and a two-credit introductory practice course.[65] Absent a wildly atypical approach to these doctrinal courses, this 1L curriculum does not reflect well the stated learning objectives as to sources of law.

The explosion of new 1L courses reaching beyond legal doctrine is a direct response to the challenge issued in the Carnegie Report and other studies to include study of fact development, practice skills and professional identity in legal education. These new courses constitute an important step forward for 1L reform. Yet they cannot deliver on the promise of the Comprehensive model for two reasons—scale and isolation.

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[60] Cox, *supra* note 4, at 5 ("Law schools with semester credits had a mean, median, and mode of thirty credits for the 1L year."); *Id.* at 5–6 (listing mean credits for the five courses).

[61] *Id.* at 18.

[62] Although, leg-reg is only slightly more popular at the thirty-six law schools with the clearest form of the Comprehensive model, with seven schools (19 percent) requiring a 1L leg-reg course. *Id.* (data in possession of author).

[63] Each of the standard doctrine courses are required in 1L by well over 90 percent of law schools. Constitutional law, however, is required in the first year by only 68 percent of law schools. When it is taught in 1L, constitutional law is offered at a mean of 3.6 credits. Among the 1L courses taught by a majority of law schools, only constitutional law and criminal law are allocated a mean of under four credits across all schools in our survey. *Id.* at 5–6.

[64] *Consumer Information (ABA Required Disclosures)*, Univ. of Mo. Sch. of L., https://law.missouri.edu/about/consumer-information-aba-required-disclosures/ ([https://perma.cc/4PPA-7FBZ] last visited Jan. 7, 2025).

[65] *JD in Law*, Univ. of Mo. Sch. of L., https://catalog.missouri.edu/schooloflaw/law/jd-law [https://perma.cc/M578-2PG5] (last visited Jan. 7, 2025).

As with 1L leg-reg courses, but more so, introductory non-doctrine courses are tiny nuggets in the 1L curriculum. Practice skills courses are offered by 11 percent of law schools at a mean of 2.4 credits. All other introductory courses are allotted a mean of 1.1 to 1.6 credits.[66] The impact on student learning will be limited by the credits allotted. Even when the introductory courses are combined with legal writing, they form exactly 20 percent of 1L curricula.[67] Comparing this credit allocation to the learning objectives of the Comprehensive model demonstrates that these courses are expected to lift a weight far greater than their credit allocation suggests possible.

This reality becomes apparent when looking at law schools with the Comprehensive model of learning outcomes that also have the most ambitious non-doctrinal 1L courses. Elon Law School, for example, has an extensive and thoughtful set of non-doctrine 1L courses. It identifies learning outcomes for each year, and it correlates those learning outcomes to learning in specific courses. Elon's 1L curriculum requires 27 (trimester) credits of doctrinal courses and 13 (trimester) credits for the following non-doctrine courses: a legal writing course that includes simulations (7 credits), an introductory law-legal analysis course (3 credits), an introductory professionalism course (2 credits) and "criminal lab" simulation practice course (1 credit).[68] Elon's 32.5 percent share for these non-doctrine course credits in the 1L curriculum is the highest of any law school in the nation.[69] The learning outcomes identified for the 1L curriculum at Elon are divided as follows: cognitive skills with five learning objectives, lawyering skills with eleven learning objectives, and context and values with four learning objectives.[70] As shown in the following table, Elon lists the non-doctrine courses as solely responsible for 75 percent of the learning objectives, including half of the "cognitive skill" learning objectives, despite constituting slightly less than one-third of the 1L course

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[66] Cox, *supra* note 4, at 7. Introductory preparatory courses are less relevant to the goals set forth in the Comprehensive model, but practice skills, professionalism, and legal methods are directly on-point.

[67] Legal writing and introductory course credits together are a mean of 19.9 percent and a median of 20.0 percent of total 1L credits. Based on data collected for the 1L Curricula study reported in Cox, *supra* note 4 (data in possession of author).

[68] *Curriculum for Students Entering in 2018 and Following*, Elon Law, https://www.elon.edu/u/law/academics/progression-of-learning/curriculum [https://perma.cc/FBY6-FWRT] (last visited Jan. 8, 2025). The doctrine courses are contracts, torts, property, criminal law, civil procedure and either BA/Corps or Evidence. The legal writing course includes a one-credit legal research course and six credits for "legal method and communication," which includes the standard legal writing functions putting students "in the role of law clerk, lawyer or judge" and presenting assignments "via a series of simulations during which students watch client interviews, provide research and objective advice to a supervisor, maintain client files and time sheets, prepare written and oral progress reports for a supervising attorney, write and orally argue motions on behalf of a client, write a brief to an appellate court and deliver a formal oral argument to a panel of judges." *Legal Method & Communication Program*, Elon Law, https://www.elon.edu/u/law/academics/programs-centers/legal-method-communication-program [https://perma.cc/Z3HF-AVTZ] (last visited Jan. 8, 2025).

[69] Based on data collected for the 1L Curricula study reported in Cox, *supra* note 4 (data in possession of author).

[70] *Learning Outcomes*, Elon Law, https://eloncdn.blob.core.windows.net/eu3/sites/996/2020/07/Elon-Law-Learning-Outcomes.pdf [https://perma.cc/W4TA-EGAQ] (last visited Jan. 8, 2025).

credits. By contrast, the doctrinal courses constituting over two-thirds of the 1L credits are solely responsible for just 15 percent of the learning objectives.

Table 3: Allocation of Learning Objectives by Course Type in Elon 1L Curriculum

	Doctrine Courses Teach Objective	**Non-Doctrine Courses Teach Objective**	**Both Types of Courses Teach Objective**
Cognitive Skills	2	2	1
Lawyering Skills	0	10	1
Context & Values	1	3	0
TOTAL	3 (15%)	15 (75%)	2 (10%)

A similar imbalance can be seen in other law schools with a Comprehensive model and higher-credit non-doctrine introductory courses.[71]

The other problem with relying on these one-off courses is that they are a curricular island, which creates isolation from the dominant curriculum. A. Benjamin Spencer explains the limitation of the add-on approach to 1L curricular reform as follows:

> [L]aw school, as it exists today, is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design. As a result, although many innovations characterize the modern approach to law school, these adjustments tend to be more superstructure than substitute, supplementing traditional law school education rather than supplanting it.[72]

Suzanne J. Schmitz and Alice M. Noble-Allgire describe how "skills development in the first year has been segregated into a stand-alone legal writing or lawyering skills course."[73] Sitting below the traditional curriculum marks

[71] The University of Minnesota Law School, for example, requires four credits of legal writing and three credits in a simulation-based course that provides "conceptual knowledge and professional skills needed to master the iterative process of discovering new facts, refining legal research objectives and managing the relationship with the client." The author was the co-creator of this 1L course. *Law in Practice*, Minn. L., https://law.umn.edu/academics/experiential-learning/law-practice#:~:text=Law%20in%20Practice%20(LiP)%20is,the%20actual%20practice%20of%20law [https://perma.cc/A8PF-AQLC] (last visited Jan. 8, 2025). Minnesota has adopted a Comprehensive model of learning objectives with five outcomes and twenty-three sub-outcomes. At best, the standard 1L curriculum directly addresses about six of the sub-outcomes, while legal writing and the introductory course fulfill the vast majority of the sub-outcomes. *Minnesota Law Learning Outcomes*, Minn. L., https://law.umn.edu/sites/law.umn.edu/files/2020/01/02/learning_outcomes_slides.pdf [https://perma.cc/KVU8-EXU3] (last visited Jan. 8, 2025); *see also* Carnegie Report, *supra* note 1, at 34–43 (describing the CUNY and NYU 1L simulation programs).

[72] Spencer, *supra* note 58, at 1960–61.

[73] Suzanne J. Schmitz & Alice M. Noble-Allgire, *Reinvigorating the 1l Curriculum: Sequenced "Writing Across the Curriculum" Assignments As the Foundation for Producing Practice-Ready Law Graduates*, 36 S. Ill. U. L.J. 287, 288 (2012).

these courses as "other," creating an initial barrier to student acceptance or prioritization.

B. An Excess of Excerpted Appellate Cases

The typical 1L class is familiar to those with even passing acquaintance with a U.S. law school. At its heart is the "case." Not just any case, but rather a particular type of judicial opinion read for a particular type of meaning. An appellate case; a case that is excerpted to present the exact issue of study for the day; and one that enunciates a discernible rule of law. This type of case reading as the core of 1L learning—as the core of legal education generally—is the legacy of the reclusive librarian and Dean of Harvard Law School in the 19th century, Christopher Columbus Langdell.[74] The Carnegie Report labelled this teaching method the "signature pedagogy" of law school.[75]

Langdell's case class method had two important purposes. First, Langdell believed that law consisted of scientific principles that could be discerned from carefully selected appellate cases.[76] Almost no law professor would subscribe to this view today. And yet, 1L students line up each year to pay hundreds of dollars to purchase books for almost every course filled with reprinted, excerpted appellate cases.[77] The reason is that the case class now reflects primarily a reliance on the second part of the Langdellian method—the case-dialogue process, better known as the Socratic method.[78] Well-executed, the case class offers an education in rigorous and careful analysis that helps law students understand one important way that the legal profession frames and resolves issues of law.[79]

Thoughtful critiques of the Langdellian case class abound, but the concern in this Subpart is more specific.[80] The case class crowds out other ways

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[74] Alfred Zantzinger Reed, Training for the Public Profession of the Law 354-88 (1921); Spencer, *supra* note 58, at 1973–80; *see* Rahim, *supra* note 49 (describing the development of the Langdellian method and its triumph as the model for U.S. legal education).

[75] Carnegie Report, *supra* note 1, at 50.

[76] Dennis Patterson, *Langdell's Legacy*, 90 Nw. U. L. Rev. 196, 196–97 (1995). Willian LaPiana provides the historical context on the innovations Langdell brought to legal education of the late 1800s, and offers a general defense of Langdell's innovations. Logic and Experience: The Origin of Modern Legal Education (New York, 1994).

[77] *See* Tim Wu, *How Professors Help Rip Off Students*, N.Y. Times (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/opinion/textbook-prices-college.html# [https://perma.cc/MLU7-WB26].

[78] Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" 141–73 (2009) (reporting on a study of seven law school classrooms and finding that six of the seven relied extensively on the Socratic method); McClurg, *supra* note 56, at 97 ("the Socratic style does indeed remain the dominant teaching methodology in U.S. law schools, at least in the first year.").

[79] *See generally* Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 Minn. L. Rev. 1 (2005).

[80] *See* Rahim, *supra* note 49; Mertz, *supra* note 78; Susan McMahon, *Teaching Legal Analysis*, 107 Minn. L. Rev. 2511 (2023); Sherri Lee Keene, *Teaching Dissents*, 107 Minn. L. Rev. 2619 (2023); Beth Hirschfelder Wilensky, *Dethroning Langdell*, 107 Minn. L. Rev. 2701 (2023); Rachel Gurvich et. al., *Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. Rev. F. 118 (2023); Spencer, *supra* note 58; Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. Legal Educ. 656 (2015); Kristen Holmquist,

that legal issues present and need to be understood. Repeating the same formula in each course as to each topic for an entire year (and beyond) produces diminishing returns, which makes it inefficient.[81] More than a few law school graduates have left the first week of a bar review course wondering why it took so long to cover the same material in law school.

An alternative is to drastically reduce case reading and substitute a direct explication of the law together with other forms of learning, such as participating in simulations, becoming more expert in legal research through open-ended research assignments, and actively producing evaluated written work product.[82] If the goal is to impart the ability to apply a particular legal doctrine to a set of given facts, laying out of the elements of claims and defenses, then asking students to work through problems applying these elements to fact patterns is a more efficient learning method. As laid out in Part IV, substantially reduced case reading loads and more engaged forms of learning can lead to a smaller number of classes. Fewer repetitive readings combined with other types of learning material means learning more in less time (i.e., more efficient learning).[83] Shifting the 1L workload also may help alleviate the stress of law students.[84]

The disconnect between the case class and the law school evaluation process aggravates the inefficiency. The typical 1L class identifies a topic of doctrinal learning, presents excerpted appellate opinions focusing on that topic and involves discussion of how the court used the facts it states as relevant to derive the holding on the identified topic. The typical law school exam requires a completely different set of reasoning. The student is presented with an undifferentiated set of facts and asked to "issue spot" from the topics studied

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Challenging Carnegie, 61 J. Legal Educ. 353 (2012); Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 Harv. L. Rev. 2320 (2017); Bender, *supra* note 54; Carnegie Report, *supra* note 1, at 100–24; Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L. Rev. 1547 (1993); Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517, 518 (1991).

[81] Best Practices, *supra* note 1, at 97–104 (2007) (describing over-reliance on the case class in the first year and the many alternative learning methods).

[82] *See, e.g.*, Carnegie Report, *supra* note 1, at 104–05 (describing student experience of learning more effectively through work product that is reviewed); Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. Legal Educ. 139 (2017) (demonstrating the positive impact of periodic graded feedback).

[83] *See* Part IV.B.

[84] Law students suffer sharp increases in anxiety, depression, and other forms of psychological distress during the first year. Kennon M. Sehldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation*, 22 Behav. Scis. & L. 261, 262 (2004) (summarizing prior studies of law students' psychological health); *id.* at 271 (reporting on a survey at two schools finding "law students appeared quite happy and healthy at the beginning of their career . . . and that any later distress among the law students is not an effect of pre-existing distress or problematic personality traits."); *id*. at 280 (summarizing findings that reported subjective well-being of law students drops substantially during the first year); *see also* David Jaffe, Katherine M. Bender & Jerome Organ, *"It Is Okay to Not Be Okay": The 2021 Survey of Law Student Well-Being*, 60 U. Louisville L. Rev. 439 (2022) (describing and reporting surveys of law student mental health). One of the primary contributors to law student stress is the overwhelming reading load. *Id*. at 445–47 (2022) (describing a study that found law school workload a primary contributor to student mental health distress); *see also* Edward Rubin, *Curricular Stress*, 60 J. Legal Educ. 110 (2010) ("[T]he psychological damage that law school inflicts on some of its students, and the excessive stress that it imposes on nearly all of them, is partially the product of its outdated curriculum and pedagogic strategy.").

in the course. While issue-spotting is directly analogous to an important skill exercised by practicing attorneys, it has little in common with the case class based on an announced topic for the day. Instead, students learn how to issue-spot when they are graded. One of the most unfair aspects of law school evaluation is that students less attuned to the informal networks of success are more likely to encounter issue-spotting for the first time when they open a law school exam.[85]

Just to underscore the key point for this Subpart, 1L students unquestionably should learn to read appellate cases, identify issues and be able to articulate how the court applies a rule of law to reason its way to an outcome. Students should read the seminal decisions known to all attorneys and law students that provide a common understanding of the development of the common law and constitute a liberal education in the law, such as *Palsgraf* in torts or *Hawkins* in contracts.[86] And the Socratic case-dialogue class should continue in some form and quantity. Yet just not nearly as much. The following Part III explores why the overuse of the case class and the emphasis on common law doctrine—this monocultural of 1L learning—results in a misdirected legal education.

III. Unlearning 1L

The guardian of traditional 1L likely would dismiss all this criticism because it misses the essence of 1L. The magic of the common law case class is not the content being taught; it is that 1Ls are learning to "think like a lawyer."[87]

This Part makes the argument that the monoculture of 1L—the repetitive and narrow nature of learning—instills habits of thought that impede understanding of law. Neither judges, nor litigators, nor transactional attorneys, nor anyone else with a law degree thinks in ways that can be absorbed by

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[85] The Carnegie Report offers a perceptive explanation of the deficiencies in the current law school system of evaluation. Carnegie Report, *supra* note 1, at 162–84*; see also* Schwarcz & Farganis, *supra* note 81, at 143 (reporting on an empirical study showing "individualized feedback in a single first-year doctrinal class can improve the quality of students' exams in all other traditional law school classes during the first year of law school," with a "stronger effect on below-median students") (emphasis in original omitted); Joan M. Rocklin, *Exam-Writing Instruction in A Classroom Near You: Why It Should Be Done and How to Do It*, 22 Legal Writing: J. Legal Writing Inst. 189, 190 (2018) (explaining thoughtfully "why law professors should teach exam-writing skills in the doctrinal classroom."); William M. Sullivan, *Align Preparation and Assessment with Practice A New Direction for the Bar Examination*, 85 N.Y. St. B.J. 41, 41 (2013) (describing assessment in the innovative upper level Daniel Webster Scholar Honors (DWS) Program at University of New Hampshire Law School); Tully, *supra* note 2, at 859 ("Law professors, particularly in the first year, continue to assess students using methods that are backed by little-to-no evidence that they successfully prepare students to practice law competently."); Rogelio Lasso, *A Blueprint for Using Assessments to Achieve Learning Outcomes and Improve Students' Learning*, 12 Elon L. Rev. 1 (2020); Jennifer E. Spreng, *Suppose the Class Began the Day the Case Walked in the Door: Accepting Standard 314's Invitation to Imagine A More Powerful, Professionally Authentic First-Year Learning Experience*, 95 U. Det. Mercy L. Rev. 421 (2018).

[86] Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929).

[87] *See, e.g.*, Bahls, *supra* note 22, at 382 ("Traditional legal curriculum, which helps students think like lawyers, should remain at the center of most law schools.").

mostly reading excerpted appellate cases to discern a rule of law. The problem is not just the absence of teaching about how law actually functions, but that students need to discard assumptions formed in 1L to apply law; they have to "unlearn" 1L.

A lengthy Subpart A makes this point by describing five types of learning in 1L that create this misdirection. Subpart B takes a critical look at the option of leaving 1L alone and reforming the upper level curriculum to correct for these deficiencies in the curriculum.

A. Misdirection in 1L Learning

Below are six ways that students who complete 1L misunderstand the task before them in attempting to apply law to solve real world problems. The common denominator in these situations, and countless permutations thereof and additional items, is that the dominant learning method of 1L chafes against, and serves as a barrier to acquiring, the habits of thought needed to resolve problems with a legal dimension.

1. The starting point: seeing legal certainty and uncertainty

One of the most fundamental, and important, legal skills is to apply known or presumptively true facts to the elements of a possible claim or defense. Matching facts to the required elements allows for identification of certain outcomes (e.g., we don't need to worry about meeting the scope requirements of this statute) from uncertainty (e.g., the plaintiff will have a hard time proving causation). Once uncertain issues are spotted, fact development and legal research can be brought to bear to wrestle the uncertainty into a litigation strategy, client advice in transactional matters, the proper language to construct in a statute or regulation and other applications of law. In litigation, for instance, this process can present as a proof plan. Something like: identify the elements of the claim, match the fact record gathered to date to the elements to identify the proof in hand to prove a claim or defense and identify the legal research and fact development plans for uncertain issues.

The Langdellian case class also involves matching facts to law, but the focus of this learning is on the particular legal issue identified as the subject matter for the day. The case is typically excerpted to focus on that issue. 1L students read these appellate cases, and manipulate the case holding based on hypotheticals, to learn how the law can be stretched and made uncertain by taking it past some logical limit. Students often are led to debate whether the court reached the "right" result. A case class is an excellent tool to achieve a narrow learning goal of teaching how legal reasoning tools can be focused on an application of law to a specific, isolated issue.

Real world problems calling for the application of law almost never so present. Even if the facts are fully collected and the client goals are fully understood (an assumption rarely true in the wild), the attorney starts by searching for issues. The attorney asks questions like: what law can help address the

client's problem?; what elements of that law appear fulfilled by the known facts?; or is there uncertainty about the meaning of the law as applied in this situation? Common to all these questions and related tasks is distinguishing certainty from uncertainty, and using the distinction to build research plans or decide if such plans are worth the cost.

The contrast here—between the narrow focus of the Langdellian case class and identifying certain versus uncertain legal outcomes on a blank piece of paper—is not a difference between useful versus unhelpful learning. Both tasks have their place in advancing understanding of the application of law. The problem, again, is monoculture. 1L students are learning that what happens in the Langdellian case class is the essence of law, what the Descriptive learning outcome models call the core or foundational knowledge of law. That the case class method repeats over and over drives the point home.

Unsurprisingly, then, students usually search for the kind of problems that present in a 1L class when they are confronted with actual legal problem-solving. Law students have sharpened their skill at case analogic legal reasoning, and thus gravitate to turning client problems into this narrow form of case law application. It is like spending months learning to conjugate verbs in Latin and then being handed a novel written in a Romance language, say, Spanish. The verb conjugation practice has value. But it won't do much good if the goal is to understand the novel, even just reading for basics of the plot. And it will be a net negative if you spend a lot of time looking through the book to find cognates you can identify because you believe this is the essence of the language.

2. Closely reading statutory and regulatory language

Upper level courses add content in specific fields of law that lean heavily toward statutory and regulatory concerns, such as tax law, bankruptcy, securities regulation, etc. Even more so than with 1L courses, the purpose of the upper level course is to teach the subject matter, not general principles of how statutes are interpreted, applied and interact with common law. This means students are unlikely to know essential introductory skills for how to comprehend a statutory scheme even when enrolled in a class dealing with statutory law.

To return to the above proof plan example, if students are not taught to closely read statutes, discerning required elements of proof for a statutory claim or defense is not a familiar skill. If you are not comfortable with this starting point for developing a proof plan, you won't be comfortable building the facts and conducting the legal research that will point out the strength or weakness of your client's position.

Otto Hetzel neatly sums up this problem as follows:

> By the second year, students have developed habits regarding research that impel them to go first if not exclusively to court decisions regarding a statute; many will simply never read the statute directly unless no decision appears in the annotations, relying instead on

> a court's description of the statute. Thus, it often is necessary to emphasize to students that they read the statute first, try to ascertain its meaning, and then look at the cases. This predilection for relying on case law is reflected in the woeful look and confusion that occurs when students are forced to interpret a statute without the guidance of a court's analysis.[88]

Students of my colleague Jean Sanderson presented her a mug imprinted with "did you read the statute?" because she uttered the phrase so often in her clinic supervision.

3. Beyond given facts

Law students learn from the case class not to jump to legal conclusions. And they also learn through hypotheticals that a legal result can change with seemingly small alterations in the given facts. Law students are not taught the same as to developing relevant facts or case strategies. While facts are manipulated in class hypotheticals for the purpose of illuminating the law, practice happens in reverse. The attorney typically begins the case by gathering facts. The job is to collect facts or imagine possible fact development to determine the likely validity of a possible claim or defense.

Because the concept of fact investigation usually is foreign to 1L, the best outcome is that these classes are a non-sequitur—that students know or assume nothing, and learn after the 1L year how to engage in fact investigation. Yet 1L can be a barrier to learning here, too. Students sometimes assume the facts presented to them at the outset of the case are true. They do not inquire about how to verify facts given at the outset or how to gather more. Why would they when facts laid in the appellate opinion are presumed true?

This leads students to assume a fact is true because it is asserted as true by the client or on some summary document given to them, and they launch into a detailed legal analysis that may (in most cases, likely will) look totally different after a bit more factual inquiry. Or they miss opportunities to ask the key questions, find the key documents or carefully examine the key evidence because of a habit of assuming facts are as given. Similarly, there is usually little or no time allotted in the case class to probing the strategic development of facts.

Consider an example case known to many 1L students, *Beeck v. Aquaslide 'n' Dive Corporation*, which is often read in civil procedure courses.[89] The opinion presents straightforward facts. Jerry Beeck "was severely injured" on a

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[88] Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. Pitt. L. Rev. 663, 688 n.78 (1987).

[89] Beeck v. Aquaslide 'n' Dive Corporation, 562 F.2d 537 (8th Cir. 1977). One reason this opinion is widely included in civil procedure casebooks is that pleading amendment is a matter within the discretion of the trial court and reviewable only after a final judgment, and thus there are not that many appellate cases on the topic. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 666 (1994). Casebooks generally are averse to using trial court opinions, even on matters like application of the Federal Rules of Civil Procedure for which trial court discretion is paramount.

water slide at a company picnic.[90] The defendant, Aquaslide, admitted manufacture of the slide in its answer, but then the President of the company visited the waterslide in question before his deposition and determined it was a counterfeit not manufactured by Aquaslide. By this point, the limitations period had run and thus the personal injury claims by Beeck and his wife against possible defendants were time-barred.[91]

The legal issue in the case was whether the trial court abused its discretion by granting Aquaslide the right to deny that it manufactured the slide by amending its answer under F.R.C.P. 15(a), which provides that pleading amendment shall be "freely given" when "justice so requires." The Eighth Circuit noted the typical factors used by trial courts in this situation—weighing bad faith or dilatory conduct by the party seeking amendment against possible prejudice to the party opposing amendment. The appellate court found that the trial court did not abuse its discretion in allowing amendment because the company relied on statements by multiple insurance adjusters that it was an Aquaslide product and there was no evidence of bad faith by Aquaslide.[92] The Eight Circuit also upheld the trial court's decision to try the question of whether Aquaslide manufactured the slide first, and then try separately the remainder of the case if the Beecks prevailed in the first trial. The first trial resulted in a verdict for the company, which ended the lawsuit. That's that; tough luck for the Beecks; and 1Ls learn how Rule 15(a) should be applied.

Except, the Beecks prevailed. While the Eight Circuit appeal was pending, the Beecks filed a complaint in Iowa state court grounded in fraud and misrepresentation because of Aquaslide's false admission in its federal court answer.[93] The Beecks presented evidence that Aquaslide dominated the manufacture of waterslides and was besieged with counterfeits being sold as its products. Aquaslide President Carl Meyer, who discovered in a pre-deposition inspection in the federal court case that the slide was not made by the company, had "ordered that in each (injury) in which an Aquaslide was said to be involved, photographs from particular angles were to be taken and sent to him," and that Meyer would determine whether it was an Aquaslide product, which he was uniquely qualified to do. As to the Beeck's injury, however, "[i]nstead of following his own procedures or taking reliable substitute steps," Meyer allowed Aquaslide to admit in its answer that it manufactured the slide. The Iowa Supreme Court upheld a jury verdict for the Beecks based on the reckless disregard for truth in this pleading admission. Jerry Beeck, who had fractured his neck on the waterslide and become a quadriplegic (the vaguely described injury of the Eighth Circuit opinion), and his wife recovered over $3 million in 1980s dollars.[94]

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[90] *Aquaslide*, 562 F.2d at 538.

[91] *Id.* at 539.

[92] The Eighth Circuit also affirmed the trial court's holding that the Beecks claim of prejudice from the expiration of the limitations period did not support denying amendment because the prejudice was speculative and the Beecks retained the right to sue people other than Aquaslide. *Id.* at 541 n.7. The fact that culpable defendants other than Aquaslide would likely be fraud purveyors and judgment-proof was not mentioned by the courts.

[93] Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984).

[94] *Id.* at 163–64.

1L students study *Aquaslide*, like other appellate cases, to discern the "rule of law" enunciated in the opinion. For the federal *Aquaslide* case, it is something like the following: when a party conducts a reasonable investigation, such as here relying on multiple insurance adjusters, Rule 15(a) allows amendment absent a showing of counter-balancing prejudice. The key lesson from the entirety of the *Aquaslide* litigation, however, is different. It is about how to build a persuasive fact record on the issue of the purported reasonableness of the reliance on the statements by the adjusters. The starting point is to recognize factual uncertainty; to ask, is reliance on the adjusters' reports the whole story? It also is about strategic concerns like: how fact investigation and conduct of litigation will vary based on the amount of money at stake, the importance of contingency fees and jurisdictional arbitrage arising from the difference in perspective between these particular federal and state courts.

The disparity between the well-known federal court *Aquaslide* opinion and the obscure state court *Aquaslide* opinion would have been no surprise to the legal realists. Jerome Frank wrote in 1933 that "[s]tudents trained under the Langdell system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else."[95] Edward Levi, Dean of the University of Chicago Law School, offered a similar view in 1951: "It is to the credit of the law schools that they emphasize both fact and theory; it is too bad that frequently they do not know what the facts are. It is for this reason that it can be said that to some extent the law schools are out of touch with reality."[96] Decades have passed since Frank and Levi made these observations, yet the role of factual uncertainty, fact development and case strategy make little appearance in 1L. Modern law school critics have added further insight on this point.[97]

The core problem of the case class in this regard is that the facts picked out by the appellate court for presentation in its opinion typically are a selection of the facts that fit neatly with the result reached by the court. They likely are not the facts identified, sorted and sequenced by the attorneys litigating the case, and may not even be very similar to how the trial court shaped the fact record. As Levi put it, "facts thrown away, the lines of inquiry not pursued, are as much a test of the lawyers' skill as any court presentation."[98]

As with the suggestion in this Article to move from teaching centered on common law to teaching statutory and other sources of law, the argument here

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[95] Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, 910–13 (1933). Frank also wrote that in the practice of law, "[t]he major 'guesswork' relates to the facts, not to legal rules." Jerome Frank, *A Disturbing Look at the Law Schools*, 2 J. Legal Educ. 189, 191 (1949). Frank was a frequent and harsh critic of the removal of law school from the realities that shape judicial outcomes. Most legal realists other than Frank held similar views on legal education. *See generally* Rahim, *supra* note 49; Laura Kalman, Legal Realism at Yale 1927-60 (1986).

[96] Edward H. Levi, *What Can the Law Schools Do?*, 18 U. Chi. L. Rev. 746, 749 (1951).

[97] *See, e.g.*, Bender, *supra* note 54, at 392–93 ("the devotion to appellate cases underscores the traditional curriculum's hidden messages, about the near irrelevance of attention to specific facts, contexts, and the people involved, by stressing the search for abstract rules of law and governing principles."); Gordon, *supra* note 48, at 1238–40 (describing the "long search for the 'facts' that will predict legal results in the positivist tradition is a fascinating sort of striptease, in which one veil of illusion after another is ripped off to reveal, in the end, only more veils.").

[98] Levi, *supra* note 96, at 750.

is not simply that we should teach students about fact development because it is needed for legal practice. It is that we can do a much better job of teaching students to understand how law is used by teaching about fact uncertainty and development. A commentator who expressly rejects the Carnegie conclusion about the success of the law school case class in teaching students to think like a lawyer, Kristen Holmquist, describes a meeting of "lawyers, judges and mediators who had come together to serve as the UC Berkeley School of Law Professional Skills Advisory Board." Consistent with the argument here, the participants in the meeting did not emphasize the doctrine-practice divide in discussing legal education, but rather lamented how new lawyers think about legal problems.[99] Holmquist summarizes this deficiency as "an over-reliance on neatly edited cases to the exclusion of working with messy, human facts, in ways that real lawyers might . . . obscures the inter-dependence of knowing and doing that is at the heart of thinking like a lawyer."[100]

4. Finding and using case law

Most fair observers would concede that 1L courses do not make a serious effort to engage with fact gathering and uncertainty, but learning case law is where the defender of traditional 1L will take a stand. Law school isn't meant to teach about the messiness of practice; it isn't "fact school." This Subpart examines why the study of pre-packaged, excerpted and presumptively binding appellate opinions make for a woefully inadequate introduction to how case law is found and used by attorneys and judges. Carrying the case class archetype into legal research is another form of misdirection.

First, the value of the case class for learning how to use case law is substantially diminished by the narrowness of the case law studied in the first year. 1L casebooks typically present cases that are excerpts from appellate decisions that are presumptively controlling law on a specific topic that is identified as the matter of study for a particular class. The difficulty with this form of case law learning is that it has not much in common with how most legal research of case law appears in practice.

The problems that result from the absence of statutory law in 1L reappears in thinking about how the case class misdirects student understanding of legal research. Students see how courts use their common law authority to enunciate law for the jurisdiction, but few students learn how case law has a different role and rhythm when the legal issue involves a matter of statutory or regulatory interpretation in which the court's role (usually) is more circumscribed. Even when the course involves statutes or regulations, such as studying procedural rules or the Uniform Commercial Code, the focus tends

[99] Holmquist, *supra* note 80, at 353–54.

[100] *Id.* at 357. In one of the most insightful critiques of the case class learning method, Holmquist also examines how the case class is at odds with theories of effective learning. *Id.* at 362–67; *see also* Edwards, *supra* note 58, at 36 ("[D]espite the dominance of legal realism for more than half a century now, the pedagogy of formalism remains the signature pedagogy of legal education."); Keene, *supra* note 80 (arguing that reading only appellate opinions creates a false sense of certainty about the application of law to the dispute).

to be on the doctrinal problem rather than how case law is being used in this context.

More generally, case law research conducted to resolve real-life problems likely will produce persuasive rather than controlling authority, including an undifferentiated mix of appellate and district court cases and of published and unpublished opinions. The typical case class, as purposefully designed by Langdell, involves carefully selected appellate decisions presumed to be controlling authority for purposes of the discussion.[101] What to make then of a district court case, an appellate decision from another federal circuit, or an opinion on federal law from a state court in a case venued in federal court (or vice versa)? An uncertain legal issue that requires legal research is much more likely to present one of these scenarios than an appellate decision in the same jurisdiction on a nearly identical set of facts; i.e., the type of controlling authority that students expect to find based on a year of 1L case law reading.

Similarly, learning to read through a case with multiple procedural and substantive issues to isolate the matter of concern is a key legal research skill removed from the case class experience.

Legal research to resolve real world problems does not result in cases that edit out the "extraneous" material unrelated to the specific topic of interest. Searching for the "rule of law" in appellate case law often sends students down the wrong path when confronted with a real situation. There might be a case venued in state court with vaguely similar facts to a mid-level appellate court decision in that state, but for which the context raises substantial questions about how courts might apply that precedent. For instance, the appellate decision may be about a private right of action brought by a wealthy professional against a small electrical company while the case at hand is a matter of public enforcement in which the possible defendant has defrauded thousands of consumers.

The disconnect between the static appellate case world and the demands of legal practice can be frustrating. Young lawyers repeatedly trained to search for the rule of law in an appellate case as the key to being an attorney can be bewildered by the shift to legal uncertainty, to the task of combining cross-cutting law and uncertain facts to guide legal research and fact investigation.

5. Creating narrative

Most law students quickly learn how to sound dispassionate. Asked to present a case in class, a student will learn to start with something like: "The plaintiff was injured and seeks damages under product liability law. The defendant argues that the plaintiff cannot show causation because the injury was caused by intervening factors." Law school class usually does not ask the student to describe the case in a way that frames the dispute simply and which evokes an empathetic response.

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[101] Frank, *supra* note 95, at 910–13 (1933) (describing the limits of the Langdellian reliance on purportedly controlling holdings in appellate cases as "hopelessly oversimplified.").

Judges and attorneys know better. For example, in *J. McIntyre Mach., Ltd. v. Nicastro*, a well-known U.S. Supreme Court opinion concerning personal jurisdiction, Justice Kennedy writing for the Court majority introduces the case as follows:

> This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there.[102]

The dissent by Justice Ginsburg presents a much lengthier and evocative factual description, including the plaintiff's injury: "On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand."[103] The dissent presents a very different narrative about the issue before the Court:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?[104]

The competing narratives here are more than just difference in style. Narrative drives fact development and legal research by identifying what matters in legal decision-making. The facts deemed relevant, and the facts driving the decision on the legal issue, usually can be gauged by the narrative created by the parties or the court. As Caroline Grose and Margaret Johnson explain in skillfully breaking down the creation of narrative in legal matters, "story and narrative are how people communicate with themselves and each other."[105]

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[102] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011).
[103] *Id.* at 894.
[104] *Id.* at 893.
[105] Carolyn Grose & Margaret E. Johnson, Lawyers, Clients and Narrative: A Framework for Law Students and Practitioners 6 (2017); *see also* Jerome Bruner, *The Narrative Construction of Reality*, 18 Critical Inquiry 1, 11 (1991) (a ten-step analysis of story-telling); Anthony Amsterdam & Jerome Bruner, Minding the Law 113–14 (2000) (a five step "austere" definition of narrative). For a summary of various perspectives on story-telling and law, see Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2104–07 (1989).

The case class that focuses on discerning a rule of law through the modern version of Langdellian legal reasoning typically devotes little or no time to helping students construct competing narratives or see how these narratives shape the dispute.

B. Law School Change Depends on 1L Change

The major studies of law school curricula and pedagogy are sharply critical of the education offered, but they pull a punch when it comes to 1L. As noted above, the otherwise superb Carnegie Report concludes that 1L is a major achievement.[106] The Best Practices report encourages less use of Socratic teaching and better assessment in the first year, but also does not suggest any changes to the traditional course list and agrees that the first year should be devoted to learning how to think like a lawyer, conventionally defined.[107] Law school reforms since the publication of these reports have not touched the core of 1L, as described in Part I.[108]

Psychologists use the term "anchor" to explain the power of an initial offer or framing in the outcome of negotiations.[109] 1L is the anchor offer of law school. The Descriptive model presents the existing 1L courses and pedagogy as "foundational."[110] Law students absorb this message.[111] The University of South Carolina Law School, for example, tells its students that the familiar 1L courses "provide the foundation on which most second and third year work is based."[112] As Randal Picker of University of Chicago Law School puts it: "[T]he 1L year is the one that law students remember forever."[113] Law school reform faces a very steep climb when it cedes a 1L year that dominates the student experience and imagination.

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[106] Sullivan, *supra* note 3.

[107] Best Practices, *supra* note 1, at 156–57 (describing the first year as primarily aimed at learning to think like a lawyer, defined as "including the grounding of analysis in facts, the comprehensive spotting of relevant issues and concerns, the search for governing rules, principles, or standards by which to make decisions, the weighing of competing policy considerations in light of their consequences, the value placed on consistency and deference to past decisions, the utility of reasoning by analogy, the importance of reasoned justification . . . .").

[108] For commentators who have focused specifically on 1L reform, *see* Bender, *supra* note 54; Rubin, *supra* note 45; Chester & Alumbaugh, *supra* note 55.

[109] *See* Katie Shonk, *What is Anchoring in Negotiation?*, Harv. L. Sch.: Program on Negot. (Dec. 31, 2024), https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-anchoring-in-negotiation/ [https://perma.cc/6KYK-BGJH].

[110] *Supra* note 32.

[111] Bender, *supra* note 54, at 391 ("By the organization of the curriculum, we tell them that these values (or their absence) animate doctrine and process, rather than the reverse."); Jennifer M. Fernandez, *The Time Is Now: ABA Standard 303(c) As the Impetus for A Truly Inclusive 1l Classroom*, 73 Wash. U. J.L. & Pol'y 78, 80 (2024) ("The 1L year sets the tone for the trajectory of students' legal careers.").

[112] *Section III - Degree Requirements*, Univ. of S.C. L. Sch., https://sc.edu/study/colleges_schools/law/internal/current_students/handbook/section_003.php [https://perma.cc/NL52-UPT9] (last visited Jan. 8, 2025).

[113] Randal C. Picker, *Revised First-Year Curriculum Allows for New Courses and Smaller Classes*, Univ. Chi. L. Sch. (Oct, 13, 2020), https://www.law.uchicago.edu/news/revised-first-year-curriculum-allows-new-courses-and-smaller-classes [https://perma.cc/E47F-D6UH].

The first year dominates in a more technical sense, too. 1L is the last chance at most schools to set a floor of common knowledge. Most law schools have a few required upper-level courses, but the general rule is that courses after 1L are ad hoc selections by each student.[114] Unless a law school has a 1L leg-reg course, or the law school requires this course in the upper level, students may or may not encounter the basics of statutory interpretation in law school, the interplay between common law and statutes, the structure of the administrative state, the use of and limits on regulations as law and many other concepts that are key to most areas of legal practice.

The first year also consumes much more than one-third of student bandwidth in the law school building and coursework.[115] Students spend a substantial amount of time in the latter two years outside of the law school classroom. Participation in law clinics and externships, working on legal journals and moot court and credit for independent research projects necessarily means less time studying in a classroom.[116] A change in 2016 to an interpretation of ABA Standard 305 allows students to be paid while earning course credits, which gives students even more incentive to spend time working at law offices.[117] Of course, leaving the law school building to engage with practicing attorneys should be strongly encouraged. It just means that upper-level law school courses are now even less likely to resolve learning gaps left by the current 1L curricula of law schools.

The deficiencies of 1L can deepen the learning problem for the substantial percentage of students demoralized by the law school business model that sorts 1L students by grades. Many important job applications, including summer jobs after the 2L year and prestigious clerkships and fellowships, are based on 1L grades. For law students in the bottom percentage by grade average (the number varies by law school), 1L grading can shape—at least initially—career opportunities.[118]

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[114] *See* ABA 2010, *supra* note 10, at 67 (reporting half—81 of 162 law schools—require constitutional law and the same number require evidence in the upper level, but no other upper level course is required at more than 46 of the 162 schools).

[115] As a starting point, 1L eats up more than one-third of the credits needed to graduate. ABA Standard 311(a) requires 83 credits to graduate, although across all law schools the median number of credits required to graduate has long been 88. ABA 2010, *supra* note 10, at 26. The current median and mean 1L course load is thirty credits, Cox, *supra* note 4, at 5, which means 1L consumes slightly more than one-third of the total required course credits.

[116] *See* ABA 2010, *supra* note 10, at 77 (breaking down field placements into eight types and showing a substantial direct line increase in the number of field placements in all eight categories from 1992 to 2002 to 2010).

[117] Memorandum from Barry A. Currier, Managing Director of Accreditation and Legal Educ., Am. Bar Ass'n, on Adoption and Implementation of Revised Standards and Rules of Procedure for Approval of Law Schools (Aug. 31, 2016) (accessed at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2016-August-Standards-Revisions-Memo.pdf) (explaining that the 2016 changes "eliminate(s) the Interpretation that prohibits the granting of credit to a student for participation in a field placement for which the student receives compensation.").

[118] Beth Hirschfelder Wilensky brilliantly describes the story of three of her students at Michigan Law School for whom the 1L year "makes many of them feel like they don't belong here—in law school, and, as a result, in the legal profession. And if our pedagogy makes them feel that way, our pedagogy is wrong." Wilensky, *supra* note 80, at 2702–03.

A carefully constructed upper-level program, which exists in very few law schools, might remedy many deficiencies in the 1L curriculum.[119] Yet it makes no sense to say that we should keep teaching the first year in its traditional form because we can teach something totally different in the upper-level curriculum. More importantly, as explained in Part III.A, even if a law school abandons the current model of ad hoc upper-level curriculum, it would not solve the problem that 1L misdirects student understanding of the law so as to create learning obstacles, not just deficiencies.

It is fair to ask at this point how one can reasonably expect the 1L year to do so much more when 1L law students already are overwhelmed with reading and pressure. The 1L year is an introductory year, but we have come to accept that the introduction will focus overwhelmingly on one narrow form of learning. If we retain teaching the case analogic thinking of the Langdellian method, but do it much less, we will create the space for more diverse learning. Case study itself can occur with attention to fact development, strategic concerns and narrative creation. The following Part IV takes this argument further by constructing an example 1L year.

IV. A New 1L

Fundamental 1L reform is possible. Subpart A provides an example of a New 1L curriculum that is bold yet practical. Subpart B ties the reforms in the New 1L to the problems in the current 1L articulated in this Article.

A. The New 1L

Imagine a different 1L. The Fall semester consists of three courses for fifteen credits, as follows:

Common Law Doctrine and Process (5 credits). This course introduces students to the identification and development of law in the common law process by the study of contract and tort law. The first part of the course will briefly ground students in the elements of oft-used claims and simple applications of these doctrines. Students then will read case law, including seminal appellate cases in these fields, that demonstrate how courts employ legal reasoning to resolve less certain situations. A key component of this course is learning how common law process develops legal principles over time. Students will study two examples of case development of the law—product liability and noncompete clauses in contracts. The course will contrast key principles of these doctrines, showing similarities and differences in how contract law and tort law regulate society and markets.

Statutory-Regulatory Law and Interpretation. (5 credits). This course introduces students to statutes as a source of law. Students will learn the

[119] For example, William Sullivan, the principal author of the Carnegie Report, suggests the University of New Hampshire Law School Daniel Webster program as a model of a well-conceived upper level integrated learning program. Sullivan, *supra* note 85, at 41.

following: how statutes are structured and how to closely read a statute; discerning elements of proof in a statute required for a valid claim or defense; distinguishing rules from standards and the use of factors and balancing tests; how case law is used in statutory interpretation; the principles of statutory interpretation; an introduction to delegated authority to administrative agencies and rulemaking; and understanding the relationship between statutes, regulations and sub-regulatory guidance. Students will learn how case law operates differently than common law in the context of statutory interpretation, and how common law interacts with statutory law when courts interpret statutes. One unit of the course will focus on exemplar federal and state laws on wage and hour regulation as an example of how courts and agencies develop law through legislative interpretation and administrative actions. Finally, students will engage in a problem-solving exercise that focuses on drafting a statute or regulation, or similar task, and then applying that law to a set of social or market regulation problems.

Legal Research, Writing and Analysis (5 Credits). This course introduces students to the critical skills of legal research, analysis and writing used by all attorneys. Students initially will engage in legal research to gain an understanding of a narrowly defined area of law, then conduct a simulated client interview to identify legal issues that must be resolved to achieve the client's goals for the representation. The classroom portion of this course also will teach the structure of the court system, the distinction between controlling and persuasive cases, and the hierarchy of case law authority. Students will produce work product similar to that required for a young attorney, including an analytical research memo, a client letter, a demand letter to opposing counsel and a dispositive motion brief.

The Spring semester consists of three courses for thirteen credits, as follows:

Constitutional Law (3 credits). This course introduces students to the United States Constitution. Students will review the powers of the federal government embodied in the constitution, and will learn the allocation of powers of the federal government and decision-making authority among government institutions, including both federalism and separation of powers. Students will study seminal cases in constitutional law and examine alternative approaches to constitutional interpretation, including differing views of how constitutional mandates interact with statutory and common law. A case file will be presented that demonstrates the development of a well-known case in constitutional law from the planning stage of litigation through the lower court briefs and judicial opinions.

Law in Practice (8 credits) (Civil or Criminal Option). Students choose to participate in either the Civil or Criminal section of this course.

Civil Litigation. This course combines a study of civil procedure with simulation and legal writing experiences designed to help students master the iterative process of discovering and evaluating facts, refining legal research objectives, making persuasive written and oral arguments and managing the relationship with the client to achieve their goals. The initial part of the semester will focus on learning the basics of civil procedure rules and standards.

Students then will engage with two simulated case files. The *first case file* involves litigation based on the documents and testimony from an actual case, either a dispute between private parties or a public enforcement action. Classroom sessions will explore more difficult applications of the civil procedure rules to developments in the case file. Students also will examine doctrinal and strategic issues raised in the case, including the use of narrative and the application of distributive negotiating theory. Students perform the following simulations in small sessions led by practicing attorneys: client interview, witness interviews, a deposition, a "meet and confer" negotiation with opposing counsel and client counseling. The *second case file* is the negotiation of a contract. The classroom portion focuses on the knowledge needed to draft contract terms, teaches integrative negotiating theory and how to be an effective transactional attorney. This course has two simulations: a client counseling session, and negotiation with opposing counsel. Students draft a proposed contract prior to the negotiating session. Students will produce written products as part of both case files, including a motion in support or opposition to a pretrial dispute (e.g., joinder of a party or a discovery dispute) that will be argued before an actual trial court judge, and a memo in support of the merits of the client's claims or defenses that will be used in a mediation before a neutral.

Criminal Prosecution and Defense. This course parallels the Civil Litigation course, but with a focus on criminal prosecution and defense. The classroom learning, and the simulation and writing experiences, focus on fundamental principles of criminal law and procedure. Students complete two simulated cases—one as prosecutor and one as defense attorney. The simulation experiences include a client or police officer interview, prosecutorial charging meeting or defense client counseling session and a simulated trial. Students will engage in two other simulations that require production of written work product, including a motion in support or opposition to suppression of evidence that will be argued before an actual trial court judge, and a memo in support of a sentencing recommendation.

Overview of Civil or Criminal Practice (2 credits). Students enrolled in the Civil section of Law in Practice will take Introduction to Criminal Law, a doctrinal overview of how criminal law and procedure differs from civil law. Students enrolled in the Criminal section of Law in Practice will take Introduction to Civil Procedure, a doctrinal overview of how civil litigation occurs in U.S. courts. These courses begin after Spring Break and are graded on a pass/fail basis using objective tests.

B. The Principles of the New 1L

Three core principles underlie the proposed New 1L: (1) students should learn in the first year the breadth and interrelationship of the key sources of law; (2) the 1L education should be efficient, which is to say student workload should be planned to maximize different types of learning across the courseload; and (3) students should have a grasp after the 1L year of the core legal reasoning skill of integrating law and facts to solve problems.

Breadth of Sources of Law. 1L students should understand the development and use of sources of law roughly in proportion to their importance in courts and society. As described in Part II.A and Part III.A.2, one of the key opportunities for 1L reform lies in bringing statutory and regulatory law into the core of the 1L curriculum. The New 1L presents statutes (and administrative law), common law and constitutional law on equal footing. A five credit leg-reg course will mean time to examine how the common law process works in statutory interpretation, and how common law interacts with statutory law. The increase in attention to legal research and writing in the Fall semester, and the focus on integrated learning in the Spring, offers more opportunities to use constitutional and statutory law in problem-solving applications.

Efficiency. The good news for the reform-minded is that the current law school curriculum and pedagogy is inefficient. We can do more effective teaching with the same resources, and with less but more engaging and illuminating work for students.

The New 1L reduces course burdens more than it adds. The reduction of core common law courses into a single five credit course frees up about one-fourth of the credits in the typical first year. The Law in Practice option selected by the student—civil law or criminal law—melds civil procedure or criminal law into a larger experiential course. Overall course credits drop from the current thirty credits to twenty-eight credits.[120] Instead of four or more courses per semester in the first year, the New 1L has three courses per semester, allowing for better control of overall reading and workloads, and better coordination between courses.

Integration of Law and Facts for Problem-solving. Fact development and strategic problem-solving are elevated in importance in the New 1L, but more importantly, they are presented as inseparable parts of a whole of learning law. The beginning of judgment and deeper professional wisdom lie in the spaces where legal analysis, fact development, and practice skills intersect. The New 1L is designed to move students much more quickly along this learning curve.

The centerpiece of this transition is the Law in Practice course. By allowing students to select between a criminal law and civil law of this course, the New 1L also presents the opportunity for students who know they want to study criminal law to have a curriculum that will provide a grounding in that area of law that otherwise is covered fairly superficially in the current 1L curriculum.

Of course, the New 1L is just one example of how to apply these principles to create a new education experience for law students. Law schools with different visions for how to meet the needs of their students could implement these principles differently. Yet, a specific alternative vision of 1L helps make visible the "hidden messages" in the current 1L curriculum, as Leslie Bender puts it.[121]

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[120] The mean, median, and mode 1L course load is thirty credits. Cox, *supra* note 4.
[121] Bender, *supra* note 54.

V. A New 1L is Achievable

This final Part argues that 1L reform is practical and possible. Seedlings of change advocated in this Article have already been occurring in U.S. law schools. Our survey of current 1L curricula and the historic development of the first year shows that law school has been inching toward the basic principles of the New 1L since the typical 1970s curriculum of four six-credit courses in contracts, torts, property and civil procedure. A required 1L course in statutory and regulatory law did not exist at any law school in 2010, and now 15 percent of law schools require this subject in 1L.[122] Law schools have begun to add introductory low-credit, non-doctrine courses at a furious pace. The required development of learning outcomes provides further support for a transformation of law school. Dozens of law schools responded to the 2014 ABA mandate by adopting a Comprehensive model that synchs quite well with the New 1L.[123]

Sarah Valentine wrote in 2015, "outside regulators, be they accrediting bodies or state licensing authorities, are compelling curricular and pedagogical change."[124] Subpart A discusses two recent changes—the NextGen Bar exam and the change to U.S. News rankings—that may provide the outside push needed to transform a late 19th century 1L education to a curriculum that synchs with the 21st century. Subpart B addresses long-standing objections to 1L reform rooted in law school resources and management.

A. The Opening for 1L Reform

Changes to the bar exam and the dominant law school ranking methodology constitute the most concerted external push for law school teaching reform in decades, perhaps ever. The mid-2020s are looking like an opportunity for substantial 1L reform.

The bar examination is changing. Starting with a few states in 2026, students will be given a "NextGen" bar exam. The National Conference of Bar Examiners described its goal as creating "[a]n integrated exam [that] permits use of scenarios that are representative of real-world types of legal problems that newly licensed lawyers encounter in practice and provides an authentic assessment of lawyering skills."[125] The new exam will frame its questions in four "skills" groups: (a) issue spotting and analysis, investigation and evaluation; (b) client counseling and advising, negotiation and dispute resolution, client relationship and management; (c) legal research; and (d) legal writing

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[122] Cox, *supra* note 4, at 10.

[123] See *supra* Part I.B.2.c.

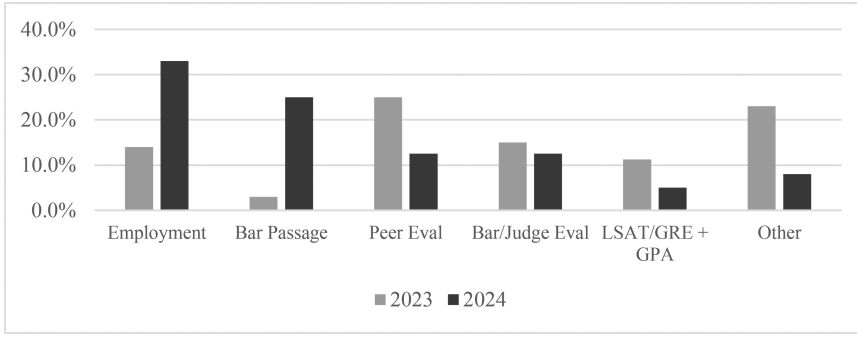
[124] Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & EDUC. 473, 475–76 (2015).

[125] Cynthia L. Martin et al., National Conference of Bar Examiners Testing Task Force, *Overview of Recommendations for the Next Generation of the Bar Examination*, 3 (2021), https://nextgenbarexam.ncbex.org/themencode-pdf-viewer/?file=https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf#zoom=auto&pagemode=thumbs [https://perma.cc/A28W-FXF4].

and drafting.[126] Although much remains unknown about the new exam, there is no doubt that it aligns quite well with the subject matter of the Law in Practice course that dominates the Spring semester of the New 1L, the legal research and writing focus in New 1L and the integrated learning methods on which the New 1L is grounded.

If U.S. News rankings continue to dominate evaluation of law school prestige, a substantial revision in ranking criteria that occurred for the 2024 rankings (released in May 2023) also will provide an impetus for 1L reform.[127] Bar passage increased from a minor 3 percent weight to the second most important criteria, now counting for 25 percent of a law school's total score.[128]

Figure 2: Changes to Criteria for U.S. News Law School Rankings



The weight given to employment outcomes went from 14 percent of a law school's ranking to 33 percent of the school's ranking, making employment outcomes the single most important factor in the ranking.[129] These changes in rankings methodology directly supports adoption of a 1L curriculum like the New 1L. Moving the curriculum to equal attention between common law and statutory law brings law school education much closer to the law that animates practice. Focusing on integration of law, fact development and skills through the 1L year should undoubtedly better prepare law students for

[126] National Conference of Bar Examiners Testing Task Force, *Bar Exam Content Scope: First Administration July 2026* (May 2023), https://www.ncbex.org/sites/default/files/2024-11/NCBE-NextGen-Content-Scope-May-24-2023_0.pdf [https://perma.cc/KDT5-TNQK].

[127] *See* Robert Morse & Eric Brooks, *Methodology: 2024 Best Law Schools Rankings*, U.S. News (Apr. 8, 2024), https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology [https://perma.cc/5H9H-PYWH].

[128] The weight for initial bar passage increased from 3 percent to 18 percent, and a new criterion of "ultimate bar passage" was added and given a weight of 7 percent of the total law school score. *Id.*

[129] *Id.*

practice. Whether these changes will actually move the hiring market toward law schools with such a reformed curriculum is speculative, but it seems a reasonable bet.[130]

B. Internal Constraints Are Not Insurmountable

Two oft-stated obstacles to law school reform are that it will cost too much to implement and the current faculty can't teach it. Subparts 1 and 2 address each of these objections, respectively.

1. Cost Should Not be an Obstacle to Adopting The New 1L

It won't cost too much to teach the New 1L because the current 1L is inefficient. The New 1L will incur costs, but it also will create savings which should outweigh the costs, at least on an operating basis without regard to transition costs. Unlike many of the laudable 1L reforms since the Carnegie Report, the New 1L eliminates and replaces, or reshapes, 1L courses rather than piling new subjects on top of the existing curriculum. The New 1L saves teaching resources compared to the existing 1L curriculum, particularly in the doctrine faculty.

Compare the New 1L teaching requirements to the current average 1L curriculum in our survey on the assumption that the 1L curriculum consists of the traditional seven courses. Doctrine faculty time shifts to new courses and is reduced overall, while legal writing faculty have an expanded role and adjuncts are introduced into the 1L teaching roster.

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[130] Georgetown is one of the very few law schools that has shuffled the doctrinal content of the 1L curriculum into different boxes and labels, and somewhat increased the presence of statutory and regulatory law in its Curriculum B that some 1L students can elect in lieu of the traditional 1L courses. A study of the graduates of this alternative curriculum shows no statistically significant difference between students enrolled in the alternative and traditional curricula (e.g., overall law school grades, bar passage, or employment at ten months), except that students in the alternative curricula tend to find jobs in the public sector and, unsurprisingly, make less money compared to employment weighted toward the private sector for traditional curriculum graduates. Hyman, Liu & Teitelbaum, *supra* note 5, at 3. This study doesn't tell us much about the likely outcomes of a fundamental shift in 1L as proposed in this Article. It is based on a Georgetown alternative curriculum that has not much in common with the New 1L; it looks only at bar passage outcomes under the Bar exam prior to implementation of NextGen and employment outcomes for graduates of a T-14 school; and it makes no attempt to evaluate whether the graduates of the alternative curriculum understand law differently, practice differently, or even perceive their training differently after some period of practice. The study findings, however, might relieve some anxiety about any potential downsides of fundamental 1L reform.

Table 4: Required Teaching Credits by Faculty Type-Current versus New 1L[131]

	Doctrine Credits Current	Doctrine Credits New 1L	LW Credits Current	LW Credits New 1L	Adjunct Credits New 1L
Contracts/Torts/Prop	13	5	0	0	0
Constitutional Law	3.5	3	0	0	0
Statutory Law	0	5	0	0	0
Civ Pro/Criminal	8	2	0	0	0
Legal Writing	0	0	5.5	5	0
Law in Practice	0	4	0	2	2
Total Current (30)	24.5		5.5		
Total New 1L (28)		19		7	2

Doctrine faculty credits are reduced by five and one-half credits overall in the New 1L. Two of these credits reflect the lower overall credit level in the New 1L.[132] The remaining three and one-half credits reflect a shift to other types of faculty for teaching in the Law in Practice course, resulting in a net increase of one and one-half credits in legal writing faculty in 1L and the addition of two credits for adjunct faculty to teach small groups in the Law in Practice courses.

The cost proposition for the New 1L assumes the existence of teaching material for the New 1L. Much of this material already exists. There are already 1L legislation and regulation courses to canvas for materials, and the alternative 1L curriculum at Georgetown has a course substantially similar to the proposed Fundamentals of Common Law course.[133] Simulation and case-file materials exist, as do problem-solving exercises.[134] The expansion of

[131] For the current curriculum, the chart shows mean credits rounded to the nearest half credit from our survey of 1L curricula for each course type. Cox, *supra* note 4, at 5–6. For the New 1L, it is assumed that the eight credit Law in Practice course requires the following allocation of faculty teaching credits: four doctrine faculty credits, two legal writing faculty credits and two adjunct credits. The two doctrine credits for civil procedure/criminal law in the New 1L doctrine teaching credit column represents the credits required for the teaching of the introduction to civil procedure for students taking the criminal law in practice course or for teaching of the introduction to criminal law/procedure for students taking the civil law in practice course.

[132] The average first year currently has more than one-third the number of credits required to graduate, and most law schools require more than the ABA-mandated number of credits to graduate. *See supra* note 114. Accordingly, a law school adopting the New 1L could either require two fewer credits or shift the two credits into the upper level curriculum.

[133] Hyman, Liu & Teitelbaum, *supra* note 5, at 36 (providing a course description for "Bargain, Exchange and Liability" in the Georgetown Curriculum B).

[134] *See, e.g.,* Katz, *supra* note 2, at 835–38 (describing simulation options); Kris Franklin, Legal Reasoning Case Files: A Contemporary Approach to Lawyers' Methods (2023) (teaching legal concepts through review and drafting of legal documents); Prentiss Cox & Laura Thomas, Law in Practice (2019) (text and simulation materials for 1L integrated

New 1L courses will create an incentive for law professors and publishers to produce more such teaching material.

2. Law Professors Can't Teach It

Commentators have suggested that the lack of practice experience and orientation of existing faculty is a serious obstacle to law school reform.[135] Law schools developed on the Langdellian model explicitly rejected the approach of medical school and some other professional schools where faculty are active members of the profession that they teach.[136] There is little doubt that law school faculties typically are a hierarchy, and that the faculty at the top of that hierarchy are tenured professors who are more likely to lack substantial experience in the profession.[137] The New 1L, however, does not require broad practice experience among the doctrine faculty. One purpose is to shift from the steady diet of common law subjects to a balanced presentation of sources of law. Current faculty are capable of teaching courses about statutory law that form the basis of most of upper level teaching and much of legal scholarship.

The use of more legal writing faculty time, placing clinical faculty in 1L teaching, and using adjunct faculty to run simulations is an incremental change for most law schools. Fortunately, civil procedure and criminal law are intensely practical courses and thus more likely to consist of faculty with extensive practice experience. To the extent that the teaching demands of Law in Practice require cooperation among the different parts of the faculty and complementary teaching groups to form, and if the New 1L places pressure on law school hiring to fill teaching positions with people who understand the profession for which they are preparing students, so much the better.

It is a safe bet that a majority of law professors want to keep the status quo. Fortunately, 1L reform does not depend on a general faculty vote.

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learning course); Eduardo R.C. Capulong, et al., The New 1L: First-year Lawyering with Clients (2015) (identifying numerous examples of 1L courses that include non-doctrinal training); Sullivan, *supra* note 85 (describing the University of New Hampshire Daniel Webster program). Jason Dykstra makes a strong argument for case-based learning of the type used in medical school or business school, which was explicitly rejected by the early propagators of the Langdellian method. Dykstra, *supra* note 58, at 125–30.

[135] R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. Rev. 1515, 1531 (2012) ("[A] fully integrated approach to teaching professional skills (such as the medical school model) will require major resource reallocations, realignment of teaching responsibilities."); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. Rev. 105, 107 (2010) (arguing "that it will not be possible to implement such proposed curricular and pedagogical reforms if law schools continue their trend of primarily hiring and promoting tenure-track faculty members whose chief mission is to produce theoretical, increasingly interdisciplinary scholarship for law reviews rather than prepare students to practice law.").

[136] Rahim, *supra* note 49, at 41 (in the Langdellian law school, "[n]o longer did experience practicing the law make one capable of teaching it. Instead, it was experience *studying* the law."). Yet Langdell also imagined that he was imitating medical school, just substituting book study for laboratory time and patient interaction. *Id.* at 33–34

[137] *See* Newton, *supra* note 135. *But see* Richard E. Redding, *The Legal Academy Under Erasure*, 64 Cath. U. L. Rev. 359, 364 (2015) ("Contrary to popular claims, engaged scholars are better teachers.").

A reform-minded law school dean with a small cadre of faculty interested in creating an experimental section would suffice. Reflecting on how law school change occurs, Robert Gordon stated:

> [O]ne factor in curricular change that is invisible to the reader of catalogues and casebooks, but nonetheless of paramount importance, is the presence on a law faculty of a critical cabal who are willing to band together and take the time to rethink traditional subjects and prepare new course materials.[138]

The New 1L is perfectly suited to change by cabal.

Conclusion

This Article focuses on the first year that dominates the curriculum and culture of the United States law school experience. It compares newly collected data about the 1L curricula at U.S. law schools with learning objectives adopted by law schools to show how law school curricula stand at odds with the use of law by attorneys and others. It contrasts the current 1L curricula with the more ambitious learning outcomes adopted by some law schools to show the chasm between those promises and a 1L program dominated by common law courses. It identifies how the current 1L misdirects student learning, leaving law students with habits of thought that impede learning how law actually functions in courts, legal practice and other settings where law is employed. Most importantly, it presents a specific exemplar 1L curriculum that illuminates the distinction between what 1L is and what 1L could be, including achievable alternatives to the current subject matters and pedagogy.

If we are going to change law school, we need to kill 1L. Law schools have been able to resist fundamental reform for generations. Yet change happens in all institutions, often in a sudden rush after a long period of stasis. Knocking on the central pillar of the law school experience is the best way to build new models of legal education in the United States.

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[138] Gordon, *supra* note 5, at 368.

Conceptualizing a Rights-based Framework for Public Institutions to Support Children

*Jonathan Todres**

Abstract

In law and policy and public discourse, children's interests are often pushed to the margins. Although children constitute more than twenty percent of the U.S. population, federal spending on children's programs is regularly below ten percent of the budget. Not only are children not a priority, but government agencies are also often not structured to account for and support the rights and healthy development of children. This article proposes a new framework, the VR3 model (Voice, Representation, Resources, and Remedies), which can help reform government institutions and agencies to be more supportive of children's rights and wellbeing. By developing policies and institutional structures and processes to implement the VR3 model, government agencies can reorient their work so that it better accounts for children's interests and supports the rights and healthy development of all children.

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Introduction

"Children are the future" is a familiar refrain heard in the United States and other countries.[1] Although there is widespread rhetoric about the importance of supporting children's development, the reality in the United States (and many other countries) is that children[2] are frequently relegated to the margins of government agendas.[3] Government policies, programs, and investment often overlook children's needs; in the United States, less than ten percent of the federal government's budget is spent on children,[4] even though children constitute approximately twenty-two percent of the U.S. population.[5]

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[1] Emilie L'Hôte & Andrew Volmert, Frameworks Institute, Why Aren't Kids a Policy Priority? The Cultural Mindsets and Attitudes That Keep Kids Off the Public Agenda 5 (2021) ("'Children are our future.' 'It takes a village.' 'All children are special.' These tropes are intended to signal how much we love kids and want to make sure they do well in life. But when it comes to policy, there is a gap between what we appear to value and what we actually do.").

[2] In this article, I focus primarily on children, using the definition of a child in the U.N. Convention on the Rights of the Child—"every human being below the age of eighteen years." Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. However, the lines between stages of development overlap at times, and at other points stretch beyond age eighteen. Adding complexity, the law, legal scholars, child development experts, and others often use the terms "children", "adolescents," "youth," or "young people" differently. So, while I primarily use "child" or "children," in some instances, I use these other terms to indicate the population being addressed. For more, see Jonathan Todres & Ursula Kilkelly, Children's Rights and Children's Development: An Integrated Approach 314–18 (2025).

[3] *See* L'Hôte & Volmert, *supra* note 1, at 5; *see also* Judith Levine, *Republicans Claim to Love Both Mothers and Children. Their Policies Prove They Love Neither*, The Intercept (Jan. 23, 2024), https://theintercept.com/2024/01/23/republicans-abortion-health-care-love-them-both/ [https://perma.cc/P49C-43PM].

[4] First Focus on Children, Fact Sheet, Children's Budget 2024, at 1 (2024), https://firstfocus.org/wp-content/uploads/2024/09/Childrens-Budget-2024-Overall-Fact-Sheet.pdf [https://perma.cc/C6WF-ABQN] ("[T]he share of U.S. federal spending on children fell to 8.87% in Fiscal Year 2024, representing the third straight year of decline."); First Focus on Children, Children's Budget 2023, at 7 (2023), https://firstfocus.org/resource/childrens-budget-2023/ [https://perma.cc/3PHR-LRXS] (finding "[i]n FY 2023, U.S. spending on children, both here and abroad, accounts for just 9.89% of the federal budget, a decrease of nearly 16% in real spending from FY 2022 and more than 2 percentage points off its pandemic-era levels.").

[5] Stella U. Ogunwole et al., U.S. Census Bureau, Population Under Age 18 Declined Last Decade (2021), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html

During the COVID-19 pandemic, children suffered greatly,[6] yet state and local governments often prioritized reopening restaurants, bars, and tattoo shops before they reopened schools.[7]

Today, children confront both immediate obstacles to their healthy development (e.g., lack of access to health care and quality education) and looming existential threats to their futures (e.g., climate change).[8] Yet, many policymakers often fail to follow up on their rhetoric about the importance of the family and of ensuring children's wellbeing.[9] Equally important, government agencies are often not structured to account for and support the rights and healthy development of children.

To address the disconnect between public pronouncements and government action, this article proposes a new model that aims to map more clearly how government agencies can orient their work to be more supportive of the rights and wellbeing of all children. Recognizing that rights are relational,[10] we need comprehensive, integrated systems of support for children. A rights-based approach offers a comprehensive framework backed by a legal mandate.[11] That legal mandate requires, among other things, that governments take "all appropriate legislative, administrative, and other measures" to ensure the rights of all children.[12] To encourage more comprehensive rights implementation,

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[https://perma.cc/7LET-DDEH] (stating that approximately twenty-two percent of the U.S. population is under eighteen years of age).

[6] Megan McDonnell Busenbark, *The Pandemic's Lasting Effects on Kids*, Children's Hosp. Ass'n (July 27, 2022), https://www.childrenshospitals.org/news/childrens-hospitals-today/2022/07/the-pandemics-lasting-effects-on-kids [https://perma.cc/UMG3-F7BX] (reporting that nearly two years after the pandemic, "[i]t may feel like life is inching toward normal, but data on kids' and teens' mental health continue to show negative trends."); United Nations, Policy Brief: The Impact of COVID-19 on Children 2 (2020), https://unsdg.un.org/sites/default/files/2020-04/160420_Covid_Children_Policy_Brief.pdf [https://perma.cc/5HVM-UPWU] ("Children are not the face of this pandemic. But they risk being among its biggest victims.").

[7] Juliette Kayyem, *Reopening Schools Was Just an Afterthought*, The Atlantic (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/reopening-bars-easy-schools-are-difficult/613861/ [https://perma.cc/EH6X-5JBQ].

[8] Annie E. Casey Foundation, 2024 Kids Count Data Book: State Trends in Child Well-Being 14–15 (2024), https://assets.aecf.org/m/resourcedoc/aecf-2024kidscountdatabook-2024.pdf [https://perma.cc/X74T-34W6]; *Climate Change and Children's Health*, U.S. Environmental Protection Agency, https://www.epa.gov/climateimpacts/climate-change-and-childrens-health [https://perma.cc/88A9-8T3E] (last updated Mar. 25, 2025); *Climate, Kids, and Health*, Harvard School of Public Health, https://hsph.harvard.edu/research/climate-health-c-change/climate-kids-and-health/ [https://perma.cc/RJS8-BUMR] (last visited Jan. 31, 2025).

[9] *See, e.g.*, Levine, *supra* note 3.

[10] Emily Ho et al., Relational Rights: A World-inclusive and Relationships-affirming Understanding of the Rights of Every Human Person 5 (2021) ("Relational Rights are proposed as a distinct understanding of the rights of the human person, as interdependent persons in relationships with one another. They seek to protect important interpersonal interests with a view to securing healthy and proximate interpersonal relationships between people"); Caralyn Blaisdell & E. Kay. M. Tisdall, *Contemporary Children's Rights Issues in Early Childhood*, in Children's Rights and Children's Development: An Integrated Approach, 80, 84–87 (Jonathan Todres & Ursula Kilkelly eds., 2025) ("Relationality recognizes these intersections of obligations and rights, between all people's human rights, and how the recognition of one person's rights can shape another's.").

[11] *See infra* notes 55–65.

[12] *See, e.g.*, CRC, *supra* note 2, art. 4.

in prior work I have emphasized the need to mainstream children's rights.[13] Mainstreaming of children's rights necessitates, at a minimum, accounting for children's rights in two respects: (1) in all sectors of society—e.g., from health and education to transportation and urban planning, and more; and (2) at all stages of the development of laws, policies, and programs that affect children's lives directly or indirectly—i.e., design, implementation, monitoring, and evaluation.[14] In contrast to a litigation-centered approach, which often addresses harm after it occurs, mainstreaming aims to help build institutions and processes that foster greater support for children's rights at the outset.[15]

Therefore, this article builds on the call for mainstreaming children's rights, as well as other literature on the implementation of children's rights,[16] to conceptualize a framework for ensuring the uptake and mainstreaming of children's rights. This framework—the VR3 model (Voice, Representation, Resources, and Remedies)—aims to move "upstream" to ensure that children's needs and interests are accounted for in the ordinary course of government policies and programs.[17] That is, by building and sustaining agencies and institutions that account for and help ensure the rights of all children, we can reduce the prevalence of children's rights violations and thus the amount of time and resources we spend trying to apprehend perpetrators and assist victims and survivors after harm has occurred. As discussed below, litigation continues to be an important tool in this framework, but it is only one

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[13] Jonathan Todres, Charlene Choi, & Joseph Wright, *A Rights-Based Assessment of Youth Participation in the United States*, 95 Temp. L. Rev. 411, 441–42 (2023); Jonathan Todres, *Mainstreaming Children's Rights in Post-Disaster Settings*, 25 Emory Int'l L. Rev. 1233, 1255–57 (2011); *see also* Child Rights Connect, Mainstreaming Child Rights: A Call for a UN-wide Strategy on Child Rights in Response to Our Common Agenda (2021), https://www.childrightsconnect.org/wp-content/uploads/2021/09/positionpaperourcommonagenda_crcnct_final.pdf [https://perma.cc/NJ3Y-HQGK]; *see generally* U.N. Development Programme, Mainstreaming Human Rights in Development Policies and Programming: UNDP Experiences (2012), https://www.undp.org/sites/g/files/zskgke326/files/publications/English_Web_draft6b.pdf [https://perma.cc/J7DA-6DFR].

[14] Todres, *supra* note 13, at 1255.

[15] *Id.*

[16] *See, e.g.*, Ursula Kilkelly, *The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation*, 23 Int'l J. Hum. Rts. 323, 326–32 (2019); Andressa M. Gadda, Juliet Harris, E. Kay M. Tisdall, Elizabeth Millership & Ursula Kilkelly, *Human Rights' Monitoring and Implementation: How to Make Rights 'Real' in Children's Lives*, 23 Int'l J. Hum. Rts. 317, 317–18 (2019).

[17] The "moving upstream" concept is an idea that has long been a cornerstone of public health. The story, of which there are several slightly different versions, is as follows:

> While walking along the banks of a river, a passerby notices that someone in the water is drowning. After pulling the person ashore, the rescuer notices another person in the river in need of help. Before long, the river is filled with drowning people, and more rescuers are required to assist the initial rescuer. Unfortunately, some people are not saved, and some victims fall back into the river after they have been pulled ashore. At this time, one of the rescuers starts walking upstream. "Where are you going?" the other rescuers ask, disconcerted. The upstream rescuer replies, "I'm going upstream to see why so many people keep falling into the river." As it turns out, the bridge leading across the river upstream has a hole through which people are falling. The upstream rescuer realizes that fixing the hole in the bridge will prevent many people from ever falling into the river in the first place.

Larry Cohen & Sana Chehimi, *Beyond Brochures: The Imperative for Primary Prevention*, *in* Prevention Is Primary: Strategies for Community Well-Being 3, 4–5 (Larry Cohen et al. eds., 2007).

component of a more holistic approach to building institutions that support children and their rights. For those genuinely interested in the wellbeing and healthy development of all children, this article offers a framework for reforming agencies so that they are more responsive to children, their families, and their communities.

The article proceeds as follows. Part I examines the state of the United States today with regard to children and their rights. It begins by discussing the U.S.'s historical and current reluctance to embrace children's rights. It then reviews the current challenges and conditions that children experience in the United States, revealing that for too many children and their families, life in the United States falls short of popular rhetoric affirming the value of children. Part II then discusses the benefits of a children's rights approach. Part III introduces the VR3 framework that can be used to foster more child-supportive government institutions and agencies in the United States, as well as in other countries. Finally, in Part IV, the article discusses the importance of all four components of the VR3 model for building a comprehensive, integrated framework that ensures children's rights and wellbeing. As Part IV explains, because all four components interact with and support one another, ultimately it is important that governments implement all components of the VR3 model to fully realize its benefits for children today and in the future.

I. Children and Children's Rights Today

A. U.S. Reluctance to Embrace Children's Rights

Although early rights philosophers and government leaders did not have children in mind—nor women, people of color, or other historically marginalized populations—when they shaped foundational instruments related to democracy and rights,[18] the central tenet of the human rights idea has remained consistent: the fact that one is human means one has rights.[19]

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[18] *See* Lua Kamál Yuille, "*Nobody Gives a Damn About the Gypsies": The Limits of Westphalian Models for Change*, 9 Or. Rev. Int'l L. 389, 426 (2007) ("[T]he human rights regime may be seen as having tainted origins—the fore *fathers* of international human rights represented one narrow view of the world that excluded the perspectives of many of those it was envisioned to protect."); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 Tex. L. Rev. 305, 307 (2023) ("For the Constitution's drafters, 'we the people' was a term of art, omitting most of the people."); *cf.* Ruth Bader Ginsburg, *Foreword* to Supreme Court Decisions and Women's Rights: Milestones in Equality, xii (Clare Cushman ed., 2001) (quoting Richard B. Morris, The Forging of the Union, 1781–1789, 193 (1987)) (writing that "a prime portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women").

[19] *See* Louis Henkin, *Religion, Religions, and Human Rights*, 26 J. Religious Ethics 229, 231 (1998) ("The human rights idea and ideology begin with an *ur* value or principle (derived perhaps from Immanuel Kant), the principle of human dignity."); Catherine Powell, *We the People: These United Divided States*, 40 Cardozo L. Rev. 2685, 2744 (2019) (asserting that "humans . . . are entitled to respect, simpl[y] by virtue of our shared humanity (as international human rights law asserts, grounded in Immanuel Kant's notion of human dignity)").

Accepting that foundational principle necessarily means that children have rights. That is, if rights are inherent to all human beings, they exist from birth. Not accepting that children have rights equates to saying rights are not inherent to all human beings but rather that governments get to decide who has rights and when they accrue to individuals (e.g., when they reach adulthood). Dependent on government largesse is exactly what rights are *not* in theory and should *never* be in practice.[20]

Despite the inherent nature of human rights and the powerful and important rhetoric on rights and liberty throughout much of U.S. history, the United States has not fully embraced the idea that children have rights, or the broader idea of human rights for that matter. Reflecting on the U.S. position on human rights, Louis Henkin wrote:

> The United States has been a leading champion of human rights around the world. . . . We helped write human rights into the Nuremberg Charter and into the U.N. Charter; we led in promulgating the Universal Declaration, and we participated importantly in drafting the Covenants. . . . But the United States has not been a pillar of human rights, only a "flying buttress"—supporting them from the outside. . . . In a word, we have not accepted international human rights for ourselves. [21]

The U.S. approach to children's rights has been similar. The U.S. government was arguably the most active delegation in the drafting of the U.N. Convention on the Rights of the Child (CRC), submitting proposals and recommendations on nearly every substantive provision of the treaty,[22] yet the United States stands alone as the only country in the world yet to ratify the CRC.[23] Some of this reluctance is due to oft-repeated general concerns in the human rights context about U.S. sovereignty and federalism issues,[24] even

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[20] Jonathan Todres, *A Magna Carta for Children? Rethinking Children's Rights*, 35 Ethics & Int'l Affs. 581, 583 (2021) (reviewing Michael Freeman, *A Magna Carta for Children? Rethinking Children's Rights* (2020)).

[21] Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 421 (1979).

[22] *See* Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 Loyola Poverty L.J. 9, 25–26 (1998) ("The United States was by far the most active, making proposals and textual recommendations for thirty-eight of the forty substantive articles."); Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 Emory Int'l L. Rev. 185, 190 (2006) (noting that the U.S. influenced the text of nearly every article of the CRC and that "U.S. influence was so strong that some people referred to the Convention as the 'U.S. child rights treaty.'").

[23] *See* Status of the Convention on the Rights of the Child, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en [https://perma.cc/E7BQ-P5WJ] (last visited Nov. 22, 2024). The U.S. has also not ratified the International Covenant on Economic, Social and Cultural Rights, which includes provisions on key issues that are vital to children's development, such as health and education. International Covenant on Economic, Social and Cultural Rights (ICESCR), arts. 12 and 13, Dec. 16, 1966, 993 U.N.T.S. 3.

[24] Sarah Mehta, ACLU, There's Only One Country that Hasn't Ratified the Convention on Children's Rights: US, (2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/HQQ2-CMZW] ("Much of the opposition to its ratification emanates from the right and has been based on incorrect assumptions about its implications for U.S. law and

though the United States has ratified other human rights treaties without ceding sovereignty and other countries with systems of federalism have ratified the CRC without issue.[25] Opponents of CRC ratification have also argued that children's rights are incompatible with parental rights.[26] However, the reality is that parents' and children's interests and rights align on the vast majority of issues; for example, with few exceptions, parents want their children to have access to quality health care and education and to be protected from violence and other harms.[27] Moreover, any potential conflicts could be addressed through reservations, understandings, or declarations to the CRC—which the United States has submitted when ratifying other human rights treaties—rather than by rejecting children's rights in their entirety.[28]

Resistance to ratification of the CRC and international human rights treaties more generally is only part of the story, however. In fact, the United States has bristled at the idea of recognizing home-grown versions of many basic human rights. U.S. federal law has refrained from recognizing a range of rights critical to children's wellbeing and healthy development, including the right to health care, the right to education, and the right to housing.[29] Despite this resistance to formally recognizing children's rights, many core rights principles—including the ideas that children should have access to health care when needed, have a right to quality education, and should have the

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how the convention affects U.S. sovereignty and our interpretation of federalism."); Ndjuoh Mehchu, *No Child Left Behind? An Interest-Convergence Roadmap to the U.S. Ratification of the Convention on the Rights of the Child*, 76 N.Y.U. Ann. Surv. Am. L. 1, 9 (2020) ("Our failure to ratify the convention is shaped in different measure by the arguments that ratification is . . . at odds with the U.S. system of federalism"); *see also* Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 Colum. Hum. Rts. L. Rev. 259, 311 (2004) ("[C]oncerns that multilateral agreements might infringe on U.S. sovereignty have resulted in an unwillingness to ratify a number of human rights treaties.").

[25] Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, *in* The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification, 19, 27–30 (Jonathan Todres, Mark Wojcik & Cris Revaz eds., 2006).

[26] Soo Joo Lee, *A Child's Voice vs. a Parent's Control: Resolving a Tension between the Convention on the Rights of the Child and U.S. Law*, 117, Colum. L. Rev. 687, 700 (2017) ("[A]nother concern is that the CRC threatens interference with the privacy of the family, particularly with the parents' domain over their children"); *see also* Todres, *supra* note 25, at 20–27 (detailing the "great value that [the CRC] places on the rights and duties of parents in raising their children" but noting that the "CRC does not allow parents to act with impunity toward their children").

[27] *See* CRC, *supra* note 2, arts. 24 (right to health care), 28 (right to education), 32 (right to protection from economic exploitation), 34 (right to protection from sexual exploitation).

[28] Todres, *supra* note 25, at 29.

[29] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); Erin C. Fuse Brown, *Developing A Durable Right to Health Care*, 14 Minn. J.L. Sci. & Tech. 439, 448–50 (2013) ("It is generally agreed that there is no broad right to health or health care under the federal constitution. . . . Health is never mentioned in the Constitution. . . ., the Court has not recognized a generally applicable positive right to health care, and it seems unlikely ever to do so"); Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 Neb. L. Rev. 245, 248 (2015) ("[T]here is no formal federal, state, or constitutional right to housing in America."). On some issues, such as education, selected state constitutions offer greater protections. *See, e.g.*, Scott Dallman & Anusha Nath, Federal Reserve Bank of Minneapolis, Education Clauses in State Constitutions Across the United States (2020), https://www.minneapolisfed.org/~/media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en [https://perma.cc/8DWZ-2FDN].

opportunity to develop to their full potential—are widely supported by the majority of the U.S. population.[30]

B. Lack of Prioritization of Children Has Led to Failing Our Children

Resistance to the CRC and international children's rights law takes many forms in the United States, but one prominent argument against U.S. ratification of the CRC has been the comparative one: children in the United States fare much better than children in other countries that have ratified the CRC, so the United States does not need the CRC.[31] This echoes the problematic sentiment that Henkin identified: the world should have human rights, but the U.S. does not need them.[32] Of course, the comparative argument overlooks a host of confounding variables (e.g., the difference in resources between the U.S. and many low-resource countries with persistent children's rights issues). More important, it also misses the most critical question: are we content with the state of children in the United States? On a host of measures related to child wellbeing, the United States is not doing nearly as well as the popular "We're #1" chants would imply.

Although many children in the United States thrive, there are significant disparities resulting in suboptimal support and outcomes for a substantial number of children. According to the U.S. government, "[m]ore than 4 in 10 (44.7%) children, representing about 31.9 million children, have experienced material hardship during their lifetime" (defined as "parent-reported difficulty covering the basics, like food or housing, on the family's income").[33] A 2022 survey found that 32.9 percent of children experienced food insecurity in the prior twelve months, while 14.1 percent experienced housing insecurity in the prior twelve months, and 9.0 percent had difficulties paying for children's medical or health care bills in the prior year.[34] That so many children in the United States have difficulties securing the basic necessities—such as food, shelter, and health care—that they need to survive and thrive is a major failure.

Not only are children struggling to secure their basic necessities, but they are also experiencing significant adverse mental health outcomes due to a variety of factors including not only inadequate access to health care, but also pressures associated with social media, academics, and "broader stressors such

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[30] *See, e.g.*, Julie Conley, *62% of Americans Agree US Government Should Ensure Everyone Has Health Coverage: The New Poll Shows the Highest Level of Support in a Decade for the Government Ensuring All Americans Have Healthcare*, Common Dreams (Dec. 9, 2024), https://www.commondreams.org/news/universal-healthcare-poll [https://perma.cc/M965-V6SW].

[31] Luisa Blanchfield, Cong. Research Service, The United Nations Convention on the Rights of the Child 15 (2015).

[32] Henkin, *supra* note 21, at 421.

[33] Maternal and Child Health Bureau, Health Resources and Services Administration, National Survey of Children's Health 1 (2023), https://mchb.hrsa.gov/sites/default/files/mchb/data-research/nsch-data-brief-2022-material-hardship.pdf [https://perma.cc/6LRQ-RT69].

[34] *Id.* at 2.

as . . . rising income inequality, racism, gun violence, and climate change."[35] Research found that "[i]n 2023, 40% of high school students felt so sad or hopeless almost every day for at least two weeks in a row that they stopped doing their usual activities,"[36] and twenty percent of high school students reported that they had "seriously considered attempting suicide during the past year."[37]

Violence and exploitation are also prevalent issues affecting children in the United States. Since 2020, firearm-related deaths have been the leading cause of child and adolescent mortality.[38] Further, many children experience and witness violence in the home, as well as in their schools and communities.[39] Trafficking of children occurs in all fifty states.[40] In addition, child labor violations have been found across numerous industries and sectors, including agriculture. In fact, the number of children in the United States employed in violation of child labor laws increased by 283% between 2015 and 2022.[41] The number of children employed in hazardous work settings in violation of the law also increased—by ninety-four percent—over the same seven-year period.[42] As one example, Human Rights Watch reports that "[m]ore U.S. child workers die in agriculture than in any other industry [and] [e]very day, 33 children are injured while working on U.S. farms."[43]

Overall, while comparisons to low-resource countries are often used as arguments against recognition of children's rights in the United States, a comparative analysis with economically comparable countries shows how much

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[35] U.S. Surgeon General, Protecting Youth Mental Health: The U.S. Surgeon General's Advisory 8 (2021), https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf [https://perma.cc/9HB9-43DN].

[36] Centers for Disease Control & Prevention, Youth Risk Behavior Survey: Data Summary & Trends Report 56 (2024), https://www.cdc.gov/yrbs/dstr/index.html [https://perma.cc/X4WF-G2E2].

[37] *Id.* at 60.

[38] Jason E. Goldstick et al., *Current Causes of Death in Children and Adolescents in the United States*, 386 N. Eng. J. Med. 1955, 1955 (2022); Silvia Villarreal, et al., Johns Hopkins Center for Gun Violence Solutions, Gun Violence in the United States 2022: Examining the Burden Among Children & Teens 2 (2024).

[39] U.S. Dep't of Justice, Office of Justice Programs, Children Exposed to Violence, https://ojp.gov/program/programs/cev [https://perma.cc/C8W7-74ND] (last visited Jan. 20, 2025) ("A study of a national sample of American children found that over the past year 60 percent were exposed to violence, crime, or abuse in their homes, schools, and communities. Almost 40 percent of American children were direct victims of 2 or more violent acts, and 1 in 10 were victims of violence 5 or more times.").

[40] U.S. Dep't of Education, Human Trafficking of Children in the United States: A Fact Sheet for Schools (2007), https://www.ed.gov/teaching-and-administration/supporting-students/human-trafficking/human-trafficking-of-children-in-the-united-states-a-fact-sheet-for-schools [https://perma.cc/WL25-4UWD] (last visited Apr. 6, 2025).

[41] USA Facts, Is Child Labor Increasing in the US?, https://usafacts.org/articles/is-child-labor-increasing-in-us/ [https://perma.cc/5JK2-U9DJ] (updated as of Oct. 5, 2023).

[42] *Id.*; *see also* U.S. Dep't of Labor, *Child Labor*, https://www.dol.gov/agencies/whd/data/charts/child-labor [https://perma.cc/5JUD-R5FR] (visited Nov. 30, 2024) (reporting that the number of children employed in violation of child labor laws increased from 3,876 in fiscal year 2022 to 5,792 in fiscal year 2023).

[43] Margaret Wurth, *Children Working in Terrifying Conditions in US Agriculture*, Human Rights Watch (Nov. 13, 2019), https://www.hrw.org/news/2019/11/13/children-working-terrifying-conditions-us-agriculture [https://perma.cc/3N7A-5V34].

children's rights, and their corresponding legal mandates, are needed in the United States. Among the thirty-eight high-income countries of the OECD:

> [T]he U.S. has the lowest life expectancy at birth, the highest death rates for avoidable or treatable conditions, the highest maternal and infant mortality, and among the highest suicide rates. . . . The U.S. has the highest rate of people with multiple chronic conditions and an obesity rate nearly twice the OECD average.[44]

Research also finds that the United States is "the only country among its higher-income peers in which guns were the leading cause of death among children and adolescents."[45] The United States has had "57 times as many school shootings as all other major industrialized nations combined."[46]

Global rankings further highlight shortcomings; for example, among all countries, the United States is ranked tied for forty-third in the world for lowest infant and child (under-five years old) mortality rate.[47] Whether the analysis is quantitative, qualitative, or comparative, the research reaches the same conclusion: too many children in the United States are suffering and do not have a genuine opportunity to develop to their full potential. Moreover, on many of these measures, children from historically marginalized communities often suffer the most.[48]

Given the breadth of harms experienced by many children in the United States today and the marginalization of children's issues in policy- and budget-making processes,[49] it is critical to develop a framework that elevates children's issues and ensures better law, policy, and institutional structures to support children's healthy development.

II. The Benefits of a Children's Rights Approach

A children's rights approach offers multiple benefits for children, their families, and their communities. First, adopting a children's rights approach means putting children on the agenda. Recognizing the rights of children as distinct, rather than entirely subsumed within an agenda item on families, brings children to the foreground, encouraging greater priority to children's

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[44] Munira Z. Gunja, Evan D. Gumas & Reginald D. Williams II, The Commonwealth Fund, U.S. Health Care from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes (2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022 [https://perma.cc/6GM5-TWT6].

[45] Luke J. Rapa et al., *School Shootings in the United States: 1997–2022*, *153(4)* Pediatrics, 2024, at 2.

[46] *Id.* at 2.

[47] *Child Mortality—Country Rankings*, The Global Economy, https://www.theglobaleconomy.com/rankings/child_mortality/ [https://perma.cc/D4MY-YGEW] (last visited May 22, 2024).

[48] Brenda Jones Harden & Natalie Slopen, *Inequitable Experiences and Outcomes in Young Children: Addressing Racial and Social-Economic Disparities in Physical and Mental Health*, 4 Annual Rev. Devel. Psychol. 133, 134–35 (2022).

[49] *See* First Focus on Children 2024, *supra* note 4.

needs and greater understanding of the impact of policies on children's lives.[50] For example, focusing on housing as a *family* issue can result in measures to address housing insecurity. However, seeing it also as a *children's* issue can help shed light on how housing insecurity affects children's schooling, their mental health, and other aspects of their lives.[51] Importantly, a children's rights approach does not ask that children's interests be considered instead of family issues, but rather that children's interests also be recognized and addressed.

Second, and related, a children's rights approach highlights the importance of hearing from children to better understand their lived experience and the impact of issues on them.[52] The CRC establishes that children have a "right to be heard" on matters that affect their lives.[53] Alison James and June Statham explain, "[C]hildren, including very young children, are experts in their own lives."[54] They can have insights and perspectives that adults do not. For example, young people today are the only ones who understand the experience of going to school during a global pandemic. They are also among the only ones who understand what it is like to grow up in an era of social media. Recognizing children's right to be heard and fulfilling that right can help communities benefit from young people's insights and expertise.

Third, a rights-based framework establishes a legal mandate. Currently, many programs that serve children in need in the United States are not rights-based. In other words, there is no legal obligation to guarantee that these programs will continue. In the health care context, Medicaid and state children's health insurance programs (CHIP) help millions of children access needed health care.[55] However, there is no federal right to health care. These programs, while long-standing, depend on politicians' preferences and commitments, which means they could be cut or discontinued at any time (as has been threatened many times).[56] Recognizing that children have a right to health care, on the other hand, comes with a legal mandate, one that

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[50] Todres, Choi, & Wright, *supra* note 13, at 417 ("Although the Convention on the Rights of the Child . . . emphasizes the centrality of the family, the CRC and children's rights more generally challenge the idea that children are solely appendages of the family. The CRC insists on recognition of children as individuals in their own right"). In addition, having a distinct treaty on children's rights forces governments, in the reporting process, to evaluate their actions specifically with regard to children. *See* CRC, *supra* note 2, art. 44.

[51] Jonathan Todres & Lauren Meeler, *Confronting Housing Insecurity—A Key to Getting Kids Back to School*, 175(9) JAMA Pediatrics 889, 889 (2021).

[52] *See infra* Section III.A.

[53] CRC, *supra* note 2, art. 12 (requiring that adults give "due weight" to the child's views, consistent with their "age and maturity" but not giving children the right to *decide* issues).

[54] Alison Clark & June Statham, *Listening to Young Children: Experts in Their Own Lives*, 29 Adoption & Fostering 45, 54 (2005).

[55] Centers for Medicare & Medicaid Services, October 2024: Medicaid and CHIP Eligibility Operations and Enrollment Snapshot 8 (2025), https://www.medicaid.gov/resources-for-states/downloads/eligib-oper-and-enrol-snap-october2024.pdf [https://perma.cc/TE23-LC8C] (reporting that in October 2024, there were 37.6 million Medicaid child and CHIP enrollees).

[56] *See, e.g.*, Allison Orris & Gideon Lukens, Ctr for Budget & Pol'y Priorities, Medicaid Threats in the Upcoming Congress (2024), https://www.cbpp.org/research/health/medicaid-threats-in-the-upcoming-congress [https://perma.cc/CV6H-6P7F]; Tim Walker, *How Project 2025 Would Devastate Public Education*, NEA Today (Oct. 4, 2024), https://www.nea.org/nea-today/all-news-articles/how-project-2025-would-devastate-public-education [https://perma.cc/5LM4-AYLH].

children (and their parents and caregivers) could rely on to demand that the government meets its legal obligations to ensure children can access health care when needed and remain healthy. The legal mandate embedded in children's rights law can also serve to protect children during difficult times (e.g., financial downturns or other periods when resources for children and families are constrained) given the "strong presumption that retrogressive measures . . . are prohibited" under economic and social rights law.[57]

Fourth, the children's rights model—outlined most prominently in the CRC—is a comprehensive approach. It addresses civil, political, economic, social, and cultural rights. It addresses health equity, social determinants, lived experience, and other relevant issues.[58] As we know from examining children's development and wellbeing through the lens of a socio-ecological framework, children confront a variety of individual, relationship, community, and societal level risk factors.[59] Moreover, these risks interrelate.[60] A rights-based approach offers a framework that addresses child development holistically, accounting for the interrelated nature of rights (e.g., the connections and interplay between health, education, and housing rights).[61]

Fifth, and finally, a children's rights framework offers many indirect benefits to families and broader society. When governments adopt policies that benefit children, such policies often result in better outcomes for working parents, the elderly, and others.[62] For example, ensuring that children have access to health care when needed—that is, ensuring children's health rights—helps keep children well and reduces absenteeism from school.[63] That not only benefits children's education, it also has benefits for working parents, and particularly mothers, who often bear the burden of caring for their out-of-school children.[64] A child-friendly built environment also benefits other populations.

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[57] U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 19 on the Right to Social Security*, U.N. Doc. E/C.12/GC/19, ¶ 42 (2008); U.N. Committee on the Rights of the Child, *General Comment No. 19 on Public Budgeting for the Realization of Children's Rights*, U.N. Doc. CRC/C/GC/19, ¶ 31 (2016) (stating that "In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations").

[58] CRC, *supra* note 2, arts. 24, 27, 28 (addressing social determinants through provisions on housing, health care, and education); *see also id.* art. 2, (addressing equity through the nondiscrimination provision); *id.* art. 12 (giving voice to children's lived experience through the right to be heard).

[59] UNICEF, Brief on the Social Ecological Model, https://www.unicef.org/media/135011/file/Global%20multisectoral%20operational%20framework.pdf [https://perma.cc/SQU2-RYUR] (last accessed Jan. 17, 2025).

[60] *Id.*; Marcela Lopez et al., *The Social Ecology of Childhood and Early Life Adversity*, 89 Pediatric Rsch. 353, 354 (2021).

[61] Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. Davis L. Rev. 417, 474 (2007).

[62] *See* Growing Up Boulder, https://www.growingupboulder.org/ [https://perma.cc/F5HA-4UJ8] (last visited June 26, 2025).

[63] Elizabeth Agneta et al., *Poor Health Is Driving Chronic Absenteeism Among High Schoolers — Here's How Pediatricians Can Help*, Health City (Sept. 7, 2023), https://healthcity.bmc.org/poor-health-driving-chronic-absenteeism-among-high-schoolers-heres-how/ [https://perma.cc/KG47-MNFE]; Sarah Komisarow & Steven W. Hemelt, *School-Based Health Care and Absenteeism: Evidence from Telemedicine*, 19 Education Finance & Policy 252, 272–73 (2024).

[64] Jonathan Todres, *Children's Rights and Women's Rights: Interrelated and Interdependent, in* Handbook of Children's Rights: Global and Multidisciplinary Perspectives (Martin Ruck et al., eds. 2016).

Growing Up Boulder, a multi-generational organization in Colorado, has undertaken numerous urban planning projects in partnership with youth, and these projects have shown that creating built spaces that work for children effectively creates spaces that work for other populations, including persons with disabilities, elderly individuals, and pregnant individuals.[65]

In short, a children's rights approach offers numerous benefits. It helps ensure children's needs and interests are firmly established on government agendas. It elevates the voices of children and youth. It carries the power of a legal mandate that children and their advocates can use to secure children's rights and wellbeing. It provides a comprehensive framework for children's development. Finally, it creates positive outcomes for communities, writ large.

III. The VR3 Model: Voice, Representation, Resources, and Remedies

In the U.S. human rights context, advocates often focus on litigation-centered initiatives.[66] While impact litigation plays an important role in forging positive change, it can also be a time-consuming process that does not always reach all children.[67] Equally important, litigation often addresses harms to children after they occur.[68] That does not mean litigation isn't necessary. It is. Indeed, it is an element of the Remedies component of the VR3 model. However, this article argues that we must be careful not to over-rely on litigation as the only vehicle for securing children's rights. Instead, litigation must be pursued simultaneously with other strategies. Furthermore, as discussed in the Introduction, this article aims to move "upstream" to ensure that children's needs and interests are accounted for in the ordinary course of government policies and programs. It focuses on institutions—primarily government agencies, but it is also applicable to private entities—and introduces the "VR3 model" as a framework for ensuring that governments and the private sector better account for and address children's rights and wellbeing.

Implementation of international human rights law at a domestic level requires that governments take "all appropriate legislative, administrative, and other measures."[69] For children's rights (and human rights more broadly) to be successful, it needs to engage more in the business of institution-building—that

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[65] *Project List*, Growing up Boulder, https://www.growingupboulder.org/project-list-and-reports.html [https://perma.cc/S7XQ-VT6Y] (last visited Jan. 1, 2025).

[66] Naomi R. Cahn, *Building the Constitutional Canon for Children's Rights*, Jotwell (July 17, 2024) (reviewing Catherine Smith, *"Children's Equality Law" in the Age of Parents' Rights*, 71 Kan. L. Rev. 539 (2023)), https://family.jotwell.com/building-the-constitutional-canon-for-childrens-rights/ [https://perma.cc/98RK-SCPS].

[67] *See, e.g.*, Vanita Gupta, *Remarks Delivered at the Thirteenth Annual Wiley A. Branton/ Howard Law Journal Symposium* on October 14, 2016, *in* 60 How. L.J. 629, 636 (2017) ("[E]ven 62 years after *Brown v. Board of Education*—the landmark ruling that Wiley Branton worked to implement in Little Rock, Arkansas—far too many children still attend racially-segregated schools and live in racially-isolated neighborhoods."); *see generally* Marta Conde et al., *Slow Justice and Other Unexpected Consequences of Litigation in Environmental Conflicts*, 83 Global Environmental Change (2023) (describing the challenges and delays to remedies through litigation).

[68] *See* Gupta, *supra* note 67, at 636.

[69] *See* CRC, *supra* note 2, art. 4.

is, creating structures, processes, and systems in which children's rights are mainstreamed. The VR3 model provides a template for government agencies (from the national to the local level) centered on Voice, Representation, Resources, and Remedies. Furthermore, this framework can be implemented whether or not the U.S. government takes action to ratify the CRC.

A. Voice

1. Theoretical Concept

In international children's rights law, Voice is represented by and enshrined in Article 12 of the CRC—children's right to be heard. This right has two core components: every child has a right to be heard on matters that affect their life, and the child's views must be given "due weight" consistent with their age and maturity.[70] Notably, there is no minimum age for exercising this right; if a child is capable of forming a view, they have the right to be heard.[71] There are a number of existing frameworks that help explicate and foster implementation of children's right to be heard, including Hart's ladder of participation, Shier's pathways to participation, and the Lundy Model.[72] While all of these models are valuable, this article relies on the Lundy Model as it is a rights-based framework that has been widely-adopted by government agencies in other countries, international organizations, and other entities.[73] The Lundy Model offers guidance to governments and civil society on the components of genuine child participation and how adults can support it.[74]

The Lundy Model has four elements: space, voice, audience, and influence.[75] The first two elements—space and voice—are encompassed in the CRC's mandate that children have the right to be heard on matters that affect their lives. Lundy defines *space* as requiring that children "be given the opportunity to express a view."[76] This may entail, for example, inviting children

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[70] CRC, *supra* note 2, art. 12.

[71] U.N. Committee on the Rights of the Child, *General Comment 12: The Right of the Child to Be Heard*, U.N. Doc. CRC/C/GC/12, ¶¶ 20–21 (2009); *see also* Todres, Choi, & Wright, *supra* note 13, at 418–19.

[72] *See, e.g.*, Roger A. Hart, UNICEF, Children's Participation: From Tokenism to Citizenship 8 (1992), https://participationpool.eu/wp-content/uploads/2020/05/Hart-R.-1992-Children-Participation-from-Tokenism-to-Citizenship.pdf [https://perma.cc/W998-J82K] (describing Hart's ladder of participation); Henry Shier, *Pathways to Participation: Openings, Opportunities and Obligations*, 15 Child. & Soc'y 107, 110 (2001); Laura Lundy, *'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child*, 33 Brit. Educ. Rsch. J. 927, 931 (2007).

[73] Polly Dunbar, *'They Called It the Lundy Model, and It Took Off': How an Academic's Landmark Paper Transformed Children's Rights*, The Guardian (Jan. 24, 2025), https://www.theguardian.com/research-to-reality/2025/jan/24/they-called-it-the-lundy-model-and-it-took-off-how-an-academics-landmark-paper-transformed-childrens-rights [https://perma.cc/H8PG-BEAS].

[74] *See also* Patricio Cuevas-Parra, *Multi-dimensional Lens to Article 12 of the UNCRC: A Model to Enhance Children's Participation*, 21 Children's Geographies 363, 370–73 (2022) (building on the Lundy model to incorporate additional dimensions of "intersecting identities" and "enabling environments").

[75] Lundy, *supra* note 72, at 933.

[76] *Id.*

to participate in school, community, or city councils. Next, *voice* means that the expression of children's views must be facilitated in a medium that they choose.[77] Ensuring that children have mentors who encourage and support young people's expression can facilitate voice. The latter two elements of the Lundy Model—audience and influence—are embedded in children's right to have their views be given due weight. *Audience* reflects the requirement that children's "view[s] must be listened to."[78] Their views can be embedded in government processes, for example, through children's commissioners and other government officials tasked with listening to youth and incorporating their views. The final component, *influence*, requires that children's "view[s] must be acted upon as appropriate."[79] Building in processes to ensure that programs developed with youth input move forward can help make sure that young people's ideas are translated into action and that youth participation is not merely tokenistic. Together, the four elements of the Lundy Model provide a framework for ensuring meaningful child participation on issues that affect their lives. This robust framework on children's participation and their right to be heard is included in the VR3 model under Voice. In other words, the Voice component of the VR3 model requires governments to build and sustain institutions and processes that provide pathways for children to be heard directly and to influence decision-making.

2. In Practice

There are countless examples of organizations that offer models of institutional structures and processes that elevate the voices of children and youth.[80] Youth councils or advisory boards provide a built-in structure for partnering with youth and ensuring their voices are heard.[81] The role, power,

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See, e.g.*, Sunrise Movement, https://www.sunrisemovement.org/ [https://perma.cc/DL7P-37P9] (last visited Jan. 31, 2025); Future Coalition, https://futurecoalition.org/ [https://perma.cc/UA24-AQX8] (last visited Jan 31, 2025); Fridays for Future, https://fridaysforfuture.org/ [https://perma.cc/3WHZ-YGQC] (last visited Jan. 31, 2025); California Coalition for Youth, https://calyouth.org/ [https://perma.cc/N6KQ-3H4X] (last visited Jan. 31, 2025).
[81] *See, e.g.*, Youth Commission, City and County of San Francisco, https://www.sfgov.org/youthcommission/ [https://perma.cc/Z6LF-SFR2] (last visited Apr. 10, 2025); Oakland Youth Commission, City of Oakland, https://www.oaklandca.gov/Government/Boards-Commissions/Oakland-Youth-Commission [https://perma.cc/42NJ-9Q2D] (last visited Jun. 30, 2025); San Antonio Youth Commission, https://www.sanantonio.gov/humanservices/about/boardscommission/SAYC [https://perma.cc/2RLT-MBVN] (last visited Apr. 10, 2025); Multnomah Youth Commission, https://www.multco.us/multnomah-youth-commission [https://perma.cc/C54C-CNAY] (last visited Apr. 10, 2025); Youth Commission, St. Paul, MN, https://www.stpaul.gov/departments/parks-and-recreation/recreation-centers/parks-recreation-programs/youth-commission [https://perma.cc/JJJ2-B4PR] (last visited Apr. 10, 2025); Youth Commission, City of Attleboro, MA, https://www.cityofattleboro.us/387/Youth-Commission [https://perma.cc/K5SP-DG7L] (last visited Apr. 10, 2025); Honolulu Youth Commission, https://www8.honolulu.gov/mayor/honolulu-youth-commission/ [https://perma.cc/9BZV-V23T] (last visited Apr. 10, 2025); *Youth Commission*, Greenville South Carolina,

and influence that a youth council may have can vary considerably,[82] but many of them provide a direct path for young people to have a say on issues that affect their lives and communities. Voting offers another pathway for young people's voices to be heard, and there are a variety of initiatives at the local level that seek to lower the voting age (to date, most frequently to age sixteen) in order to give some youth a direct pathway for participation.[83] A third example is the notice-and-comment rulemaking process. Under notice-and-comment rulemaking, the public is given an opportunity to comment on and react to proposed new regulations.[84] Such processes could be reformed to ensure that children are aware of any proposed rule—including by distributing notices through platforms young people use, creating child-friendly version of proposed rules, etc.—and have space where they can make their voices heard before new regulations are adopted.

Beyond specific institutional structures, there are also a wealth of processes that agencies and entities can draw upon to ensure children and youth have a voice. Youth-led Participatory Action Research (YPAR) offers a pathway through which young people can identify the issues that concern them, partner in developing research, and then build on that research to translate it to action.[85] Other potential processes can include story mapping, storyboarding, SMS surveying, focus groups with youth, and more.[86]

Finally, there are also many examples of youth-led organizations that provide a vehicle for young people to engage in direct policy advocacy on issues ranging from school safety to climate change.[87] While these advocacy opportunities are valuable, both for the input youth can provide and for their own development, the VR3 model requires that government agencies also provide

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https://www.greenvillesc.gov/1247/Youth-Commission [https://perma.cc/R6R4-2WG5] (last visited Apr. 10, 2025).

[82] *Youth Commissions and Councils Promote Leadership and Participation*, Institute for Local Government, https://www.ca-ilg.org/post/youth-commissions-and-councils-promote-leadership-and-participation-0 [https://perma.cc/694N-WX5F] (last visited Nov. 10, 2024); *Youth Engagement and Local Planning: Ideas for Youth Commissions*, Institute for Local Government, https://www.ca-ilg.org/sites/main/files/file-attachments/ilg_briefing_paper_3_final.pdf [https://perma.cc/L9U8-RSUG] (last visited Nov. 10, 2024).

[83] Vote16USA, Young Voices at the Ballot Box: Amplifying Youth Activism to Lower the Voting Age in 2024 and Beyond—A White Paper from Generation Citizen 13–17 (2024), https://www.vote16usa.org/wp-content/uploads/2024/10/Young-Voices-at-the-Ballot-Box.pdf [https://perma.cc/NX6S-GXH4] (reviewing U.S. localities that have lowered the voting age as well as other local and state level efforts to forge similar changes).

[84] Administrative Conference of the United States, Information Interchange Bulletin No. 014: Notice-and-Comment Rulemaking (2021), https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf [https://perma.cc/BE2X-P2MR].

[85] Ahna Ballonoff Suleiman et al., Leveraging Best Practices to Design Your Youth Participatory Action Research (YPAR) Project 2 (2024), https://yparhub.berkeley.edu/sites/default/files/updated_final_ypar_design_guide_.pdf [https://perma.cc/W4A4-SVD8].

[86] Dorothea Kleine et al., Global Kids Online, Participatory Methods: Engaging Children's Voices and Experiences in Research (2016), http://globalkidsonline.net/wp-content/uploads/2016/05/Guide-8-Participatory-methods-Kleine-Pearson-Poveda.pdf [https://perma.cc/ENB7-UGWH]; Lorraine Van Blerk et al., *Creating Stories for Impact: Co-producing Knowledge with Young People Through Story Mapping*, 55 Area 99 (2023).

[87] *See, e.g.*, Alliance for Youth Action, https://allianceforyouthaction.org/ [https://perma.cc/6VJL-RJ6V] (last visited June 26, 2025); Youth Move National, https://youthmovenational.org/ [https://perma.cc/8DLW-F4HZ] (last visited June 26, 2025).

pathways for direct input from children and youth, rather than relying solely on hearing from young people through non-governmental organizations.[88]

When assessing current or proposed structures and processes for securing children's participation, the framework of the Lundy Model can provide a lens for evaluating and understanding the extent to which a contemplated action actually ensures children's genuine participation. Equally important is to be aware that what might work for some children might not work for others.[89] Consistent with children's rights principles, the government must ensure opportunities for meaningful participation for all children, so agencies may need to draw on a variety of strategies to successfully realize the Voice component of the VR3 Model.

B. Representation

1. Theoretical Concept

Representation is a critical component of ensuring that children's interests are served, in large part because children themselves have limited power and voice in policy-making arenas.[90] Children possess no voting rights, have limited economic power to ensure they are heard by politicians, and face other constraints on their capacity to mobilize and be heard.[91] It is critical that governments create specialized offices or appoint individuals tasked with ensuring that children's rights and wellbeing are a priority. The need for representation is often recognized at an individual level—for example, a guardian ad litem is often appointed in specific cases to ensure that children's interests are acknowledged and served.[92] However, children's interests must also be given priority in decision-making at the community, regional, and national levels. Indeed, children's rights law—specifically, Article 3 of the CRC—expressly mandates that children's best interests must be "a primary consideration" in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[93]

While children's own views are essential, as the prior section emphasizes, having a representative for children is important not only because children

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[88] I recognize that some youth may choose not to participate in government spaces, but that does not negate the importance of making those spaces available. By analogy, governments must still take steps to secure every individual's freedom of speech rights, even if some will choose to exercise that right by not speaking out.

[89] *See* Cuevas-Parra, *supra* note 74, at 370–73.

[90] Todres, Choi, & Wright, *supra* note 13, at 425 ("[T]he legal and regulatory frameworks governing children's civic engagement leave young people with no direct means of participation and only limited circumstances in which they can voice concerns, protest policies or decisions, or influence outcomes").

[91] *Id.*

[92] *See, e.g.*, Georgia Office of the Child Advocate, Guardian ad Litem (Juvenile Court Dependency proceedings), https://oca.georgia.gov/training/guardian-ad-litem-juvenile-court-dependency-proceedings [https://perma.cc/A4WK-NZA9] (last visited June 4, 2024).

[93] *See* CRC, *supra* note 2, art. 3.

have limited access to the corridors of power but also because of the developmental nature of childhood. In some instances, especially in the context of young children, children may not have the requisite experience to make important decisions on their own. Indeed, children themselves have reported that, while they often want to be able to provide input, they do not necessarily want the burden of the final decision.[94] Children's rights law recognizes that some decisions need to be made by adults with the child's best interests in mind.[95] As Meredith Johnson Harbach explains, writing on early childhood: "By definition, the right to have one's best interests assessed by others in a variety of contexts is a right that children cannot exercise themselves. Instead, this right must be respected and carried out by adults: parents, guardians, private and public institutions, courts, administrative bodies, and legislative bodies."[96]

Finally, important policy and programmatic decisions are made every day while children are busy with their primary jobs of attending school and developing to their full potential. It is thus critical that someone is on watch, ensuring that children's interests are considered and given priority in decisions made at the local, state, and national level.

2. In Practice

There are numerous examples of representatives for children, including ombudspersons, children's commissioners, youth commissioners, children's cabinets, and other individual posts and entities whose mandate is to represent and serve the interests of children and youth. The Child Rights International Network has identified human rights institutions specifically for children in more than eighty countries.[97] Within the United States, a number of states have designated offices,[98] though there is no federal equivalent.[99] For example,

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[94] Tamar Morag et al., *Child Participation in the Family Courts—Lessons from the Israeli Pilot Project*, 26 Int'l J. Law, Pol'y, & Fam. 1, 4 (2012) ("[S]tudies indicate that children whose parents are going through a divorce are usually interested in expressing their positions and their feelings regarding decisions that affect their lives, although in most cases they do not wish to be the ones making the decision.").

[95] CRC, *supra* note 2, art. 3 (best interests); *see also id.* art. 12 (stating that "due weight" must be given to children's views, not that they get to decide).

[96] Meredith Johnson Harbach, *Children's Rights Law in Early Childhood, in* Children's Rights and Children's Development: An Integrated Approach (Jonathan Todres & Ursula Kilkelly eds., 2025).

[97] Child Rights International Network, Global List of National Human Rights Institutions Specifically for Children (2017), https://archive.crin.org/en/library/publications/global-list-national-human-rights-institutions-specifically-children.html [https://perma.cc/APG6-WNZZ].

[98] Nat'l Conf. of State Legislatures, Children's Ombudsman Offices: Office of the Child Advocate, https://www.ncsl.org/human-services/childrens-ombudsman-offices-office-of-the-child-advocate [https://perma.cc/C3TM-L3M6] (last updated Jan. 8, 2025); Laureen D'Ambra, *Appendix E: Survey of Ombudsman Offices for Children in the United States*, presented at the ABA 8th National Conference on Children and the Law, June 5, 1996. (1996), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/walls/appen-e.html [https://perma.cc/RUA5-AVV3].

[99] In late 2024, a bill was introduced in Congress that would have established a Children's Commission at the federal level, but it did not pass. Child Safety and Well-Being Act of 2024, H.R. 9875, 118th Cong. (2024) (the bill would need to be reintroduced in the new Congress).

Connecticut has an Office of the Child Advocate that "reviews state agency policies and procedures to ensure they protect children's rights and promote their best interest" and is tasked with other duties to advance children's wellbeing.[100]

Representatives can perform a variety of functions to support children, depending on their mandate. They can conduct investigations into situations that adversely affect children (either initiated own their own or by complaints filed by individuals). For example, the Ombudsperson for Children in Norway conducted an investigation into the use of force on children in residential care facilities and foster homes, leading to important recommendations to address the problem.[101] Ombudspersons and other representatives can also recommend and advocate for law and policy changes that can provide better protections for the rights and wellbeing of children. For example, in its 2022 report to parliament, the Ombudsperson for Children in Finland made several proposals, including recommending significant changes to the Child Welfare Act.[102] Ombudspersons can monitor existing policies and programs that affect children and track budgets and government spending on programs for children.[103] They also play an important public education role, organizing "campaigns to inform children, families, and the general public about children's rights and how to uphold them."[104] They provide expert policy advice, representing children's interests, and are also often tasked with annual reporting functions that can inform government decision-making.[105] Children's commissioners often consult directly with children, and in this regard can serve a critical role in providing pathways and support through which children can voice their views on issues affecting their lives.[106] Beyond the above, children's commissioners and other similar representatives can take on a breadth of other functions including "represent[ing] the rights and interests of children and young people in the public debate," public education, and more.[107]

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[100] Office of the Child Advocate, *About Us: Programs and Services*, Connecticut Office of Governmental Accountability, https://portal.ct.gov/oca/common-elements/common-elements/about-us [https://perma.cc/E5YF-5FW3] (last visited Mar. 20, 2025).

[101] Ombudsperson for Children in Norway, The Use of Force Against Children in Residential Child Care and Mental Health Care (2015).

[102] Ombudsman for Children of Finland, Report to Parliament by the Ombudsman for Children 2022, at 14 (2022).

[103] *Ombudsman for Children Highlights Key Budgetary Changes That Would Transform Children's Services and Supports in Ireland*, Ombudsman for Children (Sept. 18, 2024), https://www.oco.ie/news/ombudsman-for-children-highlights-key-budgetary-changes-that-would-transform-childrens-services-and-supports-in-ireland/ [https://perma.cc/7N4B-BGS2]; Talia Martinez, *Children's Ombudsman: What They Are and How Children and Families Can Access Their Services*, American Bar Association (Oct. 1, 2024), https://www.americanbar.org/groups/dispute_resolution/resources/just-resolutions/2024-september/childrens-ombudsman-what-they-are-and-how-to-access-services/ [https://perma.cc/J4B5-5X7R].

[104] Martinez, *supra* note 103.

[105] *Id.*

[106] *See, e.g.*, *Thousands of Children Gather at Commissioner's Climate Rights Assembly* Children and Young People's Commissioner of Scotland (Nov 21, 2024), https://www.cypcs.org.uk/news-and-stories/thousands-of-children-gather-at-commissioners-climate-rights-assembly/ [https://perma.cc/6GK9-CVB6].

[107] The Ombudsman for Children Act, § 3, Swedish Code of Statutes no: 1993:335 (1993), amended up to and including Swedish Code of Statutes 2017:1245.

While the form and functions of children's commissioners can vary, there are a number of critical elements to ensuring a children's commissioner can fulfill the Representative component of the VR3 Model. The Paris Principles—"Principles Relating to the Status of National Human Rights Institutions"[108]—offer guidance on the necessary elements for human rights institutions that can help ensure a children's commissioner's office realizes its potential. First, a children's commissioner's office must be established and protected by legislation. It must be granted independence, and that independence must be protected by law so that it can freely critique government policies that fall short of helping, or even cause harm to, children. It needs to be pluralistic so that it genuinely represents all children. It must have a broad mandate to address all children's rights. It must have authority to engage in the array of activities detailed above, so that, for example, it can investigate potential rights violations, collect relevant evidence, and issue findings. Finally, and importantly, it must have adequate resources—funding, staffing, and other aspects of institutional capacity—and such resources must be protected by law, rather than subject to the whim of politicized decision-making.[109]

C. Resources

1. Theoretical Concept

Ensuring rights requires resources.[110] While all rights are recognized as "indivisible, interdependent, interrelated and of equal importance,"[111] as a practical matter not all rights have been treated equally. With respect to resources, human rights law has long distinguished between civil and political rights on the one hand, and economic, social, and cultural rights on the other, holding that the former impose immediate and full obligations on states—upon ratification of a human rights treaty—while the latter are subject to progressive realization based on a country's available resources.[112] This differential treatment is rooted in the belief that civil and political rights primarily impose negative obligations (i.e., require states to refrain from certain acts that would infringe on individual rights), while economic, social and cultural rights impose positive obligations (i.e., require affirmative steps by

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[108] G.A Res. 48/134 (Dec. 20, 1993).

[109] *Paris Principles*, Global Alliance of Nat'l Human Rights Institutions, https://ganhri.org/paris-principles/ [https://perma.cc/F4QV-T82R] (last visited Mar. 20, 2025).

[110] Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 Syracuse L. Rev. 1, 7 (2005) ("All constitutional rights have budgetary implications; all constitutional rights cost money. . . . It follows that insofar as they are costly, social and economic rights are not unique.").

[111] Int'l Comm'n of Jurists, et al., *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 4, Jan. 22–26, 1997 (United Nations 1997) ("It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993) ("All human rights are universal, indivisible and interdependent and interrelated.").

[112] *See, e.g.*, CRC, *supra* note 2, art. 4.

the state), and therefore it is the latter that requires significant resources.[113] However, this split, which is reflected in human rights law,[114] is somewhat of a false dichotomy.[115] All rights require some level of resources.[116] The right to education certainly requires resources to build and maintain schools, hire and train teachers, and more, but so too does the right to vote require that states expend resources on establishing and maintaining election infrastructure. Also, a youth justice system, which is largely understood as implicating civil rights, requires resources to ensure children's procedural and substantive rights are secured. In short, the reality is that children's rights and children's healthy development require resources.

Despite children's needs and the breadth of evidence indicating how essential children's healthy development is to creating a foundation for life,[117] children are often relegated to the margins, and children's programs are often under-funded.[118] For example, in fiscal year 2023, "U.S. spending on children, both here and abroad, account[ed] for just 9.89% of the federal budget, a decrease of nearly 16% in real spending from FY 2022,"[119] even though children make up more than twenty percent of the U.S. population.[120] Federal spending on children shrunk even further as a percentage of the overall budget in

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[113] Louis Henkin, *A Bill of Rights—and-A-Half*, 32 Tex. Int'l L.J. 483, 487 (1997); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 Stan. J. Int'l L. 151, 151–52 (2009) (describing the debate over the traditional construction of rights which held that "socioeconomic rights are uniquely 'positive' in that they require expenditures of state resources in contrast to civil and political rights, which are 'negative' in that they involve only limiting government intrusion into the private sphere.").

[114] *See, e.g.*, CRC, *supra* note 2, art. 4. *Compare* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) (Article 2(1) mandates that states "undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"), *with* G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights (Dec. 16, 1966) (Article 2(1) mandates that states "undertake[] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.…").

[115] *See* Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 Comp. Lab. L. & Pol'y J. 29, 50–51 (2007) ("The argument that civil and political rights do not require the expenditure of resources, whereas social rights do, is only tenable in situations in which the focus of social rights is on the obligation to fulfill, and civil and political rights are observed on the primary level of the duty to respect. However . . . some civil rights require state obligations at all three levels, and most economic and social rights can be safeguarded by non-interference and the duty to protect."); Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 Brook. J. Int'l L. 689, 712 (1998) ("Civil and political rights are neither self-generating nor free of costs; they 'need legislation, promotion and protection and this requires resources.'") (footnote omitted).

[116] Sunstein, *supra* note 110, at 7 ("All constitutional rights have budgetary implications; all constitutional rights cost money.… It follows that insofar as they are costly, social and economic rights are not unique.").

[117] Jonathan Todres & Ursula Kilkelly eds., Children's Rights and Children's Development: An Integrated Approach (2025).

[118] First Focus on Children 2023, *supra* note 4.

[119] *Id.*

[120] Stella U. Ogunwole et al., U.S. Census Bureau, Population Under Age 18 Declined Last Decade (2021), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html [https://perma.cc/S34R-H6SL] (explaining that in 2020, approximately twenty-two percent of the U.S. population was under eighteen years of age).

2024.[121] Of course, the lack of voice and representation leaves children's interests often overlooked. However, it is critical to ensure that adequate resources are allocated to facilitate the implementation and enforcement of all rights children possess to holistically support their healthy and full development.

2. In Practice

Although children are often overlooked when it comes to allocating resources,[122] there are a variety of tools and processes that can be employed to help ensure appropriate levels of funding for children's programs. This article highlights two illustrative examples: children's budgets and child rights impact assessments.

Children's budgets are "the funds that the state allocates for expenses related to children and their families."[123] Children's budgets offer insight into how much of a government's budget goes to supporting children's programs, what types of programs are funded, and where there are gaps. A children's budget can also shed light on how much of a priority children's programs are compared to programs for adults. For example, the children's budget produced by First Focus on Children, a bipartisan organization that advocates for children and families, helps reveal that in 2023 under ten percent of the U.S. federal budget went to children's programs, with certain tax provisions accounting for about one-third of federal spending on children.[124]

As to the resources that are directed to programs for children, a children's budget can show how government resources are allocated across different programs. For example, First Focus on Children's children's budget assesses spending in the areas of early childhood, education, environmental health, health, housing, income support, justice and child protection, nutrition, and youth training.[125] Through more granular analysis, children's budgets can show which programs are prioritized by the government and, conversely, which ones receive lower priority.[126] Budget analysis can help identify where

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[121] First Focus on Children 2024, *supra* note 4.

[122] *See, e.g.*, Omar Arias & Igor Kheyfets, The World Bank, The Adequacy of Public Expenditure on Education and the Needs Post-Covid-19 (2023), https://thedocs.worldbank.org/en/doc/9b9ecb979e36e80ed50b1f110565f06b-0200022023/original/Adequacy-Paper-Final.pdf [https://perma.cc/8NSY-YQ8H]; First Focus on Children 2024, *supra* note 4 ("[T]he share of U.S. federal spending on children fell to 8.87% in Fiscal Year 2024, representing the third straight year of decline.").

[123] *Children's Budgets and What They Impact*, Joint SDG Fund (June 26, 2023), https://www.jointsdgfund.org/article/childrens-budgets-and-what-they-impact [https://perma.cc/SU2Q-C9YA].

[124] *How Much Government Spending Goes to Children?*, Peter G. Peterson Foundation (Nov. 26, 2024), https://www.pgpf.org/blog/2023/12/how-much-government-spending-goes-to-children [https://perma.cc/64EL-DEXA] (finding that under ten percent of the U.S. federal budget went to children's programs in 2023); *see also* First Focus on Children 2024, *supra* note 4 (noting that the percentage of the federal budget spent on children's programs dropped further in 2024).

[125] First Focus on Children 2024, *supra* note 4.

[126] Fundar—Centro de Análisis e Investigación, International Budget Project, & International Human Rights Internship Program, Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights 30 (2004).

governments have failed to spend allocated funds and can also help identify discrimination in the provision of services.[127] Budget analysis can also indicate trends in spending over time.[128] While children's budgets can provide vital information on what is being spent and on which programs, budget analysis does not answer the question of what *should* be spent.[129] Answering that requires analysis of the needs of different populations of children as well as articulation of clear goals with respect to securing the rights and wellbeing of all children. However, children's budgets can provide an opportunity for children's commissioners or other representatives, as well as other child advocates, to identify gaps in funding to support children's development and to press for greater resources for specific programs to address children's needs, as well as to advocate for greater spending on children's programs generally.

Second, child rights impact assessments (CRIA) require that governments assess the potential impact of any law, policy, or program on children prior to its adoption. Specifically, a CRIA "examines the potential impacts on children and young people of laws, policies, budget decisions, program[s] and services as they are being developed and, if necessary, suggests ways to avoid or mitigate any negative impacts. This is done *prior* to the decision or action being set in place."[130] Importantly, as the EU-UNICEF Child Rights Toolkit explains, "[t]here is no such thing as a child-neutral policy. Whether intended or not, every policy positively or negatively affects the lives of children."[131] Therefore, the starting point must be that any proposed law, policy, programmatic, or budget decision will have an impact on children (and their families), and the focus must be on identifying what that impact is, taking steps to ensure positive effects, and mitigating any potential negative consequences. A number of countries have adopted legislation requiring child rights impact assessments, including Austria, Belgium, Finland, Italy, Sweden and the United Kingdom.[132]

Mandating a child rights impact assessment—at the federal, state, or local level—is important to ensuring that children's rights and interests are considered before new policies and programs are adopted and resources are allocated. Conducting a child rights impact assessment would enable a government to fine-tune its policies, mitigate or eliminate potential harms, provide adequate resources for children's programs, and secure better outcomes for all children. Furthermore, as discussed above, better outcomes for children frequently will likely mean better outcomes for families and communities.

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[127] *Id.* at 37.
[128] *Id.* at 30.
[129] *Id.* at 36.
[130] *Child Rights Impact Assessment*, European Network of Ombudspersons for Children (2020), https://enoc.eu/what-we-do/annual-advocacy-areas/child-rights-impact-assessment/ [https://perma.cc/HV77-8PSB] (emphasis in original).
[131] European Commission & UNICEF, EU-UNICEF Child Rights Toolkit: Integrating Child Rights in Development Cooperation, Module 5: Child Impact Assessments, para.1.1. (2014), https://www.unicef.org/bih/media/726/file/EU-UNICEF%20Child%20Rights%20Toolkit%20.pdf [https://perma.cc/3TTH-UK69].
[132] *Child Rights Impact Assessment*, European Union Agency for Fundamental Rights (2014), https://fra.europa.eu/en/content/child-rights-impact-assessment [https://perma.cc/ZD8W-E7SV].

The Committee on the Rights of the Child has affirmed that child rights impact assessments "need[] to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children's rights."[133] Arguably, this could be extended to private sector entities whose policies and actions can have significant impacts on children and the environments they grow up in. They could conduct their own impact assessment, in conjunction with children's rights experts and other relevant professionals, to ensure their actions do not adversely affect children.

Although any discussion of resources often centers around financial resources, it is important to note that the Resources component of the VR3 model implicates more than money. Human resources and informational resources, as well as other assets that children and youth themselves view as resources (e.g., community identity, belonging, capabilities, and more), should be part of and accounted for in all discussions about resources.

D. Remedies

1. Theoretical Concept

It has long been held that every right must have a remedy.[134] Without a remedy, "rights can be reduced to mere lines on paper."[135] Ensuring clear pathways for drawing attention to rights violations and pursuing remedies is critical to the overall mission of children's rights, and human rights more generally. The U.N. Human Rights Committee has explained that every individual should have "accessible and effective remedies to vindicate th[eir] rights,"[136] while the U.N. High Commissioner for Human Rights affirms that "[a]ccess to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights."[137] Child rights

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[133] U.N. Committee on the Rights of the Child, *General Comment No. 14: on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (art. 3, para. 1), U.N. Doc. CRC/C/GC/14, ¶ 99 (May 29, 2013); *see also* U.N. Comm. on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, U.N. Doc. CRC/GC/2003/5, ¶ 45 (Nov. 27 2003); European Union Agency for Fundamental Rights, *supra* note 132 ("Child impact assessment needs to be built into government at all levels and as early as possible in the development of policies and laws.").

[134] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 147 (1803) (citing 3 William Blackstone, Commentaries *109) (Chief Justice Marshall writing, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy.").

[135] Pamela S. Karlan, *What's a Right Without a Remedy?*, Boston Rev. (Mar. 1, 2012), https://www.bostonreview.net/articles/pamela-karlan-supreme-court-rights-legal-remedies/ [https://perma.cc/RE9F-268G].

[136] U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 15 (May 26, 2004).

[137] U.N. Human Rights Council, Access to Justice for Children: Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/25/35, ¶ 3 (Dec. 16, 2013).

scholar Ton Liefaard highlights the importance of both the "legal empowerment of children" and the "availability of child-friendly or child-sensitive proceedings."[138]

When it comes to remedies, there is broad agreement that "[r]emedies should be accessible, affordable, adequate and timely, and rights holders seeking them should not fear victimization."[139] Accessibility includes ensuring that processes are transparent and widely-known and that legal and other assistance is available to children as needed.[140] Affordable means ensuring that remedies are accessible to all individuals without regard to financial means.[141] Adequate remedies address the full implications of the rights violation, while timely means that children must receive relief from rights violations without delay.[142] Timeliness may necessitate provisional measures to stop violations from occurring further.[143] Finally, children must be able to pursue remedies without fear of retribution for calling attention to any rights violations.

To build and sustain pathways for remedies requires the following components at a minimum: processes for identification of violations, including both individual reporting and more systematic evaluations (both built-in and ad hoc evaluations); pathways and spaces or institutions where individuals can seek a remedy; and enforcement mechanisms for any remedies ordered. For all of these components, it is essential that remedies be accessible to *all* children, without discrimination of any kind.[144]

2. In Practice

As noted in the prior section, several steps and processes are needed to ensure effective remedies are available in the children's rights context: children and their representatives need vehicles for identifying and reporting violations of children's rights; there must be built-in regular evaluation processes to alleviate the burden of reporting on children who have suffered trauma from violations of their rights; states must establish and maintain accessible judicial and non-judicial institutions where children can pursue a remedy; and there must be mechanisms to enforce remedies that a court or other body might order.

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[138] Ton Liefaard, *Access to Justice for Children: Towards a Specific Research and Implementation Agenda*, 27 Int'l J. Child.'s Rts. 195, 198 (2019).

[139] Press Release, General Assembly, *Preventive Measures, Accessible Remedies Required to Address Myriad Human Rights Violations, Experts Tell Third Committee During Interactive Dialogues*, U.N. Press Release, GA/SHC/4206 (Oct. 17, 2017).

[140] Scottish Human Rights Commission, Adequate and Effective Remedies for Economic, Social and Cultural Rights 6 (Dec. 2020), https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf [https://perma.cc/JBP7-8NR6].

[141] *Id.* at 7.

[142] *Id.*

[143] *Id.*

[144] *See* CRC, *supra* note 2, art. 2 (nondiscrimination principle).

a. Identification of Rights Violations – Individual and System-Based

In terms of identifying rights violations (or risks of violations, to move upstream and be able to prevent them from occurring), ideally a government should establish procedures to regularly evaluate laws, policies, and programs for their impact on children. This would take significant pressure off of individual children having to report violations under trying circumstances. Ombudspersons or children's commissioners can play a key role here. By regularly evaluating its policies and programs, a government has a better chance of prevention or early intervention, which can further minimize harm to children. At a national, state, or local level, Child Rights Impact Evaluations can be built in to "provide[] an opportunity to consider the intended or unintended effects th[at] legislative changes, policies, budgetary allocations, and other administrative decisions have had on children and young people."[145]

At the international level, mandatory reporting to a treaty body such as the U.N. Committee on the Rights of the Child effectively builds in an ongoing monitoring and evaluation process for the implementation of children's rights.[146] However, as states parties are required to report to the Committee on the Rights of the Child only once every five years (and the reporting process is sometimes delayed),[147] it is critical that evaluations be conducted at a national, state, and local level on a more frequent basis. This is particularly critical in the U.S. context, given its status as the only country that has not ratified the CRC.

In addition to regular systematic evaluations, governments need to create and maintain other mechanisms for children and their families to report violations. This can come in the form of hotlines; individual complaints submitted to a children's commissioner; and other national, state, or local reporting processes; so long as they allow children and others to safely report rights violations and to identify harms where a remedy is needed, without fear of reprisals.

b. Institutions that Provide Remedies – Judicial and Non-Judicial

Next, states must establish and maintain accessible institutions where remedies can be pursued. Courts offer the most recognizable space, and litigation is often viewed as the primary vehicle for obtaining remedies for rights violations. Seminal U.S. cases such as *Brown v. Board of Education*, *In re Gault*,

[145] European Network of Ombudspersons for Children, Position Statement on "Child Rights Impact Assessment (CRIA)" (2020), https://enoc.eu/wp-content/uploads/2020/11/ENOC-2020-Position-Statement-on-CRIA-FV-1.pdf [https://perma.cc/Q59G-GXSD].

[146] The U.S. ratified the first two optional protocols to the CRC—on the sale of children, child prostitution, and child pornography, and on the involvement of children in armed conflict, respectively—and thus reports to the Committee on the Rights of the Child on these issues, however as the only country yet to ratify the CRC, it does not report on the full range of children's rights.

[147] Charlotte S. Alexander & Jonathan Todres, *Evaluating the Implementation of Human Rights Law: A Data Analytics Research Agenda*, 43 U. Pa. J. Int'l L. 1, 26 (2021).

and *Roper v. Simmons*, are celebrated as forging leaps forward in the struggle for human rights and justice for all children.[148] More recently, youth have been at the center of lawsuits that aim to secure action to address climate change.[149] While civil litigation is a powerful tool, the courts are not the sole venue where one can pursue a remedy. Agencies can provide regulatory processes, administrative hearings, and other procedures and processes for seeking remedies for children's rights violations. For example, the Individuals with Disabilities Education Act (IDEA) establishes administrative processes through which children with disabilities can receive an individualized education program that helps secure their right to a quality education.[150]

It is important to note that the mere existence of courts does not necessarily mean remedies are accessible to *children*. Children confront a host of barriers to remedies through the courts, including financial barriers, language barriers, the lack of child-friendly mechanisms, insensitive procedures that may intimidate children and discourage them from pursuing a remedy, and more.[151] Children from marginalized communities—e.g., minoritized children, children with disabilities, etc.—may encounter additional barriers. States must ensure that courts, administrative agencies, and other institutions empowered to provide remedies are structured in a way that is genuinely accessible to all children.

If national courts and other administrative processes are not adequate, and domestic remedies have been exhausted, then international tribunals can offer a further option for children in countries that have accepted the jurisdiction of international tribunals and treaty bodies.[152] Specific to children's rights, in 2011, the U.N. General Assembly adopted a third optional protocol to the CRC on a communications procedure that provides an avenue for children and their representatives to pursue remedies for children's rights violations.[153] One unique aspect of the Optional Protocol to the CRC on a Communications Procedure is that it allows children to submit claims themselves,[154] which stands in contrast to the practice of many countries, including the United States, where there are significant barriers to children being able to file a complaint.[155] To date, ratifications of this third Optional Protocol have lagged, so a critical first step in the context of children's rights remedies at the

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[148] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); In re Gault, 387 U.S. 1 (1967); Roper v. Simmons, 543 U.S. 551 (2005).

[149] *See, e.g.*, Held v. State of Montana, 560 P.3d 1235 (Mont. 2023); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); *see generally Climate Change Litigation Database*, Columbia Center for Climate Change Law, https://climatecasechart.com/ [https://perma.cc/6VPH-GG8S] (last visited Feb. 1, 2025).

[150] 34 C.F.R. §§300.320–24 (2024).

[151] Liefaard, *supra* note 138, at 203–04.

[152] Sacchi, et al. v. Argentina, et al., No. CRC/C/88/D/104/2019 (Oct. 8, 2021), available at https://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/ [https://perma.cc/YMU3-H3Q2] (last visited Feb. 1, 2025).

[153] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res. 66/138 (Dec. 19, 2011) (only states that have ratified this third optional protocol to the CRC have granted the Committee the authority to hear cases against them).

[154] *Id.* at art. 5.

[155] *See* Lisa Martin, *Securing Access to Justice for Children*, 57 Harv. Civ. Rts-Civ. Lib. L. Rev. 615, 629–41 (2022).

international level is for countries to ratify the third Optional Protocol.[156] But even without ratification of the third Optional Protocol, progress can still be made; governments—at both the national and local levels—can draw on the Optional Protocol model to develop domestic pathways for children to pursue remedies to violations of their rights.

c. Enforcement Mechanisms

Finally, remedies are only valuable if they come to fruition. While *Brown v. Board of Education of Topeka*[157] was a landmark case for children's education rights, decades later many children were still attending largely segregated schools.[158] So, governments need to ensure appropriate enforcement tools and mechanisms are in place to make sure that children who have been granted a remedy actually realize it. In the context of gross violations of human rights, the U.N. General Assembly has described this as including: "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms."[159] Too often, enforcement mechanisms for ensuring remedies are inadequate and survivors of rights violations wait years for justice.[160] As Ton Liefaard writes, "[a]ccess to justice has been defined as 'the ability to obtain a *just and timely remedy* for violations of rights as put forth in national and international norms and standards, including the [CRC]' . . . . Without access to justice for children, children's rights would merely be symbolic."[161] States must invest in strengthening enforcement mechanisms to ensure that remedies are meaningful for all children who experience violations of their rights.

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[156] Status of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en [https://perma.cc/T2A4-C4JC] (last visited June 30, 2025).

[157] 347 U.S. 483 (1954).

[158] *See* Erica Frankenberg, *70 years after Brown vs. Board of Education, public schools still deeply segregated*, The Conversation (Jan. 5, 2024), https://theconversation.com/70-years-after-brown-vs-board-of-education-public-schools-still-deeply-segregated-219654 [https://perma.cc/L558-8J7T] ("Public school students today are the most racially diverse in U.S. history. And yet, public schools are deeply segregated.").

[159] U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly on 16 Dec 2005, U.N. Doc. A/RES/60/147, ¶ 11 (Mar. 21, 2006).

[160] *See* Frankenberg, *supra* note 158 (discussing how children in the U.S. attended segregated schools long after the Supreme Court declared them unconstitutional in *Brown v. Board of Education*). *See generally* Human Rights Watch, *Children's Rights to Access to Justice and Effective Remedies: Submission to the United Nations Committee on the Rights of the Child Regarding General Comment No. 27 on Children's Rights to Access to Justice and Effective Remedies* (Aug 23, 2024), https://www.hrw.org/news/2024/08//23/childrens-rights-access-justice-and-effective-remedies [https://perma.cc/RN7G-2YF9] (discussing lack of enforcement mechanisms and delays in realizing remedies for children's rights violations in various countries).

[161] Ton Liefaard, *Access to Justice for Children at the International Level: Reflecting on 10 years of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, *in* Fra Barnerett Til Barns Rettigheter 268, 269 (Anne Hellum et al., eds, 2024) (emphasis added).

IV. Creating an Integrated Framework for Children

The VR3 model offers a framework that enables governments at a national, state, or local level to build procedural and substantive structures that would help advance and secure children's rights and wellbeing. The model can be employed at a government-wide level (ideally) or piloted with a specific agency. All sectors of society—from education and health care to transportation and urban planning and more—affect children. Agencies across different sectors have distinct structures and processes. Each element of the VR3 model can be adapted to work with the particular structures of an agency or level of government. But while there may be significant differences between agencies or across jurisdictions, governments must adopt laws, policies, and procedures to ensure Voice, Representation, Resources, and Remedies are all embedded in the policies and practices of their agencies and institutions. Doing so can help mainstream children's rights in all sectors and processes, so that agencies act in the interests of children.[162]

In seeking to build more child-supportive institutions and agencies, each component of the VR3 model is important in its own right. However, the whole is greater than the sum of the parts because all of these components interact with and support one another. Thus, investment in only one component is valuable but not sufficient. For example, securing remedies is important in and of itself, but remedies without voice, representation, and resources mean that child advocates are likely going to be pursuing justice after harm to children has occurred, and may also have insufficient resources to ensure such violations do not occur again in the future. Likewise, voice without the other components can be reduced to tokenistic participation. Representation alone risks not fully accounting for all children's voices and might fail to have the impact it should without the resources to carry out its mandate. Finally, resources—while critical—may not be directed to the issues that matter most to, and have the greatest impact on, children and youth, unless young people's voices and the voices of their advocates are heard.

Conversely, each component can strengthen the others. Ensuring meaningful child participation (Voice) not only empowers young people, but their insights can also improve the work of children's commissioners; help ensure resources are directed to where they are most needed; and inform evaluations of laws, policies, and programs that can improve remedies. Representatives, meanwhile, can work to ensure children's voices are heard and listened to, can advocate for greater resources for children's programs, and can conduct investigations that lead to earlier interventions and other remedies. Resources, of course, can bolster all aspects of children's rights work. As one example, child rights impact assessments can help improve law, policies, and programs before they are adopted and go into effect. This can improve outcomes for children, strengthen the work of children's commissioners, and improve remedies, or better yet, prevent violations in the first place. Finally, effective remedies and

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[162] *See supra* notes 13–15 and accompanying text.

access to justice can improve the lives of children, lead to better tools for children's commissioners, and generate greater resources for programs that support children's rights and healthy development.

In short, a government agency—or ideally, the full government—needs to develop infrastructure that ensures children's voices, appoints representatives for them with meaningful authority, appropriates adequate funding and other resources, and establishes processes to secure remedies when needed. Having all four components enables each one to provide benefits to children while simultaneously enhancing the impact of the other components of VR3.

Conclusion

Young people today are demonstrating a strong desire and motivation to improve their communities and build a just, sustainable world for all.[163] In contrast, adult mindsets stuck on ideas like "children are the future" not only fail to acknowledge how significantly current actions affect children now (and thus affect their life trajectories), but they also fail to appreciate how important children are to what happens to our communities today. Children are "beings" not "becomings."[164] In light of this, implementation of the VR3 model must be done in partnership with children and youth. That means taking on the complexities of ensuring meaningful participation of children, including taking appropriate steps to ensure that the children who do participate are representative, that adults do not manipulate agendas, and that investments are made to ensure partnerships and collaborations with children and youth are sustained.[165]

Building a society in which all children thrive and can develop to their full potential is a major undertaking. However, it is also consistent with the core value of human rights: recognizing the dignity inherent in every individual. If government institutions and agencies can develop policies and institutional structures that elevate the voices of children and youth, establish and support positions that represent and serve children, allocate adequate funding and other resources for children's programs, and secure remedies for children when rights are violated, then the government can take a huge step toward achieving full implementation of children's rights, enhancing opportunities for every child to develop to their full potential.

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[163] For examples of youth-led activism, see Sunrise Movement, https://www.sunrisemovement.org/ [https://perma.cc/DL7P-37P9] (last visited Dec. 20, 2024); Future Coalition, https://futurecoalition.org/ [https://perma.cc/UA24-AQX8] (last visited Dec. 20, 2024); Fridays for Future, https://fridaysforfuture.org/ [https://perma.cc/3WHZ-YGQC] (last visited Dec. 20, 2024).

[164] *See* Michael Freeman, *Taking Children's Human Rights Seriously*, *in* The Oxford Handbook of Children's Rights Law 52, 57 (Jonathan Todres & Shani M. King eds., 2020); Emma Uprichard, *Children as 'Being and Becomings': Children, Childhood and Temporality*, 22 Children & Society 303, 304 (2008).

[165] Gerison Lansdown, UNICEF, Promoting Children's Participation in Democratic Decision-making, 1, 17 (2001) https://digitallibrary.un.org/record/437269?ln=en&v=pdf [https://perma.cc/L5UE-4Y9U].

A Role for Apology: Remedial Work by the Criminal Justice System

*Steven E. Raper, M.D., J.D.**

Abstract

Apologies are morally consequential and one of the principal ways the powerful—specifically actors in the criminal justice system—can remedy inevitable excesses of authority. In healthcare, commercial, and governmental settings, to name a few, the role of apology has assumed greater ethical weight. Calls are growing for increased use of apologies when people are injured by the criminal justice system, with the sentiment stated in its most elemental form: "Say you're sorry when you hurt somebody." Yet, of the thirty-seven state wrongful conviction statutes, not one mentions the word apology. The reality of apologizing is more complicated. Apologies are but one form of remedial work in response to transgression of societal norms encompassing a spectrum from retreat, in which the transgressor flees, through accounts and benevolent gestures, to a real apology with the attendant foundational elements of recognition, responsibility, remorse, and redress.

This paper will discuss the role of apology in the criminal justice system. Part One will briefly analyze the concept of norms and the moral imperative to do remedial work for transgression of such norms (e.g., injuries). The options for remedial work discussed will include, among others, apologies. Part Two will discuss the theory and practice of apologies and how real apologies should apply to the criminal justice system. Instructive examples of apologies—focusing on merit—in the political and governmental setting are discussed. Part Three will examine apology considerations in the criminal justice setting, including a series of examples offered by law enforcement, elected officials, and prosecutors. Part Three will also examine the dearth of empirical evidence on the role of apology by the criminal justice system. Part Four will discuss existing wrongful conviction statutes and how the sections in various state statutes support or inhibit the offering of apologies. Some policy arguments against apologizing by criminal justice actors will be refuted. Lastly, Part Five proposes a model wrongful conviction statute with provisions for apology as a novel section and additional statutory clauses necessary to support the offering of an apology.

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Introduction

Real apologies are one of the principal ways those in power can remedy inevitable excesses of privilege.[1] Calls are growing for increased use of apologies when people are injured by the criminal justice system.[2] The sentiment has been stated in its most elemental form: "Say you're sorry when you hurt somebody."[3] The reality of apologizing is more complicated. Apologies are but one form of remedial work in response to transgression of societal norms—including injuries by the criminal justice system—encompassing a spectrum from retreat, in which the transgressor flees, through accounts and benevolent gestures, to a real apology with the foundational elements of recognition, responsibility, remorse, and redress.

This paper will discuss the role of apology in the criminal justice system. Part One will briefly analyze the concept of norms and the moral imperative to do remedial work for the transgression of such norms (e.g., injuries). The options for remedial work discussed will include, among others, apologies. Part Two will discuss the theory and practice of apologies and how real apologies should apply to the criminal justice system. Instructive examples of apologies — focusing on their merit—in the political and governmental setting are discussed. Part Three will examine apology considerations in the criminal justice setting, including a series of examples offered by law enforcement, elected officials, and prosecutors. Part Three will also examine the dearth of empirical evidence on the role of apology by the criminal justice system. Part Four will discuss existing wrongful conviction statutes and how the sections in various states might support the offering of apologies by statute. Some policy arguments against apologizing will be refuted. Lastly, Part Five includes a model statute with apology as a novel section and additional statutory clauses necessary to support the role of apology.

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[1] I will use the term "real" apology while acknowledging there are many other terms from which to choose. *See* Michael Karson, *4 Parts of a Real Apology: Apology Is a Relational Process That Leads to Change*. Psychol. Today (July 14, 2016), https://www.psychologytoday.com/us/blog/feeling-our-way/201607/4-parts-real-apology [https://perma.cc/N6U4-ESX8] (last visited Jan. 12, 2025).

[2] I will use the term "injured" for the individual or group that has sustained a harm (e.g., police involved shooting, wrongful death, wrongful conviction), and "transgressor," after O'Hara, to define the individual or group (e.g., police department, detective, line prosecutor, district attorney) that has caused the harm in the context of the criminal justice system. *See* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 Wash. L. Rev. 1121, 1123 (2002).

[3] Robert Fulghum, All I Really Need to Know I Learned in Kindergarten 6 (Random House 2003) (1988).

I. Normative Justice and Remedial Work[4]

A. Normative Justice

As in all instances of social interaction, justice—including that meted out by law enforcement and prosecutors—is subject to norms, or guides for action.[5] Preservation of societal order requires community commitment to societal norms.[6] Transgression of societal norms impacts not only the injured and the transgressor, but the entire society. Norms have been distinguished as formal in the case of statutes and regulations that draw upon the authority of the state or informal as rules supported by some lesser authority.[7] Norms oblige individuals to do or refrain from doing something to another and may lead the individual to anticipate an action that will be done (or not done) by that other.[8] Such reciprocal actions may be considered rights by persons who experience transgression, and duties otherwise.[9]

Norms are often generalized, and transgression on one occasion is often perceived as indicative of transgressions in a whole class of events.[10] Sanctions can be positive, but more importantly, in remedial interchanges, negative when transgressions occur.[11] The significance of negative sanctions is twofold: sanctions may be substantive, but they also say something to the injured and witnesses of the infraction about the moral status of the transgressor.[12] Sanctions may promote normative compliance and may be

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[4] I will use the term "remedial work" after Goffman. Erving Goffman, Relations in Public: Microstudies of the Public Order, 108 (Routledge 2017) (1971). Schlenker uses the alternative phrase "remedial behavior;" Barry R. Schlenker, Impression Management: The Self-concept, Social Identity, and Interpersonal Relations 134 (Brooks-Cole Publishing Co., 1980).

[5] A thorough discussion of norms in criminal justice are beyond the scope of this paper. However, such norms are readily available for review and analysis. *See, e.g.*, American Bar Association, The Criminal Justice Standards for the Prosecution Function, Fourth Edition, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ [https://perma.cc/LN2Q-3BD6] (Last visited Jan. 12, 2025); American Bar Association, Standards on Prosecutorial Investigations, Prosecutorial Investigations, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecutorial-investigations/ [https://perma.cc/R8QD-L2Q5] (Last visited Nov. 13, 2024). Law enforcement norms also exist. Model policies from the International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center articulate norms of ethical conduct (noting access to model policy links is an IACP members only benefit). International Association of Chiefs of Police. Related Policies. http://www.theiacp.org/ethicspolicies [https://perma.cc/Z5YX-P5UF]. (Last visited Jan. 12, 2025).

[6] Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. Rev 289, 318 (2001).

[7] Goffman, *supra* note 4, at 95.

[8] *Id.* at 96–97.

[9] *Id.* at 98.

[10] *Id.* at 97 (explaining that those upon whom normative infractions are inflicted, or those who witness such infractions, perceive the offender's relationship to norms as defective, and by extension to normative justice in general).

[11] The establishment of norms does not make the application of negative sanctions any easier within in the law enforcement or prosecutorial realms. *See, e.g.*, The Innocence Project, Official Misconduct. https://innocenceproject.org/official-misconduct/ [https://perma.cc/84DD-YVED] (Last visited Jan. 12, 2025); Philip Matthew Stinson, Sr. Police Integrity Lost: A Study of Law Enforcement Officers Arrested. http://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf/ [https://perma.cc/3F2H-XQNM] (Last visited Jan. 12, 2025).

[12] Goffman, *supra* note 4, at 99–100.

formal or informal.[13] Sanctions also impart a notion of how the individual in question and others assess deviation from a specific rule. One who fails to adhere to a norm—whether through a momentary lapse or a moral failing—has an additional responsibility to understand the transgression in the context of prevailing norms.

The sociologist Goffman tersely defines the concept of moral responsibility as "*why* the individual acted as he did, how he *could* have acted, how he *should* have acted, and how in the future he *ought* to act."[14] Should transgression of norms occur, the offender can be said to have a dual responsibility: to make amends and show true concern for corrective action.[15] Once the violation of a relevant normative rule has been committed, and the offender has accepted responsibility for the infraction, another concern regarding normative justice is the requirement for communication of any analysis and corrective action. Such communication has been considered a performative utterance, a normatively enforceable obligation to communicate.[16]

B. Kinds of Remedial Work

Sociologists and psychologists distinguish a number of kinds of remedial work. Perhaps the most morally suspect is retreat, in which the transgressor tries to flee the transgression. Retreat occurs in most embarrassing situations but can turn the perception of a transgression, and can make things look worse for the transgressor in some scenarios.[17] For example, a person committing a crime might flee at the sight of law enforcement closing in.[18] Eventually, when caught, the transgressor will find the consequences of retreat more unpleasant.

1. Benevolent Gestures

For most circumstances, when individuals are injured by the criminal justice system, and events are still unfolding, benevolent gestures—ORAL OR written statements or conduct expressing sympathy, condolence, compassion, or a general sense of benevolence—should be the prevailing response.[19] One widely publicized example is the shooting of Breonna Taylor. Although statements reflective of benevolence were made, initial reports were factually incorrect.[20] In the case of recent or rapidly unfolding circumstances in

[13] *Id.* at 95 (distinguishing formal sanctions as imposed by officially delegated agencies according to a schedule, and informal sanctions are done locally by individuals and are generally of a "rough, ready, and changing form").

[14] *Id.* at 99.

[15] *Id.* at 100.

[16] *Id.* at 101.

[17] SCHLENKER, *supra* note 4, at 134–35.

[18] *Id.*

[19] *See, e.g.*, ALM GL ch. 233, § 23D (2025).

[20] Tessa Duvall, *Fact checking 8 myths in Breonna Taylor case: Was she asleep when police shot her? Is there body-cam footage?* LOUISVILLE COURIER J. https://www.savannahnow.com/story/news/2020/09/24/fact-checking-8-myths-in-breonna-taylor-case-was-she-asleep-when-police-shot-her-is-there-body-cam-f/114806548/ [https://perma.cc/F5E6-W6BE] (last visited Jan. 12, 2025)

the criminal justice system, an account or real apologies can be difficult to achieve in the absence of full recognition of the facts. Benevolent gestures have been widely adopted in the healthcare setting in an attempt to allow healthcare workers to express sympathy for unanticipated injuries while stopping short of admitting negligence. A similar rationale is used for Federal Rule of Evidence 409: "Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury."[21] FRE 409 has been widely incorporated—often verbatim—into state rules of evidence.

2. Accounts

Accounts are explanations also designed to mitigate the severity of the transgression.[22] There are three general kinds of account: innocence, excuse, and justification.[23] The three kinds of accounts are similar to affirmative defenses raised in criminal law.[24] Innocence is an account that the individual held out as the transgressor was not in fact the one responsible for the injury. One example of a plea of innocence is that of Michael Nifong—at the time Durham County District Attorney—infamously charged three Duke lacrosse players with rape but recused himself to answer ethics violations and eventually to have all charges dropped by the North Carolina attorney general.[25] Mr. Nifong clouded his first attempt at apology to the families of the Duke students and the North Carolina criminal justice system with statements that

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(noting initial reports included substantial misinformation including but not limited to: Ms. Taylor worked as an Emergency Medical Technician (false); police entered the wrong residence (false); Ms. Taylor was in bed asleep (false); Ms. Taylor was living with a drug dealer (false); body camera footage was available for execution of the search warrant (false); an officer was shot by "friendly fire" (false); Ms. Taylor shot a rifle at police (false); the main suspect was in custody before the police raid on Ms. Taylor's residence ("likely true")); *see also* Tessa Duvall, *Fact Check 2.0: Separating the truth from the lies in the Breonna Taylor police shooting* Louisville Courier J. June 16, 2020 https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/ [https://perma.cc/5259-Z3UL] (last visited Jan. 12, 2025). In addition, of the three law enforcement individuals who shot weapons, only one was charged. Nicholas Bogel-Burroughs, *Jury Deadlocks on Officer Charged with Violating Breonna Taylor's Rights,* NY Times Nov. 17, 2023, at A19. It took the Department of Justice three years to issue a detailed report on the shooting and other issues identified in the Louisville Metro Government. U.S. Dep't of Just., Civ. Rights Div., Investigation of the Louisville Metro Police Department and Louisville Metro Government (Mar. 8, 2023), https://www.justice.gov/opa/press-release/file/1573011/download [https://perma.cc/85B3-4ZKA] (last visited Jan. 12, 2025). Detective Brett Hankison was eventually convicted on federal civil rights charges after acquittal on similar state charges. Of three additional law enforcement individuals charged with obstruction and providing false information in the affidavit for the search warrant, one pleaded guilty and two await a trial date. Christina Morales & Kevin Williams, *Relief and Regret After Former Police Officer is Convicted.* N.Y. Times, Nov. 4, 2024, at A20.

[21] Fed R. Evid. 409.

[22] Schlenker, *supra* note 4, at 136–37 (noting that severity is twofold; undesirability of an event and the transgressor's responsibility).

[23] *Id.* at 137–46 (discussing the three main kinds of account).

[24] *See, e.g.*, Stephen J. Morse, Advanced Introduction to Substantive Criminal Law, 88-134 (Edward Elgar Publishing Ltd, 2023).

[25] Duff Wilson, *Facing Sanction, Duke Prosecutor Says He Will Resign*, N.Y.Times June 16, 2007 at A1, A11 (His apology was criticized by one of the defense attorneys: "I believe it's a cynical, political attempt to save his law license. His apology is far too late.").

he did not lie, did not intentionally withhold evidence, and pleaded inexperience in handling felony cases (concentrating on traffic offenses). The ethical concerns have been discussed in detail.[26]

Excuses focus not on who was responsible for an injury, but on the circumstances intended to minimize the severity of the transgression. An example of an excuse was provided by the Boston Police Department. In the early morning hours of October 21, 2005, Victoria Snelgrove died after being hit in the eye with a "non-lethal" FN303 pepper spray pellet by officers attempting to help quell a riot after the Boston Red Sox won a World Series.[27] O'Toole continued, "While I firmly and emphatically accept responsibilities for any errors... I condemn in the harshest words possible the actions of punks [Wednesday] night who turned our city's victory into an opportunity for violence and mindless destruction."[28]

One may also attempt to justify the injury; the transgressor admits some responsibility but minimizes or denies undesirability.[29] On May 8, 2005, a call for service—gunshots fired—went out, and deputies from the Compton, California Sheriff's Station attempted to contact a suspect.[30] At the end of a vehicle pursuit—complicated by the suspect's erratic driving—the deputies fired 120 rounds at the suspect, who sustained two non-life-threatening bullet wounds. There were eleven bullet strikes to five homes in the vicinity of Butler Avenue.[31] Gregory Emerson, an attorney for the deputies offered an "apology" and stated "[e]ach one of them, to a person, that stands here today, wishes that things would have been a little bit different . . . and certainly they wish it had not been necessary to fire so may shots."[32]

Initially provided accounts may evolve with time and investigation as communications occur between the injured and the transgressor.[33] In response to these concerns, one commentator has suggested that attorneys and clients consider crafting "safe" apologies to minimize the risk that they will be used as evidence of liability. Specifically, potential transgressors might offer

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[26] Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure "To Do Justice"* 76 Fordham L. Rev. 1339, 1341 (2007) (Settlement with the city of Durham was thought to be in excess of $50 million); *see also* Anne Blythe, *City of Durham Settles Long-Running Lawsuit with Former Duke Lacrosse Players*, Charlotte Observer, May 16, 2014 https://www.charlotteobserver.com/news/local/crime/article9122669.html [https://perma.cc/E7PS-36R4].

[27] Donald K. Stern, Chair, *Commission Investigating the Death of Victoria Snelgrove*, May 25, 2005, https://www.cityofboston.gov/images_documents/sternreport_tcm3-8954.pdf [https://perma.cc/U9Y7-EP9V] (Last visited Jan. 12, 2025).

[28] Thomas Farragher & David Abel, *Postgame Police Projectile Kills an Emerson Student*, A1, The Boston Globe Oct. 22, 2004.

[29] Schlenker, *supra* note 4, at 143.

[30] Off. of Indep. Rev., The May 9, 2005 Compton Shooting: The Public Report by the Los Angeles Office of Independent Review 3, http://shq.lasdnews.net/shq/LASD_Oversight/Compton_rpt.pdf [https://perma.cc/FZ8S-8YKQ] (Last visited Jan. 12, 2025) [hereinafter L.A. County Compton Report] (describing in detail the events of the pursuit and shooting, including review of an amateur videotape).

[31] *Id.*

[32] Richard Winton, *Through Lawyer, Deputies Issue Apology for Firing Hail of Bullets*, L.A. Times May 14, 2005 B3.

[33] Schlenker, *supra* note 4, at 152–53.

benevolent gestures—or "apologies lite"—that merely express sympathy, but do not admit fault, liability, or responsibility.[34]

3. Apologies

Real apologies are the most arduous kind of remedial work, and consist of the elements recognition, responsibility, remorse, and redress.[35] Real apologies, then, are reserved for specific, egregious transgressions (e.g., wrongful conviction of the factually innocent) and therefore distinct from other types of remedial work.[36] Apology holds a special place in the universe of remedial work that is intended to express sympathy towards one who has sustained a criminal justice system-related injury. As one working definition, a real apology includes four elements: recognition, responsibility, remorse, and redress. However, real apologies have special linguistic weight and may prove a case of negligence.[37] The stance of commentators and other interested parties covers a wide spectrum of views on whether to apologize as a specific form of remedial work. In empirical research, evidence that "under the right circumstances, even a partial apology might be somewhat beneficial" has been reported.[38] However, "the effects of partial apologies on settlement decision making appear to be much more complicated than the effects of full apologies."[39] Further, protective statutes may strip the apology of a moral dimension.[40] Disclosure and apology are both recommended. Disclosure without an apology leads the patient to assume the transgressor doesn't care, while an apology without information about the event leads to dissatisfaction by the injured.[41]

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[34] Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009, 1042–46 (1999) (reviewing reasons for not apologizing more frequently).

[35] *See* Karson, *supra* note 1.

[36] Goffman, *supra* note 4, at 99–100; Nicholas Tavuchis, Mea Culpa: A Sociology Of Apology And Reconciliation 1–5 (1991, Stanford University Press). *See also* Barry R. Schlenker & Michael F. Weigold, *Interpersonal Processes Involving Impression Regulation and Management*, 43 Ann. Rev. Psychol. 133, 162–63 (1992); Marvin B. Scott & Stanford M. Lyman, *Accounts,* 33 Am. Soc. Rev. 46, 59 (1968).

[37] Steven E Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*. 11 Yale J. Health Pol'y Law Ethics 267, 269 (2011).

[38] Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination* 102 Mich. L. Rev. 460, 507 (2003).

[39] *Id*. at 506.

[40] Lee Taft, *Apology Within a Moral Dialectic: A Reply to Professor Robbennolt*, 103 Mich. L. Rev. 1010, 1012 (2005) (explaining "What elevates [an apology] to a truly moral and corrective communication is the offending party's willingness to accept the consequences that flow from the wrongful act."); *see also*, Lee Taft, *Apology and Medical Error: Opportunity or Foil?*, 14 Annals Health L. 55, 62–67 (2005).

[41] Michael S. Woods, Healing Words: the Power of Apology in Medicine 33 (Joint Commission Resources 2004) (2007) (enumerating five elements of an effective medical injury apology (i.e., recognition, regret, responsibility, remedy, and remaining engaged)); *see also* Kathy Wire, *Apology Just First Step In Event Management*, 30 Medical Liability Monitor 8, 8 (2007) (advising that when a clear error is made, the transgressor should accept responsibility for the error); *but see* Ken Braxton & Kip Poe, *How Should Hospital Policy Address Apologies to Patients?*, 9 Hospitals and Health Systems Rx 22, 22 (2007) (advising "Hospitals must ensure that their risk management and legal staff fully understand applicable state law regarding "I am Sorry" guidelines . . .").

C. Experience in Healthcare: Benevolent Gestures as "Apology" Laws[42]

In healthcare, no law mandates an apology. To emphasize the moral and ethical responsibilities of healthcare providers to those injured by medical treatment, laws intended to minimize fear of legal action have been enacted to protect certain statements. Although the legal system is adversarial—unlike healthcare—some lessons may still be relevant to the criminal justice system.

Spontaneous apologies are generally a bad idea, especially if admissions of error and fault are made.[43] The disclosure of medical error leading to injury is a complex process, and should include, at a minimum, that physicians should report adverse events to the hospital; healthcare organizational risk managers should conduct timely investigations with attention to patient safety lessons, findings should be conveyed to patients with compensation and apology offered proactively where it is determined that substandard care caused injury.[44] The experience of some early adopters of these "communication and resolution programs" hoped that fewer numbers of malpractice suits would be filed, more patients would be compensated for injuries, patient trust and satisfaction would be enhanced, and administrative and legal defense costs for providers would be significantly reduced.[45]

Some commentators have endorsed the offering of "apologies" in the face of injury caused by medical treatment or other types of accident. The term "apology" has been treated somewhat dismissively in the healthcare setting, without consideration of what the offer of a real apology entails linguistically, if not morally.[46] Hence, to decrease the risks of saying "I'm sorry" in the health care setting, many state legislatures have enacted statutes intended to protect disclosures made by physicians.

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[42] A more thorough discussion of the reasons why apologies should be offered by the criminal justice system and the elements of a real apology will be discussed in Part Two *infra*.

[43] Raper, *supra* note 37, at 294.

[44] Michelle M. Mello, Yelena Greenberg, Susan K. Senecal, & Janet S. Cohn, *Case Outcomes in a Communication and-Resolution Program in New York Hospitals*, 51 (Suppl. 3) Health Services Res. 2583, 2584 (2016).

[45] Michelle M. Mello, Richard C. Boothman, Timothy McDonald, Jeffrey Driver, Alan Lembitz, Darren Bouwmeester, Benjamin Dunlap, & Thomas Gallagher, *Communication-And-Resolution Programs: The Challenges and Lessons Learned from Six Early Adopters* 33(1) Health Affairs 20, 20 (2014).

[46] Doug Wojcieszak, John Banja, Carole Houk, *The Sorry Works! Coalition: Making the Case for Full Disclosure* 32, Joint Comm'n J. on Quality and Patient Safety 344, 345 (2006) (noting some apologies can both acknowledge and disavow responsibility).

D. "Apology" Statute Concerns: Lessons for the Criminal Justice System

1. Wide Variability in Statutory Construction

The experience in healthcare apology law has important implications for the criminal justice system. As previously noted, concerns over unprotected statements have led to the enactment of a variety of "apology" laws. Fear of litigation is a commonly cited barrier to communication between the injured and transgressor in the healthcare setting.[47] However, existing "apology" laws have two major flaws. The first major problem with medical injury (or other accident) "apology" laws is the bewildering variety of statutory constructions. Thirty-one states have statutes that expressly use the word apology—among other words—in attempting to provide some protection against admissibility for some statements.[48] Conversely, Hawai'i explicitly states apologies are admissible if they acknowledge or imply fault.[49] Six states and the District of Columbia have statutes that protect the admissibility of some statements, but do not use the word apology.[50] Only one state, Montana, defines apology as a "communication that expresses regret", a very narrow interpretation of the word.[51] It is unclear whether the remaining states, in their statutes, chose to avoid the word apology as making statements difficult to protect, intended only real apologies as expressing recognition, remorse, responsibility, and redress, or something in between. Thirteen states have chosen not to enact statutes protecting some expression of apology, sympathy, commiseration, compassion, or benevolence.[52] Of these, Illinois once had protected expressions

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[47] Jennifer K. Robbennolt, *Apologies and Medical Error* 467 Clinical Orthopedics & Related Res. 376, 467 (2009).

[48] For purposes of the text, the states will be identified by name, not individual statute section numbers. Alaska Stat. § 09.55.544 (LexisNexis 2023); Ariz. Rev. Stat. § 12-2605 (2024); Colo. Rev. Stat. § 13-25-135 (2024); Conn. Gen. Stat. § 52-184d (2023); Del. Code. Ann. tit 10, § 4318 (2023-2024); Ga. Code Ann. § 24-4-416 (2023); Haw. Rev. Stat. Ann. § 409.5 (LexisNexis 2023); Idaho Code Ann. § 9-207 (2024); Ind. Code Ann. § 34-43.5-1-4 (LexisNexis 2023), La. Rev. Stat. Ann § 13:3715.5 (2024), Me. Rev. Stat. Ann. tit. 24 § 2907 (2024); Md. Code Ann. Cts & Jud. Proc. § 10-920 (LexisNexis 2023); Mass. Ann. Laws ch. 233, § 79L (LexisNexis 2024); Mont. Code Ann. § 26-1-814 (2023); Neb. Rev. Stat. Ann. § 27-1201 (LexisNexis 2024); N.C. Gen. Stat. § 8C-1 (LexisNexis 2023); N.D. Cent. Code § 31-04-12 (2023); Ohio Rev. Code Ann. § 2317.43 (LexisNexis 2023-2024); Okla. Stat. Ann. tit. 63 § 1-1708.1H (2024); Or. Rev. Stat. Ann. § 677.082 (2023), Pa. Cons. Stat. Ann. §§ 10228.2–3 (2023), S.C. Code Ann. § 19-1-190 (2023); S.D. Codified Laws § 19-19-411.1 (2024).; Tenn. R. Evid. Rule 409.1 (LexisNexis 2024); Utah Code Ann. § 78B-3-422 (2023); Vt. Stat. Ann. tit. 12 § 1912 (2024); Va. Code Ann. § 8.01-581.20:1 (2023); Wash. Rev. Code Ann. § 5.64.010 (LexisNexis 2023); Wis. Stat. Ann. § 904.14 (2023-2024); W. Va. Code Ann. § 55-7-11a (LexisNexis 2023); Wyo. Stat. § 1-1-130 (2023).

[49] Haw. Rev. Stat. Ann. § 409.5 (LexisNexis 2023).

[50] Cal Health & Safety Code § 104340 (Deering 2024), D.C. Code Ann. § 16-2841 (LexisNexis 2024); Fla. Stat. Ann. § 90.4026 (LexisNexis 2023); Mich. Comp. Laws Serv. § 600.2155 (LexisNexis 2024); Mo. Rev. Stat. § 538.229 (2023); N.H. Rev. Stat. Ann. 507-E:4 (LexisNexis 2023); Tenn. R. Evid. Rule 409.1 (LexisNexis 2024); Tex. Civ. Prac. & Rem. Code § 18.061 (2023).

[51] Mont. Code Ann. § 26-1-814 (2023).

[52] Alabama, Arkansas, Illinois, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, and Rhode Island.

of grief, apology, or explanation, but this section was invalidated as part of an inseparability clause.[53]

Eight states have statutes that do not explicitly mention health care providers or patients; instead, they choose to use the same standard of disclosure for adverse medical events as for car accidents or other civil tort actions.[54] The Vermont legislature saw fit to limit apologies and other statements to those made orally.[55] Most other states protect statements that include actions, gestures, and writings. Pennsylvania and Wisconsin only protect statements made prior to the commencement of a civil or liability action.[56]

The state statutes also differ in who can make statements that are inadmissible. Most state statutes allow health care providers or health care professionals, as well as employees or agents of health care providers or health care professionals, to make protected statements.[57] Oregon requires the person by or on whose behalf statements are made to be a licensed professional and against whom a civil action is taken.[58] Louisiana and North Carolina restrict the making of protected statements to health care providers.[59] Under Vermont and Washington statutes, statements—including apologies—must be made within thirty days of when the provider knew or should have known of the consequences of the injury to be deemed admissible.[60] Utah awaits the bringing of a claim, and limits protective statements made by or on behalf of defendants who are health care providers, and defines patient as "any person associated with the patient."[61]

Virginia has two statutes allowing statements made by health care providers or the agents of health care providers for wrongful death or unanticipated outcomes, respectively.[62] West Virginia requires such statements to be made within twenty days of when the injury was known.[63] Only New Hampshire is completely silent on who can make a statement, which presumably means

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[53] Lebron v. Gottlieb, 930 N.E.2d 895, 917 (Ill. 2010) (finding as unconstitutional 735 Ill. Comp. Stat. Ann. §§ 5/2 1704-2–1719 for limiting awards of non-economic damages. A "Sorry Works!" pilot program was subsequently repealed by Public Act 100-621. 710 Ill. Comp. Stat. Ann. 457. A statute was re-enacted, but basically conformed to FRE 408 and no protection for benevolent gestures was included. 735 Ill. Comp. Stat. Ann. 5/8-1901 (LexisNexis 2023).

[54] Cal Evid. Code § 1160 (Deering 2024); Fla. Stat. Ann. § 90.4026 (LexisNexis 2023); Haw. Rev. Stat. Ann. § 409.5 (LexisNexis 2023); Ind. Code Ann. § 34-43.5-1-2 (LexisNexis 2023); Mass. Ann. Laws ch. 233, § 23D (LexisNexis 2024); Mo. Rev. Stat. § 538.229 (2023); Tenn. R. Evid. Rule 409.1 (LexisNexis 2024); Tex. Civ. Prac. & Rem. Code § 18.061 (2023).

[55] Vt. Stat. Ann. tit. 12 § 1912 (2024).

[56] Pa. Cons. Stat. Ann. § 10228.3 (2023); Wis. Stat. Ann. § 904.14 (2023–24).

[57] Ariz. Rev. Stat. § 12-2605 (2024); Colo. Rev. Stat. § 18-1-901 (2024); Conn. Gen. Stat. § 52-184d (2023); Del. Code. Ann. tit 10, § 4318 (2023-2024); D.C. Code Ann. § 16-2841 (LexisNexis 2024); Ga. Code Ann. § 24-4-416 (2023); Idaho Code Ann. § 9-207 (2024); Me. Rev. Stat. Ann. tit. 24 § 2907 (2024); Neb. Rev. Stat. Ann. § 27-1201 (LexisNexis 2024); N.D. Cent. Code § 31-04-12 (2023); Ohio Rev. Code Ann. § 2317.43 (LexisNexis 2023-2024); Okla. Stat. Ann. tit. 63 § 1-1708.1H (2024); S.C. Code Ann. § 19-1-190 (2023); W. Va. Code Ann. § 55-7-11a (LexisNexis 2023); Wyo. Stat. § 1-1-130 (2023).

[58] Or. Rev. Stat. Ann. § 677.082 (2023).

[59] La. Rev. Stat. Ann § 13:3715.5 (2024); N.C. Gen. Stat. § 8C-1 (LexisNexis 2023).

[60] Vt. Stat. Ann. tit. 12 § 1912 (2024); Wash. Rev. Code Ann. § 70.41.380 (LexisNexis 2023).

[61] Utah Code Ann. § 78B-3-422 (2023).

[62] Va. Code Ann. § 8.01-52.1 (2023); Va. Code Ann. § 8.01-581.20:1 (2023).

[63] W. Va. Code Ann. § 55-7-11a (LexisNexis 2023).

any individual is able to make a protected statement.[64] There is also variability in the persons to whom protected statements may be made. In all cases, the alleged injured individual (patient) is included, as are those persons defined as relatives and/or family members.[65] A subgroup of states has also included a variety of other representatives.[66] South Carolina requires that, in order to be protected, the statements must be made during a designated meeting to discuss the unanticipated outcome.[67]

2. Challenges in Crafting "Safe" Statements

A second major problem with "apology" laws is the difficulty of crafting statements that are protected in whole or in part as "apologies." Twenty states explicitly allow into evidence admissions of culpable conduct, fault, liability, or negligence.[68] Massachusetts allows contradictions in fact or opinion while under oath as admissible.[69] South Dakota allows admission of any statement—for purposes of impeachment—constituting an admission against interest.[70] Only thirteen states with "apology" laws have limited the admissibility of statements to include those that constitute admissions of liability, admissions against interest, culpable conduct, or negligence.[71] Montana specifically excludes statements as evidence, including apologies, for any purpose.[72] Oregon also precludes examination during depositions of Oregon Medical

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[64] N.H. Rev. Stat. Ann. 507-E:4 (LexisNexis 2023).

[65] Various states use terms including "victim" (Conn. Gen. Stat. § 52-184d (2024)), "patient" (Ariz. Rev. Stat. § 12-2605 (2024)), "plaintiff" (Okla. Stat. Ann. tit. 63 § 1-1708.1H (2024)), and "person" (Or. Rev. Stat. Ann. § 677.082 (2023)).

[66] Various states include "any individual who claims damages by or through that victim," "legal representative," "friend," "health care decision-maker," "representative," or "decision maker for plaintiff."

[67] S.C. Code Ann. § 19-1-190 (2023).

[68] Alaska Stat. § 09.55.544 (b) (LexisNexis 2023); Cal Evid. Code § 1160 (a) (Deering 2024); Del. Code. Ann. tit 10, § 4318 (b) (2023–24); D.C. Code Ann. § 16-2841 (LexisNexis 2024); Fla. Stat. Ann. § 90.4026 (2) (LexisNexis 2023); Haw. Rev. Stat. Ann. § 409.5 (LexisNexis 2023); Idaho Code Ann. § 9-207 (2) (2024); Ind. Code Ann. § 34-43.5-1-5, (LexisNexis 2023); La. Rev. Stat. Ann § 13:3715.5 (2024); Me. Rev. Stat. Ann. tit. 24 § 2907 (2) (2024); Md. Code Ann. Cts & Jud. Proc. § 10-920 (2) (Lexis 2023); Mich. Comp. Laws Serv. § 600.2155 (2) (LexisNexis 2024); Mo. Rev. Stat. § 538.229 (1) (2023); Neb. Rev. Stat. Ann. § 27-1201 (1) (LexisNexis 2024); N.H. Rev. Stat. Ann. 507-E:4 (III) (LexisNexis 2023); Pa. Cons. Stat. Ann. § 10228.3 (b)(2) (2023); Tenn. R. Evid. Rule 409.1 (a) (LexisNexis 2024); Tex. Civ. Prac. & Rem. Code § 18.061 (c) (2023); Utah Code Ann. § 78B-3-422 (3) (2023); Va. Code Ann. § 8.01-52.1 (2023), Va. Code Ann. § 8.01-581.20:1 (2023).

[69] "[U]nless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the mistake or error shall be admissible for all purposes." Mass. Gen. Laws ch. 233, § 79L (b) (LexisNexis 2024).

[70] S.D. Codified Laws § 19-19-411.1 (2024).

[71] Ariz. Rev. Stat. § 12-2605 (2024); Colo. Rev. Stat. § 13-25-135 (2024); Conn. Gen. Stat. § 52-184d (b)(2023); Ga. Code Ann. § 24-4-416 (b) (2023); N.C. Gen. Stat. § 8C-1 (LexisNexis 2023); N.D. Cent. Code § 31-04-12 (2023); Ohio Rev. Code Ann. § 2317.43 (A)(1) (LexisNexis 2023-2024); Okla. Stat. Ann. tit. 63 § 1-1708.1H (A) (2024); S.C. Code Ann. § 19-1-190 (D) (2023); Wash. Rev. Code Ann. § 5.64.010 (2)(b)(i–ii) (LexisNexis 2023); W. Va. Code Ann. § 55-7-11a (b)(1) (LexisNexis 2023); Wis. Stat. Ann. § 904.14 (2023–24); Wyo. Stat. § 1-1-130 (a) (2023).

[72] Mont. Code Ann. § 26-1-814 (1) (2023).

Board licensed practitioners or those making statements on their behalf that have made expressions of regret or apology.[73]

3. Recent Experience with Healthcare "Apology" Laws

I have argued that real apologies after medical injury due to error are problematic; not morally, but because the existing statutes are hard to decipher—especially for healthcare providers inexperienced in reading statutes—who risk running afoul of statutory provisions.[74] Despite the moral argument for the offering of apologies after medical injury due to error, much of the enthusiasm has waned.[75] In modeling the litigation consequences of healthcare disclosure of injury, researchers found that assertions of reduced litigation volume and cost did not withstand close scrutiny.[76] A review of the available data led others to conclude that apology laws do not appear to reduce malpractice rates or costs.[77] Contradicting earlier research, a study published data from a national malpractice insurer containing information on 90 percent of U.S. physicians, and the authors reviewed a total of 3,417 claims from 2004 through 2011.[78] The data showed that apology laws had little effect on surgeons but increased the likelihood of lawsuits in non-surgeon physicians by approximately 46 percent.[79] The data led the researchers to conclude that "apology laws may facilitate an increase in malpractice liability risk in spite of their stated goals."[80] Remarkably, 65.5 percent of the claims were litigated, and only 7.1 percent initially settled.[81] These percentages are out of line with other NPDB data, in which 96.9 percent of about 58,000 claim payments were from settlement and only 3.1 percent went to trial.[82] Of litigated claims, about half resulted in a plaintiff's verdict or settlement.[83] The researchers go on to state: "Because apology laws do not decrease the frequency of lawsuits

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[73] Or. Rev. Stat. Ann. § 677.082 (2023).

[74] Raper, *supra* note 37, at 292–93.

[75] Sorry Works! is a national organization fostering disclosure and apology of medical error whose CEO, Doug Wojcieszak, recently posted an editorial. *Rethinking Disclosure & Apology: Should Programs Be the Emphasis?*, Sorry Works! (Feb. 16, 2024), https://sorryworks.net/blog/2024/2/16/rethinking-disclosure-amp-apology-should-programs-be-the-emphasis [https://perma.cc/7MGW-USMR] (wondering if the disclosure movement needs to refocus/reprioritize our efforts"). *See also* Doug Wojcieszak, *Are We Making Disclosure & Apology/CRP Programs Too Difficult?*, Sorry Works! (Nov. 8, 2023), https://sorryworks.net/blog/2023/11/8/are-we-making-disclosure-amp-apologycrp-programs-too-difficultnbspnbsp [https://perma.cc/E7Q7-UTBN] (last visited Jan. 12, 2025).

[76] *See, e.g.*, David M. Studdert et al., *Disclosure of Medical Injury to Patients: An Improbable Risk Management Strategy*, 26 Health Affairs 215, 224 (2007).

[77] Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49 J. Am. Acad. Psychiatry Law 406, 412 (2021).

[78] Benjamin J. McMichael, et al., *Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk*, 71 Stan. L. Rev. 341, 363 (2019).

[79] *Id.* at 377.

[80] *Id.* at 390.

[81] *Id.* at 367.

[82] Jessica B. Rubin & Tara F. Bishop, *Characteristics of Paid Malpractice Claims Settled In and Out of Court In the USA: A Retrospective Analysis*, 3 Brit. Med. J. Open 1, 3 (2013).

[83] McMichael et al., *supra* note 78, at 390.

or the average payment for surgeons, and increase both for non-surgeons, they increase medical malpractice liability risk overall rather than reduce it."[84]

II. Apologies as a Special Kind of Remedial Work

A. Theory and Practice of Apologies

Apologies should be crafted with great care. The moral philosopher John Langshaw Austin, in Harvard's William James Lectures, specifically identified apologies as one type of *performative utterance*; apologizing is an action rather than a description of an action.[85] Terms for a comprehensive apology depend somewhat on the commentator.[86] In modern usage, apologizing means "to acknowledge and express regret for a fault without defense, by way of reparation to the feelings of the person affected."[87] A number of legacy writers also articulate the definition of real apologies. One formulation consists of two fundamental requirements: "the offender has to be sorry, and has to say so."[88] Or, yet another definition: "We apologize when we accept responsibility for an offence or grievance and express remorse in a direct, personal, and unambiguous manner offering restitution and promising not to do it again."[89] Aaron Lazare, a psychiatrist and leading authority on apology, defines apology as "an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved."[90] Goffman, an influential sociologist, defines an apology as "a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule."[91]

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[84] *Id.* at 348.

[85] The term "performative" indicates that the issuing of the *utterance* is the performing of an action. J.L. Austin, How To Do Things With Words: The William James Lectures delivered at Harvard University in 1955 46 (Marina Sbisa & J.O. Urmson eds., Oxford Univ. Press 2nd ed. 1975) (1962). "[T]o say something is to do something, or in saying something we do something, or even by saying something we do something." *Id.* at 110. "I apologize" is expressly stated as an *explicit performative* utterance, to be distinguished from *half descriptive* (i.e., I am sorry), or merely *descriptive* (i.e., I repent). *Id.* at Table 84; *see also* Kenji Yoshino & David Glasgow, *How to Apologize*, Boston Sunday Globe, Feb. 5, 2023, at K3.

[86] Other terms include "authentic" apology. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L. J. 1135, 1140 (2000); "effective" apology, O'Hara & Yarn, *supra* note 2 at 1133 *and* Tavuchis, *supra* note 36 at 136; "full" apology, Robbennolt, *supra* note 38, at 486; "meaningful" apology, Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & Soc'y Rev. 461, 469–70 (1986); "true" apology, Harriet Lerner, Why Won't You Apologize?: Healing Big Betrayals and Everyday Hurts 15 (Touchstone 2017).

[87] The Compact Edition of the Oxford English Dictionary (Oxford Univ. Press 1986) (1971).

[88] Tavuchis, *supra* note 36, at 1–5.

[89] John Kador, Effective Apology: Mending Fences, Building Bridges, and Restoring Trust 16 (Berrett-Koehler Pub. 2009).

[90] Aaron Lazare, On Apology 21 (Oxford University Press, 2004).

[91] Goffman, *supra* note 4, at 113.

Real apologies are dependent on societal norms but, "[w]e no longer have a way of convoking two [sic] hundred million Americans into the single kind of moral community that will respond to one set of signals."[92] In the case of apologies from one individual to another, the transgressor speaks for themself and knows that they have been the source of injury. Those who apologize are expected to be remorseful in the case of personal apologies.[93] Although apologizing is simple, it is not easy, and yet, saying "I'm sorry" is not usually seen as a sign of weakness.[94]

Does current theory regarding real apology and contrition apply to the criminal justice system? The area of crisis management has long been a contentious and difficult arena into which law enforcement leadership must frequently enter. With today's media capabilities, the graphic visual imagery of police work daily permeates all media platforms viewed by the American public. Rarely a week seems to go by without a law enforcement agency caught up in the throes of a media crisis, and leadership either quickly defends the actions of the involved personnel or declines to comment until "further investigation" is completed.[95] The consequences for inadequate response can be severe. In many cases, inadequate responses by police leadership have resulted in significant organizational changes due to media coverage and the subsequent public outcry and political pressure.[96]

B. Elements of a Real Apology

One straightforward formulation of the elements required for a real apology includes recognition, responsibility, remorse, and redress. Several commentators have identified additional elements or subdivided the four 'R's'. Additional descriptions of apology elements—among others—include those

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[92] Martin E. Marty, *Ethics and the Mass Media*, in 192 Communication: Ethical and Moral Issues (Lee Thayer ed., Gordon & Breach Sci. Publ'rs 1973).

[93] Kador, *supra* note 89, at 85–96.

[94] Patricia Hayes Andrews & John E. Baird, Jr., Communications for Business and the Professions 163–64 (Waveland Press 2005); Jonathan Turley, *The Lost Art of the Apology: Reagan was Deft at It. Clinton was the Grandmaster of Saying "I'm Sorry". But Martha's Attempt at Apologizing Was as Hollow as a Yellow Bell Pepper*, Chicago Tribune July 18, 2004.

[95] Recent examples include a Maine sheriff's department that knew of a reservist who went on a shooting spree, Nicholas Bogel-Burroughs & Chelsia Rose Marcius, *Police in Maine Knew Gunman Made Threats*, N.Y.Times, Oct. 31, 2023, *at* A1; jail deaths, Christopher Damien, *$3.5 Million Settlement for Family in a Sacramento Jail Death*, N.Y.Times, Mar. 15, 2025 *at* A19; wrongful convictions, Alexandra E. Petri, *Citing New Evidence, Judge Frees Hawaii Man Wrongfully Convicted of '94 Murder*, N.Y.Times, Feb. 25, 2025 *at* A17; Lisa Lyon & Glen T. Cameron, *Fess Up or Stonewall? An Experimental Test of Prior Reputation and Response Style in the Face of Negative News Coverage*, 1:4 Web J. Mass Comm. Res. (Sept. 1998), https://wjmcr.info/1998/09/01/fess-up-or-stonewall-an-experimental-test-of-prior-reputation-and-response-style-in-the-face-of-negative-news-coverage/ [https://perma.cc/NLV7-BKBY].

[96] Ray Surette, *The Media, the Public and Criminal Justice Policy*, 2 J. Inst. of Just. Int'l Stud. 39, 45–47 (2003).

of Goffman,[97] Lazare,[98] O'Hara,[99] Orenstein,[100] Taft,[101] Kador,[102] Koehn,[103] and Wagatsuma and Rosett.[104] Given the nature of many injuries in the criminal justice system, a real apology is necessary but not sufficient if acceptance is expected. In some cases, even a real apology may not elicit acceptance or hopes of forgiveness by the injured party.

Anecdotal evidence suggests that an apology may provide significant benefits to the injured. Often, an apology takes away the desire for revenge.[105] One prosecutor refused to delay victim offender mediation (VOM) until after sentencing to preserve a "rabid" victim.[106] Apologies can also help to alleviate victim fear because they work to provide victims with assurance that the offender will not transgress in the future. If a victim can set aside their fear, anger, and bitterness, they are better able to go on with life. In fact, the civility that apology fosters may even provide tangible health benefits to the injured.[107] Apology can also provide significant benefits to transgressors, who often attempt

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[97] Goffman, *supra* note 4, at 113 (listing elements of apology as expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal hence-forth to pursue that course; performance of penance and the volunteering of restitution).

[98] Lazare, *supra* note 90, at 23 (identifying explicit parts to a true apology: acknowledgement of the offense; an explanation; and various attitudes and behaviors including remorse, shame, humility, and sincerity, and reparations).

[99] O'Hara & Yarn, *supra* note 2, at 1133 (asserting that an "effective" apology should contain most, if not all, of the following elements: 1) an expression of remorse and regret, 2) a manifestation of guilt for having transgressed socially proscribed conduct, 3) sympathy with the application of and approving sanction, 4) repudiation of the bad behavior and defamation of the self that so behaved, 5) espousal of the correct behavior and "an avowal henceforth to pursue that course," and 6) "performance of penance" and an offer of restitution).

[100] Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Least Expect It*, 28 SW. U. L. Rev. 221, 239 (1999) ("At their fullest, apologies should: (1) acknowledge the legitimacy of the grievance and express respect for the violated rule or moral norm; (2) indicate with specificity the nature of the violation; (3) demonstrate understanding of the harm done; (4) admit fault and responsibility for the violation; (5) express genuine regret and remorse for the injury; (6) express concern for future good relations; (7) give appropriate assurance that the act will not happen again; and, if possible, (8) compensate the injured party.").

[101] Lee Taft, *On Bended Knee (with Fingers Crossed)*, 55 DePaul L. Rev. 601, 605 (2005).

[102] Kador, *supra* note 89, at 16 (listing recognition, responsibility, remorse, restitution, and repetition).

[103] Daryl Koehn, *Why Saying "I'm Sorry" Isn't Good Enough: The Ethics of Corporate Apologies*, 23:2 Business Ethics Quarterly 239, 245 (Apr. 2013) (enumerating content elements for a real apology: speaker ethos, audience pathos, naming the wrongdoing, the apologizer taking responsibility, apologizing promptly, conveying a just character, creating a supportive context, apologizing in person, exhibiting empathy, and following through).

[104] Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & Soc'y Rev. 461, 469–70 (1986) (listing 1) the hurtful act happened, caused injury, and was wrongful; 2) the apologizer was at fault and regrets participating in the act; 3) the apologizer will compensate the injured party; 4) the act will not happen again; and 5) the apologizer intends to work for good relations in the future).

[105] O'Hara & Yarn, *supra* note 2, at 1141 (discussing the emotions behind apology, including transgressors' attempts to ameliorate negative image of self).

[106] David M. Lerman, *Forgiveness in the Criminal Justice System,* 27 Fordham Urb. L.J. 1663, 1670 (2000).

[107] Michael S. Woods, Healing Words: the Power of Apology in Medicine 113 (Joint Commission Resources) (2007).

to deny or minimize facts, actions, intent, knowledge, or responsibility.[108] Once a transgressor recognizes the wrongfulness of their actions, a real apology helps prevent future deflection, denial, or minimization.[109]

Psycholinguistic experts have classified apologies as illocutionary force-indicating devices (for example, "I'm sorry" or "I apologize") and suggested a number of elements which may be part of an apology: an explanation of the cause which brought about the wrong, an offer of repair, a promise of forbearance, and an expression of the speaker's responsibility for the offense.[110] Research has shown that the appropriateness of a response to injury mediates the role of apologies and the need for punishment, and apologetic transgressors are likely to avoid some consequences regardless of reputation.[111]

By saying "I apologize," one makes an explicit performative utterance.[112] Speech acts (including apologies) are a form of communicative illocutionary utterance.[113] Speech acts have been further classified into three distinct levels of action: locutionary, or the performance of an act of saying something (I apologize), illocutionary, or performance of an act *in* saying something (conveying the injury), and perlocutionary that always includes some consequences (the injured does or does not accept the apology).[114] Florian Coulmas, an eminent sociolinguist, has described apologies as reactive, making reference to an object of regret.[115] All apology strategies are intended to convey important information to the injured (e.g., wrongfully convicted) about the transgressor (e.g., the state), improving perceptions, reducing the intended sanctions, increasing emotions of remorse or regret, and enhancing the appropriateness of the apology.[116] Apologies with no acknowledgement of responsibility are not indebting and can merge into other kinds of remedial work, like accounts.[117]

Apology strategies which actually use the word "apology" make clear the transgressor's intentions, and yet, in none of the first four strategies does the

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[108] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2503 (2004) (citing Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1394, n.159 (2003)).

[109] *See* O'Hara & Yarn, *supra* note 2, at 1137 (noting that "effective" apologies, include—implicitly or explicitly— future forbearance).

[110] Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. Psycholinguistic Rsch. 127, 130–31 (1997).

[111] *See* David B. Wooten, *Say the Right Thing: Apologies, Reputability, and Punishment*, 19 J. Consumer Psych. 225, 233 (2009).

[112] Kent Bach, *Speech Acts and Pragmatics*, *in* Blackwell Guide to the Philosophy of Language, 149–52 (Michael Devitt & Richard Hanley eds., 2006).

[113] *See id.* at 151–52 (apologizing is considered an acknowledgment; one of four types of communicative illocutionary acts (Constatives, Directives, Commissives, and Acknowledgements)).

[114] Austin, *supra* note 85, at 99–108 (parenthetical examples added).

[115] Florian Coulmas, *"Poison to Your Soul": Thanks and Apologies Contrastively Viewed*, *in* Conversational Routine: Explorations in Standardized Communication Situations and Prepatterned Speech 69, 75–76 (Florian Coulmas ed., 1981) (distinguishing objects of regret as "a kind of damage, annoyance, or inconvenience which is predictable vs. unpredictable; indebting vs. not indebting").

[116] *See* Scher & Darley, *supra* note 110, at 130.

[117] Coulmas, *supra* note 115, at 76.

speaker explicitly *say* that she is responsible for or that she regrets or is remorseful for the object of regret, though these two points are certainly contained in the meaning of the words *apology* or *apologize.* Linguist Bruce Fraser has identified four direct[118] and five indirect[119] strategies for apologizing in which the speaker explicitly states that an apology is at issue. Although an illocutionary force indicating device, an apology such as "I apologize" or "Pardon me," unaccompanied by an expression of remorse, does not convey the required information about the emotional state of the speaker.

Apologies have been described as a discrete form of remedial work, "a gesture through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule."[120] Further, an apology brings heavy moral approbation down on the transgressor, and:

> [h]as several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.[121]

Another definition of apology is "[A]n acknowledgement of some fault, injury, insult, etc., with an expression of regret and a plea for pardon."[122] Apologies have been operationally defined as "admissions of blameworthiness and regret for an undesirable event, for example, a transgression, a harmful act, an embarrassing incident."[123] Such definitions leave no doubt as to the fact that apologies, as illocutionary acts, include a statement of fault.[124] Each of the four foundational elements of apology are next discussed in greater detail.

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[118] Bruce Fraser, *On Apologising*, *in* Conversational routine: Explorations in Standardized Communication Situations and Prepatterned Speech 259, 263 (Florian Coulmas ed., 1981) (describing four direct forms including the word apology or apologize: announcing that one is apologizing—"I (hereby) apologize for . . ."; stating one's obligation to apologize—"I must apologize for . . ."; offering to apologize—"I would like to offer my apology to you for ..."; requesting the hearer accept an apology—"Please accept my apology for . . ."). *See also* Oxford English Dictionary, *supra* note 87.

[119] *Id.* at 263 (expressing regret for the offense—"I (truly/very much/so . . .) regret that I . . ."; requesting forgiveness for the offense—"Forgive me for . . ."; acknowledging responsibility for the offending act—"That was my fault"; promising forbearance from a similar offending act—"I promise you that that will never happen again"; offering redress— "Please let me pay for the damage I've done").

[120] Goffman, *supra* note 4, at 109 (describing the function of remedial work as "to change the meaning that otherwise might be given to an act, transforming what could be seen as offensive into what can be seen as acceptable . . ." and setting forth three types of remedial work: accounts, apologies, and requests).

[121] *Id.* at 113.

[122] Webster's New World College Dictionary 66 (Michael Agnes ed., 4th ed. 1999).

[123] Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. Personality & Soc. Psych., 742, 742 (1982).

[124] Bach, *supra* note 112, at 148.

1. Recognition

Recognition is the first of the four elements of a real apology and requires identification of the circumstances surrounding the injury (e.g., police-involved shooting, wrongful incarceration) as specifically and completely as possible. Recognition is the foundation for a real apology. As in account, mistakes must be clearly recognized through identification of the legitimacy of norms violated, who is at fault for the resulting injury, and who should admit fault, often —but not always—the same individual or entity.[125] An unbiased investigation including a detailed timeline of events, identification of norms (e.g., relevant laws, policies, and procedures), and where such norms were violated. Although in general, apologies should be kept short, they should be fact-based. Once identified, the recognized transgressions should be shared unflinchingly with the injured individuals and their representatives. There are many excellent examples of detailed event reviews recognizing how and why events leading to injury—wrongful or not—happened. However, such reviews of necessity take time and delay the ability to give real apologies.[126]

Apologies can fail for several reasons at the stage of recognition.[127] The transgression may be unforgivable, for which no apology is adequate.[128] Transgressions must be clearly stated to avoid "mystifying" confusion and not vague or selective in information provided.[129] The focus must be on the actions of the transgressor, not the injured.[130] Use of the conjunctives "but," "if," or "however" makes the transgression conditional and signals a deflection, turning an apology into an excuse.[131] Add-on words can turn recognition of a true injury into "not really sorry at all."[132] All relevant events must be identified and given appropriate weight to avoid minimization.[133] Conversely, taking the time to understand the chain of events can ensure that admissions to unavoidable aspects of the incident are not made.[134] Other impediments to recognition include using the passive voice, making the offense conditional, questioning whether the victim was injured, or

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[125] Taft, *supra* note 86, at 1140; Tavuchis, *supra* note 36, at 12 (noting that "every social order depends . . . on some measure of commitment to norms . . .").

[126] Examples include the Stern report, *supra* note 27, *and the* L.A. County Compton Report, *supra* note 30.

[127] Anna Orso, *The Anatomy of an Apology: Public Statements Analyzed*, Phila. Inquirer, Dec. 9, 2017 at A3 (analyzing failed celebrity apologies including examples of minimization, deflection, and conditional statements).

[128] Tavuchis, *supra* note 36, at 21 (citing Albert Speer who in his memoir Inside the Third Reich recognized that involvement in the whole course of the war made apology impossible).

[129] *See* Lerner, *supra* note 86, at 19.

[130] *Id.* at 29.

[131] *Id.* at 19; *see also* Lazare, *supra* note 90, at 55–66 (providing many excellent examples of failed apologies).

[132] Lerner, *supra* note 86, at 18.

[133] One example of minimization is from the "retirement" statement and apology of Judge Alex Kozinski (9th Circuit Court of Appeals) in response to several accusations of sexual harassment: "I've always had a broad sense of humor and a candid way of speaking to both male and female law clerks alike." Debra Cassens Weiss, *Kozinski Announces His Immediate Retirement After More Women Accuse Him of Sexual Misconduct*, ABA Journal (Dec. 18, 2017), https://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of [https://perma.cc/B3XR-XHQD].

[134] Lerner, *supra* note 86, at 20.

apologizing to the wrong party or wrong offense.[135] Many injuries—especially with extensive media coverage—lead to internal or external review. Reports of such events can serve as recognition of the events leading up to and beyond the injury. Unlike accounts that try to claim innocence, excuse, or justification, these reports should be factual and transparent as to the role of the transgressor.[136] In terms of recognition by a thorough report, significant time can elapse, leading to the recommendation to provide benevolent gestures in the early stages of the injury when a timeline and actions taken are not clear. Recognition leads to the ownership of wrongful action, allowing acceptance of responsibility.

2. Responsibility

Accepting responsibility is a second important element of a real apology. The fullest apologies include acceptance of responsibility, an admission of which may itself prove a case of negligence; hence, there is a need to consider some form of statutory protection. The consensus as to the requirement of admission of fault is also confirmed by empirical studies on the uses of apology in legal settlements.[137] Several senses of responsibility exist, including proximate causation, acting "knowingly", and control of intention.[138] "Full acceptance of responsibility by the transgressor is the hallmark of a real apology."[139] Transgressors "should also realize the wrongfulness of their acts, feel sorrow for their misdeeds, and accept responsibility."[140] Recognition of the role of responsibility in the criminal justice system began with changes to the U.S. Sentencing Guidelines in 1994.[141] "Owning" the transgression is therefore a necessary element of a real apology. Responsibility requires "the painful embracement of our deeds."[142]

Empirical research has shown that apologies may mitigate the injured's judgment of the transgressor, and diminished anger was not related to responsibility.[143] Apologies may persuade the injured that by accepting responsibility, the transgression is not "a fair representation of what the actor

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[135] Lazare, *supra* note 90, at 86.

[136] *See* Schlenker, *supra* note 4, at 154 (noting an apology requires admitting blameworthiness).

[137] *See* Robbennolt, *supra* note 38, at 469 n. 36 ("'[P]artial apology' will be used to refer to a statement that expresses sympathy, but does not admit responsibility. These will be contrasted with 'full apologies,' in which the offender both expresses sympathy and accepts responsibility.").

[138] Goffman, *supra* note 4, at 98.

[139] Martha Minow, Between Vengeance and Forgiveness 115 (1998); *see also* Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 New Eng. L. Rev. 967, 980 (1998) (observing that failures to prosecute or seek apologies for acts of violence disrespect victims).

[140] Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 148 (2004).

[141] *See* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1508 (1997) (citing U.S. Sent'g Guildelines Manual § 3E1.1(a) (U.S. Sent'g Com'n 1994)) (noting reduction of offense levels for an offender who "clearly demonstrates acceptance of responsibility for his offense").

[142] Tavuchis, *supra* note 36, at 19.

[143] *See* Mark Bennett & Deborah Earwaker, *Victims' Responses to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. Soc. Psych. 457, 461–63 (1994).

is 'really like' as a person".[144] Responsibility is critically important depending on outcome severity in conflict resolution, and the injured may use any of a number of attribution criteria to assign responsibility, including actor-outcome association, causality, foreseeability, intentionality, and justifiability.[145]

An apology requires the transgressor to acknowledge responsibility for having committed some offending act and must express regret about the offense.[146] The admission of responsibility for the adverse event is a necessary feature of an apology because it conveys to the listener that the speaker is aware of the norms that have been violated, and therefore conveys that the transgressor will not repeat the transgression in the future.[147]

Acceptance of responsibility can be difficult for several reasons. One qualitative analysis identified two categories of reasons people find it hard to accept responsibility. First, there is fear of negative reactions by the injured, including loss of regard, feelings of superiority (e.g., smugness), holding a grudge, withholding forgiveness, or humiliation.[148] Second, the transgressor worries about the risk of embarrassment or negative emotions like incompetence, defeat (i.e., being a 'loser'), guilt, shame, and loss of self-esteem.[149]

3. Remorse

Recognition and responsibility are necessary but not sufficient for a real apology. Most people resist the self-knowledge that comes from remorse.[150] Expressing remorse, and the associated emotions of regret, guilt, sorrow, self-castigation, shame, and embarrassment, distinguishes apology from other forms of remedial work. Remorse has been described as ". . . the deep, painful regret that is part of the guilt people experience when they have done something wrong."[151] Without remorse, there can be no real apology.

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[144] *Id.* at 461 (citing Schlenker, *supra* note 4, at 154).

[145] F. Fincham & J. Jaspars, *Attribution of Responsibility to the Self and Other in Children and Adults*, 37 J. Personality & Soc. Psych. 1589, 1589, 1591 (1979) (citing Jean Piaget, The Moral Judgment of the Child (Collier Books, 2013) (1932); *see also* Fritz Heider, The psychology of interpersonal relations 113 (1958) (identifying responsibility-attribution criteria).

[146] Fraser, *supra* note 118, at 262.

[147] Scher & Darley, *supra* note 110, at 129–30; *see also* Jeremy C. Anderson, Wolfgang Linden, & Martine E. Habra, *Influence of Apologies and Trait Hostility on Recovery from Anger*, 29 J. Behavioral Med. 347, 348 (2006) (defining the elements of a "genuine" apology to include six verbal components: first, an explicit expression of remorse; second, a specific statement of why one feels remorse and being sorry for the right thing; third, one must accept responsibility for one's actions; fourth, a truthful explanation for the offensive behavior without trying to excuse the offence and shirk responsibility; fifth, a promise of forbearance (a statement that the offensive behavior is not reflective of the offender's true character, therefore the victim can trust the behavior will not recur); and, sixth, an offer of restitution).

[148] Lazare, *supra* note 90, at 162–63.

[149] *Id.*

[150] Thomas J. Scheff, Emotions, the social bond, and human reality: Part/whole analysis 66 (1997) (quoting in part from *The Buried Life* by Matthew Arnold:

"I knew the mass of men conceal'd
Their thoughts, for fear that if reveal'd
They would by other men be met
With blank indifference, or with blame reproved;").

[151] Lazare, *supra* note 90, at 107.

In distinction to the other elements of apology, remorse can be expressed not only in spoken or written words, but also in manifestations, or non-verbal cues, including gestures, displays of affect, and other paralinguistic practices.[152] Tavuchis, another leading voice in defining the meaning of apology, speaks of the transgressor assuming vulnerability and "moral nakedness" without excuse or appeal to circumstance.[153] Taft goes so far as to broaden the definition of apology so that it closely approximates the religious concept of repentance.[154]

Remorse requires self-examination, or "looking inward," allowing the transgressor to remember who they were before injuring another, their standing in relation to the injured, and what has been lost.[155] Remorse requires reflection on past events.[156] One commentator goes so far as to say that for some apologies to be effective, the injured person needs to see the transgressor suffer.[157] Expressions of suffering are often evidence of sincerity; a manifestation of retributive justice.[158] Often, belief in individual responsibility can limit the empathy the injured feels and limit judgment about punishment.[159] Remorse is often enhanced by a dialogue, where the injures can face the transgressor and tell the nature and severity of suffering.[160] A remorseful apology should also include an understanding of the transgression on the injured.[161] An apology without remorse seems to be perfunctory; the illocutionary force of apology without conveying information about the emotional state of the transgressor.[162] A person typically can feel remorse only for some transgression they individually made. However, in the criminal justice setting, where the original transgressor(s) may not be present, remorse can manifest as helping the injured through restored dignity and disclosure of concrete steps made to avoid future transgressions against other people.

In many circumstances, the convicted are expected to show remorse and apologize, as part of a rehabilitative ideal.[163] It has been hypothesized that during plea bargaining a willingness to apologize and show remorse may

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[152] Richard Weisman, Detecting Remorse and Its Absence in the Criminal Justice System, 19 Stud. L. Pol. & Soc'y 121 (1999).

[153] Tavuchis, *supra* note 36, at 18.

[154] *See* Taft, *supra* note 86, at 1140.

[155] Tavuchis, supra note 36, at 20.

[156] E. Mark Stern, *The Psychotherapy of Remorse*, *in* Psychotherapy and the Remorseful Patient 2 (E. Mark Stern ed., 1989) (noting remorse "maintains the reality of unique responsibility" and " . . . guilt and regret form its lattice."); *see also* Thomas Moore, *Re-Morse: An Initiatory Disturbance of the Soul*, *in* Psychotherapy and the Remorseful Patient 90–91 (E. Mark Stern ed.,1989) (defining remorse as " . . . an inner intelligence, who gets our attention with his teeth" and "a path toward inferiority"); Don Gifford & Robert J. Seidman, Ulysses Annotated: Notes for James Joyce's Ulysses 22 (Univ. of Cal. Press 1989) (1974) (noting that the Middle English phrase "agenbite of inwit" means "remorse of conscience").

[157] Lazare, *supra* note 90, at 44.

[158] *Id.* at 62.

[159] Shirin Bakhshay, *The Dissociative Theory of Punishment*, 111 Geo. L.J. 1251, 1279 (2023).

[160] *See* Lazare, *supra* note 90, at 67–68 (providing several examples of listening to suffering experienced by those injured by the holocaust, FMLN atrocities in El Salvador, and apartheid).

[161] Stephanos Bibas, The Machinery of Criminal Justice *74, n.32 (2012) (noting cognitive dissonance and ongoing denial render expression of remorse and apology difficult).*

[162] Scher & Darley, *supra* note 110, at 130.

[163] Francis A. Allen, The Borderland of Criminal Justice: Essays in Law and Criminology, 25–42 (1964).

result in a more lenient plea.[164] To facilitate an apology, one "modest" proposal suggests that victims should be granted control to reduce a sentence by ten percent if offered by the transgressor.[165] Sentencing judges are admonished to be responsive to expressions of genuine remorse in the case of otherwise undiscovered offenses.[166] Responsive Censure is a slightly new formal justification for judicial responsiveness to apologies by suggesting remorse-based mitigation as appropriate for transgressors.[167] Remorse has been considered a legal good.[168] But an apology that consists of recognition, responsibility, and remorse is incomplete without redress.

4. Redress

A fourth important element to a real apology is the rehabilitative ideal, including redress of the injury.[169] In *Hoffner v. State*, a New York court held that, "The State . . . suggests that more compensatory than money is the apologetic gesture of a penitent society. It seems to the court that such an apology accompanied by a token payment would add a highhanded insult to an almost inconceivable injury."[170] As so eloquently stated by Judge Young in 1955, in addition to the apology elements of recognition, responsibility, and remorse, material steps are required to redress an injury inflicted by the criminal justice system.[171] As with most torts, money is usually the best the law can do. Direct monetary compensation could include lost wages, property damage, loss of future earnings, and costs of medical care for physical and mental illness because of the injury. Indirect costs may also be appropriate for pain and suffering, loss of privacy, loss of freedom, humiliation, reputational damage, and for relatives, loss of consortium, and wrongful death.

The injured and their representatives are left to file state tort or federal civil claims against the presumed transgressors. Facts arise only in the face of detailed event analysis, often taking months or years. In the case of the wrongfully convicted and incarcerated, pardons are associated with a greater frequency of compensation.[172] However, not all pardons are for actual

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[164] Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 19–20 (2003); *but see* Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 Marq. L. Rev. 295 (2007) (questioning whether prosecutors are swayed by apologies during the plea-bargaining process).

[165] Erin O'Hara O'Connor, *Victims and Prison Release: A Modest Proposal*, 19 Fed. Sent'g. Rep. 130, 133 (2006).

[166] United States Sentencing Commission § 5K2.16 Voluntary Disclosure of Offense (2024); *see also* Richard L. Lippke, *Remorse, Dialogue, and Sentencing*, 16 Crim. L. & Phil. 611, 613 (2022).

[167] Hannah Maslen, Remorse, Penal Theory and Sentencing 203 (2015).

[168] Michael Proeve & Steven Tudor, Remorse: Psychological and Jurisprudential Perspectives 116 (2016).

[169] Allen, *supra* note 163, at 37 (noting "Measures which subject individuals to the substantial and involuntary deprivation of their liberty contain an inescapable punitive element . . .").

[170] Hoffner v. State, 142 N.Y.S.2d 630, 631 (N.Y. Ct. Cl. 1955).

[171] Yoshino & Glasgow, *supra* note 85, at K3.

[172] Jeffrey S. Gutman & National Registry of Exonerations, *Compensation Under the Microscope: Pardons and Compensation*, GWU Legal Studies Research Paper No. 2023-08, Feb. 27, 2023, at 6 https://ssrn.com/abstract=4372003 [https://perma.cc/9ZC6-THHW].

innocence and maintain the burden of proof on the injured.[173] Even with the best of intentions, compensation for the wrongfully convicted and incarcerated is often inadequate or not awarded at all. In one study, 38 percent of the eligible wrongfully convicted did not apply at all and only 44 percent of the injured were compensated with widely varying amounts based on state residence and the average compensation was many times smaller than that usually awarded in civil cases.[174] One hundred seventy-seven individuals on the National Registry of Exonerations who sought compensation under state statutes were denied.[175] The federal wrongful conviction statute is rarely used and seldom successful.[176]

C. When Should Apologies Matter to the Criminal Justice System?

There are many commentators who assert that those injured by the criminal justice system want an apology.[177] Yet there is a dearth of empirical research to document the use of apology by transgressors in the criminal justice system. In fact, there is no empirical research on the opinions of prosecutors or law enforcement regarding apologizing to those injured by the criminal justice system. A truism in healthcare is that "if something can't be measured, it can't be improved."[178] And yet, in the criminal justice system, there has been essentially no empirical study on the role of real apologies when the factually innocent are wrongfully convicted. Where studied, real apologies are important to the injured and by extension may also be important to the factually innocent exonerees. In one—albeit limited—study, 100 percent of interviewees stated exonerees should receive apologies and compensation.[179] The wrongfully convicted often want to hear apologies.[180]

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[173] *Id.* at 8.

[174] Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 Mo. L. Rev. 369, 437 (2017).

[175] Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 Clev. St. L. Rev. 219, 281 (2021).

[176] *Id.*

[177] O'Hara & Yarn, *supra* note 2, at 1141; *see also* Jonathan R. Cohen, *supra* note 34, at 1042–46; Bibas & Bierschbach, *supra* note 140, at 132; Leslie C. Levin & Jennifer K. Robbennolt, *To Err Is Human, to Apologize Is Hard: The Role of Apologies in Lawyer Discipline*, 34 Geo. J. Legal Ethics 513, 528–36 (2021); Abigail Penzell, *Apology in The Context of Wrongful Conviction: Why the System Should Say It's Sorry,* 9 Cardozo J. Of Conflict Resolution 145, 154–59 (2007); Wesley Parks & C.J. Larkin, *Unlocking Apology's Potential in Resolving Disputes* 51 Colo. Law 20, 27 (2022); McMichael, *supra* note 78, at 341; Lerman, *supra* note 106, at 1663; Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 Psychol. Pub. Pol'y & L. 433, 442 (1998); Strang & Sherman, *supra* note 164, at 15; Leslie Paik & Chiara Packard, *Impact of Juvenile Justice Fines and Fees on Family Life: Case Study in Dane County, WI*, Philadelphia, PA Juvenile Law Center (2019) at 27; Heidi R. Gilchrist, *Released, but Not Free: The Unexonerated*, 14 Ne. Univ. L. Rev. 113 (2022); O'Hara, *supra* note 165, at 130; Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 Behav. Sci. & L. 337 (2002).

[178] David Blumenthal & J. Michael McGinnis, *Measuring Vital Signs: An IOM Report on Core Metrics for Health and Health Care Progress*, 313 J. Am. Med. Ass'n. 1901, 1901 (2015).

[179] Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies* 75 Alb. L. Rev. 1415, 1433–34 (2012). Eleven of the authors' fifteen participants thought apologies should be public. *Id.* at 1434.

[180] Lakia Faison & Laura Smalarz, *Perceptions of Exonerees: A Review of the Psychological Science*, 83 Alb. L. Rev. 1021, 1025 (2019).

To further glimpse the importance of empirical study when the factually innocent are exonerated, one must look elsewhere. Victim-offender mediation (VOM) has been most studied from an empirical standpoint. VOM studies assert benefits for both the injured and the transgressor.[181] Mediation provides a setting in which the offender can apologize to the victim for his wrongdoing.[182] In one study, victims desired a public apology or affirmation through a Criminal Injuries Compensation Board to redress wrongs suffered—even more than monetary compensation.[183] Courts are infrequently a venue for airing of apologies.[184] Most victims say that they agree to VOM in order to confront the offender, to better understand why the crime happened, and/or to obtain reparations.[185] One survey of 4000 individuals asked how to improve the criminal justice system.[186] Experimental evidence indicates that plaintiffs are much more likely to settle their suits if the defendant has sincerely apologized to the victim.[187] There is also evidence that apologies might affect recommendations for settlement by attorneys.[188] But lawyers may be unable to eliminate psychological barriers.[189]

Japanese recipients of a hypothetical apology were sensitive to the cost of the apology.[190] Most of the work has involved semi-structured interviews and relatively low-level crimes. Paik asked youth offenders about writing a letter

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[181] Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research,* 65 Fed. Probation 29, 30–31 (2001) (noting that individualizing consequences of crimes tends to enhance satisfaction with criminal justice).

[182] Mark S. Umbreit et al., *The Impact of Restorative Justice Conferencing: A Review of 65 Empirical Studies in 5 Countries*, 1, 7–9 (2002), https://www.researchgate.net/publication/255647653 [https://perma.cc/935R-AKFV] (last visited Apr. 7, 2025).

[183] Des Rosiers et al. *supra* note 177, at 442 (finding that eighteen of twenty-four interviewees desired an apology or public affirmation of the wrong they suffered, and only three identified money as a motivating factor).

[184] *See* Strang & Sherman, *supra* note 164, at 29 ("[A] sincere expression of remorse is . . . something victims almost never have the chance to hear in the courtroom.").

[185] Mark S. Umbreit & Robert B. Coates, *Victim Offender Mediation: An Analysis of Programs in Four States of the U.S.* 17 (1992). About 89 percent of transgressors thought offering an apology was important. *Id.* at 18.

[186] Strang & Sherman, *supra* note 164, at 28 (showing data that 86 percent of Canberra victims attending restorative justice conferences received apologies from their offenders, while only 16 percent received apologies if cases were resolved in court).

[187] Robbennolt, *supra* note 38, at 485–86 (showing that with a full apology, 73 percent of respondents would definitely or probably accept a hypothetical settlement, compared to 52 percent without an apology). Full apologies also improved the participants' perceptions of the offender. *Id.* at 500.

[188] Jennifer K. Robbennolt, *Apologies and Settlement,* 45 Ct. Rev. 90, 94 (2009) (describing three possible role effects: attorneys, whether compensated by contingency or hourly fees may not wish lower settlements or fewer billable hours; attorneys are more analytical and more influenced by economic concerns; attorneys are more attuned to protection of clients' legal rights).

[189] Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107, 110, 143 (1994) (concluding there are a number of psychological barriers to value-maximizing settlement efforts including personal feelings).

[190] Yohsuke Ohtsubo & Esuka Watanabe, *Do Sincere Apologies Need to Be Costly? Test Of a Costly Signaling Model of Apology,* 30 Evolution & Hum. Behav. 114, 120 (2009) (noting a costly apology communicated sincerity); *see also* Ryo Oda & Kai Hiraishi, *Checking Boxes for Making an Apology: Testing the Valuable Relationships Hypothesis by a New Method*, 12 Letters on Evolutionary Behav. Sci. 7, 9 (2021) (noting the instrumentality of the friend, a measure of how helpful that friend was to achieving one's goals, explained how cstly an apology one might offer that friend).

of apology as an alternative to a legal financial obligation.[191] Often, empirical studies are from the victim-offender mediation literature. One study of victim-offender mediation (VOM) was done in four sites with juvenile offenders and their victims.[192] A meta-analysis of 63 studies showed most participants found VOM satisfactory, with increased rates of restitution and lower levels of subsequent offenses.[193] An empirical survey of about 700 online responses on the role of apology in alternative dispute resolution showed that apologies decreased the initial settlement offer, among other findings.[194]

Construction of real apologies must be done with meticulous consideration.[195] "Apology" laws as enacted in the healthcare setting would also be inappropriate in many criminal justice settings. If not done right, apologies might be deleterious to both the injured and the transgressor, with the needs of both better maintained by other forms of clear, explicit communication.[196] Apologies may actually threaten an injured's sense of control.[197] The injured may feel coerced into communicating forgiveness, the conventional response to an apology.[198] Another important concept is the cultural notion of 'face.'[199] The transgressor should, in any apology, indicate reluctance to encroach on the exoneree's negative face, while affirming the exoneree's positive face.[200] Apologies need to acknowledge both types of face.[201] Arbel and Kaplan consider apology law reform the work of a "strong lobby" of legal scholars called "Legal Apologists" who have contributed to the philosophical, social, and psychological understanding of the role of apologies.[202] However, the "Legal Apologists" are taken to task for not considering the potentially harmful effects of apologies in effectively achieving "tort reform through the back door."[203]

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[191] Paik & Packard, *supra* note 177, at 28 (concluding "[A] letter of apology is one thing on a long list of things youth are supposed to do."); *see also* Leslie Paik, *Reflection on the Rhetoric and Realities of Restitution*, 4 UCLA Crim. Just. L. Rev. 247, 248 n. 4, 250 (2020).

[192] Mark S. Umbreit, Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment, W. Criminology Rev., June 1998 (documenting victim and offender satisfaction, successful restitution completion, and reduced fear in crime victims).

[193] *See generally* Umbreit et al., *supra* note 185.

[194] Sunshine Yin, *The Power of Apology in Settlement Decision-Making: An Empirical Analysis*, 4 Resolved: J. Alternative Disp. Resol. 70, 88–89 (2014).

[195] Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261, 1304 (2006).

[196] Gili Freedman et al., *Softening the Blow of Social Exclusion: The Responsive Theory of Social Exclusion*, Frontiers in Psych., Oct. 10, 2016, at 12. I have substituted *injured* for target that Freedman et al. defines as one sustaining a harm (e.g., wrongful conviction) and *transgressor* for source, or by Freedman's definition, the perpetrator (e.g., local, state, or federal government).

[197] *Id.*

[198] *Id.*

[199] Penelope Brown & Stephen C. Levinson, Politeness: Some Universals in Language Use 13 (1987). "Face" refers to two types of desire. "Negative face" is the wish to be free of restraint in one's activities (e.g., not to feel coerced into expressions of forgiveness). "Positive face" is the wish for approval (e.g., to be seen as innocent). Brown and Levinson use "speaker" as one giving the apology and "hearer" as the one to whom the apology is given. As elsewhere, I have substituted "transgressor" (e.g., local, state, or federal government) for "speaker," and "injured" for "hearer."

[200] *Id.* at 187–89.

[201] *Id.* at 190 (indicating the state can be reluctant to encroach on the exoneree's faces in several ways, but perhaps the best is to admit the encroachment: "I hope what I am about to say (or write) won't trouble you too much.").

[202] Yonathan A. Arbel & Yotam Kaplan, *Tort Reform through the Back Door: A Critique of Law and Apologies*, 90 S. Cal. L. Rev. 1199, 1241 (2017).

[203] *Id.*

Apology in the criminal justice setting has often been placed under the rubric of restorative justice.[204] Restorative justice proponents have suggested "Apology Banks" be created to allow transgressors to apologize without violating rules against contacting the injured.[205] There has even been an attempt to develop an "Apology Score Card."[206] Transgressors may need assistance in crafting a redemption story in an attempt to avoid repeat offenses.[207] Real apologies, then, set a high bar for the transgressor.

III. Apology Considerations in the Criminal Justice Setting

A. Apologies on Behalf of the Criminal Justice System

Apologies have been and continue to be given by constituents of the criminal justice system with varying degrees of success. Such apologies are offered spontaneously as there is currently no statutory mandate. The wrongful conviction apologies discussed *infra* occur in a variety of circumstances—predominantly—and are instructive as to how real apologies should be offered. Apologies issued in public (e.g., news conferences) are "on the record" while those offered in private are not.

1. The Dugan Apology

Perhaps the most personal type of apology is from one individual to another. Gerald Dugan was the assistant district attorney who prosecuted fifteen-year-old Kevin Brinkley. A jury convicted Mr. Brinkley of murder and sentenced him to life without parole. Paroled in 2017 after *Miller v. Alabama*,[208] Dugan had become concerned that Mr. Brinkley did not commit the crime, met face to face with Mr. Brinkley and family members, and apologized, expressing recognition of the event, responsibility, and remorse, but no redress.[209]

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[204] Bailey Maryfield et al., *Research on Restorative Justice Practices*, Just. Rsch. Stat. Ass'n. Rsch. Brief, Dec. 2020, at 1.

[205] *Id.* at 4–5; *see also* Sandra Pavelka & Anne Seymour, *Guiding Principles and Restorative Practices for Crime Victims and Survivors*, Corrections Today, Jan./Feb. 2019, at 43, *and* Pennsylvania Office of Victim Advocate, *Inmate Apology Bank*, https://www.ova.pa.gov/RestorativeJustice/InmateApologyBank/Pages/default.aspx [https://perma.cc/54FC-Z24X] (advising that "Writing an apology letter is voluntary and has no effect on incarceration, release date and/or parole supervision.").

[206] Parks & Larkin, *supra* note 179, at 25 (offering ten criteria by which to score an apology: 1) A detailed account of the situation; 2) Acknowledged their role in the event/situation; 3) Took responsibility for their role; 4) Acknowledged the outcome (hurt/damage/consequences); 5) Described what they should or could have done differently; 6) Expressed sincere regret for their role and outcome; 7) Offered restitution, repair, or retribution; 8) Promised change/improvement with concrete a plan; 9) Listened to the aggrieved party; 10) Willing to answer question. A score of between one and five is possible in each category: 1 (poor), 2 (attempt), 3 (decent), 4 (good), and 5 (excellent), aggregated to tabulate an overall score).

[207] Nicola Lacey & Hanna Pickard, *To Blame or to Forgive: Reconciling Punishment and Forgiveness in Criminal Justice*, 35 Oxford J. Legal Stud. 665, 690 (2015) (requiring one to "forego satisfaction of our desire for full apology, repentance, suffering, and atonement.").

[208] Miller v. Alabama, 567 U.S. 460, 489 (2012).

[209] Samantha Melamed, *Former Prosecutor Apologizes to Lifer After His Parole*, Phila. Inquirer, Oct. 27, 2017, at A1, A14. The apology, in part, included the phrases "You have every

2. The Long Apology

Ronnie Long spent 44 years in prison after a wrongful conviction in 1976 and a pardon for actual innocence in 2020. He received a public apology:

We are deeply remorseful for the past wrongs that caused tremendous harm to Mr. Long, his family, friends, and our community... While there are no measures to fully restore to Mr. Long all that was taken from him, through this agreement we are doing everything in our power to right the past wrongs and take responsibility. . . .[210]

3. The Strickland Apology

Jean Peters Baker, a Jackson County, Missouri prosecutor, publicly apologized in a press conference to Kevin Strickland for his wrongful conviction and incarceration for 43 years.[211] Subsequently, on MSNBC, Rachel Maddow reported that "[B]eing a prosecutor is not the kind of job in which you ever hear an apology."[212] The report goes on to explain that the apology offered by Ms. Peters Baker is "unlike anything [Ms. Maddow had] ever seen before from a prosecutor, anywhere."[213] The apology states:

> I'm here advocating for Mr. Strickland's freedom, and his conviction should be vacated. Most importantly though, I am advocating that this man must be freed immediately. My job is to protect the innocent . . . and today my job is to apologize. It is important to recognize when the system has made wrongs and what we did in this case was wrong. So, to Mr. Strickland, I am profoundly sorry, I am profoundly sorry for the harm that has come to you. It is not however just Mr. Strickland that I owe an apology to, it is to the victim's family in this case. I suppose I could stop there, but harms like this extend beyond criminal defendants and those with the title of victim. It goes to the broader community, and to that end, I want to tell this community that I represent that I find this mistake in this system to be profound and to be one that I should take every ounce of energy I have to correct. I am sorry for this mistake made by this system.[214]

Mr. Strickland was freed in November 2021 after the press conference in May of 2021. Strickland subsequently filed a lawsuit in Jackson County

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right to hate me" and "there were a bunch of things I should have done that I didn't do." *Id.* The article says nothing about compensation.

[210] Michelle Boudin, *Ronnie Long, NC man who spent 44 years in prison for rape he didn't commit, gets $25M settlement*, WCNC (Jan. 9, 2024), https://www.wcnc.com/article/news/investigations/concord-ronnie-long-wrongfully-convicted-rape-jury-tampering-pardon/275-0b835e32-0209-4bf0-96a8-2e572cf6d6c4 [https://perma.cc/C659-TYKP].

[211] Rachel Maddow, *A 'Profound' Mistake: Prosecutor Fights to Free Wrongfully Convicted Man*, MSNBC (Jun. 18, 2021), https://www.youtube.com/watch?v=r9gMSO3JKrk [https://perma.cc/KDH9-A5XW].

[212] *Id.*

[213] *Id.*

[214] *Id.*

Circuit Court against the Kansas City police department seeking compensation for his wrongful conviction.[215] The Missouri statute only considers exoneration by DNA evidence as proof of wrongful conviction.[216]

4. The Crabtree Apology

Darwin Crabtree was exonerated in January 2018 after his conviction for child molestation in 1991.[217] He lost ten years and was required to register as a sex offender for life. The cause of his wrongful conviction was false testimony. He was invited to the office, where DA Mike Ramsey offered an in-person apology.[218] He received compensation through the California Victim Compensation Board.

5. The Davis Apology

Ricky Davis was exonerated in February 2020 after being convicted of murder in 2005. He lost twelve years of freedom. The causes of his wrongful conviction included false testimony and "overly aggressive interrogation." He received compensation through the California Victim Compensation Board. Elected DA Vern Pierson held a press conference stating "Ricky Davis [was] falsely accused, brought to trial, convicted, and has spent the last fifteen some years in custody for a crime that I can tell you in all confidence he did not commit."[219] Also, "I have personally apologized to Ricky Davis . . . for the mistakes in handling this case in the past."[220]

6. The Walker Apology

Quedellis "Rick" Walker was wrongfully convicted of first-degree murder in December 1991.[221] There was no physical evidence connecting Mr. Walker to the crime; he was tried and sentenced to twenty-six years to life in prison. After years of futile appeals, DNA evidence came to light confirming that

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[215] Ken Otterbourg, *Kevin Strickland*, The National Registry of Exonerations, Apr. 12, 2023, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6081 [https://perma.cc/5V34-RMRP].

[216] Mo. Rev. Stat. § 650.058 (2025).

[217] Northern California Innocence Project, *Darwin Crabtree*, https://ncip.org/darwin-crabtree/ [https://ncip.org/darwin-crabtree/] (last visited Mar. 13, 2025).

[218] Andre Byik, *Paradise Man Has Decades Old Molestation Convictions Overturned*, Chico Enterprise Record (Jan. 17, 2018), https://www.chicoer.com/2018/01/17/paradise-man-has-decades-old-molestation-convictions-overturned/ [https://perma.cc/QU9T-WNA2].

[219] ABC 10, *Ricky Davis Exonerated After Serving Fifteen Years*, youtube (Feb. 14, 2020), https://www.youtube.com/watch?v=CfM8tTD3dNA&ab_channel=ABC10 [https://perma.cc/2533-4UQM].

[220] Press Release, El Dorado County District Attorney, Michael Green Sentenced/New DA Interrogation Policy (Sept. 27, 2022), https://www.eldoradoda.com/michael-green-sentenced-new-da-interrogation-policy/ [https://perma.cc/99X3-4DUW].

[221] Exonerated Nation, *Rick Walker*, https://exoneratednation.org/rick-walker/ [https://perma.cc/VS7Y-B38T] (last visited Mar. 12, 2025).

Walker was not the perpetrator. Walker was set free in June of 2003 with an apology from Assistant District Attorney Karyn Sinunu, who stated "I apologized."[222] He received $100 per day for time served by legislation passed by the California State Legislature after a display of bipartisanship.[223] Walker became a member of the Northern California Innocence Project's Advisory Board. He died in 2020.

7. The Hernandez and Solorio Apologies

District Attorney George Gascon apologized to two individuals at a Los Angeles Hall of Justice press conference on December 13, 2023. The Juvenile Innocence and Fair Sentencing Clinic at Loyola Law School assisted the exoneration of Mr. Giovanni Hernandez and the Northern California Innocence Project assisted the exoneration of Mr. Miguel Solorio. Mr. Gascon's apology, after recognition of the errors in prosecution, included in part:

> This is the day when we publicly announce that they are factually innocent. . . . Mr. Hernandez, I know you have always maintained your innocence and I want to apologize to you and your family for this failure. Mr. Solorio, I am also sorry for you . . . and for what you have endured as a result of this wrongful conviction. . . . I hope that our apology is some small comfort for you as you begin your new life.[224]

D.A. Gascon's apology covered three of the four elements of a real apology. First, the announcement came in a public forum. The injury was factually recognized, his office took responsibility, and anyone watching the video could feel the remorse in his words, as he also attempted to restore dignity to the recent exonerees. Regarding redress, Mr. Gascon noted the efforts being made not only to exonerate additional individuals, but also efforts toward better processes for photo lineups. Claims under the California wrongful conviction statute are proceeding and are facilitated by the public acknowledgment of factual innocence. Neither exoneree explicitly affirmed forgiveness.

IV. The Wrongful Conviction Statutes

A. The Missing Word

No wrongful conviction statute mentions the word apology, and yet apologizing to the wrongfully convicted is the one circumstance in which a real apology might be accomplished; the judicial record and application

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[222] Harriet Chiang, *Dogged family friend wins man his freedom*, SFGate (June 10, 2003), https://www.sfgate.com/bayarea/article/Dogged-family-friend-wins-man-his-freedom-He-2578162.php [https://perma.cc/2VRY-ZCQU] (last visited Mar. 13, 2025).

[223] DVD: $100 a Day (Gwen R. Essegian & Mark Ligon 2009) (on file with author).

[224] *LADAOffice, 12-13-23 News Conference: LADA Announces Exonerations of Two Men Wrongfully Convicted of Murder in Two Separate Cases,* Vimeo (Dec. 13, 2023), https://vimeo.com/894312737 [https://perma.cc/4K2H-GNMY] (last visited Mar. 15, 2025).

provide recognition of the injury, responsibility can be assigned, remorse to the extent possible can be expressed, and redress through monetary compensation is a part of the statute, so apologies would be a small incremental step for the criminal justice system that would mean a great deal to the exonerees, specifically those exonerated for actual innocence. Adding apology would also enhance other redress, as none of the states truly have comprehensive statutory compensation for wrongful conviction.[225] Large exoneree compensations may reduce the number of wrongful convictions without affecting guilty individuals' incentives and are unlikely to affect deterrence.[226] Yet many statutes have parsimonious compensation provisions with caps or yearly compensation of less than ~$50,000/yr.[227] Wrongful conviction statutes are generally designed to acknowledge the government as the correct party to assume responsibility for wrongful conviction.[228] Further, the intent of most statutes is to separate those that can prove actual innocence from those merely avoiding criminal liability.[229] Wrongful conviction statutes generally require that a claimant must have been convicted of a crime, must have served time in prison, and, in the majority of cases, the claimant bears the burden of proof.

One frequent form of proof is a pardon. Alexander Hamilton, writing as Publius, explained the need for pardons: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[230] Regardless of whether the pardon mentions innocence—as a review of pardon data and compensation show—those who receive a pardon are more likely to seek and to obtain compensation for a wrongful conviction than other wrongly convicted exonerees.[231] In the quest for pardon, further enhancing the need, apologies are often expected at the Minnesota Board of Pardons.[232]

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[225] Marissa Cohen, *How to Alleviate the Repercussions of Wrongful Convictions: Holistically Righting the Wrongs of Inadequate Compensation Statutes*, 44 Cardozo L. Rev. 2063, 2102 (2023).

[226] Murat C. Mungan & Jonathan Klick, *Reducing Guilty Pleas Through Exoneree Compensation*, 59 J. L. & Econ. 173, 185 (2016).

[227] Statutes with parsimonious compensation include: Fla. Stat. Ann. § 961.06 (2023) (not to exceed (NTE) $2 million); Iowa Code § 663A.1 (2023) ($18,25 per year ($50/da liquidated damages)) and lost wages if any NTE $25,000); La. Rev. Stat. § 15:572.8 (2024) (NTE $400,000); Me. Rev. Stat. Ann. tit. 14 § 8242 (2024) (NTE $300,000); Mass. Gen. Laws. ch. 258D, § 5 (2024) (NTE $1 million); Miss. Code Ann. § 11-44-7 (2024) (NTE $500,000); Mo. Rev. Stat. § 650.058 (2023) (NTE $36,500 per year); Neb. Rev. Stat. Ann. § 29-4604 (2024) (NTE $500,000); N.H. Rev. Stat. Ann. 541-B:14 (II) (2023) (NTE $20,000); N.C. Gen. Stat. § 148-84 (2023) (NTE $750,000); Okl. Stat. Ann. tit. 51, § 154 (B) (4) (2024) (NTE $175,000); Tenn. Code Ann. § 9-8-108 (a) (7) (A) (2024) (NTE $1 million); Vt. Stat. Ann. tit. 13 § 5574 (2024) (no less than $30,000 but no more than $60,000 per year); Wis. Stat. Ann. § 775.05 (LexisNexis 2023-2024) (NTE $25,000).

[228] Deborah F. Buckman, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R. 6th 305, *2.

[229] Walden v. State, 547 N.E.2d 962, 966 (Ohio 1989) (stating "a verdict or judgment of acquittal in a criminal trial is a determination that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is innocent").

[230] The federalist No. 74 (Alexander Hamilton).

[231] Gutman, *supra* note 172, at 8.

[232] Dan Barry, *10 Minutes to Plead for Grace*, N.Y. Times, Oct 16, 2023 at A1.

The addition of an apology to exonerees would not be a large administrative burden, given the small numbers involved. The National Registry of Exonerations (NRE) recorded 194 pardons as of September 2022, but not all pardons were based on actual innocence.[233] Further, the number of compensated exonerees is small, making the addition of apologies to the redress a manageable endeavor. Detailed analyses of state compensation claims have been studied for six states (Table 1). A more comprehensive, if somewhat dated, analysis of all jurisdictions is available.[234]

Table 1: Exoneree Claims "Under the Microscope" in Six States

	NRE Wrongfully Convicted Exonerees	**Eligible**	**Claims**	**Exonerees with Statutory Compensation**	**Law Enacted**
Florida[235]	83	72		10	2008
Indiana[236]	41	40	14	3	2019
Michigan[237]	156	156	94	62	2017
Virginia[238]	65	60	42	36	2004
Washington[239]	51	47	22	9	2013
Wisconsin[240]	66	61	24	16	1913

The United States, thirty-eight states, and the District of Columbia have wrongful conviction statutes.[241] Twelve states currently do not have wrongful

[233] Gutman, *supra* note 172, at 1 (reporting pardons are issued by independent boards in six states, the governor and state board share power in twenty-two states, and may consult a state board prior to issuing a pardon).

[234] Gutman, *supra* note 174, at 439–40 (table).

[235] Jeffrey Gutman, Compensation Under the Microscope: Florida 4 (2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2891&context=faculty_publications [https://perma.cc/9AND-T89G] (last visited Jan. 12, 2025) (noting that five of six exonerees with connections to a conviction integrity unit have sought or received compensation).

[236] Jeffrey Gutman, Compensation Under the Microscope: Indiana 4 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203701# [https://perma.cc/WYP5-F5L7] (last visited Jan. 12, 2025).

[237] Jeffrey Gutman, Compensation Under the Microscope: Michigan 2 (2023), https://www.law.umich.edu/special/exoneration/Documents/Michigan%20denials%20v.f%20%281%29.pdf [https://perma.cc/5DW2-2R7P] (last visited Jan. 12, 2025) (listing sixty-two as awarded state compensation and twenty-eight with civil rights compensation).

[238] Jeffrey Gutman, Compensation Under the Microscope: Virginia 3 (2023), https://www.law.umich.edu/special/exoneration/Documents/Virginia%20v.f%20%281%29.pdf [https://perma.cc/B3SL-TD6H] (last visited Jan. 12, 2025).

[239] Jeffrey Gutman, Compensation Under the Microscope: Washington 8 (2022), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2899&context=faculty_publications [https://perma.cc/T4LQ-BXJP] (last visited Jan. 12, 2025).

[240] Jeffrey Gutman, Compensation Under the Microscope: Wisconsin 2 (2023), https://www.law.umich.edu/special/exoneration/Documents/Under%20The%20Microscope%20Wisconsin.pdf [https://perma.cc/7FBL-ADRT] (last visited Mar. 11, 2025).

[241] For details regarding statutory construction in states with wrongful conviction statutes *see infra* Table 2.

conviction statutes.[242] There is an Arkansas State Claims Commission not specifically for wrongful convictions but with jurisdiction over claims otherwise barred by sovereign immunity.[243] A Montana wrongful conviction statute expired in 2023.[244] Many states have additional sections in wrongful conviction statutes that would make the provision of apologies easier to the injured exonerees. That apologies should be made public is exemplified by the Virginia experience.[245] Virginia's General Assembly—often after hearing from the injured in open session—enacts legislation then signed by the governor; an explicit public process that some exonerees feel is an important step in recovery.[246] Wrongful conviction statutes have recently been studied collectively for state harm, compensation, and the aftermath of exoneration.[247] There are several other elements to the various state statutes that should be considered to strengthen protections when apologies are offered to the actually innocent who are wrongfully convicted and incarcerated.

B. Release and Waiver

Connecticut requires those eligible for compensation to voluntarily relinquish any right to pursue any other action or remedy at law or in equity arising out of the wrongful conviction and incarceration.[248] Florida requires a waiver forever releasing the state or any agency, instrumentality, or any political subdivision thereof, or any other entity.[249] Florida also bars a wrongfully incarcerated person from applying for compensation if that person has a lawsuit pending against the state or any agency, instrumentality, or any political subdivision thereof, or any other entity.[250] Lastly, Florida states that any award of wrongful conviction compensation does not constitute a waiver of sovereign immunity or increase the limit of state liability.[251] The Court of Claims Act bars the State of Illinois from being named as a defendant or party

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[242] Alaska, Arizona, Arkansas, Georgia, Kentucky, Montana, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Wyoming.

[243] Ark. Code Ann. § 16-112-201 (2024) (allowing a writ of habeas corpus for new scientific evidence—including DNA testing—that establishes actual innocence); *but see* Bureau of Just. Assistance, *Identifying, Remedying, and Preventing Wrongful Convictions in Arkansas* https://bja.ojp.gov/funding/awards/15pbja-21-gg-03613-wrng [https://perma.cc/M8D6-YSEV] (last visited Jan. 12, 2025) (stating there has been no concerted effort to review and litigate post-conviction innocence claims in Arkansas. The Midwest Innocence Project has processed 177 applications, while eleven are currently being further screened).

[244] The prior statute (Chapter 32 Wrongful Conviction Part 1 Proceedings for Compensation §§ 46-32-101–04, 106–08) was repealed effective Jun. 20, 2023. A new bill was introduced Feb. 6, 2023, passed by the legislature on Apr. 26, 2023, was vetoed by the Governor on May 12, 2023. and the legislature failed to override the veto on June 9, 2023.

[245] Va. Code Ann. §§ 8.01-195.10 - 8.01-195.13 (2023).

[246] Gutman, *supra* note 238, at 2 (noting innocence must be found by the governor or a court).

[247] Andrew J. Madrigal & Robert J. Norris, *The Good, the Bad, and the Uncertain: State Harm, the Aftermath of Exoneration, and Compensation for the Wrongly Convicted*, 30 Critical Criminology 30:895, 903–09 (2022).

[248] Conn. Gen. Stat. § 54-102uu (g) (2023).

[249] Fla. Stat. Ann. § 961.06 (5) (2023).

[250] § 961.06 (6).

[251] *Id.* at § 961.06 (7).

in any court.[252] Indiana requires that persons entitled to compensation must forever release, discharge, and waive all claims against the State of Indiana and a number of other individuals.[253]

Massachusetts requires that written acceptance by a claimant is final, constitutes a complete release of any claim, and is a complete bar to claims against the commonwealth.[254] Michigan includes, in addition to a release and bar to claims, a clause that any compromise or settlement is final and conclusive.[255] Minnesota is much the same.[256] Mississippi allows the pursuit of a claim in lieu of a tort action, but an award for such a claim requires a written release and bars subsequent awards in state court.[257] Missouri allows restitution for DNA exoneration only, and prohibits other civil redress from the state, its departments or agencies, and employees.[258] Nebraska disallows against the state, in claims with compensation, any claims based on other theories of recovery or law.[259]

In Rhode Island, written acceptance must include a provision voluntarily relinquishing all rights to pursue any other action or remedy at law or in equity arising out of wrongful conviction.[260] In addition to disallowing any action on the same subject matter, if a claimant receives compensation in Texas claims involving arrest, conviction, or length of confinement may not be brought.[261] Utah considers payment under the statute full and conclusive.[262] Vermont requires written acceptance of compensation as final and conclusive, including a release and bar to further actions. Virginia also requires a successful claimant to execute a release and waiver of present and future claims against the Commonwealth and other entities and individuals.[263] Lastly, Washington state requires that all remedies and compensation shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state.[264]

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[252] 745 Ill. Comp. Stat. Ann. 5/1- (LexisNexis 2023).

[253] Ind. Code Ann. § 5-2-23-4 (LexisNexis 2023) (including political subdivisions, applicable state agencies, current, former or successor officials; members, officers, agents, or employees).

[254] Mass. Gen. Laws. ch. 258D, § 4 (2024).

[255] Mich. Comp. Laws. Serv. § 691.1755 (8) (LexisNexis 2024).

[256] Minn. Stat. § 611.365 Subdiv. 4 (2023).

[257] Miss. Code Ann. §§ 11-44-7 (4) (2024); Miss. Code Ann. § 11-44-15 (2024).

[258] Mo. Rev. Stat. § 650.058 1. (4) (2023).

[259] Neb. Rev. Stat. Ann. § 29-4608 (2024).

[260] R.I. Gen. Laws § 12-33-4 (E)(1) (2024).

[261] Tex. Gov't Code Ann. § 103.153 (b) (2023); *but see* State v. Oakley, 227 S.W.3d 58, 63–64 (Tex. 2007) (holding that compensation from the state bars claims against other governmental units, but if a local government entity settlement is already reached, the state is not protected from adding to compensation).

[262] Utah Code Ann. § 78B-9-405(11)(a) (2023).

[263] Va. Code Ann. § 8.01-195.12 (B) (2023) (including any agency, instrumentality, officer, employee, or political subdivision thereof, any legal counsel and all other parties of interest).

[264] Wash. Rev. Code Ann. § 4.100.080 (1) (LexisNexis 2023) (adding that claimant must waive all other remedies, causes of action, and other forms of relief or compensation against the state, any political subdivision of the state, including officers, employees, agents, and volunteers related to the claimant's wrongful conviction and imprisonment, and execute a valid release prior to the payment of any compensation).

C. Additional Lawsuits

Several states' statutes address the issue of additional lawsuits and allow for federal civil rights suits under 42 U.S.C. § 1983. In the context of recognition as an element of apology, a lack of statutory protection can lead to multiple claims in a given circumstance.[265] Colorado does not limit the ability to otherwise pursue damages against an entity that is not an employee, agent, or agency of the state government.[266] Iowa does not preclude or otherwise limit any action or claim for relief based on any negligent or wrongful acts or omissions that arose during the period of the wrongful imprisonment not related to the facts and circumstances underlying the conviction or proceedings to obtain relief from the conviction.[267] Nothing in the Nebraska statute limits a claimant from making any other claim available against any other party or based upon any other theory of recovery.[268] Adjudication by the Board of Claims or the Superior Court in New Hampshire does not deprive the claimant of any other legal rights they may have against other parties.[269] The Washington statute explicitly states that if a wrongfully convicted person elects not to pursue a claim under the wrongful compensation statute, they are not precluded from seeking relief through any other existing remedy.[270]

D. Statutory Considerations for Immunity (Absolute/Qualified)

Governmental actors have been said to be protected by absolute,[271] or qualified immunity.[272] Detailed analyses of the immunity doctrines are beyond the scope of this paper. Both absolute and qualified immunity for some governmental actors is under attack. Pattern or practice strategies have been suggested to pierce prosecutorial absolute immunity.[273] Several examples will

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[265] One recent example is the case of Ronnie Long who was pardoned in 2020 after a federal appeals court vacated his sentence. Long v. Hooks, 972 F.3d 442, 446 (4th Cir. 2020). Under North Carolina statute N.C. Gen. Stat. § 148.82 (2023), Mr. Long was awarded $750,000. However, in the absence of a statutory bar to additional claims, Mr. Long also sued the city of Concord, the detectives who worked his original case, and the city's current and former police chiefs. A settlement paid $22 million on behalf of the city of Concord, and the State Bureau of Investigation for $3 million. Michelle Boudin, *Ronnie Long, NC man who spent 44 years in prison for rape he didn't commit, gets $25M settlement*, WCNC (Jan. 9, 2024), https://www.wcnc.com/article/news/investigations/concord-ronnie-long-wrongfully-convicted-rape-jury-tampering-pardon/275-0b835e32-0209-4bf0-96a8-2e572cf6d6c4 [https://perma.cc/EJ8S-DU76] (last visited Jan. 12, 2025); *see also* Michael Levinson, *Unjustly Convicted Man gets $25 Million*, N.Y. Times Jan. 12, 2024 at A13.

[266] Colo. Rev. Stat. § 13-65-103(9)(b) (2024).

[267] Iowa Code § 663 A.5 (2023).

[268] Neb. Rev. Stat. Ann. § 29-4608 (2024).

[269] N.H. Rev. Stat. Ann. § 541-B:15 (2023).

[270] Wash. Rev. Code Ann. § 4.100.080 (1) (LexisNexis 2023).

[271] Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

[272] Saucier v. Katz, 533 U.S. 194, 206 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2009).

[273] Thomas P. Hogan, *Power v. Power: Federal Pattern-or-Practice Enforcement Actions Applied to Local Prosecutors*, 76 Me. L. Rev. 1, 30 (2024); *see also* Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 Hofstra L. Rev. 315, 316 (2021) ("There is an increasing sense that unrestrained prosecutors in

also suffice to show that qualified immunity doesn't necessarily protect state actors, especially if inculpatory statements are made in attempts to provide a real apology to the injured. Recently, attempts to pierce qualified immunity protections have also assumed greater significance.[274]

Florida requires that any compensation under statute does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person.[275] Hawai'i limits waivers of sovereign immunity by the State only for the statutory wrongful conviction claim.[276] All provisions of existing Idaho law relating to absolute or qualified immunity apply to any wrongful conviction action.[277] In Louisiana, court findings in wrongful conviction claims are inadmissible in any judicial proceeding and do not form the basis for any cause of action by the petitioner or any other person.[278] Notwithstanding any immunity of the state of Maine from suit, including the Maine Tort Claims Act, the state is only liable for the wrongful imprisonment of a person.[279] An award of compensation under Michigan's act is not admissible in evidence in a civil action that is related to the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.[280]

The immunity of Mississippi and its political subdivisions is waived with respect to claims described in the wrongful conviction chapter.[281] Missouri does not waive sovereign immunity for any purposes other than restitution under the wrongful conviction statute.[282] Nevada waives its immunity from liability for wrongful conviction and consents to have its liability determined under the same rules of law as for civil actions against natural persons and corporations.[283] Further, all provisions of existing Nevada law relating to the absolute or qualified immunity of any judicial officer, prosecutor, or law enforcement officer, including all applicable provisions of federal and state

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the United States are a problem"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

[274] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 77 (2018) (noting "the real problem with qualified immunity is that it is so far removed from ordinary principles of legal interpretation.").

[275] Fla. Stat. Ann. § 961.06(7) (West 2024) (adding that the statute does not interfere with the provisions of Fla. Stat. Ann. § 768.28 (West 2024) or other applicable law).

[276] Haw. Rev. Stat. Ann. § 661B-6 (LexisNexis 2024) (stating also that Hawai'i "makes no other waiver of sovereign immunity [outside of this chapter, which governs redress for wrongful conviction], and fully retains its sovereign immunity as to all other claims, however denominated, that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual innocence. This section shall be broadly construed in favor of the State and against any waiver of sovereign immunity.").

[277] Idaho Code Ann. § 6-3502 (West 2024).

[278] La. Rev. Stat. § 15:572.8(M) (West 2024).

[279] Me. Rev. Stat. Ann. Tit. 14 § 8241(1) (West 2024).

[280] Mich. Comp. Laws Ann. § 691.1755(7) (West 2025) (noting also an award of compensation is not a finding of wrongdoing against anyone).

[281] Miss. Code Ann. § 11-44-7(5) (West 2024).

[282] Mo. Rev. Stat. § 650.058(1)(4) (West 2024).

[283] Nev. Rev. Stat. Ann. § 41.920(1) (West 2025).

law apply.[284] Ohio consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in its wrongful conviction statute.[285] And Oklahoma expressly adopts the doctrine of sovereign immunity against liability for torts within its wrongful conviction statute.[286]

E. Compensation Offsets

Some states have included provisions that limit multiple sources of compensation. Such provisions can also mitigate any losses due to real apologies. In addition to release and waiver of claims, offset provisions are sometimes incorporated to spare taxpayers from enduring "two bites of the apple." Even if the compensation awarded under wrongful conviction statutes is offset by other claims, the apology remains an important part of redress. In Kansas, claimants awarded monetary compensation or entering a settlement agreement in a civil action related to a wrongful conviction claim are required to reimburse the state for the sum paid under the judgment entry.[287] Maryland also requires a reduction in or reimbursement of compensation if individuals—before or after receiving compensation under the wrongful conviction statute—received a civil award or entered into a settlement agreement.[288] Going further, Maryland may obtain a lien against other monetary awards.[289] New Jersey and Delaware also require an offset for any damages awarded under their respective acts.[290]

Tennessee allows a right of subrogation against individuals who willfully and intentionally commit acts that result in or contribute to a wrongful conviction.[291] Virginia requires that any previous monetary awards against the Commonwealth will result in deductions pursuant to the wrongful conviction statute.[292] If a release is held invalid in Washington and a claimant receives additional compensation in a tort claim, the claimant is required to reimburse the state.[293]

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[284] *Id.* at § 41.920(3).

[285] Ohio Rev. Code Ann. § 2743.48(F)(6) (Baldwin 2025) (conditioning the waiver of liability of the state or of its employees to a wrongfully imprisoned individual on a claim not based on the fact of the wrongful imprisonment, including, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in the state correctional institution).

[286] Okla. Stat. Ann. Tit. 51, § 152.1(A) (West 2024). *But see id.* at § 152.1(B) (stating further that the state, only to the extent and in the manner provided in the Governmental Tort Claims Act (including wrongful conviction, Okla. Stat. Ann. Tit. 51, § 154(B) (West 2024)), waives its immunity and that of its political subdivisions; and that, in so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution.).

[287] Kan. Stat. Ann. § 60-5004(f)(2) (West 2024) (implying that federal civil claims would also require reimbursement).

[288] Md. Code Ann., State Fin. & Procurement §§ 10-501(a)(3)(i)–(ii) (West 2024).

[289] *Id.* at § 10-501(a)(3)(ii)(3).

[290] N.J. Stat. Ann. § 52:4C-2(b) (2024); Del. Code Ann. Tit. 10, § 7005(h)(i) (West 2025).

[291] Tenn. Code Ann. § 9-8-108(a)(7)(G) (West 2024).

[292] Va. Code Ann. § 8.01-195.12(A) (West 2024).

[293] Wash. Rev. Code Ann. § 4.100.080(1) (LexisNexis 2024).

F. Federal Considerations

One additional avenue for redress after exoneration for a wrongful conviction is a 42 U.S.C. § 1983 federal civil rights claim if a case can be made for deprivation of a constitutional right.[294] Some states specifically do not limit federal claims. Colorado does not limit the ability to pursue damages against an entity that is not an employee, agent, or agency of the state government.[295] The Michigan statute does not act as a waiver of, or bar to, any action in federal court against an individual alleged to have been involved in the investigation, prosecution, or conviction that gave rise to the wrongful conviction or imprisonment.[296]

Some states have language in the wrongful conviction statutes that is intended to bar federal claims for the same facts of wrongful conviction. In Florida, a wrongfully incarcerated person may not submit an application for compensation if the person has a lawsuit (or claim bill) pending against the state or any agency, instrumentality, or any political subdivision thereof, in state or federal court requesting compensation arising out of the facts in connection with the claimant's conviction and incarceration.[297] The Rhode Island statute states that if either the claimant has won a monetary award, or if after the time of judgment the claimant wins a monetary award as the result of a federal civil rights lawsuit under 42 U.S.C. § 1983, the claimant shall reimburse the state for the sum of money paid under the state judgment.[298]

Texas bars federal claims after compensation under its wrongful conviction statute—"The Tim Cole Act."[299] The plaintiff in *Brown v. City of Houston* pursued a 42 U.S.C. § 1983 claim in federal court; however, the Fifth Circuit held that the federal suit was barred by the Texas wrongful conviction statute.[300] Therefore, the federal courts seem to accept bars to federal claims based on state statutory construction. The Virginia statute also allows compensation against the Commonwealth for certain intentional acts by a court of competent jurisdiction, including, by implication, federal courts for § 1983 claims.[301] Lastly, the Washington statute requires that a person must execute

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[294] 42 U.S.C. § 1983 (LexisNexis 2024) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

[295] Colo. Rev. Stat. § 13-65-103(9)(b) (West 2025).

[296] Mich. Comp. Laws Serv. § 691.1755(8) (LexisNexis 2025).

[297] Fla. Stat. Ann. § 961.06(6)(a) (West 2024).

[298] R.I. Gen. Laws §§ 12-33-4(g)(1)–(2) (West 2024).

[299] Tex. Civ. Prac. & Rem. Code Ann. § 103.153(b) (West 2023); *see also* Brown v. City of Houston 660 S.W.3d 749, 751 (Tex. 2023). *But see* Brown v. City of Houston 660 S.W.3d 749, 760 n.5 (Tex. 2023) (recognizing in dictum that Brown argued to the federal courts that federal law authorizes the § 1983 lawsuit to proceed regardless of any provisions of Texas law that may forbid such action).

[300] *Brown v. City of Houston, Texas*, 65 F.4th 774, 777 (5th Cir. 2023).

[301] Va. Code Ann. § 8.01-195.13(A) (3) (2023).

a legal release from other claims, including federal 42 U.S.C. § 1983 claims, prior to payment.[302]

G. Arguments Against Apologies

As expected, some may argue against a statutory mandate for an apology. Saying one is sorry for transgression of norms and injury belies a complex process.[303] In a study of children, a transgressor's reputation and offer of an apology were important factors in the child observer's reactions to a transgression—specifically damaging a bicycle.[304] Apologies were taken at face value by the child observers and decreased the transgressor's social predicament, reducing punishment, and making the transgressor seem more likable.[305] However, transgressors portrayed as having bad reputations were seen as more worried about punishment and were thought to apologize merely to avoid punishment.[306] Responses in social interactions are limited by social convention; apologies may threaten an injured's sense of control.[307] One theory suggests that apologies might be deleterious to *both* the injured *and* the transgressor, with the needs of both better maintained by clear, explicit communication.[308] Another important concept is the notion of "face." Face consists of two desires: to be unimpeded in one's actions, "negative face," and one's desire for approval, "positive face."[309] Apologies may actually threaten an injured's sense of control or their negative face.[310] The injured may feel coerced into communicating forgiveness, the conventional response to an apology.[311] Only if the apology is adequate might the injured accept it.[312] The transgressor should, in any apology, indicate reluctance to encroach on the exoneree's negative face, while affirming the exoneree's positive face.[313] The need to acknowledge both types of face can be incorporated into the apology.[314] Additional research has explored how particular kinds of speech may be "face-threatening acts."[315]

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[302] Wash. Rev. Code Ann. § 4.100.080(1) (LexisNexis 2024).

[303] *See* Freedman et al., *supra* note 196, at 12 (for example, apologies may have some negative effects like diminishing the injured's sense of control and increasing pressure to forgive.).

[304] Darby & Schlenker, *supra* note 123, at 356.

[305] *Id.* at 356–60.

[306] *Id.* at 358.

[307] Brown & Levinson, *supra* note 199, at 26.

[308] Freedman et al., *supra* note 196, at 12 (explaining The Responsive Theory of Exclusion that proposes that both injured and transgressor will fare better when responsive to the injured's needs).

[309] Brown & Levinson, *supra* note 199, at 13–15.

[310] *Id.* at 70.

[311] *Id.* at 67–68.

[312] *Id.* at 76.

[313] *Id.* at 236.

[314] *Id.* at 187–90 (indicating, for example, the state can show reluctance to encroach on the exoneree's faces in several ways, but perhaps the best is to admit the encroachment: "I hope what I am about to say (or write) won't trouble you too much.").

[315] *Id.* at 25–27 (declaring the state can indicate reluctance to encroach on the exoneree's face in several ways, but perhaps the best is to admit the encroachment: "I hope what I am about to say (or write) won't trouble you too much.")

Further, requiring a state transgressor—*de jure*—to apologize may impose moral burdens. "Remorse and apology are fundamentally moral, and the law cannot force them. Offenders and victims enjoy freedom of conscience, and they have the right to remain defiant."[316] Therefore, although the legislature and courts can mandate an apology, it will be difficult to mandate remorse, one of the cornerstones of a real apology. Regardless, compelling reasons for requiring apologies by some courts—if not legislatures—have been described and required in both the civil and criminal setting.[317] Often, a simple apology expressing remorse is considered mitigation.[318] The Tennessee Advisory Commission on the Tennessee Rules of Evidence has commented that "a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter."[319]

Additional concerns include, importantly, First Amendment violations and piercing long-standing criminal justice immunities.

1. First Amendment Considerations

The First Amendment in the United States Constitution's Bill of Rights protects "[t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action," which includes "both the right to speak freely and the right to refrain from speaking at all."[320] Regarding a statutory mandate for an apology to the wrongly convicted and imprisoned, First Amendment concerns about compelled speech can be justifiably, if not easily, dismissed.[321] Although the First Amendment has protections against compelled speech, the U.S Supreme Court has affirmed compelled speech in certain cases. For instance, it has upheld the requirement that a doctor obtain informed consent to perform an operation as "firmly entrenched in American tort law."[322] Further, the law regulates speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State."[323]

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[316] Bibas & Bierschbach, *supra* note 140, at 148 (going on to say "[T]he law can remove roadblocks to remorse, provide opportunities and venues, and encourage offenders and victims to speak face to face. Prosecutors, defense counsel, and judges can all come to see themselves as players in a human moral drama").

[317] White, *supra* note 195, at 1301–02 (citing Imperial Diner v. State Human Rights Appeals Bd. 417 N.E.2d 525, 529 (N.Y. 1980)); *see also* State v. Perkins, 310 P.3d 1051 (Haw. Ct. App. 2013)) (the "Dawley Letter" is interesting reading, but unprintable here, about how *not* to write an apology); United States v. Purchess 107 F.3d 1261, 1269 (7th Cir. 1997).

[318] Paul H. Robinson, Sean E. Jackowitz, & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 Vand. L. Rev. 737, 746–47 (2012).

[319] Tenn. R. Evid. 409.1 advisory commission comment (2003) (also cautioning that Rule 409.1 extends only to "benevolent gestures," but does not exclude statements of fault).

[320] W. Va. State Bd. of Educ. v. Barnette 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

[321] White, *supra* note 195, at 1298–1300.

[322] Cruzan by Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269 (1990). *See generally* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Consistent, and Independent and Nuanced Compelled Speech Doctrine*, 2020 U. Ill. L. Rev. 1, 3–45 (2020).

[323] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992) (emphasis added), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org. 597 U.S. 215, 292 (2022).

Statutorily mandated apologies could also be considered compelled or forced speech.[324] The legal apology literature suggests that most scholars feel that even compelled apologies have value.[325] The federal government has long felt the need to apologize for grievous injury. Many political (or governmental) apologies have been offered.[326] Such apologies should also require feelings of remorse and some form of redress.[327] Many, if not most, political apologies are inadequate precisely because they lack the remorse and redress associated with personal apologies. Researchers have analyzed the apologies of nations and concluded that public apologies have a legitimate structure different from that of personal apologies.[328] The political dimension of an apology requires the right context, both at the level of social and political conditions.[329]

Statutes administered by state civil rights agencies of the executive branch can call into question an agency's statutory authority to award injunctive relief.[330] We must consider not only the desired impact of a state apology for prior injustice on the injured, but also the ways in which such apologies might trigger changes in the broader political culture. Apologies by the

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[324] Lesley Wexler & Jennifer Robbennolt, *Forced Apologies: Thinking About Ordinary, Restorative and Translational Justice*, Verdict (Jun. 29, 2023), https://verdict.justia.com/2023/06/29/forced-apologies-thinking-about-ordinary-restorative-and-transitional-justice [https://perma.cc/DB6S-R99Q].

[325] *See, e.g.*, Andrea Zwart-Hink, Arno Akkermans, & Kiliaan van Wees, *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 U. W. Austl. L. Rev. 100, 120 (2014); Robyn Carroll, *You Can't Order Sorriness, So is there Any Value in an Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases*, 33 Univ. N.S.W. L. J. 360, 369 (2010); Gijs van Dijck, *The Ordered Apology*, 37 Oxford J. Legal Stud. 562, 565 (2017). *But see* Nick Smith, *Against Court-Ordered Apologies*, 16 New Crim L. Rev. 1, 7 (2013).

[326] *See* Graham G. Dodds, *Political Apologies: Chronological List*, Penn Nat'l Comm'n (Jan. 23, 2003), https://www.upenn.edu/static/pnc/politicalapologies.html [https://perma.cc/Q5GG-SNXS] (last visited May 10, 2024) (listing many national and international political or government apologies); *see also* Peter Baker & Aishvarya Kavi, *Biden Apologizes for U.S. Abuse of Indian Children*, N.Y. Times, Oct 26, 2024, at A1.

[327] *See* Edward C. Tomlinson, Brian R. Dineen, & Roy J. Lewicki, *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. Mgmt, 165, 182 (2004) (noting "offenders should always give an explicit apology in the wake of a trust violation").

[328] *See* Michel-Rolph Trouillot, *Abortive Rituals: Historical Apologies in the Global Era*, 2 Interventions 171, 184 (2000).

[329] *See* Danielle Celermajer, The Sins of the Nation and the Ritual of Apologies 247 (2009); 50 U.S.C.S. §§ 4201–51 (2024); Letter of apology from President Clinton (Oct. 1, 1993), https://www.pbs.org/childofcamp/history/clinton.html [https://www.pbs.org/childofcamp/history/clinton.html] (Last visited Jan. 12, 2025); Alison Mitchell, *Clinton Regrets 'Clearly Racist' U.S. Study,* N.Y. Times, May 17, 1997, at § 1 p.10.; Apologizing for the Enslavement and Racial Segregation of African-Americans, H. R. Res. 194, 110th Cong. (2007) (enacted), https://www.congress.gov/bill/110th-congress/house-resolution/194/text [https://perma.cc/F36W-V636] (Last visited Jan. 12, 2025); A Concurrent Resolution Apologizing for the Enslavement And Racial Segregation of African Americans, S. Con. Res. 26, 111th Cong. (2009) (enacted), https://www.congress.gov/bill/111th-congress/senate-concurrent-resolution/26/text [https://perma.cc/MG6A-9DVX] (Last visited Jan. 12, 2025); Apology to Native Hawai'ians for Overthrow of the Kingdom of Hawai'I, S.J. Res. 19, 103th Cong. (1993), https://www.congress.gov/bill/103rd-congress/senate-joint-resolution/19/text [https://perma.cc/YCP3-SVV3] (Last visited Jan. 12, 2025); Radiation Exposure Compensation Act — Indemnification and limitation of liability, 42 U.S.C.S § 2210 (2024); California Involuntary Sterilization Act, Cal. Health & Safety Code §§ 24210-24217 (Deering 2024).

[330] *See* Deborah Tussey, Annotation, *Requiring Apology as "Affirmative Action" or Other Form of Redress Under State Civil Rights Act*, 85 A.L.R 3d 402 (2024) (collecting cases to date which concern a formal apology as a remedy or form of redress for violations of state civil rights statutes).

criminal justice system serve as exemplary political judgments; they may catalyze shifts in the culture of our yet imperfectly just society.[331] Apologies by the transgressor—for instance, the criminal justice system—are not like personal apologies, but also take on a political meaning and function.[332] By placing an apology on the public record, commitments not to repeat past errors would lead to political embarrassment or even legal challenge.[333]

The addition of an apology to other compensation in the case of wrongful conviction arguably qualifies as an essential operation, given the terrible injury to those innocent people wrongly convicted and incarcerated. Free speech protections are subject to a balancing test.[334] Apologies in the aftermath of state wrongdoing—specifically the wrongful conviction and incarceration of the actually innocent—would seem to serve a compelling interest in strengthening the legitimacy of criminal justice institutions.[335] Balancing a governmental interest "[I]n promoting the efficiency of the public services it performs through its employees," which—if a statute requiring an apology to the wrongfully convicted were enacted—would qualify as "promoting the efficiency of the public services" and thus, while compelling an apology to the wrongfully convicted, prosecutors would be protected with absolute immunity.

Courts have often required apologies in a number of circumstances, including criminal cases,[336] civil cases,[337] and disciplinary actions.[338] A Georgia

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[331] *See* Mihaela Mihai, *When the State Says "Sorry": State Apologies as Exemplary Political Judgments*, 21 J. Pol. Phil. 200, 220 (2013).

[332] *See* Richard Vernon, Historical Redress: Must We Pay for the Past? 83 (2012).

[333] *See Id.*

[334] *See* Borzilleri v. Mosby 874 F.3d 187, 194 (4th Cir. 2017) (quoting Pickering v. Bd. Of Educ., 391 U.S. 563, 568 (1968); City of San Diego v. Roe 543 U.S. 77, 82 (2004)) (balancing against "interests as citizens 'in commenting upon matters of public concern,'" and "the community's interest in hearing employees' informed opinions on important public issues.").

[335] *See* Stephen Winter, *Theorizing the Political Apology*, 23 J. Pol. Phil. 261, 273 (2015) (arguing for apology in cases of state wrongdoing to prevent undercutting the legitimacy of any political institution).

[336] *See, e.g.*, Melvin v. Zappala, No. 15-1225, 2016 U.S. Dist. LEXIS 47826, at *75 (W.D. Pa. Apr. 7, 2016) (describing that enforcement of an order for an apology letter was appropriate, but only after direct appeal was concluded); Slayton v. State, No. 49A04-1410-CR-463, at *3 (Ind. Ct. App. Apr. 22, 2015) (noting as a condition of probation court ordered apology letter); State v. Whitfield, 827 So. 2d 1196, 1197 (La. Ct. App. 2002) (upholding sentence that included written victim apology); State v. Lobato, 611 N.W.2d 101, 103 (Neb. 2000) (affirming sentence that included written victims apology); State v. Ogden, 544 N.W.2d 574, 575 (Wis. 1996) (noting prior apology order).

[337] *See, e.g.*, Desjardins v. Van Buren Community Hosp., 969 F.2d 1280, 1282 (1st Cir. 1992) (waiving First Amend. objection to a public apology for wrongful termination); Imperial Diner v. State Human Rights Appeals Bd., 52 N.Y.2d 72, 76 (N.Y. 1980) (enforcing State Human Rights Division commissioner's order for a written apology).

[338] *See, e.g.*, Krim v. Banctexas Group., 99 F.3d 775, 776 (5th Cir. 1996) (sanctioning attorney for defects in complaint); *In re* Swan, 833 F. Supp. 794, 800 (C.D. Cal. 1993) (ordered to offer and prove written apology to assistant U.S. attorney), *rev'd on other grounds sub nom.* U.S. v. Wunsch, 54 F.3d 579, 1120 (9th Cir. 1995); *In re* Gooch, 250 B.R. 887, 900 (Bankr. S.D. Ohio 2000) (ordering apology to debtor); People v. Piccone, 459 P.3d 136, 163 (Colo. 2020) (ordering letter of apology to City Attorney); *In re* Kraushaar, 907 P.2d 836, 837 (Kan. 1995) (ordered to appear in open court to apologize to judge with a transcript); *In re* Castellano, 566 P.2d 1152, 1152 (N.M. 1977) (ordering respondent to apologize in writing to judges and attorney general); *In re* Kemper, No. 93CA15, 1994 Ohio App. LEXIS 619, at *9 (Ohio Ct. App. Jan. 31, 1994) (noting with approval letter of apology to a victim's husband).

juvenile court ordered a defendant to write a 300-word letter of apology to a bailiff and an essay on appropriate courtroom behavior.[339] A Nevada rule requires public officers subject to ethics complaints to issue a public apology.[340] On the issue of court-imposed apologies, consider that not only is the desired impact of state apology for prior injustice on the injured, but also in the ways such apologies might affect improvement in the broader criminal justice system culture. Apologies by the criminal justice system can serve as exemplary political judgments, and may catalyze shifts in the culture of our yet imperfectly just society.[341] In a Hawai'i proceeding, parole revocation was held improper because the defendant complied with a timely letter of apology as a condition of probation.[342] Although the probation officer thought the defendant's initial letter was threatening rather than apologetic, the defendant timely submitted a second letter that both the parole officer and the judge found to be apologetic and satisfactory (but for the earlier letter).

The threat of criminal or civil action can interfere with transgressors' apologies to the injured; this is true of lawyer discipline.[343] Defendants' lawyers and insurance companies are concerned that apologies could be used in court as evidence of guilt.[344] Written apologies may implicate First Amendment rights against compelled speech.[345] Fifth Amendment rights against self-incrimination may be abridged if a real apology were offered in later proceedings.[346] Imposing an apology as a remedy may also raise substantive due process concerns.[347] Restorative justice advocates are concerned that "A forced apology . . . will not suffice; indeed, it may even be counterproductive in eliciting a genuine change of attitude in the offender."[348] There are significant reasons why the "therapeutic value" of apologies may be overrated.[349]

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[339] *In the Interest of P.W.*, 657 S.E.2d 270, 271 (Ga. Ct. App. 2008) (decided under former O.C.G.A. § 15-11-1).

[340] *See* Nev. Rev. Stat. Ann. § 281A.785 (LexisNexis 2023).

[341] *See* Mihai, supra note 331, at 220.

[342] *State v. Perkins*, 310 P.3d 1051 (Haw. Ct. App. 2013) (interesting reading, but expletive-laden and unprintable here, for how *not* to write an apology).

[343] *See* Levin & Robbennolt, *supra* note 177, at 528–36.

[344] *See* Cohen, *supra* note 34, at 1042–46 (reviewing reasons for not apologizing more frequently).

[345] *See* Kate Weisburd, *Rights Violations as Punishment*, 111 Cal. L. Rev. 1305, 1358–59 (table) (2023).

[346] *See id.* at 1312.

[347] *See* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001) (listing three criteria to determine if an imposed punishment crosses the line of grossly disproportional punishment: the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm, and sanctions imposed for comparable misconduct).

[348] Lisa Forsberg & Thomas Douglas, *What Is Criminal Rehabilitation?* 16 Crim. L. & Phil. 103, 117 (2022) (*citing* John Braithwaite & Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice 37 (1990)).

[349] Arbel & Kaplan, *supra* note 202, at 1217 (noting five reasons: pressure, manipulation, misunderstanding of commercial apologies, how commercial apologies differ from interpersonal ones, and the importance to the injured of the apology).

Several courts have held that apologies were inappropriate as not within the scope of existing statutes under which relief was sought.[350] However, the Supreme Court has ruled that a person could pursue a § 1983 claim as an action at law, suit in equity, or other proper proceeding for redress.[351] One court in dictum said, "[A written apology] is calculated to humiliate and debase its writer and will succeed in producing only his resentment—an emotion not particularly conducive to the advancement of human rights."[352] An Illinois court vacated the requirement of an apology and booking photo in a local newspaper.[353]

2. Piercing Absolute and Qualified Immunity

An additional concern, along with the First Amendment argument against compelled speech in wrongful conviction statutes to mandate apologies, is the ongoing litigation attempting to cabin and perhaps eliminate both absolute and qualified immunity invoked by governmental actors.[354] Detailed analyses of absolute and qualified immunity doctrines are beyond the scope of this paper. However, the absolute immunity prosecutors have previously enjoyed in the judicial phase of their functions is under attack.[355] Suggesting

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[350] *See* Birnbaum v. U.S., 588 F.2d 319, 335 (2d Cir. 1978) (holding that district courts have exclusive jurisdiction for claims under 28 U.S.C. § 1346 (b) for money damages only, not apologies); *see also* Gray v. UAW Local 12 Jeep Comm., 2004 U.S. Dist. LEXIS 5877, at *7 (N.D. Ohio Mar. 16, 2004) (apology requested from union officials for discrimination was a form of injunctive relief—an extraordinary remedy in equity—not available under Americans with Disabilities Act 42 U.S.C.S 2000e-5(g)); Pa. Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 889 (Pa. 1973) (public apology requested for race-based discrimination would serve no appropriate purpose when private letter of apology already provided. Regardless, the Pennsylvania Human Relations Act 43 P.S. §§ 951–63 (1973) has broad remedial powers).

[351] *See* L.A. County v. Humphries, 562 U.S. 29, 37 (2010) ("Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [They can also be sued for] deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1977)) (Internal references and citations omitted).

[352] Minneapolis v. Richardson, 239 N.W.2d 197, 205–06 (Minn. 1976), *superseded by statute on other grounds*, Minn. Stat. § 363.071, subd. 2 (1982) *as recognized in* Huygen v. Plums Enterprises of St. Paul, Inc., 355 N.W.2d 149, 155 (1984) (believing "the legislature intended affirmative action orders to be used to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination," none of which are effectuated by letters of apology).

[353] *See* Illinois v. Johnson, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (vacating requirement of a published apology as beyond intent of the relevant statute and in dicta possibly to "add[] public ridicule").

[354] *See* Loftus v. Bobzien, 848 F.3d 278, 292 n.5 (4th Cir. 2017) (noting "[q]ualified immunity protects [state actors] who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful.").

[355] *See* Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (noting "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate"(citation omitted).

ethical behavior directed at prosecutors may not be the best strategy.[356] As previously noted, "pattern or practice strategies" have been suggested to pierce "unrestrained" prosecutorial absolute immunity.[357] Shields of absolute or qualified immunity do not necessarily protect state actors, especially if inculpatory statements are made in attempts to provide a real apology to the injured. As a further example of the weakening of the immunities, common law analysis has shown that in the past, high-ranking executive officers had absolute immunity, but now have only qualified immunity.[358]

The procedural safeguards known as absolute and qualified immunity have traditionally made it hard for the injured—including the wrongfully convicted— to bring action against those the criminal justice system.[359] Even when the injured can clearly document unjust conduct by law enforcement, the doctrines of absolute and qualified immunity often defend law enforcement actors from liability for damages.[360] Judges and grand jurors also enjoy absolute immunity for acting within the scope of their official capacity.[361] Prosecutors are also immune from liability, "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."[362] Absolute immunity protects the prosecutor from, "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties . . ."[363] States are immune from suits for damages under 42 U.S.C. § 1983 in both state and federal court unless they waive their immunity and subject themselves to suit.[364] While police officers only possess qualified immunity, their mistakes may be immunized.[365] Some wrongfully convicted and incarcerated individuals have been successful in suing state actors for their wrongful

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[356] *See* Bibas, *supra* note 273, at 1016 ("Telling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior.").

[357] *See* Hogan, *supra* note 273, at 2 ("There is an increasing sense that unrestrained prosecutors in the United States are a problem" (*quoting* Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 Hofstra L. Rev. 315, 316 (2021)).

[358] *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1358–66 (2021).

[359] *See* Penzell, *supra* note 177, at 154.

[360] *See* Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted,* 41 Am. Crim. L. Rev. 157, 164 (2004); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (observing "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."); Malley v. Briggs, 475 U.S. 335, 343 (1986) (holding "[i]n the case of the officer applying for a warrant, the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity.").

[361] *See Imbler,* 424 U.S. at 422–23; *see also* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 7 U. Chi. L. Sch. Roundtable 73, 90 (1999) (noting "that [a] prosecutor acting within the scope of his duties as an advocate in pursuing a criminal prosecution is not amenable to suit").

[362] *Imbler,* 424 U.S. at 431.

[363] *Id.* at 422–23.

[364] Bernhard, *supra* note 361, 723–24.

[365] Anderson v. Creighton, 483 U.S. 635, 639 (1987) (holding "[s]omewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken.")

convictions under § 1983 federal civil rights or other civil claims.[366] Compensation, if substantial, may help exonerees overcome the substantial barriers to reentry and considerably reduce post-release recidivism.[367]

However, other legal barriers make holistic recovery difficult.[368] Even if immunity barring claims is upheld, prosecutors and other members of the criminal justice system who offer apologies can still face strong criticism from members of the court, the local bar, and politicians. Those who disagree with the findings of injury may not review in detail the materials reviewed by those who feel apologies are appropriate. The critique of unnecessarily defaming the system of justice by admitting a mistake can sting. Prosecutorial incentives for getting and maintaining convictions may be founded in deep personal and psychological beliefs in the correctness of verdicts, discounting the possibility that some post-conviction claims merit exoneration for innocence.[369] Politics and sentiment about race could steer discussions down less productive paths. Complaints that such apologies should be done in private, not publicly, could make prior prosecutors look bad, and undermine faith in juries less willing to convict, which can all disincentivize apologies.

Recently, qualified immunity is under increased scrutiny, and the legal basis has been called into question.[370] To defeat qualified immunity, a claim must satisfy a two-pronged test: first, showing a clearly established constitutional right was violated, and then whether that right was clearly established at the time of any alleged misconduct.[371] This two-pronged test, although often beneficial, is not mandatory and allows judges to exercise sound discretion in deciding how to address the qualified immunity analysis.[372] Further, the Fourth Circuit Court of Appeals has ruled that statutory immunity does not extend to gross negligence on the part of police officers.[373] The Supreme Court of the United States, as of April 2024, denied certiorari in a case involving a 42 U.S.C. § 1983 claim.[374]

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[366] *See, e.g.*, Ken Armstrong & Robert Becker, *Record Ford Heights 4 Payout May Not be End: Criminal Investigation Under Consideration*, Chicago Tribune, Mar. 6, 1999, at C1. (discussing the Ford Heights Four, four men who were collectively incarcerated for 65 years after wrongful convictions received a $36 million settlement from Cook County, Illinois); *see also* John Chase, *Angry DuPage Settles Cruz Suits: 3 Former Defendants to Split $3.5Million*, Chicago Tribune, Sept. 27, 2000, at C1 (reporting that Rolando Cruz, Alejandro Hernandez, Stephen Buckley, and their attorneys received $3.5 million from DuPage County, Illinois in a settlement that deeply divided the community and made no pretense of actual innocence.).

[367] *See* Evan J. Mandery, Amy Shlosberg, Valerie West & Bennett Callaghan, *Compensation Statutes and Post- Exoneration Offending*, 103 J. Crim. L. & Criminology 553, 583 (2013).

[368] Armbrust, *supra* note 360, at 161–66.

[369] Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 182 (2004).

[370] *See* Baude, *supra* note 274, at 49.

[371] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), overruled in part by Pearson v. Callahan, 555 U.S. 223 (2009).

[372] *See Pearson*, 555 U.S. at 236.

[373] *See* Henry v. Purnell, 652 F.3d 524, 536 (2011), *cert. denied* Purnell v. Henry, 565 U.S. 1062 (2011).

[374] Price v. Montgomery Cnty., 144 S. Ct. 2499 (2024).

V. Model State Statute for the Wrongfully Convicted with Apology

The idea of enacting or amending a wrongful conviction statute to include apology has merit and can provide guidance on how to offer an apology. One recent attempt at a model wrongful conviction statute has been proposed and addresses the need to include an apology, but there is no analysis of what an apology to the wrongfully convicted should look like in the context of the criminal justice system.[375] The model statute described below includes additional clauses that would best provide support for statutorily mandated apologies.

Model State Statute: Redress for Wrongly Convicted and Incarcerated Persons[376]

1) Intent

The legislature recognizes that actually innocent persons wrongly convicted and incarcerated for crimes they did not commit have been uniquely injured. Suffering injustice by being deprived of liberty, often for years or decades, those who suffer wrongful conviction and incarceration are often doubly stigmatized as ex-convicts. The legislature intends to provide a remedy for the wrongly convicted and incarcerated that includes an apology recognizing the events leading to the conviction of an actually innocent person, assignment of responsibility, a measure of remorse, and redress, also with compensation for the lost years of their lives. The legislature further intends to address the unique challenges faced by the wrongly convicted and incarcerated after exoneration.

2) Eligibility

(A) Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors of which they are actually innocent may file a claim for compensation against the state.

(B) For purposes of this statute, a person is:

i) *Actually innocent* of a felony or misdemeanor if the claimant did not engage in any illegal conduct alleged in the charging documents; and

ii) *Wrongly convicted* if they were charged, convicted, and subsequently incarcerated—for a term of one or more years—for one or more felonies or misdemeanors of which they are actually innocent.

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[375] Jacqueline Kamel, *A Model State Compensation Law for the Wrongfully Convicted*, 50 J. Legis. 179, 213–21 (2024) (noting in each section the phrase "[t]he state shall apologize," without more).

[376] Draft statute modeled in part on Wash. Rev. Code Ann. §§ 4.100.010–090 (LexisNexis 2023).

C) If the person entitled to file a claim is incapacitated and incapable of filing the claim, or if they are a minor, or a nonresident of the state, the claim may be filed on behalf of the claimant by an authorized agent.

D) A claim filed under this statute survives to the estate of the claimant.

3) Statute of Limitations

(A) A claim for redress under this statute must be commenced within two years after the grant of a pardon, the grant of judicial relief, and satisfaction of other conditions or release from custody, whichever is later.

(B) Any action by the state challenging or appealing the grant of judicial relief or release from custody tolls the two-year period.

(C) If an individual can show that they were not provided with the information needed to initiate a claim, they have an additional twelve months beyond the statute of limitations to bring a claim under this statute.

4) Venue

(A) Actions for the cause of wrongful conviction and incarceration in the face of actual innocence shall be tried in the county court where the cause, or some part thereof, arose.

(B) Service of the summons and complaint is personal service. The summons shall be served by delivering a copy thereof, as per appropriate court rules.

5) Documentary Evidence

(A) In order to file an actionable claim for redress under this statute, and obtain a judgment, the claimant must establish by clear and convincing documentary evidence that:

(B) The claimant has been convicted of one or more felonies or misdemeanors in court and subsequently sentenced to a term of imprisonment of not less than one year, and has served all or part of the sentence;

(C) The claimant is not currently incarcerated for any crime;

(D) During the period of confinement for which the claimant is seeking redress, the claimant was not serving a term of imprisonment or a concurrent sentence for any crime other than the felonies or misdemeanors that are the basis for the claim;

(E) The claimant has been pardoned on grounds consistent with actual innocence for the felonies or misdemeanors that are the basis for the claim; or

(F) The claimant's judgment of conviction was reversed or vacated, and the charging document dismissed based on significant new exculpatory information or, if a new trial was ordered pursuant to the presentation of significant new exculpatory information, either the claimant was found not guilty at the new trial or the claimant was not retried, and the charging document dismissed.

(G) The claimant must state facts in sufficient detail for the finder of fact to determine that:

(i) Illegal conduct did not occur, or the claimant did not engage in any illegal conduct alleged in the charging documents;

(ii) The claimant did not commit or suborn perjury or fabricate evidence to cause or bring about the conviction;

(iii) An Alford guilty plea to a crime the claimant did not commit, or a confession that is later determined by a court to be false, does not automatically constitute perjury or fabricated evidence; and,

(iv) The claimant must verify the claim unless they are incapacitated, in which case the personal representative or agent filing on behalf of the claimant must verify the claim.

(H) Any pardon or proclamation issued to the claimant must be certified by the officer having lawful custody of the pardon or proclamation and be affixed with the appropriate seal of office or with the official certificate of such officer before it may be offered as evidence.

(I) In exercising its discretion regarding the weight and admissibility of evidence, the court must give due consideration to difficulties of proof caused by the passage of time or by release of evidence pursuant to a plea, the death or unavailability of witnesses, the destruction of evidence, or other factors not caused by the parties.

(J) If the district attorney or other appropriate prosecutor concedes that the claimant was wrongly convicted, the court must award redress as provided herein.

6) Redress

(A) If the right to a jury is waived and the court finds, or if a jury finds, by clear and convincing evidence that the claimant was wrongly convicted and incarcerated, the court must order the state to provide the actually innocent claimant the following redress, adjusted for partial years served and to account for inflation. The claimant may still receive an apology but may not be compensated monetarily for any period of time in which they were serving a term of imprisonment or a concurrent sentence for any conviction other than the felony or misdemeanors that are the basis for the claim.

(B) Redress, including monetary compensation under this statute constitutes a full and conclusive resolution by the claimant on the specific issue of claims of actual innocence.

(C) The state waives sovereign immunity by only for the claims brought pursuant to this statute. The state makes no other waiver, and fully retains its sovereign immunity as to all other claims that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual

innocence. This section shall be broadly construed in favor of the state and against any waiver of sovereign immunity.

(D) All provisions of existing law relating to absolute or qualified immunity shall apply to an action brought pursuant to the provisions of this section.

(E) Any finding by the court shall be inadmissible in any judicial proceeding and shall not form the basis for any cause of action by the claimant or any other person.

(F) Apology

(i) In open court or other proper public venue, the district attorney or other appropriate prosecutor will offer, verbally and in writing, an apology to consist of:

(ii) Recognition of the injury and a full account of the transgressions leading to wrongful conviction and incarceration;

(iii) Assignment of responsibility to appropriate transgressors;

(iv) A statement of remorse to include restoration of the individual's dignity and steps taken to prevent additional persons from suffering the same injury;

(v) Monetary compensation, to include:

(a) Fifty thousand dollars for each year of actual confinement including time spent awaiting trial and an additional fifty thousand dollars for each year served under a sentence of death. Partial years will be pro-rated;

(b) Twenty-five thousand dollars for each year served on parole, community custody, or as a registered sex offender pursuant only to the felonies or misdemeanors which are grounds for the claim. Partial years will be pro-rated;

(c) Child support payments owed by the claimant that became due and interest on child support arrearages that accrued while the claimant was in custody on the felonies or misdemeanors that are grounds for the claim. The funds must be paid on the claimant's behalf in a lump sum payment to the department of social and health services for disbursement as appropriate;

(d) Reimbursement for all restitution, assessments, fees, court costs, and all other sums paid by the claimant as required by pretrial orders and the judgment and sentence; and,

(e) Attorneys' fees for successfully bringing the wrongful conviction claim calculated at ten percent of the monetary damages award, plus expenses. However, attorneys' fees and expenses may not exceed seventy-five thousand dollars. Attorney's fees and expenses may not be deducted from the compensation award due to the claimant and counsel is not entitled to receive additional fees or expenses from the client related to the

claim. The court may not award any attorneys' fees to the claimant if the claimant fails to prove they were wrongly convicted.

(f) Redress may not include any punitive damages.

(g) The court may not offset redress with claimed expenses incurred by the state, the county, or any political subdivision of the state including, but not limited to, expenses incurred to secure the claimant's custody, or to feed, clothe, or provide medical services for the claimant. The court may not offset against the compensation award the value of any services or reduction in fees for services to be provided to the claimant as part of the award under this section.

(h) The redress compensation is not income for tax purposes, except awarded attorneys' fees.[377]

(i) Upon finding that the claimant was wrongly convicted, the court must expunge the claimant's record of conviction and seal any records related to the wrongful conviction and incarceration.

(k) Upon request of the claimant, the court must refer the claimant to the department of corrections or the department of social and health services for access to reentry services offered to other released convicts, if available, including but not limited to counseling on the ability to enter into a structured settlement agreement and where to obtain free or low-cost legal and financial advice if the claimant is not already represented, the community-based transition programs and long-term support programs for education, mentoring, life skills training, assessment, job skills development, mental health and substance abuse treatment.

(l) The department of corrections or the department of social and health services shall facilitate acquisition of proper identification, notary services, assistance with obtaining necessary forms, and correspondence as the claimant requires.

(m) The claimant and the state may initiate and agree to an annuity or other structured settlement for the awarded remedy compensation. The claimant must be given adequate time to consult with the legal and financial advisors of their choice during negotiation of the structured settlement agreement. Any structured settlement agreement binds the parties with regard to all compensation awarded. A structured settlement agreement entered into under this section must be in writing and signed by the parties or their representatives and must clearly state that the parties understand and agree to the terms of the agreement.

(n) Before approving any structured settlement agreement, the court must ensure that the claimant has an adequate understanding of the agreement. The court may approve the agreement only if the judge finds

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[377] Federal tax relief for state wrongful conviction compensation was also enacted, 26 U.S.C. § 139F (2015); *see also IRS Updates Frequently Asked Questions Related To Wrongful Incarceration*, IRS (Nov. 2023), https://www.irs.gov/newsroom/irs-updates-frequently-asked-questions-related-to-wrongful-incarceration [https://perma.cc/X8YQ-DYU4] (last visited Jan. 12, 2025).

that the agreement is in the best interest of the claimant and is actuarially equivalent to or exceeds the lump sum remedy compensation award. When determining whether the agreement is in the best interest of the claimant, the court must consider the claimant's age and life expectancy; claimant's marital or domestic partnership status; and the number and age of claimant's dependents under 18 years of age.

7) Documents To Which the Claimant Is Entitled:

(A) When a court reverses or vacates a person's conviction, consistent with the criteria established herein, the court must provide to the claimant a copy of documents confirming actual innocence at the time the remedy is granted.

(B) The clemency and pardons board or other appropriate review board, upon issuance of a pardon by the governor on grounds consistent with innocence must provide a copy of documents confirming actual innocence at the time the remedy is granted.

(C) Expungement and Sealing of Records[378]

(i) Upon request of the claimant, the court may order the claimant's record of conviction vacated if the record has not already been vacated, expunged, or destroyed under court rules. Other statutory requirements for vacating records do not apply.

(ii) A court that directs the state to provide redress to an exonerated person, or representative of an exonerated person, shall order all records relating to the exonerated person's wrongful conviction or adjudication to be expunged as if such events had never taken place and such records had never existed.

(iii) The court shall direct such an expungement order to the exoneree and every person or agency that may have custody of any part of any records relating to the exonerated person's wrongful conviction or adjudication.

(iv) If a court issues an expungement order, the court, law enforcement agency, or other state agency that maintains records relating to the exonerated person's wrongful conviction or adjudication shall physically seal such records and thereafter treat the records as confidential.

8) Exclusivity of Remedy

(A) It is the intent of the legislature that the remedy of compensation provided under this statute shall be exclusive to all other remedies at law and in equity against the state or any political subdivision of the state.

(B) For redress under this statute, the claimant is required to waive, in a signed writing, all other remedies, causes of action, and other forms of relief or compensation against the state, any political subdivision of the state, and their officers, employees, agents, and volunteers related to the

[378] Additional text modeled on Colo. Rev. Stat. § 13-65-103(7)(a) (2024).

claimant's wrongful conviction and imprisonment as set forth in the account of events.

(C) The claimant's signed, written waiver shall also include all state, common law, and federal claims for relief, including claims pursuant to 42 U.S.C. § 1983.

(D) A wrongfully convicted and incarcerated person who elects not to pursue a claim under this statute may seek relief through any other existing venue for relief. The claimant must execute a legal release prior to the payment of any monetary compensation awarded under this statute. If the release is held invalid for any reason and the claimant is awarded remedy compensation under this statute and receives any tort or other civil award related to his or her wrongful conviction and incarceration, the claimant must reimburse the state for the greater of:

(i) The amount of the wrongful conviction and incarceration monetary award, less any fees paid to attorneys or for costs in litigation;

(ii) The amount received by the claimant under the tort award less any fees paid to attorneys or for costs in litigation;

(iii) Regardless of waiver or offset, the apology remains in force.

(G) A release dismissal agreement, plea agreement, or any similar agreement whereby a district attorney or appropriate prosecutor's office or an agent acting on their behalf agrees to take or refrain from certain action if the accused individual agrees to forgo legal action against the county, the state, or any political subdivision, is admissible and should be evaluated considering all the evidence. However, any such agreement is not dispositive of the question of whether the claimant was wrongly convicted or entitled to a remedy under this statute.

9) Appeal

(A) If the district attorney or other appropriate prosecutor denies that the claimant was wrongly convicted and the court finds after reading the claim that the claimant does not meet the filing criteria set forth in herein, it may dismiss the claim, either on its own motion or on the motion of the district attorney or other appropriate prosecutor.

(B) If the court dismisses the claim, the court must set forth the reasons for its decision in written findings of fact and conclusions of law. Any party is entitled to the rights of appeal afforded parties in a civil action following a decision on such motions. In the case of dismissal of a claim, review of the court is de novo.

Conclusion

For evolving injuries in which remedial work is considered by actors in the criminal justice system, only benevolent gestures should be offered. Absolute prosecutorial immunity or qualified law enforcement immunity is under attack

and can't be relied upon in the future unless statutory protections are enacted. Matters of transgression by independent review through recognition of the event facts are important. Real apologies are appropriate in cases of wrongful conviction and incarceration. Recognition of events requires detailed analysis, through discovery in civil tort or federal civil rights claims, official inquiry, pardon applications, or evidence required by wrongful conviction statutes. This discovery process can assign responsibility for transgression by state actors.

Despite not being the actual transgressors, those in positions of power offering apologies to the injured can still show remorse by acknowledging attempts to restore dignity lost by state-caused injury. Statutory protections by legislative bodies to prevent admission of real apologies—including admissions of fault or statements against interest—into evidence. Statutory bars to additional litigation (e.g., civil tort claims, federal civil rights claims), thereby preventing two or more "bites of the apple," have been enacted by several states with some success. Alternatively, legislative offset provisions can prevent the taxpayer from compensating the injured more than once for the same set of facts. In the case of legislative offset, even if compensation is returned by statute, the apology remains valid.

Lastly, real apologies for wrongful conviction should be in public, and the examples *supra* show venues including press conferences or other publicly available documents. Documentation by certificates of innocence or pardons, and expungement of records regarding the injury must be provided. In summary, remedial work by the criminal justice system is necessary to maintain societal norms. The kinds of remedial work should be tailored to the injury with benevolent gestures in a rapidly evolving series of events and accounts, when the factual record is complete. However, there is a role for apology—albeit restricted to the wrongfully convicted—by the criminal justice system.

Table 2: Wrongful Conviction Statutes

Jurisdiction & Funding Source	Statute	Showing Required of Claimant, Burden of Proof, Statute of Limitations (SOL)	Compensation	Additional Redress	Fees
	Clauses for Immunity, Bars to Other Claims, or Compensation Offsets				
United States United States Court of Federal Claims & General appropriation	28 USCS § 2513 (LexisNexis 2024) Unjust conviction and imprisonment Tit. 28, Judiciary and Judicial Procedure, Pt. VI, Particular Proceedings, Chapter 165 United States Court of Federal Claims (1948, amd 1954, 1982, 1992, 2004).	Reversed or set aside on grounds of not guilty; or found not guilty in new trial or rehearing. Pardoned for innocence; Requires proof of facts by certificate of the court setting aside or reversing or pardon; Statute of Limitations (SOL) 6 yrs.	$50,000/yr, $100,000/yr death row for each 12 month period.		
Alabama Committee on Compensation for Wrongful Incarceration & State Division of Risk Management	Ala. Code §§ 29-2-150–65 (LexisNexis 2024) Committee on Compensation for Wrongful Incarceration Tit. 29 Chap. 2 Article 9 (2001).	Innocence, vacated or reversed & charges dismissed 'on grounds consistent with innocence'; served >2 years pretrial for state felony, SOL 2 yrs.	$50,000/year prorated.	No offset for expenses by state, Committee can recommend additional funds through legislative bill if warranted; Survives to estate.	
Alaska	HB 55 did not advance to the House floor during the 29th legislative session.				
Arizona	SB1694-erroneous conviction, damages, tuition assistance; Held in Committee.				
Arkansas					

California California Victim compensation board & if General Fund money available	Cal. Penal Code §§ 4900–06 (Deering 2024) Penal Code; Part 3 Of Imprisonment and the Death Penalty; Title 6 Reprieves, Pardons, and Commutations; Chapter 5 Indemnity for Persons Erroneously Convicted and Pardoned (1941 amd many depending on § 2000; 2006; 2009; 2013; 2015; 2016; 2017; 2019; 2022).	Crime not committed, or, if committed, not by claimant; Pardon for innocence or being "innocent"; Declaration of factual innocence; Writ of habeas, motion to vacate, charges dismissed, acquitted on retrial, Burden of proof on government clear and convincing; SOL 10 yrs.	$140/day; $70/da parole or supervised release; updated by CPI West.	Not treated as state gross income.	
Colorado District Court in the county in which the case originated; & State court administrator	Colo. Rev. Stat. §§ 13-65-101–03 (2024) Title 13 Courts and Court Procedure, Judgments and Executions, Article 65. Compensation for Certain Exonerated Persons (2013 amd. 2018).	Actual innocence; Felony; not legal insufficiency or error; Clear and convincing evidence; SOL 2 yrs.	$70,000/yr + $50,000/yr on death row + $25,000/yr parole, probation, registered S.O. prorated.	Reduce directions to writing; Tuition waivers (3 yrs), Child support, Financial management, Reduced $10,000 in absence of health care; Expungement.	Reasonable attorney's fees.
	13-65-103(9)(b) Does not limit ability to pursue damages against an entity that is not an employee, agent, or agency of the state government.				

Connecticut Claims commissioner	Conn. Gen. Stat. § 54-102uu (2023) Compensation for Wrongful Incarceration Title 54, Chapter 961; Part IIc Post-Conviction Remedies (§§ 54-102jj–54-102uu) 2016.	(a)(2) Such person's conviction was vacated or reversed and (A) the complaint or information dismissed on grounds of innocence, or (B) the complaint or information dismissed on a ground citing an act or omission that constitutes malfeasance or other serious misconduct by any officer, agent, employee or official of the state that contributed to such person's arrest, prosecution, conviction or incarceration; Not if guilty plea (unless Alford) Pardon, or conviction vacated, or reversed, and the charges dismissed on grounds consistent with innocence. Preponderance of the evidence; SOL 2 yr.	Up to 200% state median household income/yr; prorated; ± 25% by Claims Commish; >$20,000 Gen. Assembly reviews.	Employment training/ counseling, tuition/fees in state system of higher education, other services such person may need to facilitate community reintegration.	
	54-102uu(g)Voluntarily relinquishes any right to pursue any other action or remedy at law or in equity that such person may have arising out of such wrongful conviction and incarceration.				

Delaware Wrongful Conviction Compensation Fund	Del. Code Ann. Tit. 10, §§ 7001–08 (2025) Tit. 10 Courts & Judicial Proceedings, Pt. IV Special Proceedings, Chap. 70 Delaware Wrongful Conviction Compensation and Services Act.	After conviction overturned, charge dismissed, or acquitted on retrial, and did not commit or no crime, Preponderance, SOL 6 yrs.	$75,000/yr, $100,000/yr death row, $50,000/yr parole or S.O; all prorated Proof of economic damages.	Emergency stipend, Community services, health, dental, SNAP.	Reasonable attorney's fees.
	§ 7005 (i) Award acceptance does not preclude other relief under law. Awards of noneconomic and/or economic damages under § 7005 reduced by any civil action award or settlement agreement.				
D.C. Superior Court & Director	D.C. Code §§ 2-421–25 (2024) Division 1; Title 2, Chapter 4, Subchapter III. Unjust Imprisonment. (1981 amd. 2017).	Innocence and unjust conviction for felony; Clear and convincing; conviction reversed or set aside on the ground that claimant is not guilty; Alford plea; SOL 2 yr from certificate of innocence.	$200,000/yr prorated; $40,000/ yr parole, probation, registered S.O. prorated; No punitive.	$10,000 immediate; physical/behavioral care for life (DC Healthcare alliance); Tuition and fees (UDC, UDCCC; vocation); Child support; writing about how to get comp.	Reasonable attorney's fees.

Florida Sentencing court & General Revenue Fund	Fla. Stat. Ann. §§ 961.01–07 (2023) Title XLVII Criminal Procedure and Corrections; Chapter 961 Victims of Wrongful Incarceration Compensation. (2008 amd 2011, 2014, 2015, 2017 2023, 2024).	Actual innocence; If prosecuting authority does not certify, admin. law judge must find innocence by clear and convincing; Petition to court within 90 days after vacatur; application for compensation SOL 2 yr.	$50,000/yr prorated (poss COLA); NTE $2 mil; paid as annuities; parole/probation revocation restrictions; Does not follow to estate, but beneficiary in case of death.	Waiver tuition and fees Florida college system; waives fines, penalties, court costs; expungement.	Reasonable attorney's fees.
	961.06(5) Release and waiver on behalf of the wrongfully incarcerated person, forever releasing the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to § 768.28. (6)(a) A wrongfully incarcerated person may not submit an application for compensation under this act if the person has a lawsuit (or claim bill) pending against the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to the provisions of § 768.28, in state or federal court requesting compensation arising out of the facts in connection with the claimant's conviction and incarceration. (7) Any payment made under this act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of § 768.28 or other law.				
Georgia	HB1354 Wrongful conviction Compensation Act (Senate read and referred) Must lobby Gen. Assembly.				

Hawaii	Haw. Rev. Stat. Ann. §§ 661B-1–7 (Lexis+ 2024) Div. 4; Tit. 36; Chapter 661B Redress for Wrongful Conviction and Imprisonment (§§ 661B-1–7) (2016).	Pardon or reversal or vacatur of conviction for actual innocence; Preponderance; SOL 2 yrs.	$50,000/yr prorated; $100,000 for 'extraordinary circumstances'.	Not subject to state tax.	Reasonable attorney fees NTE $10,000.
	661B-6 waiver of sovereign immunity by the State only for the claims brought pursuant to this chapter. The State makes no other waiver of sovereign immunity, and fully retains its sovereign immunity as to all other claims, however denominated, that seek compensation of any kind or nature that are a result of, related to, or arise from a conviction and imprisonment for crimes for which the claimant alleges actual innocence. This section shall be broadly construed in favor of the State and against any waiver of sovereign immunity.				
Idaho District Court & Innocence fund	Idaho Code Ann. §§ 6-3501–05 (2024) Title 6 Actions in Particular Cases; Chapter 35 Idaho Wrongful Conviction Act (2021).	Felony; Factual innocence; Preponderance; Did not commit crime, if not retried charges dropped, re-tried not guilty; SOL 2 yrs.	$62,000/yr + awaiting trial, $75,000/yr death row, $25,000/yr parole or S.O; prorated.	Re-entry services; Certificate of innocence; state tax exempt.	Reasonable attorney's fees NTE $25,000.
	§ 6-3502 All provisions of existing law relating to absolute or qualified immunity shall apply to an action brought pursuant to the provisions of this section.				

Illinois Court of Claims	705 Ill. Comp. Stat. Ann. 505/8 (c) (LexisNexis 2023) Court of Claims Act Chapter 705 Court of Claims (2018).	Pardon for innocence; conviction reversed or vacated; Certificate of innocence; Preponderance of the evidence; SOL 2 yr (705 Ill. Comp. Stat. Ann. 505/22 (c) (Lexis+ 2023) Time Limitations (2018 amd 2021, 2022).	At discretion of court but shall make no award ≤5 yrs., $85,350 max, ≤14 yrs., $170,000 max, >14 yrs., $199,150 max, with COLA increase.	Certificate of innocence; 735 Ill. Comp. Stat. Ann. 5/2-702 (LexisNexis 2023) Petition for a certificate of innocence that the petitioner was innocent of all offenses for which he or she was incarcerated. Chap. 735 Civil Procedure; Code of Civil Procedure Art. II Civil Practice; Pt 7 Action for Declaratory Judgment (2021).	Reasonable attorney's fees NTE 25% of award.
	745 ILCS 5/1 [A]s provided in the Court of Claims Act . . . the State of Illinois shall not be made a defendant or party in any court.				
Indiana Indiana Criminal Justice Institute & Exoneration fund repealed	Ind. Code Ann. §§ 5-2-23-1–10 (LexisNexis 2023) Tit.5 State and Local Administration; Art 2 Law Enforcement Officers; Chap 23 Restitution for wrongfully incarcerated persons (2019 amd. 2021, 2022).	Actual innocence; Pardon/ vacated/reversed/set aside Preponderance; SOL 2 yrs.	$50,000/yr prorated (equal sums over 5 yrs); Doesn't pass to estate.	Mental health; Community transition; Reintegration.	
	§ 5-2-23-4 A person . . . is entitled to compensation . . . only if the person forever releases, discharges, and waives any and all claims against The state of Indiana, a political subdivision, any applicable state agency, any current, former, or successor to officials, members, officers, agents, or employees.				

Iowa District Court for liability; State Appeal Board or Civil Ct. for Damages	Iowa Code § 663A.1 (2023) Wrongful Imprisonment–Cause of Action; Tit. XV Judicial Branch and Judicial Procedures; Subtit. 5 Special Actions; Chapter 663A (1997).	Conviction was vacated, dismissed, reversed, and no further proceedings held; Aggravated misdemeanor or felony; Clear and convincing; SOL 2 yrs.	Liquidated damages $50/da; Lost wages NTE $25,000/yr. Court costs.	Lost wages (economic) $25,000/yr; court costs (e.g. fines).	Reasonable attorney's fees.
	§ 663A.1 An action doesn't preclude or otherwise limit actions or claims for relief based on any negligent or wrongful acts or omissions not related to the facts and circumstances underlying the conviction.				
Kansas District Court & Attorney General	Kan. Stat. Ann. § 60-5004 (2024) Compensation for Wrongful Conviction; Chap. 60 Procedure, Civil; Art. 50 Civil Action for Victims of Child (2018).	"Innocent of all crimes" Conviction reversed, vacated, charges were dismissed or not guilty on retrial; Preponderance of the evidence 2 yr SOL ; certificate of innocence.	$65,000/yr; $25,000 parole/post-release supervision or S.O.; Initial NTE $100,000 rest as annuity NTE $80,000/yr.	Non-monetary relief (e.g. housing); Tuition assistance; State health care benefit; re-entry services; Certificate of Innocence; Expungement.	Reasonable attorney's fees NTE $25,000.
	§ 60-5004 If the claimant wins a monetary award enters into a settlement agreement against the state or any political subdivision related to the same subject, the claimant must reimburse the state for the sum of money paid under the judgment entry (less attorney fees or costs in litigating the other civil action).				
Kentucky	HB178 Wrongful conviction compensation (2nd reading to rules).				

Louisiana District Court of original conviction & Innocence Compensation Fund	La. Rev. Stat. § 15:572.8 (2024) Compensation for wrongful conviction and imprisonment; petition process; compensation; proof; assignment of powers and duties. Tit. 15; Chap. 5 Reprieve, Pardon, and Parole; Pt. 1 Reprieve and Pardon (2005, amd 2007, 2008, 2011, 2012, 2018, 2019, 2021).	Conviction reversed or vacated AND Proof of factual innocence; Clear and convincing; Compensation not limited by willful misconduct by state actors; SOL 2 yr.	$25,000/yr NTE $250,000; after 7/1/22 $40,000/yr NTE $400,000 or lump sum $250,000; Over $100,000 court may fund an annuity.	NTE $80,000 for "loss of life opportunities"; Job/skills training, education, housing any other services.	
	§ 15:572.8(M) Findings by the court are inadmissible and will not form the basis for any cause of action.				
Maine Superior Court has original jurisdiction & General Fund	Me. Rev. Stat. Ann. tit. 14 §§ 8241–44 (2024) Title 14 Court Procedure-Civil; Pt. 7 Particular Proceedings; Chap. 747 Wrongful Imprisonment (1993).	Full & free pardon with written finding by Governor (final if Governor does not issue writing of innocence, no judicial review) and court finds innocence; Clear and convincing; 2 yr SOL.	NTE $300,000 total.		
	§ 8241(1) Notwithstanding any immunity, the State of Maine is liable for the wrongful imprisonment of a person.				

Maryland State's Administrative law judge & Board of Public Works	Md. Code Ann., State Fin. & Proc. §§ 10-501–02 Payment to individuals convicted, sentenced, and confined in error; Div. 1 State Finance; Tit 10 Board of Public Works; Subtit. 5 Payment (1999 amd 2003, 2021, 2024).	Full pardon, reversed, vacated, innocent on re-trial; Erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit; Clear and convincing; No guilty plea or false confession; SOL 2 yr.	Days confined multiplied by a daily rate of the State's most recent annual median household income passes to estate.	State ID; Housing NTE 5 yrs; Education/ Training; Health & dental care (≥five years); Tuition and fees regional higher ed or BCCC; court fees.	Reasonable attorney's fees.
	§ 10-501(a)(3)(i) Individuals who previously received a monetary award from a civil suit (or settlement) with the State for an erroneous conviction, will be reduced by the amount paid to the individual (less attorney's fees and costs). (ii) If, after receiving compensation under the erroneous conviction statute, monetary awards are received for an erroneous conviction, sentence, or confinement, the monetary reward shall reimburse the state the amount paid under this statute (less attorney's fees and costs).				
Massachusetts Superior Court in the county where the claimant was convicted or in Suffolk County & Funds appropriated by general court	Mass. Gen. Laws. ch. 258D, §§ 1–9 (2024) Compensation for Certain Erroneous Felony Convictions Pt. III Courts, Judicial Officers, and proceedings in Civil Cases; Tit. IV Certain Writs and Proceedings in Special Cases; Chapter 258D (2004 amd. 2018).	Full pardon for innocence (governor states belief in innocence); vacated/ reversed felony conviction; not guilty on re-trial; Clear and Convincing right to jury trial; SOL 3 yrs.	Income would have earned; circumstances of the claimant's trial; length and conditions under which the claimant was incarcerated; any other factors deemed appropriate; NTE $1 mil.	Services reasonable and necessary for deficiencies in the individual's physical and emotional condition; tuition and fees for the claimant from a state or community college in the commonwealth; expungement & sealing of records.	Reasonable attorney's fees.
	258D § 4 Awards or settlements accepted must be in writing and are final and conclusive, constituting a complete release of any claims against the commonwealth and a complete bar to any action by the claimant against the commonwealth for the same subject matter.				

Michigan Court of Claims & Wrongful Imprisonment Compensation Fund	Mich. Comp. Laws. Serv. §§ 691.1751–57 (LexisNexis 2024) Chap. 691 Judiciary; Act 343 of 2016 (2016 amd. 2019, 2020).	Conviction reversed/ vacated and charges dismissed or on retrial the plaintiff was not guilty; New evidence (not witness recant without more) Clear and convincing; SOL 3 yrs.	$50,000/yr + parole; < 1yr prorated; single or multiple (1st 20%); Child support 1st deducted.	Child support accrued during imprisonment; Expungement.	Attorney fees if plaintiff actually paid; Lesser of 10% or $50,000.
Minnesota District Court	Minn. Stat. § 590.11 (2023) Order Determining Eligibility for Compensation Based On Exoneration; Remedies Controlling Personal Action; Chap. 590. Postconviction Relief.	Vacated, reversed, or set aside a judgment of conviction; Petition for order declaring eligibility; "On grounds consistent with innocence"; Pardon/ commutation for factual innocence after felony conviction SOL 2 yrs.			
Minnesota Compensation Panel to commissioner of management and budget (submits to legislature for appropriation)	Minn. Stat. §§ 611.362–68 (2023) Imprisonment and Exoneration Remedies; Crimes; Expungement; Victims Ch. 611 Rights of Accused (2014 amd. 2019).	60 days after order based on petition but SOL 3 yr if not notified.	Not less than $50,000/yr (NTE$100,000/ yr); Not less than $25,000 (NTE$50,000/ yr) for supervised release/S.O.; passes to estate.	Economic damages; medical/dental expenses; Tuition and fees; Child support; reintegrative expenses NTE $100,000/yr.	Reasonable attorney's fees.
	§ 611.365 Subdiv. 4 Acceptance of an award, compromise, or settlement must be in writing and is final and conclusive.				

Mississippi Circuit Court of the county in which the claimant was convicted	Miss. Code Ann. §§ 11-44-1-15 (2024) Tit. 11 Civil Practice and Procedure; Chap. 44. Compensation to Victims of Wrongful Conviction and Imprisonment (2009).	Pardon for felony conviction; based on innocence; vacated/ reversed; re-trial not guilty; Preponderance of evidence; SOL 3 yrs.	$50,000/yr NTE $500,000 passes to estate.	Economic damages; medical expenses; tuition and fees; child support; reintegration.	10% for preparing and filing the claim; 20% for litigating the claim if contested by the Attorney General; and 25% if the claim is appealed, plus expenses.
	§ 11-44-7 (4) Claimants can pursue a claim under this statute in lieu of pursuing a tort claim against the State of Mississippi, but claimants who obtain an award by this statute can't obtain an award for the same subject. (5) Immunity of The State of Mississippi waives immunity with respect to the claims. Claimants who receive compensation must sign a release from all claims against the state regarding the compensated incarceration.				
Missouri Petition to sentencing court & Department of Corrections	Mo. Rev. Stat. § 650.058 (2023) Individuals Who Are Actually Innocent May Receive Restitution, Amount, Petition, Definition, Limitations and Requirements — Guilt Confirmed by DNA Testing, Procedures — Petitions for Restitution — Order of Expungement; Tit. 40 Additional Executive Departments; Chap. 650 Department of Public Safety; DNA profiling analysis (2006 amd 2016, 2021).	DNA must show actual innocence of felony conviction; Finding of "actually innocent", restitution, expungement; if DNA confirms guilt, liability for costs.	$100/day NTE $36,500/yr.	Expungement, records confidential.	Civil barred.
	§ 650.058 1(4) One receiving restitution is prohibited from seeking any civil redress from the state. The waiver of sovereign immunity doesn't extend to any purposes other than the provided restitution.				

Montana	HB 93 "Died in Process" May 22, 2025				
Nebraska Filed under State tort claims act	Neb. Rev. Stat. Ann. §§ 29-4601–08 (2024) Chap. 29 Criminal Procedure; Art. 46 Nebraska Claims for Wrongful Conviction and Imprisonment Act (2009).	Innocence of felony crimes by pardon; vacated/ reversed/remanded; Clear and convincing; SOL 2 yrs.	NTE $500,000; does not pass to estate	Nothing precludes state from providing services treated as advance on judgment; Court can extinguish defense lien.	Reasonable attorney's fees and expense paid out of award.
	§ 29-4608 Nothing in the Neb. Wrongful Conviction and Imprisonment Act (NWCIA) limits the claimant from making any other claim against others. However, claimant who recovers under the NWCIA shall not have any other claim against the state.				
Nevada District court & Reserve for Statutory Contingency Account (approved by State Board of Examiners)	Nev. Rev. Stat. Ann. §§ 41.900–70 (2023) Action for Wrongful Conviction; Tit. 3 Remedies; Special Actions and Proceedings; Ch. 41 Actions and Proceedings in Particular Cases Concerning Persons (2019 amd. 2021).	Innocence (conduct or lesser included); Reversed/ remanded; not guilty at re-trial; Pardon for innocence; Preponderance; SOL 2 yrs.	$50,000/yr 1-10 yr; $75,000/yr 11-20 yr; $100,000/yr ≥21 yr; not less than $25,000 parole/S.O. Round up to half-year.	Tuition/books/fees in Nevada higher ed (w/in 3 yr); Health exchange plan; Community re-entry (w/in 3 yr); housing NTE $15,000/ yr; Counseling; financial literacy; all NTE $100,000; Certificate of innocence; sealing of records.	Reasonable attorney's fees NTE $25,000.
	§ 41.920(1) Nevada waives immunity from liability [for wrongful conviction] and allows liability in accordance with the same rules of law as applied to civil actions against persons; (3) All provisions of existing law relating to the absolute or qualified immunity of any judicial officer, prosecutor or law enforcement officer, including all applicable provisions of federal and state law still apply.				

New Hampshire Board of Claims' Board majority vote; or Superior court judgment & Governor to draw from unappropriated funds	N.H. Rev. Stat. Ann. 541-B:14 II (2024) Limitation on Action and Claims Tit. LV Proceedings in Special Cases; Chap. 541-B Claims Against the State; (1977 amd. 1993, 1995, 1996, 2003, 2007, 2018).	[A] person is found to be innocent of the crime for which he was convicted; SOL 3 yrs.	NTE $20,000.		Fees approved by board of municipality or superior court.
	§ 541-B:15 Adjudication on any claim does not deprive the claimant of other legal rights against other parties.				
New Jersey Superior Court & Department of the Treasury	N.J. Stat. Ann. §§ 52:4C-1–7 (2023) Tit. 52 State Government, Departments and Officers; Subtit. 1 General Provisions; Chapter 4C Mistaken Imprisonment (1997 amd. 2013).	Pardon; Did not commit crime or plead guilty; Clear and convincing; SOL 2 yr.	Twice income prior to incarceration or $50,000 per year (may award annuity after $1 million).	Certificate of innocence, vocational training, tuition assistance, counseling, housing assistance, and health insurance coverage.	Reasonable attorney's fees.
	§ 52:4C-2(b) Damages awarded in an action against the State about the same subject matter are offset by any award of damages awarded under the statute.				
New Mexico	SB407 "Died."				
New York Court of Claims	N.Y. Ct. Cl. Act § 8-b (2024) Claims for Unjust Conviction and Imprisonment (1984 amd. 2007, 2023).	Pardon for crimes due to innocence; reversed/ remanded/re-trial not guilty; Docket priority for DNA innocence Clear and convincing; SOL 2 yr.	"[A]ward damages in such sum of money as the court determines will fairly and reasonably compensate."	Records sealed; Health & dental benefit; CUNY or NY university tuition; All benefits due parolees.	Reasonable attorney's fees.
	N.Y. Ct. Cl. Act § 12 (2024) Liability will not be implied against the state in any case. No judgment will be granted except upon legal evidence as for persons.				

North Carolina Industrial Commission & Contingency emergency fund (Director of Budget)	N.C. Gen. Stat. §§ 148.82–84 (2023) Ch. 148 State Prison System; Art. 8 Compensation to Persons Erroneously Convicted of Felonies (1947, amd 1973, 1997, 2001, 2008, 2010, 2012).	Pardon of innocence of all felony charges; or dismissal by three judge panel (sufficient evidence of factual innocence) SOL 5 yr.	$50,000 each year prorated NTE $750,000.	Job skills training for at least one year and tuition reimbursement at any NC community college or constituent institution of the UNC; Claimants are also entitled to assistance in meeting any admissions standards, including satisfying requirements for completion of secondary education.	
North Dakota	Chap. 12-57 Relief for Wrongful Imprisonment (Repealed).				
Ohio Court of Common Pleas for liability; Court of Claims for damages & Emergency purposes special purpose account;	Ohio Rev. Code Ann. §§ 2743.48–49 (2023-2024) Tit. 27 Courts-General Provisions-Special Remedies; Ch. 2743 Court of Claims; Wrongful Imprisonment (1986, amd. 1989, 1994, 2003, 2012, 2013, 2018).	Felony or misdemeanor; Vacated/Dismissed/ Reversed; Brady violation; SOL 2 yr.	$55,045/yr (adjusted by state auditor), prorated.	Court costs; Lost wages; Recovery of cost debts incurred while in custody.	Reasonable attorney's fees.
	§ 2743.48(F)(6) Ohio consents to be sued by a wrongfully imprisoned individual and to liability. The statute does not affect state liability on a claim for relief not based on the facts of the wrongful imprisonment.				

Oklahoma Court of Competent Jurisdiction	Okl. Stat. Ann. tit. 51, § 154 (B) (2024) Extent of Liability Tit. 51 Officers; Ch. 5. The Governmental Tort Claims Act (1978 amd. 2003).	Actual innocence of felony; Full pardon 'felony not committed'; Clear and convincing; 5 yr SOL (12 Okl. St. § 95(12)).	NTE $175,000	Certificate of Innocence; Sealed records.	
	§ 152.1 A. Oklahoma adopts the doctrine of sovereign immunity. The state is immune from liability for torts. B. The state waives its immunity only for purposes of the wrongful conviction statute but not to waive any rights under the U.S. Constitution's Eleventh Amendment.				
Oregon Circuit court Marion county or county of conviction	Or. Rev. Stat. § 30.657, 659 (2023) Tit. 3 Remedies and Special Actions and Proceedings; Chap. 30- Actions and Suits in Particular Cases; Actions for Compensation for Wrongful Conviction (2022 amd. 2023).	Felony Reversed/vacated/ dismissed on re-trial; Pardon; Preponderance; must file notice in 180 da. SOL 2 yr.	$65,000/yr (+CPI adjustment); $25,000 parole/ postprison supervision/S.O.; First payment NTE $100,000 rest as annuity NTE $80,000 Request Certificate of innocence.	Existing state, local or other programs for counseling, housing assistance, eligibility for medical assistance, educational assistance, job training, legal services to regain custody of children, assistance with food and transportation and personal financial literacy assistance; may request re-entry services.	Reasonable attorney's fees.
	§ 30.657(9)(a) If, when a judgment is entered, the claimant has previously won a monetary award against a public body in a separate civil action (or settlement) related to the same case, the amount of economic damages awarded is deducted from the sum of money awarded under the wrongful conviction statute, (less attorney fees, costs, and expert fees), (b) If, after a judgment is entered under the wrongful conviction statute the claimant wins a monetary award against a public body in a separate civil action (or settlement) about the same subject, the claimant must reimburse the state for the sum of money paid (less attorney fees, costs, and expert fees).				

Pennsylvania	SB 54 referred to Senate Judiciary Committee March 21, 2025.				
Rhode Island Presiding justice of superior court & General Treasurer	R.I. Gen. Laws §§ 12-33-1–7 (2024) Tit. 12 Criminal Procedure; Ch. 33 Claims for Wrongful Conviction and Imprisonment (§§ 12-33-1–7) (2021 amd 2022).	Pardon; vacated; reversed (other than IAC); preponderance; SOL 3 yr.	$50,000/yr (<1 yr prorated); deduct/ reimburse if award for 42 U.S.C. § 1983.	Release from child support; any services provided by the state for offenders residing in the community.	Reasonable attorney's fees NTE $15,000.
	§ 12-33-4 (E)(1) Claimant's acceptance must be documented in writing that voluntarily relinquishes all rights to pursue other actions from their wrongful conviction and incarceration. (G) If, before or after, the claimant wins a monetary award under a 42 U.S.C. § 1983 federal civil rights lawsuit, the award, shall be deducted from the sum of money to which the claimant is entitled under the wrongful conviction statute (less attorney's fees or litigation costs).				
South Carolina	H 3566 "Failed."				
South Dakota					
Tennessee Board of Claims	Tenn. Code Ann. § 9-8-108 (a)(7)(A-H) (2024) Tit. 9 Public Finances; Ch. 8, Board of Claims; Pt. 1 Establishment and Operation of Board (1984, amd. 1986, 1988, 2003, 2004; 2010; 2012; 2013, 2021).	After consideration of the facts, circumstances, and any newly discovered evidence to § 40-27-109 (exoneration by governor); SOL 1 yr.	NTE $1 mil 'all factors considered relevant'; equal monthly installments; may fund annuity; Passes to surviving spouse/ children if any.	Expungement; restore rights of citizenship.	
	§ 9-8-108(a)(7)(G) Tennessee has a right of subrogation for any amount awarded against anyone who acted willfully and intentionally or engaged in conduct that resulted in or contributed to the claimant's wrongful conviction and imprisonment.				

Texas Comptroller & State Disbursement Unit	Tex. Civ. Prac. & Rem Code Ann. A §§ 103.001–07; B §§ 103.051–54; C §§ 103.101–05; D §§ 103.151–54 (2023) Civ. Prac. & Rem. Tit. 5; Chap. 103 Compensation to Persons Wrongfully Imprisoned; Subchap. A Eligibility; Notice of Eligibility (§§ 103.001–07); Subchap. B Administrative Proceeding (§§ 103.051–54); Subchap. C Fees (§§ 103.101–05); Subchap. D Payments and Limitations (§§ 103.151–54) (1985 amd. 2001, 2009, 2011, 2023).	Pardon for innocence; Writ of habeas corpus finding of actual innocence; State's attorney believes claimant actually innocent; SOL 3 yrs.	$80,000/yr prorated; $25,000/yr parole/S.O.; annuity (except child support); May designate beneficiary.	Child support; Tuition and fees (if within 7 yrs); Group health benefit plan (monthly contribution); Tuition for career center or public university.	Attorney's fees Reasonable hourly rate; Fee for application process.
§ 103.153(b) A claimant receiving compensation under the wrongful conviction statute may not bring any action involving the same subject matter, including an action involving the person's arrest, conviction, or length of confinement, against any governmental unit or an employee.					

Texas	Tex. Health & Safety Code Ann. § 614.021 (2023) Services for Wrongfully Imprisoned Persons Health & Safety Code; Tit. 7 Mental Health and Intellectual Disability; Subtit. E Special Provisions Relating to Mental Illness and Intellectual Disability; Ch. 614 Texas Correctional Office on Offenders with Medical or mental Impairments (2009 amd. 2011,2015).			Case management; Medical, Dental, & Mental health treatment; transition support.	
Texas	Tex. Gov't Code Ann. §§ 501.101-501.102 (2023) Gov't Code Tit. 4 Executive Branch Subtit. G Corrections; Ch. 501 Inmate Welfare; Subch. C Continuity of Care Programs; Reentry Program (2009 amd 2011).	Pardon, Actual innocence, SOL no later than third anniversary.		Same programs and services for an inmate Life-skills, Reentry $10,000, State ID.	

Utah District Court of conviction & Crime Victim Reparations Fund	Utah Code Ann. § 78B-9-405 (2023) Tit. 78B Judicial Code; Ch. 9 Postconviction Remedies Act; Pt. 4 Post Conviction Determination of Factual Innocence (1953 amd. 2008, 2011, 2012, 2021).	Factual innocence of felony conviction; Averment for ineffective assistance of counsel; Clear and convincing; SOL 1 yr to bring petition for post-conviction relief § 78B-9-107.	Up to a maximum of 15 years, monetary equivalent of average annual nonagricultural payroll wage in Utah/yr prorated; Initial sum 20%; Survives to spouse.	Expungement; Letter of innocence to petitioner, no state tax, no offsets for expenses by state.	
	§ 78B-9-405(11)(a) Payments are a full and conclusive resolution of the claimant on the specific issue of factual innocence.				
Vermont Washington County Superior Court & State treasurer	Vt. Stat. Ann. tit. 13 §§ 5572–78 (2024) Tit. 13 Crimes and Criminal procedure; Pt. 3 Proceedings Before Trial; Chap. 182 Innocence protection; Subchap. 2. Compensation for Wrongful Convictions (§§ 5572–78) (2007 amd 2013; 2015, 2016).	Actual innocence of felony; Exonerated through conviction being reversed or vacated, the information or indictment being dismissed, the complainant being acquitted after a second or subsequent trial, or the granting of a pardon; ≥ 6 mos. incarceration; Clear and convincing; SOL 3 yrs.	≥$30,000 but ≤$60,000/yr prorated.	Economic damages; Lost wages; 10 yrs state funded health care; reintegrative services.	Reasonable attorney's fees.
	§ 5574(d) The claimant's acceptance of a damages award, compromise, or settlement because of a claim under the wrongful conviction statute must be in writing and is final and conclusive on the claimant. Acceptance also constitutes a complete release against the State and a complete bar to any action against the State about the same subject matter.				

Virginia Court of appeals & General Assembly appropriates funds; Comptroller	Va. Code Ann. §§ 8.01-195.10–13 (2023) Tit. 8.01 Civil Remedies and Procedure; Ch. 3. Actions; Art. 18.2. Compensation for Wrongful Incarceration for a Felony Conviction (2004 amd. 2010, 2012, 2014, 2018, 2020, 2021, 2022).	Actual innocence; Felony conviction vacated (Chapter 19.2 or 19.3); 'absolute pardon'; pled not guilty (or Alford); SOL 2 yrs.	$55,000/yr (pegged to C-CPI-U); 25% as lump sum, then annuity; Additional compensation for intentional state acts; Passes to estate, but no claim for estate or representative of decedent.	Transition assistance grant $15,000; Tuition assistance $10,000 VA CCs; Court costs.	Reasonable attorney's fees.
	§ 8.01-195.12(B) As a condition of receiving compensation under the wrongful conviction statute, the claimant must execute a release and waiver. The waiver releases Virginia and other parties of interest from any present or future claims arising out of the same factual situation in connection with the conviction for which compensation is sought under this article. Also, the claimant receiving compensation cannot have been awarded a finally adjudicated judgment in a court of law against or (or settlement) for compensation or damages arising out of the same factual situation.				
Washington Superior Court	Wash. Rev. Code Ann. §§ 4.100.010–90 (LexisNexis 2023) Tit. 4 Civil Procedure; Chap. 4.100 Wrongly Convicted Persons (2013).	Felony pardon for actual innocence; Pardon for grounds consistent with innocence'; reversed/ vacated/not guilty on retrial; 3 yr SOL.	$50,000/yr; $100,000/yr on death row; $25,000/ yr parole/S.O.; Possible structured settlement; Passes to estate.	Child support; Court costs; Re-entry services (education, mentoring, life skills, job skill, mental health & substance abuse); Seal records on request, expunged.	Reasonable attorney's fees NTE 10% or $75,000.
	WA § 4.100.080(1) Washington intends that the remedies provided under wrongful conviction statute are exclusive to all other remedies against the state. The claimant must waive, as a requirement to make a claim under the wrongful conviction statute, all other remedies, causes of action, and other forms of relief or compensation against Washington. The waiver includes all state, common law, and 42 U.S.C. § 1983 federal civil rights claims. If the wrongfully convicted person chooses not to pursue a claim for compensation under the wrongful conviction statute, they are not precluded from seeking relief through any other remedy. The claimant must execute a legal release prior to the payment of any compensation under the wrongful conviction statute. If the release is held invalid for any reason and the claimant is awarded compensation and receives a tort award related to their wrongful conviction and incarceration, they must reimburse the state for the lesser of the amount of the wrongful conviction compensation (less attorney's fees and litigation costs), or the amount received by the claimant under the tort award.				

West Virginia WV Legislative Claims Commission & Crime Victim's Compensation Fund	W. Va. Code Ann. § 14-2-13a (LexisNexis 2023) Claims for unjust arrest and imprisonment or conviction and imprisonment; Chap. 14 Claims Due and Against the State; Art. 2. Claims Against the State § 14-2-13a. (1987 amd 2014, 2020).	Pardoned for innocence; Reversed/vacated/ not guilty in new trial/ not re-tried; Clear and convincing; SOL 2 yr.	"Court shall award damages in a sum of money as the court determines will fairly and reasonably compensate the claimant based upon the sufficiency of the claimant's proof at trial. The damages shall depend upon the unique facts and circumstances of each claim."		
Wisconsin Claims Board	Wis. Stat. Ann. § 775.05 (LexisNexis 2023–24) Compensation for Innocent Convicts; Actions and Proceedings in Special Cases; Chap. 775 Actions Against State (1979 amd 1987).	Innocence; Clear and convincing.	NTE $25,000 and $5,000/yr; Claims board may petition legislature for more.		Includes attorney's fees.
Wyoming	2014 SF 30 – failed.				

Financial Regulation and the New Social Safety Net

*Manisha Padi**

Abstract

The traditional social safety net takes the form of direct government benefits like the earned income tax credit (EITC) and Medicaid. Access to benefits is explicitly limited by income and requires significant documentation, which limits access to the needy. Despite the success of these programs over the past fifty years, however, inequality has skyrocketed, and the middle and upper classes have expanded their wealth at much higher rates than the poor. This Article describes one reason for the divergence. Middle and upper classes have had access to a shadowy and growing set of safety net programs—direct and indirect subsidies provided by regulators through private financial markets. The resulting benefits do not always accrue to needy and vulnerable populations. Indeed, I provide novel evidence that financial regulation often helps the rich at the expense of the poor, in direct contrast to the goals of the tax and benefits system.

To begin, I study the mortgage and student loan payment pauses that supplemented traditional, means-tested stimulus payments during the COVID-19 pandemic. Payment pauses acted as loans to borrowers, increasing their spending power. Yet, they were inaccessible to those who rented or paid cash for their education. With original analysis of empirical data, I show that low-income, and Black and Hispanic, households were less likely to qualify for mortgage forbearance. I also show that richer households received the majority of the benefits of student loan payment pauses. In total, payment pauses provided nearly $1.6 trillion in emergency liquidity, with the richest half of the population receiving three times the benefits provided to the rest. Although they were hailed as economic successes, payment pauses transferred resources to those who needed them the least.

Examples of this phenomenon abound throughout the financial regulatory system as a whole. For example, the Federal Reserve subsidizes employment opportunities by carefully managing the money supply. The Securities and Exchange Commission requires disclosures and limits capital market participation to ensure high returns for retail investors. The Consumer Financial Protection Bureau regulates credit provision for purchasing a home or getting a payday loan, indirectly controlling which loans are available to which families. Each agency provides benefits only to certain subgroups, such as workers, investors, and borrowers, at the expense of those who do unpaid labor, save in bank accounts, or make most purchases with cash. Most recently, the second Trump administration has taken steps to limit traditional safety net programs like Medicaid and has instead expanded political power over the Federal

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Reserve and the Consumer Financial Protection Bureau, accelerating the existing trend toward disbursing government benefits through the financial markets. The result is that financial inclusion, which typically describes populations' access to private financial products, is now the determinant for access to government benefits.

There are both costs and benefits to disbursing government benefits through the financial markets. The costs include the possibility that implementing benefits through regulation could distort markets and create inefficiency. Historically, scholars studying redistribution have argued for benefits programs to remain limited and connected to the tax code. Modern voices calling for agencies to incorporate distributive justice into their decision-making have largely overlooked financial regulation. On the benefits side, however, are the unique forms of redistribution that financial regulation can provide, such as risk management, emergency liquidity, and subsidized returns. Moreover, financial regulators can provide benefits cheaply by offering implicit or explicit government guarantees, which spur private markets to step in at low cost to taxpayers.

To create a truly inclusive regulatory safety net, I propose that financial regulators should make their role in the social safety net more explicit and begin to evaluate the incidence of their policies. Borrowing from principles of effective redistribution established in tax law, I describe the tradeoff between progressive redistribution and internalizing externalities. I argue that state regulators can help hold federal agencies to account and help to implement effective policies. If the financial regulatory system acknowledges its important role in protecting the financial health of ordinary Americans, it can ensure that the vulnerable do not finance the prosperity of the privileged.

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Introduction

Poor, minority, and marginalized communities have become more reliant on financial markets in every aspect of their lives.[1] As a result, their welfare has been placed directly in the hands of financial regulators.[2] Deposits into a bank account are immediately loaned to another bank or to a neighbor for their mortgage.[3] Credit card companies pay for purchases, relying on a promise to repay next month. Contributions to retirement accounts are invested in the capital markets, earning positive returns for the lucky or savvy and negative returns for everyone else.[4] All participants rely on the soundness of financial institutions and markets to safeguard their hard-earned wealth until they are ready to spend it, possibly generations in the future.[5] Financial markets, and the legal systems that govern them, thereby provide some insurance against financial losses, and sources of money when times are tough.[6]

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[1] *See generally* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093 (2019); Abbye Atkinson, *Borrowing Equality*, 120 Colum. L. Rev. 1403 (2020); Mehrsa Baradaran, The Color of Money (2017); Mehrsa Baradaran, How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy (2015); Lisa Servon, The Unbanking of America: How the New Middle Class Survives (2017); Emily Winston, *Unequal Investment: A Regulatory Case Study*, 107 Cornell L. Rev. 781 (2022); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 Notre Dame L. Rev. 211 (2019); Manisha Padi, *Contractual Inequality*, 120 Mich. L. Rev. 825 (2022); Vijay Raghavan, *Consumer Law's Equity Gap*, 2022 Utah L. Rev. 511 (2022).

[2] On banking, *see generally* Michael S. Barr, *Banking the Poor*, 21 Yale J. on Reg 121 (2004); Baradaran, The Color of Money, *supra* note 1; Baradaran, How the Other Half Banks, *supra* note 1; Servon, *supra* note 1; Christopher R. Leslie, *Banking Deserts, Structural Racism, and Merger Law*, 108 Minn. L. Rev. 695 (2023); Mehrsa Baradaran, *Banking on Democracy*, 98 Wash. U. L. Rev. 353 (2020); Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 Iowa L. Rev. 1739 (2021). On access to finance, see generally J. Carter Braxton et al., *Intergenerational Mobility and Credit* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32031, 2024), https://www.nber.org/papers/w32031 [https://perma.cc/JP4T-JA8A]; Roxana Mihet, *Financial Technology and the Inequality Gap*, (Swiss Fin. Inst., Research Paper No. 21-04, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474720 [https://perma.cc/MLR7-97FP]; Abraham J. B. Cable, *Regulating Democratized Investing*, 83 Ohio State L.J. 671 (2022). On consumer law, *see generally* Brian Galle, *Is Local Consumer Protection Law a Better Retributive Mechanism than the Tax System*, 65 N.Y.U. Ann. Surv. Am. L. 525 (2009); Natasha Sarin, *Making Consumer Finance Work*, 119 Colum. L. Rev. 1519 (2019); Van Loo, *supra* note 1; Padi, *supra* note 1.

[3] *See* Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. Chi. L. Rev. 357, 367 (2016).

[4] Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings*, 14 J. Legal Analysis 16, 17 (2022).

[5] *See generally* Saule T. Omarova, *The Too Big to Fail Problem*, 103 Minn. L. Rev. 2495 (2019) (describing the promise and perils of prioritizing the stability of the largest financial institutions during financial crises); Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. Rev. 2295 (2020) (showing how gaps in regulators knowledge prevent them from achieving long term stability).

[6] *See generally* Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 Am. Bankr. Inst. L. Rev. 129 (2005) (characterizing bankruptcy courts as a form of social insurance); Martin Feldstein, *Rethinking Social Insurance*, 95 Am. Econ. Rev. 1 (2005) (giving a general definition of social insurance and providing several examples); Atkinson, *Rethinking Credit*, *supra* note 1 (describing the growing role of private credit in providing social insurance).

Financial regulators, however, do not typically acknowledge their role in providing a safety net for households.[7] Calls for financial regulators to openly prioritize the underprivileged have even faced backlash. For example, in 2023, House Democrats introduced a bill that would expand the Federal Reserve's mandate to include minimizing racial disparities in economic well-being.[8] Despite support from President Biden, the proposed law was met with significant pushback.[9] The Consumer Financial Protection Bureau (CFPB) faced multiple challenges to its authority,[10] including a Texas court's ruling that the CFPB lacked the authority to bring disparate impact claims.[11] As a result, the general public has been led to believe that providing benefits to the underprivileged is outside the purview of financial regulators.

The second Trump administration has made the transition to financial markets as a safety net even more apparent than in the past. It has continued the fight against the CFPB,[12] expanded retail investment options for retail customers,[13] and attempted to wield unprecedented political power over the Federal Reserve.[14] At the same time, Trump has cut traditional safety net programs, such as Medicaid and the Supplemental Nutrition Assistance Program (SNAP).[15] The nation is therefore seeing, in real time, the replacement of government benefit programs with relatively unregulated financial markets.

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[7] This piece takes a broad view of financial regulation, including traditional bank supervisory regulators such as the Federal Reserve, as well as federal agencies who touch on any aspect of the financial markets, such as the Department of Education with student loans, the Consumer Financial Protection Bureau with mortgages and consumer credit, and the Securities and Exchange Commission with equity markets.

[8] *See Ranking Member Waters, Senator Warren Reintroduce Bill Requiring the Fed to Close Racial Employment and Wage Gaps*, U.S. House Comm. on Fin. l Servs. (June 22, 2023), https://democrats-financialservices.house.gov/news/documentsingle.aspx?DocumentID=410585 [https://perma.cc/6RXP-LREF].

[9] *See* Danielle Kurtzleben, *Biden Wants the Fed to Help Close Racial Economic Gaps. How Would That Work?*, NPR (Aug. 1, 2020), https://www.npr.org/2020/08/01/897911727/biden-wants-the-fed-to-help-close-racial-economic-gaps-how-would-that-work [https://perma.cc/DWF5-AUBA]; *A Woke Mandate for the Federal Reserve*, Wall St. J. (June 21, 2022), https://www.wsj.com/articles/a-woke-mandate-for-the-federal-reserve-racial-equity-congress-house-joe-biden-11655659047 [https://perma.cc/MMD5-M4A3]; James A. Dorn, *Racial Equity is Beyond the Fed's Scope*, CATO Inst. (July 6, 2022), https://www.cato.org/blog/racial-equity-beyond-feds-scope [https://perma.cc/WNG5-VDSQ].

[10] *See* Richard J. Andreano, Jr., *CFPB Suffers Significant Defeat in ECOA Lawsuit Against Townstone Mortgage*, Consumer Fin. Monitor (Feb. 6, 2023), https://www.consumerfinancemonitor.com/2023/02/06/cfpb-suffers-significant-defeat-in-ecoa-lawsuit-against-townstone-mortgage/ [https://perma.cc/9KT5-YPS9].

[11] Dan Ennis, *Texas Court Strikes Down CFPB's Anti-Discrimination Effort*, Banking Dive (Sept. 12, 2023), https://www.bankingdive.com/news/cfpb-court-discrimination-exam-manual-update-lawsuit-aba-cba-chamber-commerce-udaap/693435/ [https://perma.cc/WK9M-QZN7].

[12] *See The Trump Administration Is Hurting Consumers' Wallets by Kneecapping the CFPB*, Ctr. for Am. Progress (Mar. 20, 2025), https://www.americanprogress.org/article/the-trump-administration-is-hurting-consumers-wallets-by-kneecapping-the-cfpb/ [https://perma.cc/9VDU-MWMC].

[13] Executive Order No. 14300, 90 Fed. Reg. 38921 (Aug. 7, 2025).

[14] Colby Smith, *Fed's Independence Remains at Risk Despite Temporary Legal Victory*, N.Y. Times (Oct. 2, 2025), https://www.nytimes.com/2025/10/02/business/federal-reserve-independence-lisa-cook.html [https://perma.cc/882S-6TFR].

[15] Lauren Bauer & Diane Whitmore Schanzenbach, *SNAP Cuts in the One Big Beautiful Bill Act Will Significantly Impair Recession Response*, Brookings (Oct. 8, 2025), https://www.brookings.edu/articles/snap-cuts-in-the-one-big-beautiful-bill-act-will-significantly-impair-

In this Article, I show that financial regulation has long been used as a means of distributing subsidies via financial products at a large scale, albeit covertly and without public accountability. To do so, I introduce several case studies to show how financial regulation has created a secretive new safety net that benefits middle income and rich households. Traditionally, benefits were targeted to low-income groups through means-tested tax and benefits programs such as the Earned Income Tax Credit (EITC), SNAP, and Medicaid.[16] Despite the success of these programs, they have become less generous over time.[17] At the same time, inequality has grown, with the top 50 percent of the income distribution seeing much larger gains in wealth than the bottom 50 percent.[18]

I propose that these trends have been accelerated by a growing reliance on regulated and subsidized financial markets that provide funds to distressed households. Throughout the past fifty years, loan guarantees, direct grants, and regulations of financial institutions have encouraged more Americans to participate in the financial markets. Gaps in the social safety net for all except the most destitute have been filled with consumer credit products, regulated investment assets, and job opportunities funded by subsidized credit.[19] These have allowed households to consume more than they would have in a pure cash economy and give limited support in times of financial distress.[20]

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recession-response/ [https://www.brookings.edu/articles/snap-cuts-in-the-one-big-beautiful-bill-act-will-significantly-impair-recession-response/] (last visited Oct. 8, 2025); Amelia Coffey & Heather Hahn, *Medicaid Cuts in the One Big Beautiful Bill Act Leave 3 in 10 Young Adults Vulnerable to Losing Health Care Access*, Urban Inst. (Aug. 7, 2025), https://www.urban.org/urban-wire/medicaid-cuts-one-big-beautiful-bill-act-leave-3-10-young-adults-vulnerable-losing [https://perma.cc/GFU6-N87P].

[16] *See generally* Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes But Not Program Choice or Design*, *in* Measurement in Public Choice 123 (Steinar Strøm ed., 1981) (introducing a formal economic model describing the efficiency benefits of limiting redistribution to the income tax system); Steven Shavell, *A Note of Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 Am. Econ. Rev. 414 (1981) (providing the mathematical basis for Kaplow and Shavell's future work in the legal field arguing for the supremacy of efficiency in deciding legal rules); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994) (translating the intuitions of economics articles on redistribution to a law audience); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. Legal Stud. 821 (2000) (following up on previous literature to respond to critiques by Sanchirico and others).

[17] Ali Zane & Cristina Toppin, *Research Note: Study Shows Why TANF Is Not the Success That Some Claim* Ctr. on Budget & Pol'y Priorities, (Aug. 9, 2022), https://www.cbpp.org/research/income-security/study-shows-why-tanf-is-not-the-success-that-some-claim [https://perma.cc/9RWK-23EB]; *see also* Alexandra Cawthorn Gaines et al., *How Weak Safety Net Policies Exacerbate Regional and Racial Inequality*, Ctr. for Am. Progress (Sep. 22, 2021), https://www.americanprogress.org/article/weak-safety-net-policies-exacerbate-regional-racial-inequality/ [https://perma.cc/MB2J-4R7Z] (showing less generous policies in different parts of the country).

[18] Thomas Blanchett et al., *Who Benefits from Income and Wealth Growth in the United States*, Realtime Inequality, https://realtimeinequality.org/ [https://perma.cc/E2NC-XF3C] (last visited Aug 8, 2024).

[19] *See* Atkinson, *Rethinking Credit*, *supra* note 1, at 1101–02; Johnna Montgomerie, *America's Debt Safety-Net*, 91 Pub. Admin. 871, 871–72 (2013).

[20] *See, e.g.*, Christine L. Dobridge, *High-Cost Credit and Consumption Smoothing*, 50 J. Money, Credit & Banking 407, 407–12 (2018).

Regulators help determine the supply and price of credit,[21] and who is included in financial markets.[22] Inclusion in the financial markets means the opportunity to receive significant subsidies from the government,[23] making financial regulators the gatekeepers of the new social safety net.

To demonstrate this phenomenon and its risks, I introduce four case studies of redistribution through financial regulation. To begin, I focus on the highest profile example of government benefits provided directly through the financial markets—the COVID-19 payment pauses.[24] The pauses, implemented by both the first Trump and Biden administrations, allowed mortgage borrowers up to eighteen months of relief from paying their housing costs and nearly two years without making student loan payments.[25] Individuals without student debt or mortgage debt did not receive these subsidies.[26] Using data from the Survey of Consumer Finances[27] and drawing on external research,[28] I provide novel evidence that these policies had eligibility rules with regressive distributional consequences.[29] Eligibility for mortgage forbearance disproportionately excluded Black and Latino households, as well as low- and middle-income households.[30] Additionally, richer borrowers had larger payments and received more of a benefit from the payment pause than low-income borrowers.[31] Student loan payment pauses also benefited the richest borrowers the most.[32] According to my novel estimates, the payment pauses together provided nearly $1.2 trillion in emergency liquidity to the rich, and less than $400 billion to low-income groups, none of which was accessible to non-borrowers.[33]

A plethora of other, albeit less explicit, examples abound of safety nets provided through financial regulation. I look to the Federal Reserve ("Fed"), the Securities and Exchange Commission (SEC), and the CFPB as examples

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[21] Jonathan Zinman, *Consumer Credit: Too Much or Too Little (or Just Right)?*, 43 J. Legal Stud. S209, S212–13 (2014).

[22] Atkinson, *supra* note 1, at 1105.

[23] *See infra* Parts II and III.

[24] *See* Alexandra Hegji, Cong. Rsch. Serv., Student Loans: A Timeline of Actions Taken in Light of the COVID-19 Pandemic, (2024), https://crsreports.congress.gov/product/pdf/IF/IF12136 [https://perma.cc/7D64-T23N]; Darryl E. Getter et al., Cong. Rsch. Serv., Housing Issues In the 116th Congress (2021), https://www.congress.gov/crs-product/R45710 [https://perma.cc/JT6H-7JGF].

[25] *Id.*

[26] *See id.*

[27] *See* Aditya Aladangady et al., Fed. Rsrv., Survey of Consumer Finances (2023) https://www.federalreserve.gov/publications/files/scf23.pdf [https://perma.cc/Y7GA-2TCQ].

[28] *See* Sarah Turner, *Student Loan Pause Has Benefitted Affluent Borrowers the Most, Others May Struggle When Payments Resume*, Brookings Inst. (April 13, 2023), https://www.brookings.edu/articles/student-loan-pause-has-benefitted-affluent-borrowers-the-most-others-may-struggle-when-payments-resume/ [https://perma.cc/8DJS-TZWN]; Kristopher Gerardi et al., Fed. Rsrv. Bank Bos., Racial Differences in Mortgage Refinancing, Distress, and Housing Wealth Accumulation During COVID-19 (2021), https://www.bostonfed.org/publications/current-policy-perspectives/2021/racial-differences-in-mortgage-refinancing-distress-and-housing-wealth-accumulation-during-covid-19.aspx [https://perma.cc/56SY-LFCH].

[29] *See infra* Part II.A.

[30] *See infra* Part II.A.

[31] *See infra* Part II.A.

[32] *See infra* Part II.A.

[33] *See infra* Part II.B.

of agencies that regularly distribute subsidies to average households. The Fed has broad-based power to set interest rates and expand or contract money supply, in service of a three-part mandate to maximize employment, keep prices stable, and ensure moderate interest rates.[34] By using language that requires the Fed to prioritize the needs of the unemployed over workers, the mandate implicitly requires the Fed to focus on disadvantaged citizens. This approach reflects the history of the Fed's full employment mandate, which was a key component of the civil rights movement,[35] and has continued to be enacted with an eye to racial justice.[36] Moreover, recent research in macroeconomics has identified that monetary policy has complex, disparate impacts across groups, meaning that all components of the Fed's mandate have implicit distributional aims.[37] I argue that the Fed is engaged in indirectly providing benefits to the needy, making it a tempting target for political oversight by the second Trump administration.[38]

The SEC is another agency with a broad focus on improving the function of capital markets as a whole, all while implicitly disbursing benefits to the vulnerable.[39] The SEC's mandate imposes a special duty to improve market efficiency for uninformed investors, ultimately increasing their returns.[40] Since large institutional investors are well-informed about market conditions, it follows that ordinary retail investors are a primary focus for the agency. SEC rulemaking and enforcement surrounding retail investors has pushed them away from high-risk investments, taking potentially high returns away from retail investors with high risk tolerance.[41] Moreover, their exclusive focus on

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[34] *Federal Open Market Committee Rules and Authorizations*, Fed. Rsrv., 4 (2023), https://www.federalreserve.gov/monetarypolicy/files/FOMC_RulesAuthPamphlet_202301.pdf [https://perma.cc/28NC-LJFX].

[35] *The Full Employment Mandate of the Reserve: Its Origins and Importance*, Popular Democracy in Action (Jul. 11, 2017), https://populardemocracyinaction.org/publication/news-publications-full-employment-mandate-reserve-its-origins-and-importance/ [https://perma.cc/963B-2Z49] (last visited Sep. 11, 2025); David Stein & Ira Regmi, *The Civil Rights Struggle for True Full Employment*, Roosevelt Inst. (Apr. 25, 2024), https://rooseveltinstitute.org/publications/civil-rights-full-employment/ [https://perma.cc/TPE2-DAYA].

[36] *See* Jerome H. Powell, Chair, Fed. Rsrv., New Economic Challenges and the Fed's Monetary Policy Review at Navigating the Decade Ahead: Implications for Monetary Policy (Aug. 27, 2020), https://www.federalreserve.gov/newsevents/speech/powell20200827a.htm [https://perma.cc/QL4M-EGB2]; Jerome H. Powell, Chair, Fed. Rsrv., Press Conference (Sept. 22, 2021), https://www.federalreserve.gov/mediacenter/files/FOMCpresconf20210922.pdf [https://perma.cc/HD5P-VDQS].

[37] *See* William M. Rodgers, *African American and White Differences in the Impacts of Monetary Policy on the Duration of Unemployment*, 98 Am. Econ. Rev. 382, 382–83 (2008); Alina K. Bartscher et al., *Monetary Policy and Racial Inequality*, 2022 Brookings Papers on Economic Activity 1, 4–6 (2022).

[38] *Infra* Part III.A.

[39] *See* Spamann, *supra* note 4, at 30–31.

[40] *Id.* at 25–26; Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669, 693–95 (1984); Stephen J. Choi & A. C. Pritchard, *Behavioral Economics and the SEC*, 56 Stan. L. Rev. 1, 3 (2003); Tom C. W. Lin, *Reasonable Investor(s)*, 95 B.U. L. Rev. 461, 466–68 (2015).

[41] *See* Winston, *supra* note 1, at 786 (2021); Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. Pa. L. Rev. 605, 646–47 (2014); Sue S. Guan, *Meme Investors and Retail Risk*, 63 B.C. L. Rev. 2051, 2054–56 (2022); Joel Seligman, *Payment for Order Flow and the Great Missed Opportunity*, 18 Hastings Bus. L.J. 3, 26–27 (2021); Jonathan R. Macey & Maureen O'Hara, *The Law and Economics of Best Execution*, 6 J. Fin. Intermediation 188, 219–20 (1997).

investors means that no regulator is maximizing returns for people who are too risk averse to participate in the capital markets.[42] I argue that these rules subsidize investors with average levels of risk aversion to the detriment of those with higher or lower levels of risk aversion, which may have the opposite consequence of that intended by traditional benefits programs.[43]

Finally, the CFPB has been more explicit in its social mission since its founding.[44] It has made fair lending enforcement a priority and has taken steps to protect the most disadvantaged individuals from unsavory business practices at financial institutions.[45] Yet the CFPB still faces challenges as a financial regulator that intends to participate in the social safety net. I focus on the CFPB's rules on mortgage origination[46] and their proposed rules on payday loans[47] to show how regulations on borrowers' ability to repay can transform households' access to housing and credit. Requiring that income be used in mortgage underwriting limited lending to lower-income households facing the risk of volatility, which decreased access to credit among vulnerable households.[48] When the CFPB planned to extend similar rules to the payday loan context, it was rebuffed by the first Trump administration[49] and had its very existence threatened with lawsuits.[50] The second Trump administration has made every effort to shutter the agency,[51] despite its popularity across

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[42] The Office of the Comptroller of the Currency (OCC), for instance, is focused on stability rather than maximizing returns. *See About Us,* Off. Compt. Currency (last visited January 13, 2025), https://www.occ.treas.gov/about/index-about.html [https://perma.cc/6MVD-S2PU] (showing the OCC's primary goal is stability, rather than maximizing yields to depositors).

[43] *Infra* Part III.B.

[44] *See* Atkinson, *Borrowing Equality*, *supra* note 1, at 1458.

[45] *See* Robert L. Clarke & Todd J. Zywicki, *Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau*, 33 Rev. Banking & Fin. L. 235, 236–40 (2013); John L. Ropiequet & L. Jean Noonan, *Fair Lending Developments: Back to the First Step?*, 78 Bus. Law. 607, 616–18 (2023).

[46] 12 C.F.R. §§ 1026.1–61 (2024).

[47] *Executive Summary of the Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule*, CFPB (Oct. 5, 2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_executive-summary_payday-loans-rule.pdf [https://perma.cc/QV9K-2NWG].

[48] Andreas Fuster et al., *Does CFPB Oversight Crimp Credit?*, (CEPR Discussion Paper No. DP15681, 2021), https://papers.ssrn.com/abstract=3783896 [https://perma.cc/9UBM-BPLV]; Francesco D'Acunto & Alberto G Rossi, *Regressive Mortgage Credit Redistribution in the Post-Crisis Era*, 35 Rev. Fin. Stud. 482, 492 (2022).

[49] *See Executive Summary of the July 2020 Amendments to the 2017 Payday Lending Rule*, CFPB (July 7, 2020), https://files.consumerfinance.gov/f/documents/cfpb_executive-summary_payday-revocation-final-rule_2020-07.pdf [https://perma.cc/42HW-GLBX]; *see also* Nicholas Confessore & Stacy Cowley, *Trump Appointees Manipulated Agency's Payday Lending Research, Ex-Staffer Claims*, N.Y. Times (Apr. 19, 2020), https://www.nytimes.com/2020/04/29/business/cfpb-payday-loans-rules.html [https://perma.cc/U623-R4AN].

[50] Shaid Naeem & Joe Gaeta, *The War on the Consumer Financial Protection Bureau: CFPB v. Community Financial Services of America*, Am. Econ. Liberties Project (Aug. 31, 2023), https://www.economicliberties.us/our-work/the-war-on-the-consumer-financial-protection-bureau-community-financial-services-of-america-v-cfpb/ [https://perma.cc/M27Q-VZ6M].

[51] Alan S. Kaplinsky, Richard J. Andreano, Jr. , & John L. Culhane, Jr., *Plaintiffs ask for en banc rehearing in CFPB shutdown case*, Consumer Finance Monitor (Oct. 1, 2025), https://www.consumerfinancemonitor.com/2025/10/01/plaintiffs-ask-for-en-banc-rehearing-in-cfpb-shutdown-case/ [https://perma.cc/ZA24-PUET].

party lines,[52] suggesting that it is perceived as a threat to Trump's broader anti-"woke" agenda.[53] I argue that even the financial regulator most openly devoted to needy households, and punished for its explicitly redistributive mission, has made a series of missteps due to the challenges of implementing a safety net through private financial markets.[54]

These examples show that financial regulation has both disadvantages and advantages in administering these new benefits. Traditionally, the safety net has been implemented through means-tested tax and transfer programs.[55] Taxes have been recognized for centuries as an efficient mechanism for redistributing income from the wealthy to the poor.[56] A group of law and economics scholars developed a theory that went one step further and argued that taxation should be the unique distributive mechanism across all areas of law.[57] This theory, referred to below as the "tax supremacy" approach, suggested that legal rules outside the tax system, such as damages in tort law or fines imposed by agencies, create efficiency losses when they redistribute.[58] Widespread acceptance of the tax supremacy approach created a historical consensus that administrative agencies need not consider the distributional consequences of rules outside the tax system.[59] More recently, a movement of scholars and policymakers have fought back and proposed that non-tax rules have an important role to play in the distribution of benefits across social groups.[60] They show

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[52] Kevin Hanley, Cecilia Bisogno, & Lew Blank, *Voters Overwhelmingly Support the Consumer Financial Protection Bureau's Recent Actions*, Data For Progress (Nov. 21, 2024), https://www.dataforprogress.org/blog/2024/11/21/voters-overwhelmingly-support-the-consumer-financial-protection-bureaus-recent-actions [https://perma.cc/W7TC-GXSL].

[53] Kate Gibson, *Trump Has Subdued the Consumer Financial Protection Bureau. So What Does This Agency Do?*, CBS News (Apr. 21, 2025), https://www.cbsnews.com/news/trump-consumer-financial-protection-bureau-what-is-the-cfpb-refunds/ [https://perma.cc/C7XQ-XA5D].

[54] *Infra* Part III.C.

[55] *See* Richard A. Westin, *The Historical Origins of Progressive Taxation*, 23 J. Juris. 203, 205 (2014).

[56] *Id.* at 204.

[57] *See supra* note 16 and accompanying text.

[58] *See, e.g.*, Kaplow & Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, *supra* note 16 at 667–68.

[59] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L.J. 165, 186 (1999) ("The purpose of CBA, as typically understood, is to separate out the distributional issue and isolate the efficiency issue, so that the agency will evaluate projects solely on the basis of their efficiency.").

[60] *See generally* Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1653 (1998) (showing that replacing neoclassical economic assumptions with behavioral ones increases the importance of legal rules in redistribution); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. Legal Stud. 797 (2000) (highlighting failures in the tax supremacy approach); Richard S. Markovits, *Why Kaplow and Shavell's Double-Distortion Argument Articles Are Wrong*, 13 Geo. Mason L. Rev. 511 (2004) (arguing that tax supremacy theory is inapplicable to most practical examples); Daphna Lewinsohn-Zamir, *In Defense of Redistribution through Private Law*, 91 Minn. L. Rev. 326 (2006) (using legal theory to argue against the tax supremacy approach); Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 Iowa L. Rev. 1125 (2004) (challenging the assumptions underpinning the tax supremacy approach); Aditi Bagchi, *Distributive Injustice and Private Law*, 60 Hastings L.J. 105 (2008) (providing a theoretical basis for considering distributive justice across private law disciplines); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 Minn. L. Rev. 1051 (2016) (describing the missing role of redistribution in law and economics literature); Zachary Liscow, *Is Efficiency Biased*, 85 U. Chi. L. Rev. 1649 (2018) (showing the limitations of efficiency-only analysis of legal rules); Zachary Liscow,

that regulation has redistributive effects, and argue that redistribution outside the tax system could be valuable.[61] As a result, the Office of Management and Budget (OMB) issued guidance that that cost-benefit analyses should include consideration of the distributive impacts of regulation; but financial regulation was largely excluded from this process.[62]

In this Article, I show that financial regulation is an important exception to the tax supremacy theory, with significant advantages over traditional benefits programs that balance out the disadvantages.[63] Even if they are not collecting revenue and distributing cash, financial regulators can redistribute resources in other ways—by taking away or imposing risk, by providing liquidity, or by impacting returns on an investment. Moreover, financial regulators have access to mechanisms that are not available to benefits administrators. Instead of paying in cash for safety net policies, financial regulators can provide governmental guarantees that are either explicit, such as deposit insurance for banks, or implicit, such as bailouts. A carefully designed safety net, implemented through financial regulation, may be achieved at a lower cost than traditional benefits.

The modern social safety net requires households to access private financial markets to qualify for benefits provided through financial regulation. I contend that a successful regulatory system will aim for a holistic approach to financial inclusion.[64] Drawing from a long literature in tax law, I show how regulators may struggle to define coherent goals because of conflicts between progressivity and internalizing externalities.[65] I propose that state financial regulators should take the lead in gathering data on the impacts of regulatory changes on households, and provide some accountability to the public.[66] When financial regulators acknowledge their role in the social safety net, they can target subsidies to the neediest populations.

This paper proceeds as follows. Part I introduces the increasingly important role that financial markets play in the social safety net. Part II presents novel empirical analysis of the COVID-19 payment pauses, showing the regressive consequences of subsidies disbursed through financial markets. Part III discusses the fundamental role that three agencies—the Fed, SEC, and CFPB—play in providing benefits to the underprivileged. Part IV raises the primary theoretical challenge to regulators implementing a social safety net—the tax supremacy theory—and rebuts its primary arguments. Part V

Redistribution for Realists, 107 Iowa L. Rev. 495 (2022) (providing a framework for incorporating distributional analysis into the evaluation of legal rules).

[61] *See generally* Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. Rev. 1489 (2018); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. Chi. L. Rev. 649 (2022).

[62] Zachary D. Liscow & Cass R. Sunstein, *Efficiency vs. Welfare in Benefit-Cost Analysis: The Case of Government Funding*, (Harv. Pub. L., Working Paper, 2023), https://papers.ssrn.com/abstract=4589563 [https://perma.cc/CT7B-62MB] (last visited Jan 24, 2024).

[63] *See infra* Part V.A.

[64] *See infra* Part V.A.

[65] *See infra* Part V.B.

[66] *See infra* Part V.C.

provides a path forward for aligning financial regulators with the goals of traditional government benefit programs.

I. Financial Markets as Safety Nets

Two contemporaneous economic trends have transformed the economy over the past fifty years. The poverty rate has decreased since the War on Poverty in the 1960s increased the generosity and stability of benefits programs.[67] At the same time, wealth and income inequality have increased significantly, suggesting that middle and upper class households are gaining wealth at a faster rate than low-income groups.[68] This Part provides one potential explanation for the increasing divergence between the poor and the rich—the growth of a "shadow" social safety net targeting the middle and upper classes.

Historically, Americans facing financial hardship received support in the form of cash or in-kind benefits directly from the government. Since the Social Security Act of 1935 introduced welfare for the poor, disabled, and needy, budgets for safety net programs have grown.[69] Throughout the 1960s and later, welfare programs expanded. The Clinton administration's 1996 welfare reform was the first major contraction in the welfare state in recent history.[70] Despite this, a large and growing fraction of the national budget has been devoted to government benefits, with the most recent estimates suggesting that nearly 15 percent of the country's GDP is spent on benefit programs.[71] These programs have been largely successful.[72] Severe poverty has decreased by more than 60 percent over the past fifty years.[73] The social safety net has disproportionately benefited Black and Hispanic households.[74]

Yet, current measures may not capture the hardships that low-income groups face, despite the gains members of these groups have made from social programs. First, poverty is measured based on income, relative to required expenditures on a basket of necessary goods like food.[75] These measures are arguably biased since they may embed assumptions such as a lack of childcare expenses, and don't account for the high debt burden that many low-income

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[67] Susannah Camic Tahk, *The New Welfare Rights*, 83 Brook. L. Rev. 875, 880–81 (2017).

[68] Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, 34 J. Econ. Pers. 3, 5–12 (2020).

[69] *Origins of the State and Federal Public Welfare Programs (1932 – 1935)*, Soc. Welfare Hist. Project (2011), https://socialwelfare.library.vcu.edu/public-welfare/origins-of-the-state-federal-public-welfare-programs/ [https://perma.cc/85J4-A4PE].

[70] Zane & Toppin, *supra* note 17.

[71] Michael Tanner, *Poverty and Welfare*, Cato Inst. (2022), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/poverty-welfare [https://perma.cc/YDE3-W7P2].

[72] Danilo Trisi & Matt Saenz, *Economic Security Programs Reduce Overall Poverty, Racial and Ethnic Inequities*, Ctr. on Budget & Pol'y Priorities (July 1, 2021), https://www.cbpp.org/research/poverty-and-inequality/more-than-4-in-10-children-in-renter-households-face-food-andor [https://perma.cc/A3XD-S8N3].

[73] Zane & Toppin, *supra* note 17.

[74] *Id.*

[75] *How Is Poverty Measured?*, Inst. for Rsch. on Poverty, https://www.irp.wisc.edu/resources/how-is-poverty-measured/ [https://perma.cc/EZ36-L5ZA] (last visited Sep. 20, 2025).

households face.[76] Second, distributional harms may have actually increased during this time period since the higher quality of life for low-income groups has not been accompanied by less inequality.[77] Higher-income households have experienced staggering growth, with their wealth multiplying at a much higher rate than that of low-income groups.[78] A household in the bottom tenth percentile of the wealth distribution has seen their assets increase by only $500 between 1963 and 2022. In contrast, a household at the fiftieth percentile has gained nearly $150,000 in wealth during the same time. The ninetieth percentile has gained nearly $1.6 million.[79] Growth in wealth is also lowest for minorities and women, suggesting that inequality along multiple dimensions is worsening over time.[80] Traditional safety net programs have failed to bridge the wealth gap between the poor and rich, suggesting that other factors have accelerated the growth in wealth of middle- and high-income households.

I propose that this divergence is explained in part by significant and growing support from the government in the form of credit access and a regulated financial sector focused on expanding markets for financial products to include moderately wealthy households.[81] Policies enacted in the second half of the twentieth century, such as the expansion of the Government Sponsored Enterprises (GSEs) supporting mortgage markets,[82] the expansion of student loan availability through the Department of Education (DoE),[83] and the Community Reinvestment Act (CRA) that expanded bank activity in underserved communities,[84] were accompanied by deregulatory financial policy[85] that increased financial institutions' reach. As the financial industry grew, more households began to depend heavily on financial products and the regulation of financial institutions began to impact a broad swath of the American

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[76] Jill Rosen, *New Measurement Suggests U.S. Undercounts People in Poverty*, Hub, Johns Hopkins Univ. (Mar. 22, 2025), https://hub.jhu.edu/2022/03/25/supplemental-expenditure-poverty-measurement-robert-moffitt/ [https://perma.cc/CY42-QX9L] (last visited Sep. 20, 2025); *Developing a Child Care-Inclusive Poverty Measure*, U.S. Census Bureau (Aug. 7 2025), https://www.census.gov/library/working-papers/2025/demo/sehsd-wp2025-11.html [https://perma.cc/QHE4-EUSW] (last visited Sep. 20, 2025).

[77] Gaines et al., *supra* note 17.

[78] *Nine Charts about Wealth Inequality in America,* Urban Inst. (Apr. 25, 2024), https://apps.urban.org/features/wealth-inequality-charts/ [https://perma.cc/CJ9U-2HXF].

[79] *Id.*

[80] *Id.*

[81] Rowena Olegario, *The History of Credit in America,* Oxford Rsch. Encyc. of Am. Hist. 1 (May 23, 2019), https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-625 [https://perma.cc/QT9P-ZMHR]; Montgomerie, *supra* note 19, at 871–72.

[82] Ronel Elul, *The Government-Sponsored Enterprises: Past and Future*, Fed. Rsrv. Bank of Phila. (2015), https://www.philadelphiafed.org/the-economy/banking-and-financial-markets/the-government-sponsored-enterprises-past-and-future [https://perma.cc/UYT2-3CDJ].

[83] *A Brief History of Student Loans*, FAIR Student Loans, https://www.bu.edu/fairstudentloans/a-brief-history-of-student-loans/ [https://perma.cc/3X95-N5PE] (last visited Jan 10, 2025).

[84] *Community Reinvestment Act (CRA*), Fed. Rsrv., https://www.federalreserve.gov/consumerscommunities/cra_about.htm [https://perma.cc/WLG8-HA7E] (last visited May 11, 2025).

[85] *Financial Industry Deregulation in the 1980s*, Fed. Rsrv. Bank of Chi, https://www.chicagofed.org/publications/economic-perspectives/1985/september-october-evanoff-1 [https://perma.cc/8DR6-VZC3] (last visited Jan 10, 2025).

public.[86] Yet these institutions have largely excluded the poorest Americans, who did not have wealth to store in banks or brokerage accounts, and could not afford to take on debt.[87] Inclusion in the financial system has become a key marker for a household's ability to thrive in the American economy.[88]

A. The Insurance Value of Financial Markets

In this subpart, I argue that access to the private financial markets has created a safety net for middle- and high-income households. The argument may appear radical, since private financial markets look quite different from public social insurance programs at first glance. However, private financial markets and public social insurance programs share a similar core value: They provide extra resources, such as spending power or protection against further harm, when times are tough. For example, consider a household that takes on debt to finance a home purchase. If the household later experiences financial distress, such as job loss, they can ask their mortgage servicer for forbearance or a loan modification to lower their payment.[89] Servicers are required to pause the foreclosure process to consider these requests under guidelines promulgated by the GSEs that pool and insure a majority of US loans,[90] as well as under rules promulgated by the CFPB.[91] Renters, in contrast, have fewer protections from eviction threats by landlords as soon as they cannot make payments.[92] Financial regulation therefore provides protection to homeowners with a mortgage that is not afforded to those with other financial arrangements.

This pattern is repeated across a swath of financial products and regulators. As Abbye Atkinson characterized it in her seminal article, debt has been repurposed as a form of social provision.[93] To be specific, private financial markets provide alternative methods by which households in distress can continue consuming goods when they don't have cash on hand. Consumer credit is the most well-described example.[94] During a temporary loss of income,

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[86] *See* Robin Greenwood & David Scharfstein, *The Growth of Finance*, 27 J. Econ. Persps. 3, 5–6 (2013).

[87] *2023 FDIC National Survey of Unbanked and Underbanked Households*, Federal Deposit Insurance Corporation (Nov. 14, 2024), https://www.fdic.gov/household-survey [https://perma.cc/QVR2-4YZZ].

[88] Miguel Ampudia & Michael Ehrmann, *Financial Inclusion: What's It Worth?*, (Eur. Cent. Bank, Working Paper No. 1990, 2017), https://www.econstor.eu/handle/10419/154423 [https://perma.cc/3Y6U-NZVG].

[89] Darren J. Aiello, *Financially Constrained Mortgage Servicers*, 144 J. Fin. Econ. 590, 590 (2022); Naser Hamdi et al., *Capital Regulation and Asset Allocation Amidst Agency Conflicts: Evidence From Mortgage Servicing* 7 (Olin Business School Ctr. for Fin. & Accounting, Research Paper No. 2023/08, 2023), https://papers.ssrn.com/abstract=4550175 [https://perma.cc/WAA7-YV8P].

[90] *Servicing Loss Mitigation*, Fannie Mae,, https://singlefamily.fanniemae.com/servicing/loss-mitigation [https://perma.cc/AYA9-LDGH] (last visited May 11, 2025).

[91] 12 C.F.R. § 1024.41 (2025).

[92] *See* Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 City & Community 638, 642–43 (2019).

[93] Atkinson, *Rethinking Credit*, *supra* note 1, at 1093.

[94] *Id.* at 1098.

households can use credit cards and other loans to pay for expenses until they begin earning again.[95] Credit is therefore a source of "self-insurance," since it allows borrowers to shift their costs across time and make payments when they are best able to afford it.[96] Regulatory actions that support access to credit, which is part of the CFPB's mandate,[97] are implicitly creating a safety net for creditworthy households.

Outside of debt, other financial markets provide similar alternatives to social insurance. The most obvious example is private insurance, such as health insurance, which allows households to pre-pay for health expenses and share risk with others in their insurance pool.[98] Job and investment opportunities are likewise based in the financial markets. Companies with cheap access to credit can hire more employees[99] and can solicit more investment in their stock.[100] Households with more job opportunities are less likely to experience long term distress[101] and those with more investment opportunities can earn higher returns to maximize their wealth.[102] Regulation that supports job creation and high investment returns help protect only those that are targeted.

Financial regulators therefore have an important role to play in social safety nets. They set rules that determine the price and availability of credit, both directly to consumers and to companies that then provide jobs and investment opportunities.[103] They also specifically help determine which households have access to which financial products, often in the name of consumer protection.[104] Moreover, regulators make decisions that are intended to increase stability or supervise financial institutions that alter the safety net unexpectedly.[105] Return, for instance, to the example of a homeowner with a mortgage. When the household experiences job loss, their servicer can offer forbearance or other forms of loss mitigation, but the amount of help the servicer offers depends on the servicer's own financial solvency.[106] Servicers that

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[95] *Id.* at 1097.

[96] Dobridge, *supra* note 20, at 407–12.

[97] *See* 12 U.S.C § 5511.

[98] *See* Linda J. Blumberg & John Holahan, *Don't Le the Talking Points Fool You: It's All About the Risk Pool*, Health Affs. (Mar. 15, 2016), https://www.healthaffairs.org/content/forefront/don-t-let-talking-points-fool-you-s-all-risk-pool [https://perma.cc/TCT4-R223].

[99] *How Does the Federal Reserve Affect Inflation and Employment?*, Fed. Rsrv., https://www.federalreserve.gov/faqs/money_12856.htm [https://perma.cc/DVS9-WX6G] (last visited Aug 9, 2024).

[100] Mark R. Hake, *How Interest Rates Impact Stock Prices*, Kiplinger (Sept. 19, 2024), https://www.kiplinger.com/investing/how-interest-rates-impact-stock-prices [https://perma.cc/A8W5-FS4A].

[101] Caterina Giannetti et al., *Job Insecurity and Financial Distress*, 24 Applied Fin. Econ. 219, 219 (2014).

[102] Richard A. Booth, *How I Stopped Worrying and Learned to Love Index Funds*, Cato Inst. (Spring 2025), https://www.cato.org/regulation/spring-2025/how-i-stopped-worrying-learned-love-index-funds [https://perma.cc/PQC4-S893]; Larry Fink, *The Democratization of Investing: Expanding Prosperity in More Places, for More People*, Harv. L. Sch. F. on Corp. Gov. (Apr. 14, 2025), https://corpgov.law.harvard.edu/2025/04/14/the-democratization-of-investing-expanding-prosperity-in-more-places-for-more-people/ [https://perma.cc/A5HY-A6WF].

[103] Zinman, *supra* note 21.

[104] Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 Harv. Bus. L. Rev. 197, 231–33 (2019)

[105] Hamdi et al., *supra* note 89, at 36–39.

[106] Aiello, *supra* note 89, at 608–09.

are non-depository institutions, or non-banks, are less financially stable than bank servicers, and are less likely to support distressed borrowers.[107] The identity of a loan's servicer doesn't depend on the borrower at all; instead, rules such as Basel III's mortgage servicing provisions help determine how many loans are serviced by non-banks.[108] Empirical data shows that financial regulation has pushed low credit score borrowers toward strict servicers aggressively pursuing foreclosure.[109] Ultimately, regulators implicitly or explicitly redistribute resources across social groups, and therefore have similar impacts as government benefit administrators and tax authorities.

B. The Impact of Financial Regulation on Inequality

There is one key difference between the tax and transfer system and financial regulation: The first has an explicitly progressive agenda served by means testing while the second has little accountability for the distributional effects of its policies and includes no recourse when it redistributes regressively. Prior scholarship has shown that financial products tend to benefit more privileged populations, while the costs of indebtedness and bankruptcy hurt the least privileged the most.[110] When combined with decreasing generosity of government benefits to the very poor,[111] the growing reliance of American households on financial products has likely exacerbated social inequality. Existing data supports this view, since the wealth and income of the richest people has grown many times more quickly than that of low-income groups.[112]

The following Parts reconstruct the financial regulatory system as an underinclusive but highly effective social safety net, relying on case studies and theoretical discussion. They bring together several literatures that have already begun to discuss the role of financial regulation in influencing inequality and poverty. First, a large literature on financial inclusion and the unbanked has demonstrated how the financial services industry failed the neediest members of society.[113] Second, discussion of a market movement towards democratizing finance that have resulted in ordinary individuals receiving access to risky investments previously reserved for sophisticated parties.[114] Third, the work of scholars and policymakers who have highlighted market inequities in retail products such as mortgages, credit cards and bank accounts to motivate rulemaking by the CFPB and other regulators.[115]

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[107] *Id.* at 592–95.
[108] Hamdi et al., *supra* note 89, at 8–10.
[109] *Id.*
[110] Atkinson, *Rethining Credit*, *supra* note 1, at 1154–57.
[111] Trisi & Saenz, *supra* note 72.
[112] Saez & Zucman, *supra* note 68, at 5–12.
[113] *See generally* Baradaran, The Color of Money, *supra* note 1; Baradaran, How the Other Half Banks, *supra* note 1; Servon, *supra* note 1; Leslie, *supra* note 2; Baradaran, *supra* note 2; Odinet, *supra* note 2.
[114] J. Carter Braxton et al., *supra* note 2; Mihet, *supra* note 2; Cable, *supra* note 2, at 672–75.
[115] *See generally* Galle, *supra* note 2; Sarin, *supra* note 2; Van Loo, *supra* note 1; Padi, *supra* note 1.

The literature on financial inclusion has focused on the financial habits of low-income and disadvantaged individuals. Scholars have documented how exclusion from formal banking—including savings accounts, checking accounts, and bundled products like credit cards and mortgage loans—kept minority families from building wealth over the last century.[116] Though less than 10 percent of US citizens are unbanked, the number rises to over 30 percent for low-income citizens, and likely much higher for undocumented and underdocumented immigrants.[117] These populations are more likely to use alternative financial services such as check cashing and payday lending, which come with high fees and risk.[118] At least part of these patterns can be explained by differential availability of traditional and alternative banking services in low-income communities of color.[119] Bank branches have been closing in increasing numbers, with closures concentrated in low-income neighborhoods,[120] and those that remain open create barriers to access with short business hours and identification requirements.[121] In contrast, check cashers and payday lenders are available to provide liquidity to night shift workers, and bundle their services with wire transactions so immigrants can send money to family overseas.[122] The result is a two-tiered financial services system, with the most disadvantaged individuals being shut out from the high-quality offerings of traditional banks.[123] Ultimately, these disparities can be traced back to a long history of discrimination in access to wealth-building, such as redlining.[124] Indeed, even when historically disadvantaged communities are now welcomed into traditional financial services, they are provided lower-quality products with higher fees, low returns, and more risk borne by the consumer—a practice termed "predatory inclusion."[125]

Separately, a grassroots movement towards "democratizing finance" has attempted to capture the high investment returns enjoyed by institutional

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[116] Baradaran, *How the Other Half Banks*, *supra* note 1.

[117] *Id.* at 139–61.

[118] Baradaran, The Color of Money, *supra* note 1, at 101–03; Servon, *supra* note 1, at 103–05.

[119] Leslie, *supra* note 2, at 744.

[120] Alaina Barca & Harry Hou, *U.S. Bank Branch Closures and Banking Deserts*, Fed. Rsrv. Bank of Phila. (Feb. 2024), https://www.philadelphiafed.org/community-development/credit-and-capital/u-s-bank-branch-closures-and-banking-deserts [https://perma.cc/4ZTT-CR6C] (last visited Sep. 20, 2025); Melissa Hellmann, *Bank branch closure rate doubled during pandemic*, Ctr. for Pub. Integrity (Feb. 17, 2022), https://publicintegrity.org/inequality-poverty-opportunity/bank-branch-closure-rate-doubled-during-pandemic/ [https://perma.cc/233J-6H9Z].

[121] Paul Calem, Chris Henderson, & Jenna Wang, *Who Remains Unbanked in the United States and Why?* (Fed. Reserve Bank of Phila. Working Paper No. 25-02, Jan. 2025), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2025/wp25-02.pdf [https://perma.cc/WYY3-98PN].

[122] Servon, *supra* note 1, at 120–25.

[123] Baradaran, *The Color of Money*, *supra* note 1, at 250–51.

[124] Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership 3–4 (2019).

[125] *Id.* at 5.

investors and distribute them to smaller retail investors.[126] Ordinary people have become increasingly likely to participate in the capital markets, with retail trading volume doubling since 2014.[127] This growth has coincided with several changes in the retail investment markets. Brokerage accounts have increasingly offered low fee or commission-free trading options.[128] Further, fractional investments became widely available, allowing retail traders to buy a small slice of an expensive security.[129] Capitalizing on these trends, financial technology companies such as Robinhood entered the marketplace, offering retail investors access to options and other complex investment vehicles that were previously available only to sophisticated investors.[130] Technological innovations introduced a new class of crypto investments to the retail sector.[131] Social media trends and easy communication across investors on forums such as Reddit allowed for retail investors to take coordinated action, giving rise to high profile stock market events like the GameStop short squeeze.[132] Taken together, these market mechanisms helped retail investors access new markets that were previously off limits to them. Since retail investors are more likely to be young and low-income, the SEC and other regulators have taken an increased interest in protecting these investors through aggressive enforcement and targeted new regulation.[133]

In the aftermath of the 2008 financial crisis, a group of scholars and policymakers highlighted how distributional concerns can motivate consumer-facing financial regulation. The increased attention to consumer finance after the crisis was driven by the impulse to protect uninformed and behaviorally

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[126] John Detrixhe, *The Dark Side of the Democratization of Trading,* Quartz (Jan. 29, 2021), https://qz.com/1966363/gamestop-shows-the-dark-side-of-financial-democratization [https://perma.cc/S83P-MM8Q].

[127] Pallavi Rao, *Charted: U.S. Retail Investors Inflows* (2014-2023), Visual Capitalist (Nov. 5, 2023), https://www.visualcapitalist.com/charted-u-s-retail-investor-inflows-2014-2023/ [https://perma.cc/W4BT-B4QN].

[128] Lisa Beilfuss & Alexander Osipovich, *The Race to Zero Commissions*, Wall St. J. (Oct. 5, 2019), https://www.wsj.com/articles/the-race-to-zero-commissions-11570267802 [https://perma.cc/3E6P-YUUE].

[129] Thomas Heath, *Shares By the Slice: Fractional Investing Sparks a Stock Market Stampede*, Washington Post (Jul. 10, 2020), https://www.washingtonpost.com/business/2020/07/10/shares-by-slice-fractional-investing-sparks-stock-market-stampede/ [https://perma.cc/DTQ7-7Z68].

[130] John Divine, *How Robinhood Changed an Industry,* U.S. News (Oct. 17, 2019), https://money.usnews.com/investing/investing-101/articles/how-robinhood-changed-an-industry [https://perma.cc/G49L-2YL8].

[131] Inbar Preiss, *Majority of Bitcoin Retail Investors Lost Money in the Last Seven Years*, The Block (Feb. 20, 2023), https://www.theblock.co/post/213372/majority-of-bitcoin-retail-investors-lost-money-in-the-last-seven-years-bis [https://perma.cc/2MZ2-877X].

[132] Allan M. Malz, *The GameStop Episode: What Happened and What Does It Mean?* CATO Inst. (2021), https://www.cato.org/cato-journal/fall-2021/gamestop-episode-what-happened-what-does-it-mean [https://perma.cc/SHR9-8WSN].

[133] *Crypto Assets and Cyber Enforcement Actions*, SEC, https://www.sec.gov/spotlight/cybersecurity-enforcement-actions [https://perma.cc/7VP2-LL7G]; Cable, *supra* note 2, at 699 (2022).

biased consumers from making financial mistakes.[134] The crisis was partly exacerbated by the willingness of consumers to take on excessively risky mortgages, with these mortgages going disproportionately to low-income and minority borrowers.[135] In response, scholars and policymakers pointed out that financial markets regularly impose disproportionate costs on disadvantaged consumers.[136] Credit cards are more expensive for poor and unsophisticated users.[137] Mortgages have higher interest rates and result in worse outcomes for low-income borrowers.[138] Low-income consumers are pushed towards high risk credit products such as payday loans instead of being provided with stronger social safety nets.[139]

Despite the widespread acknowledgement that financial markets have disparate impacts on disadvantaged populations, financial regulation has not openly claimed its role as a provider of social safety nets.[140] In the following Parts, I discuss several modern examples of direct and indirect safety net programs instituted through financial regulation.

II. Direct Benefits through Debt Relief

During the COVID-19 crisis, financial regulators began directly providing subsidies to the American people. When many businesses shut down in March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[141] The CARES Act authorized direct payments to American citizens to provide them with economic relief, as well as other forms of emergency assistance.[142] Two loan products were given special treatment in the CARES Act: student loans and mortgages.[143] Student loan payments owed to the federal government were automatically paused, without any negative consequences to the borrower's credit report.[144] Mortgage borrowers could request forbearance status on their loans, which relieved them of the obligation

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[134] John Y. Campbell et al., *The Regulation of Consumer Financial Products: An Introductory Essay with Four Case Studies* (Harvard Kennedy School, Working Paper No. RWP10-40, 2010), https://papers.ssrn.com/abstract=1649647 [https://perma.cc/6ZMZ-JU7A].

[135] Jackson & Rothstein, *supra* note 104, at 256–65 (2019); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 64, 98–100 (2008).

[136] *See generally,* Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond* 107 Minn. L. Rev. 2039 (2022); Atkinson, *Rethinking Credit*, *supra* note 1; Raghavan, *supra* note 1, at 511; Sarin, *supra* note 2, at 1519; Padi, *supra* note 1, at 825; Van Loo, *supra* note 1.

[137] Sarin, *supra* note 2, at 1519.

[138] Padi, *supra* note 1, at 825.

[139] Atkinson, *Rethinking Credit*, *supra* note 1, at 1112.

[140] Raghavan, *supra* note 1, at 511.

[141] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136 (as Amended Through Pub. L. No. 117–328) (2024) (hereinafter "CARES Act").

[142] *Id.*

[143] *See id.* at §§ 3501–3519.

[144] *COVID-19 Emergency Relief and Federal Student Aid*, Fed. Student Aid, https://studentaid.gov/announcements-events/covid-19#resources [https://perma.cc/7DRU-QW9E] (last visited May 11, 2025); *see also* CARES Act § 4021.

to pay for at least six months.[145] When these payment pauses were set to expire, they were extended by executive order, resulting in a maximum pause of twenty-two months for student loans and eighteen months for mortgages.[146]

The stated purpose of these pauses was to provide emergency liquidity to borrowers experiencing "hardship" due to COVID-19.[147] By definition, however, non-borrowers did not qualify for these programs. Payment pauses conferred benefits on a subset of the American population, without any discussion as to why debt financing was prioritized over the sector of the population that rented their homes or paid for schooling in cash.[148] In contrast, the stimulus payments that the CARES Act authorized were carefully graduated on the basis of income, reflecting the structure of the tax code.[149] The distinction makes clear that the stimulus payments were explicitly redistributive subsidies modeled on traditional safety net programs like the EITC, unlike payment pauses.[150] In this Part, I show that the payment pauses acted as highly regressive subsidies, with a potentially larger impact than cash stimulus payments, using novel analysis of publicly available economic data.

A. Data and Analysis

To shed light on who was eligible for payment pauses and how much they stood to benefit, a dataset must be representative of the US population and include information about mortgage and student loan borrowing. The Survey of Consumer Finances (SCF) is a cross-sectional survey conducted by the Federal Reserve Board, in conjunction with the Department of the Treasury.[151] Data is collected every three years by the National Opinion Research Council, which randomly samples the US and uses voluntary structured interviews to construct a dataset about the financial health of US households.[152] Many official publications about the nation's economic health released by federal agencies, as well as scholarly academic research, have been

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[145] CARES Act § 4022; *see also What is Mortgage Forbearance?* CFPB (Oct. 19, 2023), https://www.consumerfinance.gov/ask-cfpb/what-is-mortgage-forbearance-en-289/ [https://perma.cc/682D-BEV6].

[146] Hegji, *supra* note 24 (providing a timeline of the several extensions on student loan payments announced by the Executive Department); *Learn About Forbearance*, CFPB (describing eligibility for mortgage forbearance), https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/help-for-homeowners/learn-about-forbearance/ [https://perma.cc/J54R-NGM8].

[147] CARES Act § 4022.

[148] *Id.*

[149] *Economic Impact Payments,* U.S. Dept. of Treasury, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/economic-impact-payments/ [https://perma.cc/S9RF-HQ62].

[150] *Id.*

[151] *Survey of Consumer Finances*, Fed. Rsrv. (2022), https://www.federalreserve.gov/econres/scfindex.htm [https://perma.cc/U9KG-5PEJ].

[152] *Survey of Consumer Finances*, Nat'l Opinion Rsch. Council, https://www.norc.org/research/projects/survey-of-consumer-finances.html [https://perma.cc/Q4JJ-D8AS].

based on the SCF.[153] The data is both comprehensive and representative, including information about a household's demographics, financial choices, and outcomes.[154]

I analyzed subsamples of publicly available SCF data that provide the most accurate information possible about payment pauses. To do so, I limited my analysis to data collected in 2022, which was the closest in time to the payment pauses in 2020 and 2021. I then created two subsamples of data—one for analyzing mortgage policy and the other for student loan policy. The mortgage policy sample restricted the data to households who reported making either a mortgage payment or a rent payment in the previous year. The goal was to compare the difference in benefits provided to homebuyers relative to their closest comparison group, renters. This mortgage policy subsample included nearly 16,000 surveyed households. The student loan policy sample restricted the data to households who reported having at least one year of education past high school. The goal was to compare households who financed their education with debt to those who paid in cash or already paid off their loans by the time they were surveyed. The student loan policy subsample included a different set of 16,000 households.

The method of analysis was weighted least squares.[155] It is similar to the standard linear regression, which estimates the relationship between a dependent and independent variable within a sample, holding fixed other controls. Relative to linear regression, weighted least squares uses a small sample of nationwide data, re-weights it, and estimates the population-wide relationship between variables. I performed four separate regression analyses. First, I regressed an indicator for mortgage forbearance eligibility for the full mortgage sample on controls for race, income, and age. In Figure 1 below, I show the marginal effect of race on mortgage eligibility. In other words, holding income and age fixed, the plot shows the estimated fraction of households of a particular race that are eligible for mortgage forbearance. Surrounding the estimated mean is a confidence interval that shows how much error exists in the estimation. Figure 1 demonstrates that among White households, 57 percent were eligible for forbearance. In contrast, 48 percent of Black and 49 percent of Hispanic households were eligible. Because the confidence intervals around these estimates are small, the results show that Black and Hispanic households were less likely than White households to be eligible for mortgage forbearance.

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[153] Suzanne Lindamood, Sherman D. Hanna, & Lan Bi, *Using the Survey of Consumer Finances: Some Methodological Considerations and Issues*, 41 J. Consumer Affs. 195, 195–96 (2007).

[154] *Survey of Consumer Finances (SCF), About*, Bd. of Governors of the Fed. Rsrv. Sys. (Oct. 10, 2024), https://www.federalreserve.gov/econres/aboutscf.htm [https://perma.cc/8S28-8JNL] (last visited Sep. 20, 2025); *Survey of Consumer Finances*, NORC at the Univ. of Chi. (2025), https://www.norc.org/research/projects/survey-of-consumer-finances.html [https://perma.cc/LMW7-9GHE] (last visited Sep. 20, 2025).

[155] *Weighted Least Squares*, Penn State College of Sci., https://online.stat.psu.edu/stat501/lesson/13/13.1 [https://perma.cc/5WEJ-6GBR] (last visited May 11, 2025).

FIGURE 1: THE MARGINAL EFFECT OF RACE OF MORTGAGE ELIGIBILITY

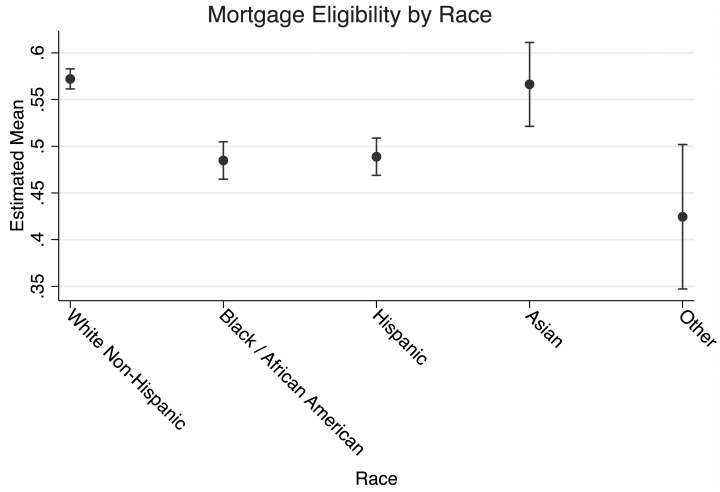
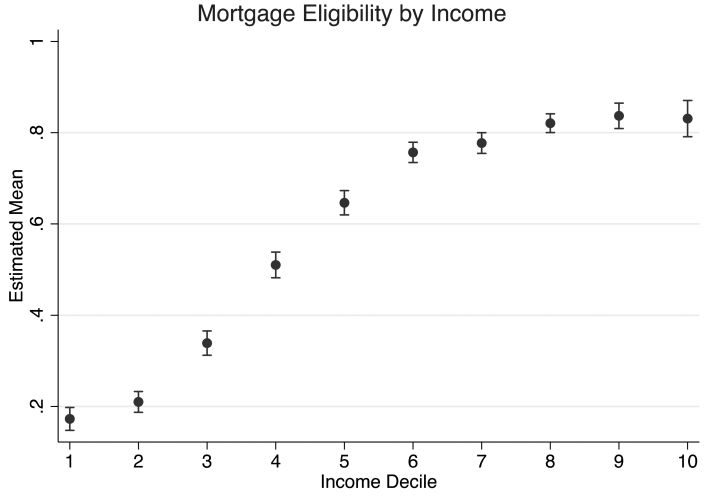


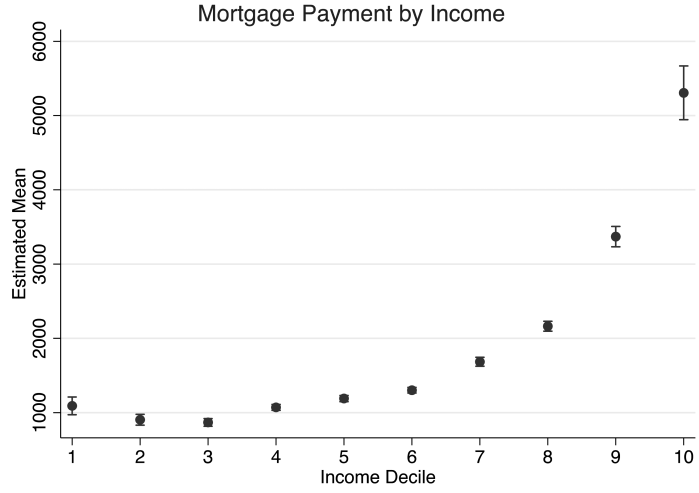
Figure 2 also reports results from the same regression. This time, the plot holds fixed race and age and plots the estimated probability of eligibility for mortgage forbearance by each income decile. Within the lowest decile of income, less than 20 percent of households classified for mortgage forbearance. Meanwhile, about 80 percent of the top four deciles were eligible for forbearance. In other words, the wealthiest 40 percent of people were four times as likely to qualify. The confidence intervals once again show how precise these estimates are. The results demonstrate that the mortgage forbearance program disproportionately benefited middle- and upper-class households.

FIGURE 2: THE MARGINAL EFFECT OF INCOME ON MORTGAGE ELIGIBILITY



The next regression restricts the sample to mortgage borrowers and compares the value of mortgage payments across demographic groups. I ran the same weighted least squares regression with the size of mortgage payment as the dependent variable. Figure 3 shows the difference in average mortgage payments across income deciles. Borrowers in the lowest deciles paid about $1000 per month in mortgage payments. In the top half of earners, this amount increased sharply. The top two income deciles made mortgage payments of $3400 and $5400 per month, respectively. Within mortgage borrowers, the top income deciles stand to gain the most from forbearance.

Figure 3: The Marginal Effect of Income on Mortgage Payment



Next, I turned to the student loan sample to analyze borrowing eligibility and the amount of student loan payments. To begin, I regressed an indicator for having a student loan based on race, income, and age. In other words, I estimate how the likelihood of having a student loan varies with race, income, and age. Figure 4 plots the results, showing how likely each racial group is to have a student loan, holding fixed income and age, which in turn results in differential eligibility for the student loan payment pause. In contrast to the mortgage payment pause, eligibility was highest among Black households, with more than 40 percent being eligible for the student loan payment pause. Figure 5 shows the difference by income decile. Middle income deciles were most likely to have student debt, with one third of households being eligible for the payment pause. In the richest and poorest deciles, only 20 percent of borrowers were eligible for the pause. The distributional impact of student loan payment pause eligibility is mixed. Middle income and Black households benefited significantly while low-income and Hispanic households were disproportionately left out of the program.

Figure 4: The Marginal Effect of Race on Student Loan Eligibility

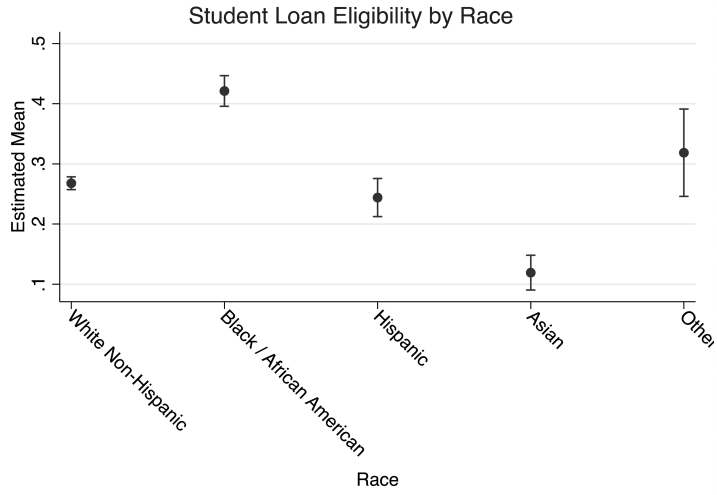
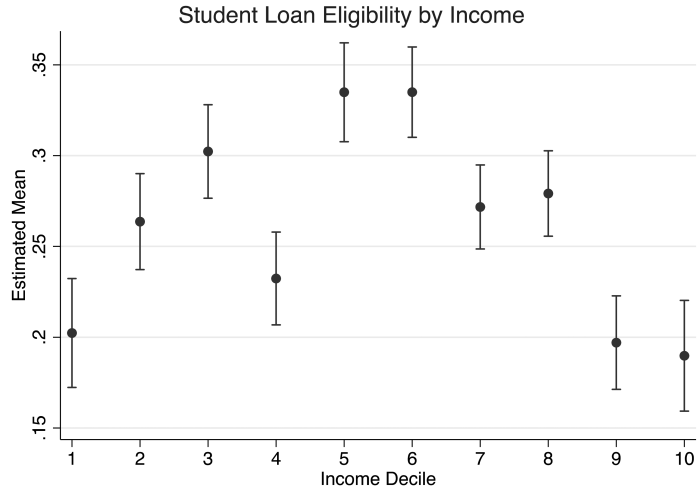


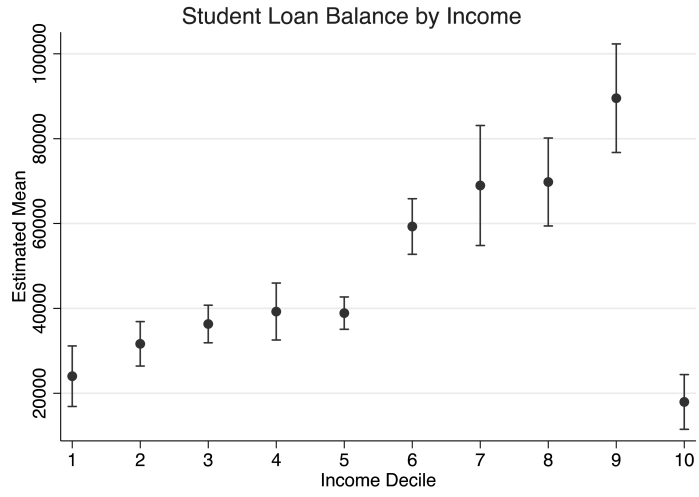
Figure 5: The Marginal Effect of Income on Student Loan Eligibility



Finally, the last regression estimated the effect of race, income, and age on total student loan balance. Figure 6 shows the marginal effect of income on student loan balances, holding age and income constant. The lowest income decile has an average loan balance of around $25,000. Loan balances increased steadily with income until the second highest decile, which had an average loan balance of $100,000. The trend reversed for the highest decile, which had

the lowest average student loan balance. Since student loan payments scale with total balances, these results show that higher-income people received more benefits from payment pauses than low-income groups. Although eligibility for the payment pause had a mixed distributional impact at the highest level, higher-income borrowers overall received nearly four times the benefit from the payment pause as low-income borrowers.

Figure 6: The Marginal Effect of Income on Student Loan Balance



B. Discussion

Empirical results above demonstrate quantitatively how the new social safety net prioritized the middle and upper classes for benefits during economic upheaval. The rich were disproportionately eligible for mortgage forbearance. Black and Hispanic households were significantly less likely to be eligible than White Non-Hispanic households. Among eligible households, the richest received the largest benefits from forbearance. In contrast, eligibility for student loan payment pauses was highest for Black borrowers, relative to White and Hispanic borrowers. Middle income households were more likely to be eligible than rich or poor households. But, similar to the case of mortgages, higher income student loan borrowers also have the highest outstanding balances.[156] Taken together, the results suggest that payment pauses did not target the vulnerable and, therefore, diverged significantly from traditional safety net programs.

How exactly did eligibility for payment pauses and the size of the paused payment impact borrowers? One way to characterize payment pauses is as

[156] The only exception is the highest income decile, which evidently pays for education largely in cash.

a form of government lending. The government relieved borrowers of their obligation to pay in exchange for a promise that the borrower would repay that money after the pause ended. Payment pauses are therefore contractual in nature and ultimately require borrowers to pay back their benefits, with the entire paused balance coming due at the end of the pause.[157] In contrast, traditional safety net programs have long been recognized as a form of property, entrenching them more firmly in the legal system.[158] Research has shown that the pauses had some of the same impacts as loans—they increased households' solvency, increased consumption and investment, and lowered signs of financial distress such as bank overdrafts.[159] Note that the analysis in this paper focuses on eligibility for pauses, not actual usage of pauses. Mortgage borrowers had to opt in to receive forbearance, and borrowers who opted in were largely low-income and minority borrowers.[160] In contrast, student loan pauses were automatic, but only covered loans from the federal government.[161] Ultimately, the distributional impact was likely more complex than characterized in this analysis. Nevertheless, payment pauses provided a safety net for the middle and upper classes without the transparency and accountability of comparable tax and transfer programs.

Based on the results, I can quantify how much money was provided to borrowers that was inaccessible to non-borrowers and low-balance borrowers. For the mortgage payment pause, the total number of months paused was eighteen at most.[162] Renters, in comparison, could get fifteen months of eviction protections if they had incomes below $99,000.[163] Renters with higher

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[157] Payment pauses are most closely related to contract modifications, since they change some terms of the contract without always requiring separate consideration. Debates rage over the enforceability and fairness of such changes, *see*, *e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. Rev. 605 (2009).

[158] For a helpful discussion of government benefits as property over the past few decades, *see* Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 Nw. U. L. Rev. 361 (2020).

[159] Ben Lourie et al., *The Impact of Debt Forbearance on Borrowers' Financial Behavior and Labor Outcomes: Evidence from Student Loans*, 57 Fin. Rsrch. Letters 104265, 1–2 (2023).

[160] Xudong An et al., *Inequality in the Time of COVID-19: Evidence from Mortgage Delinquency and Forbearance*, 21 (Fed. Rsrv. Bank of Phila., Working Paper 21-09, 2021), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2021/wp21-09.pdf [https://perma.cc/N8XQ-EJ9G]; Lan Shi, *Heterogeneity in the Effect of COVID-19 Mortgage Forbearance: Evidence from Large Bank Servicers*, 24 Cityscape 21 (2022).

[161] *COVID-19 Emergency Relief and Federal Student Aid*, Fed. Student Aid, https://studentaid.gov/announcements-events/covid-19 [https://perma.cc/N42E-ZDUM] (last visited May 11, 2025).

[162] *CARES Act Forbearance Fact Sheet for Mortgagees and Servicers of FHA, VA, or USDA Loans*, U.S. Dep't of Agric., https://www.rd.usda.gov/sites/default/files/Interagency_COVID19_Housing_Forbearance_FS_Lenders.pdf [https://perma.cc/P2WQ-UPET] (last accessed September 12, 2025).

[163] *Federal Moratorium for Nonpayment of Rent*, Nat. Housing L. Project (Aug. 2021), https://nlihc.org/sites/default/files/Overview-of-National-Eviction-Moratorium.pdf [https://perma.cc/ZFR3-MCF9]; Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 760 (2021).

incomes received about six months of such protection.[164] Having a mortgage with an income below $99,000 in the SCF data translates to payments of about $1270 per month.[165] Three additional months without paying for housing translates to $3810 per low-income mortgage borrower.[166]

In higher-income populations, the average monthly payment is $3,060.[167] A full year of housing without payment, which is the additional generosity offered to homeowners over renters, amounts to an interest-free loan of $36,720.[168] SCF data shows that half of mortgage borrowers have incomes above $99,000, meaning that the average mortgage borrower received $19,890 of value from payment pauses.[169] However, given that the distribution of income nationwide is skewed towards very high incomes for very few and assuming that about fifty million mortgages were outstanding in the US,[170] the top 50 percent of the income distribution received 89 percent of the benefits of mortgage forbearance.[171] That is, out of the total of $995 billion in liquidity provided by the program, the top 50 percent of the income distribution received $885 billion.[172]

To quantify the magnitude of the student loan payment pause, I estimate a borrower's monthly payment based on their loan balance. The average student loan balance is about $49,400.[173] This translates to a monthly payment of about $520.[174] Over the twenty-two months of payment pauses, this translates to an additional $11,440 in liquidity per person. Given that there are 43.6 million student borrowers in the United States, the total size of the student loan pause provided nearly $500 billion in liquidity nationwide.[175] Though middle income and Black borrowers were most likely to be eligible, higher-income individuals received a disproportionately large share of the benefits. The top 50 percent of the student loan borrower income distribution had an average total balance of $63,530, or $663 per month in payments. This means the wealthier half of the population received $317 billion of the $500 billion

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[164] *See* Data Appendix (SCF Analysis), available at https://manishapadi.com/workingpapers/ *and* https://www.dropbox.com/scl/fi/dh6ztrdj212e9tjp1m4bm/FinRegSafetyNet_Data-Appendix_small.zip?rlkey=mkppiicf9qg8rr766hu6wfe8w&e=2&st=9p4cldoy&dl=0 [https://perma.cc/J6QJ-ZVNL].

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See Economic Well-Being of U.S. Households (SHED)*, Fed. Rsrv. (2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-income.htm [https://perma.cc/2JER-XM76].

[170] *Homeowners Equity Remains High*, FHFA (Aug. 31, 2023), https://www.fhfa.gov/Media/Blog/Pages/Homeowners-Equity-Remains-High.aspx [https://perma.cc/6Z4W-R9AZ].

[171] This calculation is based on data showing that only the top 32 percent of the income distribution has an income over $99,000. Therefore, the remainder of the top 50 percent of the income distribution received approximately $3,810, with the proportion of the benefits accruing to the top 50 percent of the population being calculated as (3060*.18+36720*.32)/(3060*.68+36720*.32).

[172] *See* Data Appendix, *supra* note 164.

[173] *Id.*

[174] *Id.*

[175] Matt Schulz & Dan Shepard, *Student Loan Debt Statistics*, Lending Tree (Aug. 10, 2023), https://www.lendingtree.com/student/student-loan-debt-statistics/ [https://perma.cc/8M9R-37KJ].

(63.4 percent) in liquidity created by the pause.[176] These results are consistent with a line of research showing that the student loan payment pause was regressive.[177] Combined with mortgage forbearance, the payment pauses extended nearly $1.6 trillion in additional liquidity to households.[178] More than 75 percent of these benefits accrued to the top half of the income distribution. In comparison, direct stimulus payments, which the richest households were prevented from receiving, paid out only $814 billion nationwide.[179]

The legacy of the COVID-19 payment pauses is likely to be mixed. Experts in financial stability have lauded the pauses for helping the US economy to avoid recession, unlike in 2008.[180] As such, they may recur as a policy lever in future nationwide emergencies. Detractors have argued, however, that payment pauses drove inflation and encouraged profligate spending.[181] Inflation itself has regressive consequences, which may have reinforced the regressive design of the payment pause policy. More research is needed to determine whether pandemic policy could have been better designed. Regardless, payment pauses made borrowing to finance housing or education the key factor in eligibility for emergency liquidity. This new form of protection during an economic downturn was therefore disproportionately available to high income groups.

III. Indirect Benefits through Regulation

Payment pauses during COVID-19 made explicit a long-standing, but previously hidden, history of privileging households who could access financial markets. They were the latest in a long history of safety net policies implemented in secret by financial regulators. In this Part, I argue that typical regulatory actions—made purportedly to remedy market failures, increase

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[176] *See* Data Appendix, *supra* note 164.

[177] Diego Briones et al., *Student Loan Payment Pause Benefits High-Income Households the Most*, Education Next (Jan. 17, 2023), https://www.educationnext.org/student-loan-payment-pause-benefits-high-income-households-most-borrowers-unprotected-from-risk/ [https://perma.cc/XL24-7U6E]; Turner, *supra* note 28.

[178] The bottom 50 percent of income received $14 billion from mortgage forbearance and $283 billion from student loan payment pauses. The top 50 percent received $980 billion from mortgage forbearance and $317 billion from student loan payment pauses. The total across both programs for the entire population is $1.59 trillion. Data Appendix, *supra* note 164.

[179] *Update: Three Rounds of Stimulus Checks. See How Many Went out and for How Much*, Pandemic Oversight (Feb. 17, 2022), https://www.pandemicoversight.gov/data-interactive-tools/data-stories/update-three-rounds-stimulus-checks-see-how-many-went-out-and [https://perma.cc/8P7U-K5RB].

[180] Mark A. Calabria, *Pandemic Mortgage Forbearance Design: A Practitioner's Perspective*, CATO Inst. (2023) https://www.cato.org/regulation/spring-2023/pandemic-mortgage-forbearance-design-practitioners-perspective [https://perma.cc/H3MZ-5SB6].

[181] *Extending the Student Loan Payment Pause is Bad Policy,* CRFB (Jul. 28, 2022), https://www.crfb.org/blogs/extending-student-loan-payment-pause-bad-policy [https://perma.cc/XRT2-4M2B]; Allysia Finley, *How the Student-Loan Payment Pause Hurt Borrowers,* Wall St. J. (Aug. 20, 2023), https://www.wsj.com/articles/how-the-student-loan-payment-pause-hurt-borrowers-personal-finance-politics-4b07b360 [https://perma.cc/Q638-R9BU]. *Contra* Ben Kaufman, *No, the Student Loan Pause is Not Driving Inflation*, SBPC (April 21, 2022), https://protectborrowers.org/no-the-student-loan-pause-is-not-driving-inflation/ [https://perma.cc/3DL4-UC86].

efficiency, or improve macroeconomic health—impact households' access to safety nets. Moreover, I demonstrate that regulators often have an implicitly redistributive mandate and must make policy with an eye to spreading resources across social groups. Yet there is little awareness among regulators or accountability to the public for the potentially regressive consequences of rulemaking.

A. The Federal Reserve and Monetary Policy

The Fed has many policy responsibilities, but its most high-profile choices surround monetary policy decisions made by the Federal Open Market Committee (FOMC).[182] The FOMC sets a target federal funds rate, or the interest rate at which commercial banks lend to each other.[183] To achieve this rate, the Fed engages in open market operations such as buying or selling securities at scale.[184] When the Fed buys securities and injects money into the market, commercial banks have more cash on hand to lend and interest rates in the market decrease. The opposite occurs when the Fed sells securities to increase interest rates. The Fed can also use other levers, such as changing the discount rate at which commercial banks can borrow from the Fed,[185] and reserve requirements that mandate banks to deposit cash reserves with the Fed for macroprudential stability.[186] The power the Fed wields over the economy is difficult to overstate; not only is it the most independent federal agency, but any public statements by Fed officials can also shift public sentiment and make waves in the capital markets.[187]

It is illuminating, therefore, to start by understanding the Fed's mandate. The FOMC releases policy directives each year that describe the goals of monetary policymakers.[188] In 2023, it articulated a three-part mandate of "promoting maximum employment, stable prices, and moderate long-term interest rates."[189] These stated goals do not overtly mention social insurance, safety nets, or redistribution. Instead, employment, inflation, and interest rates are key macroeconomic indicators which can be used to evaluate whether an economy is growing sustainably.[190] Within these goals, however, lurk distributional considerations.

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[182] *Policy Tools*, Fed. Rsrv. (last updated May 20, 2024), https://www.federalreserve.gov/monetarypolicy/policytools.htm [https://perma.cc/C45M-234K].

[183] *Id.*; *Policy Tools: Open Market Operations*, Fed. Rsrv. (last updated Dec. 18, 2024), https://www.federalreserve.gov/monetarypolicy/openmarket.htm [https://perma.cc/4ZD7-CZL5].

[184] *Id.*

[185] *Policy Tools: The Discount Window and Discount Rate*, Fed. Rsrv. (), https://www.federalreserve.gov/monetarypolicy/discountrate.htm [https://perma.cc/2HGW-44P9] (last updated May 20, 2024).

[186] *Policy Tools: Reserve Requirements*, Fed. Rsrv., https://www.federalreserve.gov/monetarypolicy/reservereq.htm [https://perma.cc/QU6V-RTD6] (last updated Nov. 26, 2024).

[187] *See generally* Peter Conti-Brown et al., *Towards an Administrative Law of Central Banking*, 38 Yale J. Reg. 1 (2021).

[188] *Open Market Committee Rules*, *supra* note 34.

[189] *Id.* at 2.

[190] J. Lindé, F. Smets & R. Wouters, *Challenges for Central Banks' Macro Models*, *in* 2 Handbook of Macroeconomics 2185 (John B. Taylor & Harald Uhlig eds., 2016).

First, the definition of maximum employment impacts who is most affected by Fed policy. The FOMC describes maximum employment as "broad-based and inclusive."[191] Chairman Powell noted that this language was included to highlight the Fed's focus on "low- and moderate-income communities."[192] Chairman Powell has further clarified that this means the Fed looks at "unemployment rates and participation rates and wages for different demographic and age groups."[193] Indeed, the full employment mandate was historically tied to the civil rights movement.[194] Racial justice advocates have long recognized the power of monetary policy tools in impacting inequality.[195] Just as important is what the mandate does not say—no mention is made of maximizing incomes or replacing employment with an indicator that captures the overall productivity of the labor sector.[196] If the purpose of Fed policy was purely to maximize efficiency, the Fed should pursue policies that maximize overall income, paired with tax policy that would redistribute the income earned by the wealthy to low-income groups or unemployed.[197] By pursuing the goal of maximum employment, the Fed is attempting to get every worker an income, no matter how small.

This closely mirrors the goal of a government benefits program or universal basic income.[198] Although this is a progressive goal in many ways, the focus on *employment*, referring to formal paid labor, can also have regressive consequences for stay-at-home parents and other workers who do not receive monetary compensation.[199] The first part of the Fed's mandate takes a strong stance on redistribution, and this has already been partially acknowledged by the Fed.[200]

Second, the Fed's goal of achieving stable prices also has distributional impacts on ordinary households. The opposite of stable prices is inflation, which has been recognized in economics as having distributional consequences for over seventy-five years. As early as the 1950s, inflation was shown to decrease returns to creditors and benefit debtors making fixed payments.[201]

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[191] *Open Market Committee Rules*, *supra* note 34, at 4.

[192] Powell, *supra* note 36.

[193] *Id.*

[194] *The Full Employment Mandate*, *supra* note 35; Stein & Regmi, *supra* note 35.

[195] *Id.*

[196] For example, the labor share of income has been decreasing even though employment levels have been high. *See* Michael W. L. Elsby, Bart Hobijn & Ayşegül Şahin, *The Decline of the U.S. Labor Share*, 2013 Brookings Papers on Econ. Activity 1 (2013).

[197] This policy would follow the proposals made by Kaplow and Shavell in several papers. *See, e.g.*, Kaplow & Shavell *Should Legal Rules Favor the Poor?*, *supra* note 16.

[198] *Guaranteed Income Pilot Program*, CA Dept. of Soc. Servs., https://www.cdss.ca.gov/inforesources/guaranteed-basic-income-projects [https://perma.cc/S8XX-L82P] (last visited Apr. 12, 2025).

[199] Charges that the Fed redistributes away from stay-at-home parents and towards formal sector workers reached the national news when the Fed implemented credit card rules that favored workers with documented individual income. Robert Schmidt, *Why Stay-at-Home Moms Are Mad at the Fed,* NBC News (Feb. 28, 2011, 2:45 PM), https://www.nbcnews.com/id/wbna41784394 [https://perma.cc/GTR3-7VH9].

[200] *Open Market Committee Rules*, *supra* note 34, at 4.

[201] Reuben A. Kessel, *Inflation-Caused Wealth Redistribution: A Test of a Hypothesis*, 46 Am. Econ. Rev. 128, 128–29 (1956).

Since debt is issued in nominal dollars, a debtor making payments of $100 per month finds those payments to be a smaller part of their overall costs in an inflationary environment. In contrast, the creditor receiving payments of $100 a month finds that their resulting purchasing power is lower in an inflationary environment. Further early work showed other dimensions along which inflation redistributes.[202] People whose incomes were rising higher than inflation benefited relative to those with slow income growth. Investors with higher-return assets did better than investors with low-risk, low-return portfolios. Modern empirical research showed that on average, this resulted in redistribution away from wealthy, older individuals towards young middle-class households with growing incomes and high indebtedness.[203] Counteracting this somewhat progressive result is the finding that inflation redistributed from foreigners to citizens.[204] Extrapolating from these results, it is likely that low-income individuals without debt, with low income growth, and with few high-growth assets are hurt the most by inflation—they face decreasing purchasing power without any countervailing benefits. Despite implicit redistribution resulting from the Fed's inflation policy, Chairman Powell and the FOMC have not discussed these economic principles in their public addresses.

Third, the Fed is tasked with maintaining moderate long-term interest rates. The impact of interest rates on redistribution is difficult to ascertain, but a spate of new research in macroeconomics has made headway on this issue.[205] Since high interest rates are associated with a contraction of credit and less economic activity, they benefit households with low marginal propensities to consume (MPC).[206] Low-income households are estimated to have high MPC, meaning that a larger share of any raise they might recive would go towards consumption.[207] Therefore, they are less likely to benefit from high interest rates. Moreover, high interest rates benefit households with low marginal propensities for risk taking.[208] That is, households that would allocate an increase in wealth to a low-risk asset, rather than a high-risk asset, benefit from high interest rates. Populations with these preferences include retirees and other wealthy, but risk-averse, individuals.[209] Note that these models refer to unexpected increases in interest rates, while the Fed aims for no unexpected changes. Therefore, the beneficiaries of Fed policy would likely be the opposite of the populations described above. Individuals with stronger preferences to consume and take risk, including both low-income and wealthy households with high risk tolerance, benefit from long-term stability and moderately low

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[202] G. L. Bach & Albert Ando, *The Redistributional Effects of Inflation*, 39 Rev. Econ. and Stat. 1, 2 (1957).

[203] Matthias Doepke & Martin Schneider, *Inflation and the Redistribution of Nominal Wealth*, 114 J. Pol. Econ. 1069, 1071 (2006).

[204] *Id.*

[205] *See generally* Rohan Kekre & Moritz Lenel, *Monetary Policy, Redistribution, and Risk Premia*, 90 Econometrica 2249 (2022); Adrien Auclert, *Monetary Policy and the Redistribution Channel*, 109 Am. Econ. Rev. 2333 (2019).

[206] Auclert, *supra* note 205. The term MPC refers to what share of an increase in income a household would spend on consuming goods rather than saving or investing.

[207] *Id.*

[208] Kekre & Lenel, *supra* note 205.

[209] *Id.*

interest rates. Of course, the meaning of the term moderate is subjective and may also be taken to mean moderately high.[210] Regardless of the precise impacts, the Fed's interest rate policy will have significant distributional consequences, which are likely to be shrouded from the public by rhetoric that focuses on average impacts across the economy, rather than separately analyzing subgroups.

Taken together, the Fed's mandate implicitly creates a weighting over individuals' welfare. That is, by satisfying the conditions specified in their mandate, Fed officials generate winners and losers among sectors of the populace. Retrospective studies have provided empirical evidence to support these differential impacts by income and wealth.[211] Low-interest-rate environments have been shown to harm risk-averse savers investing in treasury bills and similar vehicles.[212] Low-income groups and unbanked people are likely to be most harmed by inflation.[213] High unemployment rates tend to hurt low-income populations the most.[214]

A growing literature has also documented disparities in the effects of monetary policy by race. Monetary policy has differential effects on Black unemployment rates.[215] Unexpected increases in interest rates decrease Black employment disproportionately, and result in longer durations of unemployment with slower recovery for Black workers.[216] Low interest rates and increased money supply, on the other hand, have complex impacts on the racial wealth gap.[217] Black households get larger gains in employment, but not in income.[218] In contrast, wealth increases less for Black households due to fewer high-return investments such as real estate.[219] Theoretical models calibrated using real-world data suggest that expansionary monetary policy with low interest rates may ultimately benefit Black and Hispanic populations the most.[220] Given the tremendous complexity of this type of policymaking, however, a lot remains to be understood in order to quantify the redistributive effects of monetary policy.

Despite the growing interest among academics in documenting the distributive effects of Fed policy choices, politicians and the public seem to be largely unaware of the Fed's redistributive role. Members of Congress proposed adding an explicit redistributive component to the Fed's mandate in

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[210] Kelly Evans, *The Fed Has Three Mandates,* CNBC (Oct. 20, 2023, 11:27 AM), https://www.cnbc.com/2023/10/20/kelly-evans-the-fed-has-three-mandates.html [https://perma.cc/V533-F48F].

[211] Renee Haltom, *Winners and Losers from Monetary Policy*, Richmond Fed (2012), https://www.richmondfed.org/-/media/richmondfedorg/publications/research/econ_focus/2012/q2-3/pdf/federal_reserve.pdf [https://perma.cc/9EE9-JFFQ].

[212] *Id.* at 6.

[213] *Id.* at 8.

[214] *Id.* at 9.

[215] *See generally* Rodgers, *supra* note 37.

[216] *Id.*

[217] Bartscher, *supra* note 37.

[218] *Id.*

[219] *Id.*

[220] Makoto Nakajima, *Monetary Policy with Racial Inequality* (Fed. Rsrv. Bank of Phila., Working Paper No. 23-9, 2023), https://papers.ssrn.com/abstract=4475084 [https://perma.cc/AH7U-VG76].

2021 and again in 2023.[221] If passed, the bill would require the Fed's actions to "foster the elimination of disparities across racial and ethnic groups with respect to employment, income, wealth, and access to affordable credit."[222] President Biden was in support of the bill, and had even mentioned an explicitly redistributive Fed mandate as a policy proposal in his original presidential campaign in 2020.[223] On the other hand, critical commentators branded this the "woke mandate" that would "politicize monetary policy" and require Fed policymakers to decide which economic outcomes are fair.[224]

The second Trump administration has moved in the opposite direction by taking unprecedented steps to decrease Fed independence.[225] One key move in this direction is Trump's attempt to remove Fed Governor Lisa Cook from her position, based on allegations of mortgage fraud.[226] In attacking central bank independence and, in particular, a respected Black female economist studying segregation and inequality, Trump has implicitly acknowledged that an independent Fed has the power to support a "woke" agenda that would clash with his political base.[227] Ultimately, the Fed plays many important roles in influencing the American economy, but both parties have separately acknowledged its power to redistribute income and wealth.

B. SEC Rules on Retail Investors

The Securities and Exchange Commission (SEC) is the primary regulator of the capital markets. The SEC engages in rulemaking, supervision and enforcement against financial institutions devoted to trading and investment. Though most participants in the capital markets are large firms, the actions taken by the SEC have significant impacts on ordinary people who have invested their savings in stocks or other financial assets.[228] This population, known as retail investors, is a significant focus of SEC rulemaking and

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[221] *See* Federal Reserve Racial and Economic Equity Act, H.R. 2543, 117th Cong. (2021); *Ranking Member Waters, supra* note 8.

[222] Federal Reserve Racial and Economic Equity Act, H.R. 4194, 118th Cong. (2023).

[223] Kurtzleben, *supra* note 9.

[224] *A Woke Mandate*, *supra* note 9; *see also* Dorn, *supra* note 9.

[225] Alexandra Thornton, *The Trump Administration's Interference With Federal Reserve Independence Carries Significant Risks*, Ctr. for Am. Progress (Sep. 25, 2025), https://www.americanprogress.org/article/the-trump-administrations-interference-with-federal-reserve-independence-carries-significant-risks/ [https://perma.cc/9ZZL-KYSC].

[226] Steven Greenhouse, *Why Trump's attacks on the Fed's independence are so dangerous*, The Guardian (Sep. 21, 2025), https://www.theguardian.com/global/commentisfree/2025/sep/21/trumps-fed-attacks-independence-dangerous [https://perma.cc/6MS8-CVMY].

[227] Curtis Bunn & Steve Kopack, *Lisa Cook's path to Fed governor prepared her for a fight in the spotlight*, NBC News (Aug. 28, 2025), https://www.nbcnews.com/news/nbcblk/lisa-cook-bio-federal-reserve-governor-trump-mortgage-fraud-rcna227565 [https://perma.cc/V4LV-BADU]; Bryan Fair, *Trump's effort to terminate Lisa Cook is a 'shameful abuse of executive power'*, S. Poverty L. Ctr. (Aug. 29, 2025), https://www.splcenter.org/resources/hopewatch/trump-lisa-cook-federal-reserve-board-governors/ [https://perma.cc/G67T-6QCW]; *Firing Federal Reserve Governor Lisa Cook*, Econ. Pol'y Inst. (Oct. 1, 2025), https://www.epi.org/policywatch/firing-federal-reserve-governor-lisa-cook/ [https://perma.cc/HKH6-JUB2] (last visited Oct. 7, 2025).

[228] Khrishan Arora, *The Rise of the Retail Investor*, Forbes (Nov. 4, 2022, 7:30 AM), https://www.forbes.com/sites/forbesagencycouncil/2022/11/04/the-rise-of-the-retail-investor/ [https://perma.cc/P5ZB-HYCX].

enforcement.[229] Retail investors' returns depend on the smooth functioning of capital markets.[230] Retirees and upwardly mobile workers can have their entire lives upended if they make the wrong investment.[231] Despite the SEC having responsibility for managing markets for the benefits of all participants, their policies have the disproportionate impacts on unsophisticated investors who are least able to bear losses in risky financial ventures.[232]

At its core, the SEC's regulatory focus is ensuring that information and investment returns flow from the sophisticated and wealthy institutional market participants to small retail investors. Its redistributive mission is evident in the three-part mandate: protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation.[233] Commentators have noted that the first part of the SEC's mandate has long focused on retail investors.[234] Indeed, the goal of introducing securities laws after the Great Depression was motivated by a desire to avoid a repeat of the stock market crash, with a focus on protecting the most vulnerable investors, who were too uninformed to protect themselves from loss.[235] Moreover, the second part of the mandate introduces an explicit reference to redistribution—maintaining *fair* markets requires weighing concerns for equity against any benefits for efficiency.[236] Debates around high-frequency trading,[237] insider trading,[238] and mandatory disclosure[239] have centered around equitable concerns created by lack of regulation. Finally, the goal of facilitating capital formation has made the SEC's mission special among agencies. In its role as regulator, the SEC is required to help the industries it targets to grow.[240] Part of this mission involves helping small enterprises and underrepresented minorities to raise money.[241] The SEC

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[229] *See* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 Va. L. Rev. 1025, 1029–35 (2009).

[230] *See generally* Spamann, *supra* note 4.

[231] *See generally* Fisch & Wilkinson-Ryan, *supra* note 41.

[232] Winston, *supra* note 1, at 786.

[233] *Mission*, SEC, https://www.sec.gov/about/mission [https://perma.cc/ZR6S-CYNX] (last updated Dec. 29, 2023).

[234] Langevoort, *supra* note 229 at 1025.

[235] *See generally* Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance (3d ed. 2003).

[236] Janet Austin, *What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation*, 8 Wm. & Mary Bus. L. Rev. 215, 220 (2016).

[237] *Id.*

[238] Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin to the Realm in the Information Age*, 95 Nw. U. L. Rev. 443, 444 (2000).

[239] Jeff Schwartz, *Fairness, Utility, and Market Risk*, 89 Or. L. Rev. 175, 177 (2010); *see also* Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 Harv. Bus. L. Rev. 135, 139 (2013).

[240] *See generally* David S. Ruder, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case -- Investors Rights Symposium*, 26 Pace L. Rev. 39 (2005).

[241] *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets,* SEC (Nov. 30, 2022), https://www.sec.gov/corpfin/facilitating-capital-formation-secg [https://perma.cc/F8SL-JVXX]; *SEC Adopts Rules to Facilitate Smaller Companies' Access to Capital*, SEC (March 25, 2015), https://www.sec.gov/news/press-release/2015-49#:~:text=The%20Securities%20and%20Exchange%20Commission,for%20smaller%20issuers%20of%20securities [https://perma.cc/AM9L-P2NJ]; Caroline A. Crenshaw,

would not be satisfying its mandate if it did not prioritize the disadvantaged participants in the financial markets.

Three examples of SEC rulemaking and enforcement in recent years have demonstrated the distributional consequences of capital markets regulation. First, the accredited investors rule has limited risk-taking among unsophisticated investors.[242] Typically, retail investors have access to securities sold by public companies and registered with the SEC. Registration means that companies must disclose information about the potential risks and returns associated with an investment opportunity, to the benefit of uninformed investors. Private investment opportunities that do not satisfy these rules, such as early stage private companies raising venture capital and hedge funds engaging in short selling, are typically available only to accredited investors.[243] Investors are deemed "accredited" if they have more than $200,000 a year in income consistently, or over $1 million in non-housing wealth, or alternatively if they passed exams to qualify as a financial advisor.[244] The justification for restricting investment opportunities to wealthy or educated investors was that these groups could best avoid or absorb the potential losses associated with high-risk investments.[245] Nevertheless, the high risks of these investment opportunities are also associated with high rewards. During the 2008 financial crisis, private investments provided valuable returns when the public markets were suffering from serious losses.[246] Moreover, accreditation disproportionately prevents low-income and minority investors from receiving the high returns available to more wealthy investors, perpetuating existing patterns of income and wealth inequality.[247] Although the rule was recently updated to expand access, the SEC's conception of appropriate risk-taking favors the wealthy.

Second, another recent SEC rule, Regulation Best Interest (Reg BI), has also influenced retail investors' access to non-traditional investments. In 2019, the SEC passed Reg BI, which was intended to harmonize rules applying to financial advisors.[248] Historically, there were two types of financial advisors in the US market: registered investment advisors (RIAs) and broker-dealers (BDs).[249] RIAs had a fiduciary duty to their clients to recommend the best

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Remarks to Small Business Capital Formation Advisory Committee (Nov. 29, 2023), https://www.sec.gov/news/speech/crenshaw-remarks-sbcfac-112923 [https://perma.cc/H6GM-YDFN].

[242] Winston, *supra* note 1, at 801–02 (2021).

[243] *Accredited Investors: Updated Investor Bulletin,* SEC, (April 14, 2021), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-3 [https://perma.cc/R7TW-FJ7Z].

[244] 17 C.F.R. § 230.501 (2011).

[245] *Accredited Investors: Updated Investor Bulletin, supra* note 243.

[246] Mauro Pfister & Philippe Jost, *Private Equity During the Global Financial Crisis: Investing in the Next Generation*, Capital Dynamics (Sept. 2017), https://www.capdyn.com/Customer-Content/www/news/PDFs/privateequityfinancialcrisis_nextgeneration15sep17.pdf [https://perma.cc/H7NF-RC39].

[247] Mariah Lichtenstern, *Investors Still Engage in Racist Redlining. Why Haven't We Done Something About It?* Fortune (Jan. 6, 2021, 7:00 PM), https://fortune.com/2021/01/06/redlining-black-latinx-entrepreneurship-investment-sec/ [https://perma.cc/8NLH-JQX5]; Winston, *supra* note 1.

[248] Vivek Bhattacharya et al., *Fiduciary Duty and the Market for Financial Advice*, (Nat. Bureau of Econ. Rsch., Working Paper No. 25861 2023), https://www.nber.org/papers/w25861 [https://perma.cc/24ED-3KJ2].

[249] *Id.* at 4.

products to customers and were typically paid a fraction of the total portfolio size to manage all the customers' investments.[250] BDs were considered order-takers who often were paid by commissions that created conflicts of interest between them and the client.[251] Over time, the function of BDs and RIAs converged, with both types of advisors making product recommendations and serving retail clientele.[252] The law did not change, resulting in a two-tiered market in which BDs with conflicts of interest served lower-wealth populations.[253] In and of itself, this distinction creates distributional consequences for investors at different wealth levels. Reg BI was intended to level the playing field by requiring all advisors to disclose conflicts of interest to investors and to document that their investment recommendations matched the needs and wants of their clients.[254]

The success of Reg BI has been debated, however. Proponents have argued that it has revolutionized investment recommendations and advisor compensation.[255] Criticisms have included the broad emphasis on disclosure over substantive direction to advisors, with new terms being used that are hard to interpret.[256] SEC officials noted that these issues with Reg BI would particularly hurt vulnerable investors.[257] Moreover, the SEC's enforcement of Reg BI has created uncertainty over how many high-risk investments an advisor can recommend, even with appropriate disclosure.[258] The SEC sued investors for violating Reg BI when they recommended high-risk assets to risk-averse retirees.[259] This conflicts with the SEC's own advice that investors diversify their investments, with both high- and low-risk assets having a place in a risk-averse investor's portfolio.[260] In response, the Department of Labor is currently introducing additional regulation aimed at protecting the most

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[250] *Id.* at 5.

[251] *Id.*

[252] Michael Kitces, *The Great Convergence And The Death Of Fiduciary Differentiation (For RIAs)*, Kitces (Jul. 15, 2019), https://www.kitces.com/blog/great-convergence-ria-fiduciary-marketing-differentiation-broker-dealer-regulation-best-interest/ [https://perma.cc/QG6Q-SE6R].

[253] U.S. Sec. & Exch. Comm'n, *Study on Investment Advisers and Broker-Dealers* 154 (Jan. 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf [https://perma.cc/5JJ7-LK7L] (describing how removing the broker-dealer exception may limit access to financial advice for low wealth consumers, implying that low wealth consumers rely heavily on BDs).

[254] *Regulation Best Interest, Form CRS and Related Interpretations,* SEC (Dec. 8, 2023), https://www.sec.gov/regulation-best-interest [https://perma.cc/BG45-YFMN].

[255] Mark Schoeff Jr., *Reg BI Turns 2, But Not Everyone Is Celebrating,* Investment News (May 16, 2022), https://www.investmentnews.com/regulation-and-legislation/reg-bi-turns-2-but-not-everyone-is-celebrating/221445 [https://perma.cc/6BMD-UGSZ].

[256] *Id.*

[257] Robert J. Jackson Jr, *Statement on Final Rules Governing Investment Advice,* SEC (June 5, 2019), https://www.sec.gov/news/public-statement/statement-jackson-060519-iabd [https://perma.cc/A98U-F5AS].

[258] Complaint & Jury Demand, SEC v. Western International Securities, No. 2:22-cv-04119, 4 (C.D. Cal. June 15, 2022), https://www.sec.gov/files/litigation/complaints/2022/comp-pr2022-110.pdf [https://perma.cc/225R-BVP8].

[259] Pete S. Michaels et al.,, *High Risk, No Reward: SEC's First Reg BI Enforcement Action,* Mintz (June 21, 2022), https://www.mintz.com/insights-center/viewpoints/2161/2022-06-21-high-risk-no-reward-secs-first-reg-bi-enforcement-action [https://perma.cc/X875-R9BP].

[260] *Beginners' Guide to Asset Allocation, Diversification, and Rebalancing,* SEC (Aug. 27, 2009), https://www.sec.gov/about/reports-publications/investor-publications/investor-pubs-asset-allocation [https://perma.cc/F5FF-ATWC].

vulnerable investors: retirees.[261] Not only has the SEC's regulation of financial advice re-allocated returns across investors with different levels of wealth, it has also restricted vulnerable investors to moderately risky investments.

Third, enforcement actions against Robinhood and other companies serving "ultra retail" investors have shined light on the distributive consequences of capital market regulation.[262] Robinhood revolutionized the brokerage marketplace by providing no-fee accounts with little to no minimum balance to young, tech savvy investors. Their clients were encouraged to invest in fractional shares of big companies, as well as in complex structured investments like options and derivatives. Robinhood's stated mission was to democratize finance, meaning that retail investors would have access to the same assets as wealthy institutional investors.[263] Its business model relied on Robinhood being paid for routing their orders through specific trading firms.[264] The execution prices of these trades were lower than they would have been if completed on regulated exchanges, essentially decreasing Robinhood's investors' returns.[265] Regulatory attention promptly focused on Robinhood, with state regulators, FINRA, and the SEC suing the company on a variety of bases. Among other claims, the SEC contended that Robinhood misled its clients about the cost of trading through the app, potentially letting investors believe they were receiving the same net returns as they would have using a more traditional brokerage service.[266] Other research has shown how Robinhood's user interface, which resembles social media, causes investors to overestimate their knowledge and ability, with disparate impacts on minority investors who ultimately absorb more losses.[267] Robinhood's stock price plummeted after its initial public offering in 2021, and the company has continued to struggle with regulators.[268] The SEC has used its strategic enforcement actions to send

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[261] *U.S. Department of Labor Announces Proposed Rule to Protect Retirement Savers' Interests by Updating Definition of Investment Advise Fiduciary*, U.S. Dept. of Labor (Oct. 31, 2023), https://www.dol.gov/newsroom/releases/ebsa/ebsa20231031 [https://perma.cc/77ZD-XUCK].

[262] Cable, *supra* note 2, at 701.

[263] *About Us,* Robinhood, https://robinhood.com/us/en/about-us/ [https://perma.cc/T35G-4AZR].

[264] Cable, *supra* note 2, at 686; Dennis M. Kelleher et al.,, *Securities - Democratizing Equity Markets With and Without Exploitation: Robinhood, GameStop, Hedge Funds, Gamification, High Frequency Trading, and More*, 44 W. New Eng. L. Rev. 51, 74 (2022).

[265] Christopher Schwarz et al., *The "Actual Retail Price" of Equity Trades*, 35 (Aug. 17, 2022), https://papers.ssrn.com/abstract=4557302 [https://perma.cc/9RS4-8UFG]; Stanislav Dolgopolov, *Off-Exchange Market Makers and Their Best Execution Obligations: An Evolving Mixture of Market Reform, Regulatory Enforcement, and Litigation*, 17 N.Y.U. J.L. & Bus. 477, 479 (2021).

[266] *See* Khristopher J. Brooks, *Robinhood Financial Fined $65 Million by SEC for Misleading Users*, CBS (Dec. 17, 2020), https://www.cbsnews.com/news/robinhood-sec-fine-65-million/ [https://perma.cc/8SUC-JRBJ]; Michael J. de la Merced & Erin Griffith, *Robinhood is Fined $70 Million Over Misleading Customers & System Outages*, N.Y. Times (June 30, 2021), https://www.nytimes.com/2021/06/30/technology/robinhood-fined-misleading-customers.html [https://perma.cc/7YXT-F5EJ].

[267] Andrew Ridgeway & Noah Wason, *From the Poor to the Rich: Predatory Inclusion and the Robinhood App*, 70 Technical Commc'n 60, 62–68 (2023).

[268] *See California Joins Multiple States in $10 Million Settlement with Robinhood for Failing Investors,* Calif. Dept. of Fin. Prot. and Innovation (Apr. 6, 2023), https://dfpi.ca.gov/press_release/california-joins-multiple-states-in-10-million-settlement-with-robinhood-for-failing-investors [https://perma.cc/TQ2L-DKYY].

a strong message: Services diversifying access to high risk assets may raise the ire of regulators, limiting future profits.

Taken together, these three actions have steered investors with low wealth towards low-risk assets, while those with high wealth are free to take bigger risks and potentially receive bigger rewards. This approach prioritizes the investor protection mandate over that of capital formation, since retail investors with high risk tolerance are discouraged from matching their preferences to their investment profile.[269] Therefore, SEC retail investor rules make it impossible or costly for risk-loving investors to match their preferences, limiting them to lower average returns than their ideal portfolio. In contrast, investors with moderate risk tolerance are implicitly subsidized by regulations that maximize liquidity and returns on assets like stock market indices. This would be progressive if risk-loving investors were predominantly wealthy, but empirical research suggests that this is not the case.[270] Rich investors are often older, with many responsibilities and potential spending needs, such as retirees. On the other hand, young and low-wealth people may have a higher tolerance for speculative investment as they try to build wealth without as many liquidity needs.[271] It is likely that the SEC engages in some regressive redistribution across investors.

More broadly, the limits of the SEC's mandates create inequalities between investors and savers. Low-income, low-wealth individuals who do not participate in the capital markets, but save in bank accounts, do not receive the benefits of the SEC's capital formation mandate. Fair prices and relatively high returns are some of the primary benefits the SEC offers.[272] A significant difference exists between average returns offered by FDIC-insured savings accounts and even the most basic brokerage accounts.[273] Bank regulators, unlike the SEC, do not have a mandate to increase returns on deposits.[274] Ultimately, the SEC benefits savers who want to pull money out of a savings account and put it into a brokerage account to invest in a moderately risky portfolio. Individuals with very high and very low risk tolerance, both of whom may be in the bottom of the wealth distribution, subsidize moderate risk takers. In return, the SEC helps ensure that ordinary investors with small portfolios receive moderate returns at relatively low risk.

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[269] Michaels et al., *supra* note 259.; Lichtenstern, *supra* note 247; Brooks, *supra* note 266.

[270] Daniel Paravisini et al., *Risk Aversion and Wealth: Evidence from Person-to-Person Lending Portfolios*, 63 Mgmt. Sci. 279, 281 (2017).

[271] *Id.* at 285.

[272] *See generally* Spamann, *supra* note 4.

[273] Alice Holbrook & Ruth Sarreal, *Saving vs. Investing: Know the Differences and How to Choose*, NerdWallet (June 9, 2023), https://www.nerdwallet.com/article/banking/saving-vs-investing-when-to-choose-how-to-do-it [https://perma.cc/R9XZ-5YNL]; *Oversight of Financial Regulators: Protecting Main Street, Not Wall Street: Hearing Before the S. Comm. on Banking, Housing, and Urban Affs.*, 118th Cong. (2023) (statement of Martin J. Gruenberg, Chairman, FDIC), https://www.fdic.gov/news/speeches/2023/spnov1423.html [https://perma.cc/Z9EC-7ZGF].

[274] *FDIC Annual Report (*2020), https://www.fdic.gov/about/financial-reports/reports/2020annualreport/ar20mission.pdf [https://perma.cc/2SL7-5PET].

C. CFPB Loan Regulations

The CFPB is one of the youngest federal agencies and has been focused specifically on consumer-facing financial services companies. Since its inception, it has been more vocal about its focus on distributive justice than the other agencies discussed above.[275] Part of this comes from the history of the CFPB, introduced by Senator Elizabeth Warren as part of her broader interest in issues of redistribution.[276] It is also the agency tasked with supervision of fair lending, scrutinizing racial differences in lending and other financial services.[277] The CFPB has aggressively fought historical redlining in mortgage lending, as well as other credit lines.[278] Unlike other financial regulators, the CFPB has broadcast its role in the social safety net and in ensuring equity across groups, and has been willing to take the political consequences.[279] The agency has had to face continuous challenges to its authority both on procedural and substantive grounds.[280] With a majority of the detractors coming from the right of the political spectrum, the CFPB has a reputation as a left-leaning, progressive agency.[281]

Nevertheless, CFPB rulemaking has had unintended consequences that do not match the agency's reputation. Pursuant to the agency's mandate, the CFPB promulgated final rules in 2013 requiring mortgage lenders to consider a borrower's ability to repay their mortgage in underwriting.[282] These rules, referred to collectively as Ability-to-Repay/Qualified Mortgage (ATR/QM), were intended to discourage risky lending. They were designed with a two-part structure. First, loans were required to be underwritten based on seven repayment factors, which would require lenders to gather information about income, savings and expenses.[283] Second, a safe harbor from

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[275] Ashley Hutto-Schults & Michael Buckalew, *Far-Ranging CFPB Action Expected in Support of Racial Equity Priorities* Davis Wright Tremaine (June 30, 2021), https://www.dwt.com/blogs/financial-services-law-advisor/2021/06/cfpb-racial-equity-priorities [https://perma.cc/7CQB-7DJ8].

[276] *Testimony of Elizabeth Warren Before the House Financial Services Committee*, CFPB (Mar. 16, 2011), https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-house-financial-services-committee/ [https://perma.cc/DXV9-A9US].

[277] 12 CFR § 1002.1(a) (2011).

[278] Abigail M. Lyle & Nicole Skolnekovich, *Navigating Fair Lending and Redlining Considerations under the Biden Administration*, 139 Banking L.J. 138, 138–39 (2022); Nanci L. Weissgold et al., *Modern-Day Redlining Enforcement: A New Baseline*, 139 Banking L.J. 86, 89–90 (2022).

[279] Aaron Nicodemus, *CFPB under Biden will likely get new director, new direction.*, 17 Compliance Week 30 (2020).

[280] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020); Consumer Fin. Prot. Bureau v. Credit Acceptance Corp., No. 23-CV-00038 (JHR), 2023 WL 5013303 (S.D.N.Y. Aug. 7, 2023); Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc., No. 20-CV-4176, 2023 WL 1766484 (N.D. Ill. Feb. 3, 2023); *Hurting Consumers' Wallets*, *supra* note 12.

[281] Jackie Wattles & Matt Egan, *Why Wall Street and Republicans Hate the CFPB,* CNN (Nov. 27, 2017), https://www.cnn.com/2017/11/25/news/wall-street-elizabeth-warren-consumer-financial-protection-bureau/index.html [https://perma.cc/2CTV-SCTE].

[282] 15 U.S.C. § 1639 ("A creditor shall not engage in a pattern or practice of extending credit to consumers . . . based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment.").

[283] 12 C.F.R § 1026 (2014).

stringent underwriting requirements was created for mortgages with safe features, including no exotic features like balloons or negative amortization, and which would result in a debt-to-income ratio below 43 percent.[284] The goal of this structure was to allow exotic mortgages to continue being originated when necessary and prudent, while providing a fast track through regulatory quagmire for low-risk loans.[285]

In practice, low-income borrowers who couldn't afford traditional mortgages but wanted to buy a home were now at a significant disadvantage in the mortgage market. Loans targeted to risky borrowers became very difficult to access, with qualified mortgages comprising the vast majority of loans originated after the rule was implemented.[286] Overall lending volume dropped, eliminating 15 percent of loans and decreasing loan amounts for 20 percent of riskier borrowers.[287] The resulting drop in originations particularly impacted middle income households, while the rich were relatively unaffected.[288] The CFPB recognized the unintended regressive consequences of its rule by 2020, when it promulgated amended definitions of "qualified mortgages."[289] The most significant change was that the debt-to-income ratio cap was lifted in favor of price-based restrictions that favored low-interest-rate loans.[290] At the same time, the housing market boomed, making 2021 a significant growth year for homebuyers.[291]

More recently, the CFPB attempted rulemaking around payday loans with a similar structure to the QM rules. The first version of the rule included provisions that would mandate underwriting on the basis of ability to repay.[292] Lenders were required to verify income and expenses from a credit reporting agency and check that enough disposable income would remain to pay off the loan within three rollover cycles.[293] The rule would cover short term loans with a maturity of forty-five days or fewer, as well as longer-term loans with a balloon payment. The purpose was to cover payday loans, vehicle title loans,

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[284] *Id.*

[285] David Reiss, *Message in a Mortgage: What Dodd-Frank's Qualified Mortgage Tells Us about Ourselves*, 31 Rev. Banking & Fin. L. 717, 725–26 (2012).

[286] *See generally* Anthony A Defusco et al., *Regulating Household Leverage*, 87 Rev. Econ. Stud. 914 (2020).

[287] *Id.* at 917.

[288] D'Acunto & Rossi, *supra* note 48 at 485; *see also* Fuster, *supra* note 48 at 1; Patricia A. McCoy & Susan M. Wachter, *The Macroprudential Implications of the Qualified Mortgage Debate: Law and Macroeconomics*, 83 Law & Contemp. Probs. 21, 23 (2020).

[289] *Consumer Financial Protection Bureau Issues Two Final Rules to Promote Access to Responsible, Affordable Mortgage Credit*, CFPB (Dec. 10, 2020), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-two-final-rules-promote-access-responsible-affordable-mortgage-credit/ [https://perma.cc/Z8D9-65LG].

[290] *Id.*

[291] Richard Fry, *Amid a Pandemic and a Recession, Americans Go On a Near-Record Homebuying Spree,* Pew Rsch. Ctr. (Mar. 8, 2021), https://www.pewresearch.org/short-reads/2021/03/08/amid-a-pandemic-and-a-recession-americans-go-on-a-near-record-homebuying-spree/ [https://perma.cc/VHU8-QD63].

[292] *Executive Summary*, *supra* note 47.

[293] *Id.*

and alternatives that were widely perceived as "debt traps" that encouraged nonpayment, rollovers, and ever-mounting fees.[294]

Research into payday loan usage does not suggest that such a rule would universally benefit borrowers. Bans and restrictions on payday lending have been shown to have significant negative impacts on borrowers, either pushing them to use even riskier credit products or causing worse financial distress.[295] Theoretically, pricing payday loans in such a way that would limit rollovers could help payday borrowers balance the need for liquidity with a way out from a debt trap.[296] In practice, however, the cost of implementing such underwriting standards could wipe out access to short-term loans altogether.[297] Just as in the QM/ATR rule case, critics were concerned about the shutdown of a market that predominantly benefited minority and low-income communities.

In 2019, after pushback from industry and a change in CFPB leadership, the ability-to-repay portion of the payday rule—originally promulgated in 2017—was delayed.[298] The underwriting procedures were revoked in 2020, though other provisions limiting collection attempts remained in place.[299] Moreover, the second Trump administration has made it a priority to reduce much of the CFPB's regulatory authority and activity throughout 2025.[300] Layoffs, budget cuts, and orders to stop long-standing work have limited the oversight the CFPB can provide across much of its portfolio, and legal challenges are unlikely to fully reverse these changes during the remainder of Trump's term.[301] Ultimately, this financial regulator, like others, has been an arbiter of *who* can and should use credit to smooth their consumption over time, laying out the boundaries of the credit-based safety net.[302] The Trump administration's aggression against the CFPB is therefore consistent with other policy changes intended to decrease the size of the safety net, including

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[294] Susanna Montezemolo, *Payday Lending Abuses and Predatory Practices*, 2 (Ctr. for Responsible Lending, 2013), https://papers.ssrn.com/abstract=2391403 [https://perma.cc/46H9-Y7VY].

[295] Paige Marta Skiba, *Regulation of Payday Loans: Misguided Regulation in the Fringe Economy Symposium*, 69 Wash. & Lee L. Rev. 1023, 1038 (2012); Neil Bhutta at al., *Consumer Borrowing after Payday Loan Bans*, 59 J. L. and Econ. 225, 227 (2016); Donald P. Morgan & Michael R. Strain, *Payday Holiday: How Households Fare After Payday Credit Bans*, 24 (Fed. Rsrv. Bank of N.Y., Staff Report No. 309, 2010), https://papers.ssrn.com/abstract=1032621 [https://perma.cc/NUE8-H9NQ] (last revised June 10, 2010); Chintal A. Desai & Gregory Elliehausen, *The Effect of State Bans of Payday Lending on Consumer Credit Delinquencies*, 64 Q. Rev. Econ. and Fin. 94, 104 (2017).

[296] Hunt Allcott et al., *Are High-Interest Loans Predatory? Theory and Evidence from Payday Lending*, 89 Rev. Econ. Stud. 1041, 1070 (2022).

[297] Chris Daniel et al., C*FPB Payday Rule: A Ban or a Blueprint for the Future of Short-Term Consumer Lending?*, Paul Hastings (Oct. 19, 2017), https://www.paulhastings.com/insights/client-alerts/cfpb-payday-rule-a-ban-or-a-blueprint-for-the-future-of-short-term-consumer-lending [https://perma.cc/W6HA-6DWJ].

[298] Kelsey Ramirez, *Kraninger Releases Plan to Gut CFPB Payday Lending Rule,* Housing Wire (Feb. 6, 2019), https://www.housingwire.com/articles/48121-kraninger-releases-plan-to-gut-cfpb-payday-lending-rule/ [https://perma.cc/FS7B-YHSP].

[299] *Executive Summary of the July 2020 Amendments*, *supra* note 49.

[300] Eric Katz, *Trump may proceed with dismantling and mass layoffs at CFPB, court rules*, Gov. Exec. (Aug. 15, 2025), https://www.govexec.com/management/2025/08/trump-may-proceed-dismantling-and-mass-layoffs-cfpb-court-rules/407486/ [https://perma.cc/Y4J8-8H34].

[301] Kaplinsky, Andreano, & Culhane, *supra* note 51.

[302] Atkinson, *Rethinking Credit*, *supra* note 1.

cuts to Medicaid and SNAP in the One Big Beautiful Bill.[303] Through his naked hostility to the CFPB, Trump has solidified its reputation as a financial regulator with unique powers to redistribute to the needy.

IV. Disadvantages and Advantages of Regulatory Safety Nets

In the examples above, I have shown that financial regulators like the Fed, the SEC, and the CFPB are key participants in the new social safety net and are often required to pursue redistributive goals by their mandates. New policy instruments like the COVID-19 payment pauses utilize financial regulation to directly provide government benefits and redistribute across individuals. So, why don't regulators acknowledge that they are part of the social safety net?

Conceptualizing financial regulation as a part of the social safety net would require challenging fundamental assumptions that scholars and policymakers have espoused over the last thirty years. In this Part, I describe influential arguments made by law and economics scholars that describe the disadvantages of using laws outside the tax code to redistribute and provide safety nets. New scholarship has challenged the supremacy of this view, but financial regulation has been largely excluded from the conversation.

I then document how financial regulation has two key advantages in providing an effective safety net. First, regulatory safety nets can redistribute resources outside cash by redistributing risk, providing emergency liquidity, and subsidizing returns on investments. Second, safety nets implemented through regulation are cheaper to finance, since they can be paid for through implicit or explicit government guarantees.

A. Efficiency and the Tax Supremacy Theory

The tax and transfer system has long been the primary source of redistribution. Although many forms of taxation were used to redistribute, progressive income taxes were both theoretically and practically popular throughout history. Progressive taxation was described by ancient Greek philosophers, justified by the difference in value of additional goods to the rich, who value them very little, as opposed to the poor, who value them highly.[304] These were implemented by wealth taxes, in which wealthy residents were forced to contribute to public programs that benefited all classes.[305] Later, when preparing for the Napoleonic wars in 1799, Britain implemented a progressive income tax where tax rates were less than 1 percent for lower incomes and up to 10 percent on higher incomes.[306] Utilitarian philosophers formulated

[303] Jacob Wendler, *Republicans are making changes to SNAP and Medicaid. County officials say they're not prepared to handle it.*, Politico (Sep. 27, 2025), https://www.politico.com/news/2025/09/27/trump-snap-medicaid-county-cuts-00582624 [https://perma.cc/XHF8-62KR].

[304] Westin, *supra* note 55, 207–08.

[305] *Id.* at 210.

[306] *Id.* at 215.

theoretical justifications for progressive income tax, which intended to maximize the welfare, or well-being, of the maximum number of people. To do so, resources had to be redistributed from the wealthy to low-income groups, whether through a wealth tax, income tax, or estate tax.[307] Utilitarian ideas spread in popularity throughout the first half of the nineteenth century.

The first progressive income tax in the US was implemented shortly thereafter, in 1862, to fund the government during the Civil War.[308] Though this was in large part an emergency measure, the Sixteenth Amendment and the Revenue Act of 1913 solidified the important role income taxes would play in financing the federal government.[309] The Sixteenth Amendment granted the federal government the power to levy taxes of any design.[310] The Revenue Act specified six tax brackets, which were taxed between 1 and 6 percent.[311] Congressional debates prior to the passage of the Act suggested that fairness was a key motivating factor in the implementation of an income tax, as opposed to the more common excise tax.[312] Since excise taxes required low-income groups to pay a larger fraction of their income or wealth towards taxes than the rich, legislators were motivated to implement a system that would more fairly distribute the cost of taxes across individuals.[313] The goal was not necessarily to redistribute *income*, but instead to assign tax rates on the basis of ability to pay. Implicitly, income tax was a mechanism used to achieve the ultimate goal of redistributing welfare, or well-being, across individuals in a fair way. Nevertheless, progressive income tax became entrenched throughout the twentieth century in the US, overcoming objections that progressivity contradicted the principles of proportionate taxation that had motivated the American Revolution.[314]

The modern tradition of law and economics approach has used newer models of economic thought to justify the supremacy of progressive income tax as a mechanism for redistribution.[315] Kaplow and Shavell are credited with the seminal contributions to this literature in a series of highly cited pieces.[316]

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[307] *Id.* at 218–19.
[308] *Id.* at 223.
[309] *Id.* at 224.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id* at 225.
[314] Walter J. Blum & Harry Kalven Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 418–19 (1952).
[315] *See, e.g.*, Hylland & Zeckhauser, *supra* note 16 (introducing a formal economic model describing the efficiency benefits of limiting redistribution to the income tax system); Shavell, *A Note of Efficiency*, *supra* note 16 (providing the mathematical basis for Kaplow and Shavell's future work in the legal field arguing for the supremacy of efficiency in deciding legal rules); Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 16 (translating the intuitions of economics articles on redistribution to a law audience); Kaplow & Shavell, *Should Legal Rules Favor the Poor?*, *supra* note 16 (following up on previous literature to respond to critiques by Sanchirico and others).
[316] *See generally* Shavell, *A Note of Efficiency*, *supra* note 16; Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 16; Kaplow & Shavell, *Should Legal Rules Favor the Poor?*, *supra* note 16.

They argue that redistributing cash from high- to low-income groups cannot be done efficiently through redistributive legal rules outside the tax code.[317] Their argument is based on economic theory, which suggests that maximizing overall welfare across individuals would increase the size of the "pie" from which redistributive slices are cut.[318] Any legal rule that shrinks the size of the pie should be replaced with an efficient alternative. Kaplow and Shavell focus on the distortion in incentives to work created by progressive income tax, and compare it to the incentives created by other progressive legal rules.[319] Taxes alone are distortive, because they shift the incentive for individuals to work, a phenomenon known as the tax elasticity of income. That is, a higher tax rate on the rich gives them less incentive to work an additional hour, since the government will collect a larger fraction of that wage in taxes. In essence, Kaplow and Shavell's argument is that legal rules should maximize potential tax revenue.[320] The larger the pot of government revenue, the greater the potential benefits of redistribution through the tax code.

Kaplow and Shavell's ideas have endured in popularity among law and economics scholars because they create a compelling and simple guideline for lawmakers.[321] Moreover, Kaplow and Shavell's ideas stamp modern economists' approval on the long-standing historical consensus around progressive taxation.[322] However, Kaplow and Shavell's insistence that tax law should be the exclusive domain of redistribution is more controversial. Their work may have given lawmakers outside the tax system a justification for ignoring the distributive consequences of their actions.[323] For example, administrative agencies engaging in complex rulemaking face the daunting task of trading off the well-being of many stakeholders in the cost-benefit analysis process. They have largely overlooked the distributional consequences of their rulemaking, justified by the primacy of efficiency in legal rules.[324]

In addition, Kaplow and Shavell have spurred a large literature of scholarly articles and policy research that contradicts their findings. A chorus of scholarly voices has encouraged lawmakers to push against the tax supremacy approach by incorporating distributional concerns into the crafting of legal rules.[325] The arguments raised by these dissenting voices have focused on three objections. First, they note that there are differences across people within the same income bracket that may result in progressive legal rules targeting different subpopulations than an income tax.[326] Second, they argue that other values

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[317] Kaplow & Shavell, *Should Legal Rules Favor the Poor?*, *supra* note 16, at 822.
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] *See* Adler & Posner, *supra* note 59, at 186.
[322] Westin, *supra* note 55 at 213–14.
[323] Revesz, *supra* note 61 at 1510–11.
[324] Adler & Posner, *supra* note 59, at 186 (1999) ("The purpose of CBA, as typically understood, is to separate out the distributional issue and isolate the efficiency issue, so that the agency will evaluate projects solely on the basis of their efficiency.").
[325] *See generally* Sanchirico, *supra* note 60; Lewinsohn-Zamir, *supra* note 60; Ronen, *supra* note 60; Bagchi, *supra* note 60; Fennell & McAdams, *supra* note 60; Liscow, *Is Efficiency Biased?*, *supra* note 60; Liscow, *Redistribution for Realists*, *supra* note 60.
[326] *See generally* Sanchirico, *supra* note 60; Avraham et al., *supra* note 60.

are at play, such as a philosophical commitment to fairness or democratic accountability, that would constrain legal rules from pursuing only efficiency.[327] Third, they argue that policymaking frictions make the implementation of Kaplow and Shavell's ideas implausible, while progressive legal rules have a higher chance of successfully remedying inequality.[328]

The first argument—discussed by Sanchirico, Avraham, Fortus, and Logue[329]—has to do with a key simplification made by Kaplow and Shavell that underpins their final results. The literature points out that Kaplow and Shavell implicitly assume that there is no difference in response to legal rules across social groups, meaning that when a particular fine is imposed on dangerous driving, for example, every driver is equally deterred from unsafe action.[330] This "homogeneity" in response to a fine means that scaling fines by income is distortive, since changing the level of the fine is not related the likelihood of taking care. If driving skill is correlated with income, this work argues, it may be optimal to impose different fines on rich and poor drivers.[331] Moreover, progressive fines create a unique outcome that an income tax cannot – they can redistribute from bad drivers to good drivers within income level. Therefore, progressive legal rules have an important role to play when the individual's key features are not their income, but instead a correlated characteristic.[332]

The second argument uses principles from philosophy and legal theory to establish alternative bases for redistribution. This literature does not take issue with the important role that progressive income taxes play in redistribution. Instead, it argues against the strong tax exclusivity that Kaplow and Shavell demonstrate, and instead provides a justification for considering distributive justice in all forms of lawmaking. Each piece provides different justifications for the inclusion of distributive justice in private law. Lewinsohn-Zamir suggests that a successful system of redistribution should do more than allocate money to the needy.[333] Instead, it should confer a sense of well-being on the needy, and the resources should be disbursed in a way that all participants in the system perceive as fair.[334] Lewinsohn-Zamir suggests that progressive income taxation may not provide the type of resources that the needy require and may cause humiliation, rather than satisfaction, upon receiving a subsidy.[335] Other forms of redistribution that avoid these pitfalls may be preferable. Bagchi also takes issue with Kaplow and Shavell's idea that private law should not take distributive justice into account.[336] She argues that a private

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[327] *See generally* Lewinsohn-Zamir, *supra* note 60; Bagchi, *supra* note 60; Liscow, *Redistribution for Realists*, *supra* note 60.

[328] *See generally* Jolls, *supra* note 60; Fennell & McAdams, *supra* note 60; Liscow, *Is Efficiency Biased?*, *supra* note 60.

[329] *See generally* Sanchirico, *supra* note 60; Avraham, et al., *supra* note 60.

[330] Sanchirico, *supra* note 60, at 800.

[331] *Id.*

[332] *Id.*

[333] Lewinsohn-Zamir, *supra* note 60, at 330.

[334] *Id.*

[335] *Id.* at 394–95.

[336] Bagchi, *supra* note 60, at 107–08.

law system that consistently results in distributive injustice destabilizes those legal institutions.[337] Therefore, a less efficient but more fair outcome in contract or tort cases may be preferable in order to maintain the stability of these institutions.[338]

The third argument focuses on Kaplow and Shavell's claim that any redistributive legal rule can be replaced with a more efficient tax. Jolls uses behavioral reasoning to argue that taxes may be more salient to individuals than legal rules.[339] If that is true, redistribution through legal rules will distort work incentives less than redistribution through taxation. Ultimately, the implication of Jolls' argument is that a realistic estimate of responsiveness to incentives created by redistribution may render legal rules more efficient than taxes.[340] Fennell and McAdams introduce political costs that make changes to the tax system costly.[341] In such a case, legal rules that maximize efficiency may increase the size of the pie, but the cost to change the tax code to compensate may be prohibitively high. Once political costs are included in the calculation, Fennell and McAdams show that legal rules dominate the tax code as a source of redistribution in a variety of applications.[342] Liscow shows that Kaldor-Hicks efficiency, the criteria which supports efficiency as the primary goal of legal rules, is fundamentally flawed if resources are "sticky."[343] That is, if only part of a re-allocation of resources due to one legal rule can be undone by another, the lost transaction cost can be enough to overturn Kaplow and Shavell's conclusions.[344] In many ways, Liscow generalizes the idea introduced by Fennell and McAdams, showing how any source of allocative stickiness could result in the need for redistributive legal rules.[345]

The practical implication of deviating from the tax supremacy theory is that regulators must acknowledge, measure, and account for the distributional consequences of policy choices. To do so, scholars of regulation have argued that cost-benefit analysis should incorporate distributional consequences. Revesz proposes that alongside traditional cost-benefit analysis, agencies should report differential effects of a rule on subpopulations of special interest.[346] The process of cost-benefit analysis is itself a complex and technical process of identifying, monetizing, and aggregating. Making separate calculations for each subpopulation can come with subtle technical challenges, including accurately valuing a statistical life.[347] Despite these challenges, the Biden administration revised OMB Circulars A-94 and A-4

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[337] *Id.*
[338] *Id.*
[339] Jolls, *supra* note 60, at 1658.
[340] *Id.*
[341] Fennel & McAdams, *supra* note 60, at 1052–53.
[342] *Id.*
[343] Liscow, *Is Efficiency Biased?*, *supra* note 60.
[344] *Id.* at 1664–68.
[345] *Id.*
[346] Revesz, *supra* note 61, at 1570–71.
[347] Hemel, *supra* note 61, at 652.

in 2023 to specify that cost-benefit analysis must incorporate distributional concerns in future.[348]

Though scholars and policymakers are beginning to recognize that regulation has redistributive effects, financial regulation has been largely excluded from this discussion. The reason is simple: Most financial regulations are excluded from traditional cost-benefit analysis, and many are promulgated by highly independent agencies such as the Fed.[349]

B. Redistributing Risk, Liquidity, and Returns For Less

In this Part, I argue that financial regulation can provide a safety net with features that cannot be replaced by the tax system. Primarily, this is because the tax and transfer system works with cash as its currency, while regulators use alternative financial instruments. Financial regulators can redistribute risk, provide emergency liquidity, and shift returns across subsets of the population. Moreover, I argue that financial regulation can do two things that an income tax cannot do. It can improve the function of regulated markets, increasing overall welfare and maximizing efficiency. It can also provide more help when individuals are in a bad state of the world, such as during times of financial distress. In contrast, I argue that income tax cannot by itself increase the efficiency of the economy, nor can it provide targeted relief during bad times. Finally, financial regulation is able to finance the new social safety net more cheaply than traditional benefits administrators. Regulators can provide government guarantees that are either explicit or implicit to boost private financial markets.

Regulators have access to three types of redistributive tools that are not available to tax authorities. The first is shifting risk across parties. Many agencies and quasi-governmental entities were created with the explicit mandate of redistributing risk. For example, GSEs, including Fannie Mae and Freddie Mac, re-insure residential mortgages and remove risk from mortgage investors and borrowers. The Federal Deposit Insurance Corporation (FDIC) removes risk from banks and depositors. Bank regulators impose rules that limit risk-taking by systemically important financial institutions. By shifting risk away

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[348] Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-94.pdf [https://perma.cc/V3WJ-EDZ8]; Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-4, Regulatory Analysis (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/5Q68-G4CC].

[349] *See generally,* Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation*, 43 J. Legal Stud. S1 (2014); Eric A. Posner & E. Glen Weyl, *Benefit-Cost Analysis for Financial Regulation*, 103 Am. Econ. Rev. 393 (2013); John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. Legal Stud. S63 (2014); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L. J. 882 (2014); Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis Collection: Cost-Benefit Analysis of Financial Regulation*, 124 Yale L. J. F. 263 (2014); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. Legal Stud. S351 (2014); Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost-Benefit Analysis in Financial Disclosure Regulation*, 43 J. Legal Stud. S253 (2014).

from individual borrowers, investors, and depositors, these rules expand the market for financial products and distribute those benefits among market participants. The redistributive impact of these regulations would be difficult to replicate through standard taxation. First, income taxes provide some benefits to borrowers, but not to investors in particular assets or depositors with bank accounts. Targeting the same population would be challenging. Moreover, there would be no market expansion achieved by taxation, and tax revenue would have to fully fund tax payments to the subsidized population. Since risk shifting provides insurance, the size of these markets expand, making the subsidies cheaper to provide.

The second mechanism for redistribution through financial regulation is liquidity provision. The federal government has grown significantly in its capacity as a lender over the past century. Direct lending programs include the historical role of the Home Owners' Loan Corporation (HOLC), federal student loans from the Department of Education, and some loans provided by the Small Business Administration (SBA). The Fed regularly engages in emergency lending during crises.[350] The COVID-19 payment pauses also fell into this category—though the government did not directly provide liquidity through the pauses, the restriction on creditors collecting payments meant that the federal government played a causal role in individuals' liquidity access. Many other indirect lending programs exist, including SBA-backed private loans.[351] Each of these programs have redistributive impacts because qualifying for a direct or subsidized loan opens doors to investment in a home, education, or business. Without these loans, many would not be able to go to college or realize high returns on investment opportunities. Replacing a loan with a tax credit would be challenging in two ways. First, in the absence of a lending program, it would be difficult for the government to identify which individuals would be willing to take these risks. Second, to compensate for not being able to make this investment, the tax code would have to pay the taxpayer the full potential value of their future earnings. This is prohibitively costly, especially compared to the social value resulting from simply financing the investment directly.

The third means by which regulators redistribute is shifting returns to investment across assets. Capital markets regulations, including disclosure rules[352] and limits on insider trading,[353] ensure that market participants share information. The result is fewer returns to insiders and more returns to outsiders without material non-public information. Bank capital requirements also implicitly limit the types of investments banks can make, shifting equilibria in

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[350] *Responding to Financial System Emergencies*, Fed. Rsrv., https://www.federalreserve.gov/financial-stability/responding-to-financial-system-emergencies.htm [https://perma.cc/2E3A-8JU3] (last visited Feb 12, 2024).

[351] *Loans*, U.S. Small Bus. Admin., https://www.sba.gov/funding-programs/loans [https://perma.cc/P94L-4DNZ] (last visited Feb 12, 2024).

[352] *Disclosure Guidance*, SEC, https://www.sec.gov/corpfin/cfdisclosure [https://perma.cc/55GG-LYAQ] (last visited Feb 12, 2024).

[353] Katherine D. Ashley et al., *What the SEC's New Insider Trading Rules Mean for Directors*, Skadden (Jan. 26, 2023) https://www.skadden.com/insights/publications/2023/01/what-the-secs-new-insider-trading-rules-mean [https://perma.cc/6YTM-ESWW].

markets for riskier assets like mortgage-backed securities.[354] The federal government also creates investment opportunities that may not have otherwise existed, such as relatively low-risk investment in Fannie Mae and Freddie Mac mortgages.[355] The fair allocation of returns across investors has a redistributive impact that is again difficult to replicate using tax law. Investors who would have received returns if regulation had been in place would be difficult to identify if regulation was removed and replaced with a tax. Moreover, the existence of information-sharing rules ensures fair markets that attract more investment and generate returns to society as a whole.[356]

Many of the policies discussed here can be implemented at relatively low cost, since only rulemaking is required and the private market steps in to provide the rest. Financial regulators do have a cheap source of funding available that traditional benefit programs do not have, however. When private financial markets are sluggish, regulators have historically offered government insurance or guarantees, whether explicit or implicit, to help reduce risk and entice private market participation. The classic example is the explicit provision of insurance to banks through the establishment of the FDIC.[357] Created in the aftermath of the Great Depression in 1933, the goal of the FDIC was to prevent bank runs by insuring depositors.[358] In many ways, this was the foundation of the modern regulatory safety net. Depositors enjoyed the benefits of insurance, but only if they sacrificed liquidity to store their money in a bank account. Non-depositors who preferred to keep cash or other valuable assets were denied the benefits of FDIC protection.

Examples of implicit guarantees are those provided to the GSEs[359] and financial institutions that receive "bailout" money in times of potential failure.[360] GSEs and other institutions that receive emergency liquidity in times of distress play an important role in the financial system. Letting these institutions become insolvent may have systemic consequences. As a result, these institutions are seen to have a preferred status in the eyes of the government, and are able to profit from this status.

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[354] *Risk-Weighting of MBS and Sovereign Debt Under Financial Regulations*, Brookings Inst. (Dec. 5, 2011), https://www.brookings.edu/articles/risk-weighting-of-mbs-and-sovereign-debt-under-financial-regulations/ [https://www.brookings.edu/articles/risk-weighting-of-mbs-and-sovereign-debt-under-financial-regulations/] (describing Basel rules around capital requirements that weight assets by risk, which caused significant shifts in banks holding MBS when post-crisis reforms increased MBS risk weights).

[355] *See* Bre Bradham, *A Trump Reelection Is Seen as Boosting Fannie, Freddie Shares*, Bloomberg (Jan. 18, 2024), https://www.bloomberg.com/news/articles/2024-01-18/a-trump-reelection-seen-as-bullish-for-fannie-freddie-shares [https://perma.cc/WJ7K-K3KK].

[356] Spamann, *supra* note 4 (demonstrating the benefits of fair prices generated by mandated disclosures in securities regulation).

[357] Stephen A. Buser et al., *Federal Deposit Insurance, Regulatory Policy, and Optimal Bank Capital*, 36 J. Fin. 51, 51–52 (1981).

[358] *Id.*

[359] Wayne Passmore & Alexander H. von Hafften, *GSE Guarantees, Financial Stability, and Home Equity Accumulation*, 24 Fed. Rsrv. Bank N.Y. Econ. Pol. Rev. 11, 11 (2018).

[360] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008); *Bailout Tracker*, ProPublica, https://projects.propublica.org/bailout/list [https://perma.cc/NHW9-TZWT].

Perhaps the biggest advantage of these guarantees provided by financial regulators, however, is the relative low cost in cash to the government. Explicit insurance is paid for by premiums, while implicit insurance is often provided in the form of a loan that is then repaid with interest. Each of these options rarely cost as much as a cash grant would. For instance, the FDIC charges premiums to member banks, who pay whether or not they experience a run. Then, the FDIC pays out to depositors in the case of a bank failure. Premiums are sufficient to cover the FDIC's costs, and no taxpayer money is needed to fund the FDIC.[361] Even bailouts to banks did not cost taxpayers as much as they would have in cash because much of the funding to restore financial health was provided in loans. According to some calculations, the government profited from providing bailouts.[362] When the GSEs failed during the 2008 financial crisis, they were put into conservatorship. Taxpayer money was channeled into a new regulatory regime that would lessen risk-taking by GSEs.[363] Since then, however, the Treasury has been recovering money from GSEs on each loan they purchase and pool.[364] By raising this payment slightly, the government can continue to offer guarantees that subsidize homeownership for those who can access the market for private loans.

V. Towards an Effective Regulatory Safety Net

In order to align financial regulation with the tax and benefits system, a new theoretical and institutional framework is needed. The first step is to define an efficient baseline for redistribution through financial regulation. To do so, I expand the definition of financial inclusion, based on the principal of minimizing distortions. Then, I describe two possibly conflicting goals of redistribution in this context, drawing on examples from the tax system. Regulation may attempt to redistribute progressively, mirroring the goals of the income tax system, or help internalize externalities, reflecting the goals of "sin" taxes such as the cigarette tax. Conflicts between these goals may arise, and regulators would have valid justification for regressive regulatory policy: the need to aggressively combat negative externalities. I argue that multiple regulators across federal and state agencies are well positioned to evaluate the

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[361] *How Does the FDIC Protect Consumers?*, FDIC (Feb. 2020), https://www.fdic.gov/consumers/consumer/news/february2020.html [https://perma.cc/PGZ8-GBS6].

[362] Tim Habert, *Here's How Much the 2008 Bailouts Really Cost*, MIT Sloan School of Mgmt. (Feb. 21, 2019), https://mitsloan.mit.edu/ideas-made-to-matter/heres-how-much-2008-bailouts-really-cost [https://perma.cc/ZWD2-PNP4]; *Bailout Tracker*, *supra* note 364.

[363] *The GSE Conservatorships: Fifteen Years Old, With No End in Sight*, The Stoop (Sept. 5, 2023), https://furmancenter.org/thestoop/entry/the-gse-conservatorships-fifteen-years-old-with-no-end-in-sight [https://perma.cc/EQS2-FMQ3]; Thomas Aiello & Peter Klensch, *The Taxpayer's Perspective: An Analysis of the Administration's Housing Finance Reform Proposa*l, Citizens Against Gov't Waste, https://www.cagw.org/taxpayers-perspective/ [https://perma.cc/H6GH-THCY] (last visited May 3, 2025).

[364] *Raise Fannie Mae's and Freddie Mac's Guarantee Fees and Decrease Their Eligible Loan Limits*, Cong. Budget Off. (Dec. 12, 2024), https://www.cbo.gov/budget-options/60894 [https://perma.cc/2AHE-X4FM].

safety net created by financial regulation and to propose reforms that benefit vulnerable populations.

A. Redefining Financial Inclusion

If financial regulators have a key role to play in redistribution, it is important that they define a goal that the regulatory system can feasibly achieve. Previous scholarship has advocated for fair treatment of disadvantaged populations by the financial system,[365] but has stopped short of wholeheartedly embracing the term "financial inclusion" that other fields have embraced.[366] This is because the financial system has been both under- and over-inclusive of low-income groups throughout its history. On one hand, a long line of research has shown that unbanked and underbanked Americans suffer from exclusion relative to those participating in the formal banking sector.[367] On the other hand, another line of research has shown evidence of "predatory inclusion" in debt, which suggests some populations would be better off with more exclusion from the financial system.[368] Each of these hint at a broader phenomenon created by the financial system's shadow redistribution. The regulatory system subsidizes the use of traditional banking services and high household debt, to the detriment to those who opt out of the system or to those who opt into unsustainable financial arrangements.

I argue that true financial inclusion does not necessarily require all households to use formal banks or to either borrow or opt out of the financial system. Instead, a truly inclusive financial system should be defined as one where government policy distorts all households' financial choices minimally. This definition reflects the goals of optimal taxation.[369] An inclusive regulatory regime would provide the same oversight and opportunities for growth regardless of whether someone chooses to rent or own their home, whether their work creates highly variable or steady income, whether they use banks or alternative financial services, whether they invest in capital markets or save

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[365] *See, generally*, Baradaran, The Color of Money, *supra* note 1; Baradaran, How the Other Half Banks, *supra* note 1; Servon, *supra* note 1.

[366] *Compare* Taylor, *supra* note 124, *with Financial Inclusion*, World Bank (Jan. 27, 2025), https://www.worldbank.org/en/topic/financialinclusion/overview [https://perma.cc/E3AB-RBSG] (last visited Oct. 8, 2025); *Inclusive Financial Systems*, Gates Found., https://www.gatesfoundation.org/our-work/programs/global-growth-and-opportunity/inclusive-financial-systems [https://perma.cc/GUS5-5QM8] (last visited Oct. 8, 2025).

[367] Baradaran, The Color of Money, *supra* note 1; Baradaran, How the Other Half Banks, *supra* note 1; Servon, *supra* note 1.

[368] Atkinson, *Rethinking Credit*, *supra* note 1, at 1099 (2019) ("Credit is fundamentally incompatible with the entrenched intergenerational poverty that plagues low-income Americans."); Atkinson, *Borrowing Equality*, *supra* note 1, at 1405–06 (2020) ("[T]he increased ability to borrow money, cast as a mechanism of positive social change, may function in some ways as a Trojan horse, wheeling in the unique dangers of indebtedness to the front gates of marginalized communities and threatening their already tenuous socioeconomic existence."); Taylor, *supra* note 124 at 5.

[369] Joost Haddinga, *Does the Optimal Tax System Exist?*, Tax Foundation (May 8, 2023), https://taxfoundation.org/blog/does-the-optimal-tax-system-exist/ [https://perma.cc/7UDG-V8U8] ("Economic optimality asserts that taxes should limit economic distortions and not drastically alter people's decision-making.").

in bank accounts, whether they buy commercial insurance or choose to self-insure, or whether they finance their purchases with debt or cash.

Minimizing distortion is the primary goal of economists studying optimal taxation.[370] Income taxes distort the incentive to work by decreasing the returns to increasing income. Higher taxes mean less incentive to work more hours, invest in your career, or move to a job with higher earning potential. At the same time, high taxes collect more revenue. This tradeoff doesn't exist in a theoretical world where taxes can be assessed on the basis of immutable characteristics. Called "lump sum transfers," this theoretical tax system assesses an individualized payment simply based on identity, with no room for taxpayers to manipulate the amount they owe.[371] Such a system is optimal because it does not distort decision-making—people will owe the same amount no matter how much they work. However, it is both impossible to implement and may be normatively undesirable.[372] Therefore, optimal tax theory suggests that higher taxes are levied on populations that are most sensitive to tax rates in their work choices.[373] This preserves incentives to work while raising the maximum amount of revenue for the government.

Regulatory redistribution shares similarities and differences with the tax example. Just as in taxation, regulation can distort choices. But those distortions can operate along multiple dimensions. Rules that incorporate consideration of income, such as the CFPB ability to repay rule and the SEC accredited investor rule, may distort the choice of how much to work. The effect is likely to be much smaller than the impact of income tax, however, since these rules are less salient and therefore less likely to change behavior than the tax code.[374] Of greater concern are distortions in households' financial choices. An aggressively expansionary Fed policy, such as the low interest rates that prevailed before the COVID-19 crisis, may have pushed households to take on more debt than they would have if the Fed had been promoting moderate interest rates. Now that interest rates are higher, households that borrowed heavily may see their payments increase unexpectedly or feel locked in to a fixed, low interest loan, restricting their ability to move.[375] SEC regulations such as accredited investor requirements may have forced middle-income households to invest in only public markets prior to the 2008 crisis, without

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[370] Joel Slemrod, *Optimal Taxation and Optimal Tax Systems*, 4 J. Econ. Persp. 157, 158 (1990) ("The spirit of the optimal tax literature is that the efficiency costs of taxation are potentially large, and therefore it is worthwhile to focus attention on how to minimize these costs").

[371] *See generally* Henry Tam, *The Humean Critique of Lump Sum Taxation (or the Implausibility of Pure Lump Sum Taxes in Autocracy)*, 118 Public Choice 61 (2004) (summarizing the concept of lump sum transfers as economically optimal but legally and sociologically non-credible due to arbitrariness); Francesco Parisi, The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts (2017).

[372] Tam, *supra* note 375 at 63–64.

[373] Slemrod, *supra* note 374, at 165–66.

[374] Jolls, *supra* note 60, at 1658–60.

[375] Jessica Dickler, *"Borrowers are feeling the squeeze" as interest rates climb while inflation remains high, chief financial analyst says*, CNBC (Oct. 27, 2022), https://www.cnbc.com/2022/10/27/how-federal-reserve-interest-rate-hikes-impact-your-borrowing-costs.html [https://perma.cc/LC52-WZAS].

exposure to private markets that were less affected by the downturn.[376] As a result, middle-income households experienced larger drops in wealth in 2008 than high-income households with more private market exposure.[377] The CFPB's mortgage rules may have limited the options of households with low credit scores by forcing them to rent, rather than own, their homes. During the COVID payment pause, this resulted in fewer benefits accruing to renters than buyers.[378]

The impact of distortionary regulation is also different than that of distortionary taxation. Regulation does not raise revenue, so there is no direct cost to the government from distortion. Instead, it impacts households' economic welfare, which can in turn impact growth and the nation's economic welfare. Therefore, the goal of an optimal regulatory system has to incorporate the long-term well-being of all households. As discussed below, this can include a weighting function to focus on the neediest households, as recent research has begun to do in the tax context.[379]

Drawing from the tax example, I develop by analogy a principle of optimal regulatory redistribution. Stringent regulation that can distort household choices should be imposed on populations whose choices are not sensitive to the changes regulation will bring. Each regulation should assess and weigh the effect on households that substitute away from the regulated product, and should include other provisions mitigating any negative effects on those populations. Implementing this policy will likely differ significantly based on context. For example, future iterations of mortgage lending regulations should coordinate across agencies to minimize overall impacts. If some potential homebuyers can no longer afford a mortgage, for instance, the CFPB would work with the Department of Housing and Urban Development (HUD) and other regulators to increase affordability for renters. In contrast, the Fed's choice of interest rate targets would need to account for differential impacts of the same policy across groups. If high interest rates disproportionately hurt lower-income individuals with low levels of debt, the Fed should work with bank regulators to maximize the benefits of high interest rates to savers and work with Treasury to maximize takeup of the EITC. To do so, the Fed could use supervisory discretion to encourage banks to automatically enroll customers in high-yield savings accounts, rather than traditional accounts, while Treasury could increase the salience of the EITC by funding community outreach.

A completely non-distortionary system of financial regulation is likely impossible to achieve, just as it is in the tax code. By making a principled effort to identify distortive policy choices and to remedy their negative effects, however, regulators can create a coherent distributive goal. Current conceptions

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[376] Shai Bernstein, Josh Lerner, & Filippo Mezzanotti, *Private Equity and Financial Fragility during the Crisis*, 32 Rev. Fin. Stud. 1309, 1315–16 (2019).

[377] Fabian T. Pfeffer et al., *Wealth Disparities before and after the Great Recession*, 650 Ann. Am. Acad. Pol. Soc. Sci. 98, 101–02 (2013).

[378] *See supra* Part III.

[379] Emmanuel Saez & Stefanie Stantcheva, *Generalized Social Marginal Welfare Weights for Optimal Tax Theory*, 106 Am. Econ. Rev. 24 (2016).

of "financial inclusion" should be expanded to mean development of a financial system that is non-distortionary and respects the preferences of a diverse population.

B. Progressivity vs. Externalities

How exactly should regulators pursue financial inclusion? Minimizing distortion in a redistributive system requires understanding individuals' behavioral responses to policy. Drawing on the tax system as an analogy, I identify two considerations regulators must weigh in determining how best to target regulation. First is the difference in sensitivity to policy across income or wealth levels. If low-income groups have a smaller behavioral response, or a lower "elasticity," to regulation than high-income groups, low-income groups should be targeted for more stringent regulation.[380] In the study of taxation, this draws on baseline work on optimal taxation by Mirrlees—extended by Piketty and Saez—to determine optimal progressivity of an income tax.[381] Second is internalizing externalities, where privately optimal choices with negative social consequences are penalized to encourage pro-social behavior.[382] In tax, this approach is widely credited to Marshall and Pigou and used to design taxes on pollution and other social ills.[383] Later, this approach was utilized by behavioral economists to craft "sin taxes" that help correct externalities and internalities resulting from costly behavior like smoking.[384] In the financial regulation context, both types of goals can coexist and create internal conflicts in policy.

Progressive redistribution in the theory of optimal taxation does not necessarily arise from a policymaker highly weighting the welfare of low-income groups.[385] Instead, efficiency may necessitate a high marginal tax on high incomes if the rich do not change their effort in response to taxes.[386] Mirrlees, who established the canonical optimal tax model widely used by modern economists, made the assumption that the wealthy were more sensitive to tax rates than low-income groups.[387] This can happen in reality through both changes in effort—meaning that the rich work fewer hours or decrease their income when they are taxed more—or through tax avoidance, where income

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[380] Blum & Kalven, *supra* note 314, at 437–39; David Splinter, *U.S. Tax Progressivity and Redistribution*, 73 Nat. Tax J. 1005, 1013 (2020).

[381] Thomas Piketty & Emmanuel Saez, *Optimal Labor Income Taxation*, *in* 5 Handbook of Public Economics 391 (Alan J. Auerbach et al. eds., 2013).

[382] Agnar Sandmo, *Optimal Taxation in the Presence of Externalities*, 77 Swedish J. Econ. 86, 86 (1975); William J. Baumol, *On Taxation and the Control of Externalities*, 62 Am. Econ. Rev. 307, 307–08 (1972).

[383] Katia Caldari & Fabio Masini, *Pigouvian versus Marshallian Tax: Market Failure, Public Intervention and the Problem of Externalities*, 18 Eur. J. Hist. Econ. Thought 715, 716–23 (2011).

[384] Ted O'Donoghue & Matthew Rabin, *Optimal Sin Taxes*, 90 J. Pub. Econ. 1825, 1827–30 (2006).

[385] Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. Econ. Persp. 165, 171–73 (2011).

[386] *Id.*

[387] *Id.*

is recharacterized, moved overseas, or simply shrouded by taking advantage of legal loopholes.[388] Regardless of the mechanism, if the wealthy are sensitive to tax rates, it is most efficient to impose a lower marginal tax rate on the wealthy than on low-income groups. Then, only a policymaker with a strong preference for redistribution at the expense of efficiency would impose a high tax on the wealthy—by increasing the top marginal tax rate, policymakers would be losing a great deal of tax revenue as top incomes decrease. The lost tax revenue would mean fewer subsidies available for low-income groups, ultimately harming the progressivity of the tax system.

Recent research has shown, however, that high incomes are not highly sensitive to income tax changes.[389] Careful study reveals that the ultra-rich do not usually adjust their labor income or time worked in response to tax changes. Instead, they avail themselves of legal loopholes to make it appear as if they make less income.[390] Moreover, incomes can vary, and any uncertainty over total income in a particular year attenuates the behavioral response to a change in tax rate. For example, a CEO receiving equity compensation will try to maximize stock returns even if tax rates are high since less effort may result in large losses. Based on these results, Piketty, Saez, and Stantcheva, along with a generation of progressive tax economists, have argued that high earners should be taxed at high rates while the government separately closes avenues for legal tax avoidance or illegal tax evasion.[391] Moreover, policymakers with a preference for progressive redistribution could multiply this effect, choosing very high tax rates that reflect their social welfare function.[392]

These concepts can be applied to regulatory redistribution as well. The first task is to assess how responsive different individuals are to the incentives created by financial regulation. For example, some households may be more responsive to the Fed's changing interest rates than others.[393] The rich may be unaffected by the SEC's retail investor regulations or the CFPB's income underwriting, but low-income groups are more responsive.[394] These patterns would guide regulators on targeting more stringent or permissive regulatory policy. Unlike the tax scenario, there is no revenue collected through the regulatory process. Instead, regulators should design regulations to provide the largest benefits to the groups with the highest social welfare weights. Consider the CFPB's underwriting rules, for example. The CFPB's mandate asks the agency to maximize credit access while protecting consumers from risky products. If using income in underwriting would decrease credit access among

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[388] Daniel J Hemel & David A Weisbach, *The Behavioral Elasticity of Tax Revenue*, 13 J. Legal Analysis 381, 383 (2021).

[389] Thomas Piketty et al., *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 Am. Econ. J.: Econ. Pol'y 230, 231–32 (2014).

[390] *Id.* at 231.

[391] *Id.*

[392] *See* Stefanie Stantcheva, *Tax Reform: An Optimal Equation,* Stan. Inst. for Econ. Pol'y Rsch. (Dec. 2017), https://siepr.stanford.edu/publications/policy-brief/tax-reform-optimal-equation [https://perma.cc/4UPT-4EEN].

[393] Auclert, *supra* note 205, at 2333–34; Kekre & Lenel, *supra* note 205, at 2258.

[394] Winston, *supra* note 1, at 784; Fuster et al., *supra* note 48, at 1–3.

the poorest consumers who receive the highest welfare weights, the CFPB should provide an alternative underwriting criterion that is income-neutral or benefits low-income populations disproportionately.

The goal of progressivity may directly conflict with the Pigouvian principle of corrective redistribution. In the tax context, these are taxes imposed to give taxpayers incentives to do social good, even if that is not privately optimal.[395] For example, factories are taxed when they release higher quantities of harmful compounds in order to give firms the incentive to redesign their production processes for the benefit of local communities. Similar reasoning lies behind smoking taxes, soda taxes, and plastic bag taxes that are intended to give taxpayers better incentives in their choices.[396] Usually, these taxes are imposed on individual goods, services, and actions, and can coexist with a separate progressive income tax.

In the financial regulation context, however, internalizing externalities must be done using the same types of regulatory choices that impact the progressivity of regulators' choices. For example, the SEC cannot make one set of rules around retail investors that optimally subsidizes returns to low-wealth individuals while making another set of rules that forces investors to internalize negative externalities. Therefore, regulators may need to weigh the potential positive externalities created by a regulatory regime against its negative distributional consequences. This direct conflict is less common in the tax context. For instance, the EITC provides cash to individuals regardless of whether that cash is spent on cigarettes or plastic bags. However, means-tested benefits programs do incorporate restrictions that encourage pro-social choices.[397] In both benefits programs and financial regulation, policymakers must confront the difficult choice between progressivity and internalizing externalities.[398]

The primary externality that financial regulators are concerned with is the impact of their policy choices on the stability of the financial system and on macroeconomic growth.[399] This concern can justify many of the regressive policies described above. The Fed's primary purpose is to maintain widespread economic health.[400] Retail investors, especially acting in a coordinated fashion, can destabilize the capital markets, providing an impetus for highly protective SEC rulemaking.[401] The CFPB's underwriting rules were promulgated pursuant to Dodd-Frank, which was intended to minimize systemic risk during a crisis.[402] The CARES Act's payment pauses were intended to

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[395] Baumol, *supra* note 386, at 307–08; Sandmo, *supra* note 386, at 87.
[396] O'Donoghue & Rabin, *supra* note 388, at 1825–27.
[397] David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 Conn. L. Rev. 1687, 1688–90 (2013).
[398] Hunt Allcott et al., *Regressive Sin Taxes, with an Application to the Optimal Soda Tax*, 134 Q. J. Econ. 1557, 1557–80 (2019).
[399] Awrey & Judge, *supra* note 5, at 2296–2301.
[400] *See* Carmen M. Reinhart & Kenneth S. Rogoff, *Shifting Mandates: The Federal Reserve's First Centennial*, 103 Am. Econ. Rev. 48, 48 (2013).
[401] Guan, *supra* note 41, at 2055 (2022).
[402] D'Acunto & Rossi, *supra* note 48, at 486–87.

prevent the economy from falling into a longer term recession.[403] If there are regressive consequences from these actions, those impacts may be justified by the benefits they created for the macroeconomy. If this is part of policymakers' reasoning, however, it should be explicitly discussed and weighed to improve public accountability. In particular, there should be a government entity whose mandate is to investigate policies and determine whether there was a more progressive policy that would create the same macroeconomic benefits.

C. Implementation: A State-Federal Partnership

I propose that state financial regulators take the lead in evaluating the impact of financial regulation on the social safety net. Each financial regulator making relevant policy choices is not equipped with the data or authority to oversee the entire process. Instead, state financial regulators can provide data and insight about their key constituents to federal actors. Agencies can then be held accountable for the impacts of their rulemaking and make modifications to their policies, or states can themselves fill gaps in federal policy that exclude their citizens.

The states' role would be to retrospectively analyze the distributive consequences of financial regulation and identify demographic groups who are negatively impacted. To do so, state regulators would bring together data on individual outcomes derived from federal reporting and private sources, including lending data such as consumer credit report data, Home Mortgage Disclosure Act (HMDA) data, financial institution data from bank call reports, and trading data in securities markets. States could then fill gaps in the social safety net that particularly impact their citizens, or pressure federal agencies to revise their policies.

This structure provides a workable alternative to Senator Warren's proposal that the Fed's mandate be amended to incorporate redistribution.[404] The Fed alone would face both practical and legal challenges in decreasing the racial wealth gap. The tools the Fed uses are often too blunt to provide targeted relief to a specific subgroup. Moreover, even if monetary policy tools could be neatly categorized into increasing or decreasing inequality, it is not obvious that decreasing inequality would be worth a significant cost to the economy as a whole.[405] The tradeoff between progressivity and externalities

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[403] Sean Chanwook Lee & Omeed Maghzian, *Household Liquidity and Macroeconomic Stabilization: Evidence from Mortgage Forbearance* 2 (Fed. Rsrv. Bank of Boston, Working Paper No. 23-12, 2023), https://www.bostonfed.org/publications/research-department-working-paper/2023/household-liquidity-and-macroeconomic-stabilization-evidence-from-mortgage-forbearance.aspx [https://perma.cc/9HMT-E72E].

[404] *See* Dylan Matthews, *How the Fed ended the last great American inflation — and how much it* hurt, Vox (July 13, 2022), https://www.vox.com/future-perfect/2022/7/13/23188455/inflation-paul-volcker-shock-recession-1970s [https://perma.cc/UT2X-SZR4] (describing the Volcker-induced recession that decreased inflation in the 80s to the detriment of ordinary households' wealth).

[405] *See generally* Daniel J. Hemel, *Redistributive Regulations and Deadweight Loss*, 14 J. Benefit-Cost Analysis 407 (2023) (describing the losses to social welfare when inequality is lowered through redistributive taxation).

is particularly challenging for the Fed, whose primary goal since its founding has been achieving stability—even at tremendous cost to the general public.[406] States are better situated to assess the impacts of monetary policy on their citizens and coordinate change.

Examples of this structure at work occurred in California during the pandemic. The Golden Gate Stimulus payment was offered to California residents who did not qualify for federal stimulus, filling an important gap that federal policy created.[407] The City of Los Angeles took a further step to fill the gap between protections offered to mortgage borrowers and those offered to renters. The City limited rental evictions until March 2023, allowing LA renters to get nearly as much emergency liquidity as mortgage borrowers would.[408] States have historically taken a backseat in financial regulation, but recent developments such as increased politicization of finance have increased their importance.[409]

It is essential that policymakers dedicate public attention to the incidence and effectiveness of regulatory safety nets. Shedding light on this system of shadow redistribution, even if no reforms are made, will benefit the public. Households have a right to know which financial decisions will be rewarded by the government, just as they have a right to know how they will be taxed and under what circumstances they would qualify for traditional government benefits.

Conclusion

The modern financial system is tremendously complex but provides its participants with some irreplaceable benefits. Ordinary households who buy, borrow, deposit, and invest in these markets are provided with insurance against financial distress and may receive subsidies as regulation redistributes across social groups. In this Article, I demonstrate how financial regulation lays out the boundaries of the new social safety net and redistributes primarily to groups that do not receive traditional government benefits.

Creating a safety net that is administered through financial regulation is usually indirect, highly opaque, and often regressive. Examples of actions taken by the Fed, the SEC, and the CFPB have complex impacts that are hidden from public view. Looking at the mandates of these agencies shows that regulators are often required to prioritize the needy to do their jobs. Their missions are implicit, however, and attempts to make distributive justice an explicit aim of the financial regulatory system have been met with widespread pushback.

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[406] William Poole, *President's Message: Volcker's Handling of the Great Inflation Taught Us Much*, Fed. Rsrv. Bank of St. Louis (Jan. 1, 2005), https://www.stlouisfed.org/publications/regional-economist/january-2005/volckers-handling-of-the-great-inflation-taught-us-much [https://perma.cc/JF23-ZDY4].

[407] *COVID-19 Relief and Assistance for Individuals and Families*, Cal. State Controller's Off. (Jan. 22, 2022), https://www.sco.ca.gov/covid19ReliefAndAssitanceIF.html [https://perma.cc/YC4Q-LVR6].

[408] *About L.A. County's COVID-19 Tenant Protections Resolution*, L.A. Cnty. Consumer & Bus. Affs., https://dcba.lacounty.gov/noevictions/ [https://perma.cc/U6DY-S2NZ].

[409] Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 Calif. L. Rev. 327, 332–34 (April 2013).

In contrast, when payments on mortgages and student loans were paused in response to COVID-19, the role of financial regulation in defining the new social safety net was made explicit. In novel empirical work, I have shown that these payment pauses had widespread regressive consequences. Eligibility for the benefits these pauses provided was largely restricted to the rich, and often excluded underrepresented minorities. Ultimately, the pauses provided $1.2 trillion in emergency liquidity to rich borrowers. In contrast, only $400 billion was provided to lower-income borrowers. Non-borrowers received nothing.

The social safety net created by financial regulation has both advantages and disadvantages. Regulation may generally be more distortive than tax changes in allocating resources away from the rich and toward low-income groups. At the same time, financial regulation provides a non-cash form of benefits that are paid for cheaply through government guarantee programs.

Regulators urgently need a structure to help create a more equitable financial system. In this Article, I have taken the first steps in developing that structure by defining the goal of the system as implementing broad principles of financial inclusion. Financial regulation faces tradeoffs between macroeconomic growth and progressive redistribution. I propose that state financial regulators take the lead in assessing the distributional consequences of policy choices made by federal financial regulators, thereby facilitating accountability. Financial regulators' power over the modern social safety net must be brought out of the shadows and restructured to benefit a financially diverse swath of citizens.