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Toward Justice

The Justice Series: Foreword

*Judge Nancy Gertner**

Justice. You don't hear the word very much in law firms, even in law school courses. I was a federal district court judge for seventeen years; I didn't hear it much in court either—in the presentations of the lawyers, their memoranda, or my colloquies with other judges. But justice, fulfilling the law's promise of justice, is the focus of the series by Jon Hanson and Dean Strang. Reclaiming justice and identifying its opposite is what the book explains, examining how courts claim neutrality while serving power, obscuring normative choices under doctrines of certainty and objectivity.

I recall a number of times during my judicial career when this came into focus. In one instance, I was in Prague, Czech Republic. I had been asked to teach judges from the former Soviet Union—judges who had trained under a totalitarian regime and now were supposed to judge in free countries. I was the second to speak. Another judge, a state trial judge, was first. She began very deliberately looking at each of the judges seated there with their pens and notebooks. She said with great authority: "Ladies and Gentlemen. The most important thing is . . . to be on time!" The judges nodded, each and every one. I was aghast. I rustled my papers, trying to get her attention. Finally, I passed her a note: "These judges were from the *former Soviet Union*! They know how to be on time; it's the justice part they need to learn."

Strang and Hanson's series is about reclaiming "the justice part." The law's promise—what propels law students to law schools, and what propelled me in the 1970s. The law's promise of equality for black people, for women, and for other marginalized people; the law's promise of fair procedures for criminal defendants. It is what propelled me to stand before juries and courts of appeals, as well as students, television cameras, and lay audiences. And it was what animated me when I was on the bench (I left in 2011 to teach). It still does.

A small example: A man was injured while using a saw. He sued the manufacturer and won. The manufacturer appealed; the jury's verdict was reversed, and a new trial was ordered. The case was then assigned to me. Between the appeals court decision and the reassignment to me, the man died. His lawyer missed a deadline for filing a notice of the man's death and substituting his estate as the plaintiff. My clerk reminded me that I had discretion to dismiss the case; and if I did, it would lower my case load numbers—the number of active cases which I was obliged to report to the Administrative Office of the U.S. Courts in Washington. But I also had the discretion to allow the case to go forward. And then he added, "*Justice in the world* says let his estate—his family—have another trial." And so I did.

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* Federal District Judge (retired), United States District Court for the District of Massachusetts. Senior Lecturer on Law, Harvard Law School.

"*Justice in the world.*" There were surely times when I was on the bench, in my judicial robe, on an elevated platform, with the American flag behind me, with lawyers on both sides talking about rules, four-part tests, and precedent. It looked like justice; too often it was not. It was about imposing formulas that made no sense but would shield my decision from reversal. It was about intoning abstract standards far from the real people whose interests they supposedly served.

Sometimes I felt like the princess in the Hans Christian Andersen story, *The Princess and the Pea*. The prince knew that he had found his princess because she was able to feel the pea through twenty mattresses and twenty feather beds. I looked for the just kernel under the layers and layers of hyper technical rules, and rigid formulas—layers that no longer bore any relation to the purposes the law was intended to serve. "Does this make sense," I asked my clerks. How did these rules evolve to be what they are? And often—too often—I was forced to conclude that I could not do what I believed to be just. A statute, a decision of the Supreme Court or the Appeals Court precluded it.

Whitney North Seymour, United States Attorney for the Southern District of New York from 1970 to 1973, said of Judge Learned Hand: "[Hand's] opinions suggest a builder trying to fit each stone into its proper place but also concerned that the resulting edifice will not offend esthetic taste." "Esthetic taste" to me is a metaphor for my law clerk's admonition, to do "justice in the world."

This series is about that edifice, that kernel the princess was looking for, the law's promise. It is about finding the route to reclaim justice from a system gone astray.

The Justice Series: A Preface

Jon Hanson and Dean A. Strang***

Introduction

> *"I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice."*
>
> – Martin Luther King, Jr. (1963).[1]

Dr. King's elevation of justice over order named a distinction that our legal culture has spent at least half a century trying to avoid. His observation that white moderates preferred order to justice described a deeper, cultural—and perhaps human—tension between the yearning for justice and flinching from what its pursuit demands. That tension in King's time (and ours) often results in a substitution: the comfortable displacement of a harder value by an easier one. Calling out the kind of historically embedded injustice that King resisted endangers those who do it and threatens those who benefit from the arrangements being challenged.

Our shallow relationship with justice also owes something to the seeming malleability of its meaning. The idea of justice bridges narrative and conceptual thought; it bridges what James Boyd White calls the shift from primitive to analytic thought.[2] White does not use "primitive" dismissively. He recognizes that narrative—storytelling—remains as powerful and important as ever and sometimes can do much more than analytic or conceptual accounts of justice can.

In narrative form, humans easily grasp justice and injustice, fair and unfair, good and evil. Artists have relied on the emotional charge of injustice stories at least as far back as the great Athenian playwrights, who wove them to engage their contemporaries, and whose stories have continued to move readers across cultures and generations.[3]

Yet when we shift to conceptual or analytic thinking, justice eludes us. How shall we define it? Is there anything objective about it, or are we perpetually trapped in a world in which your justice is my injustice? Even if we can define it at some high level of generality, how do we apply or achieve it in practice? And, for lawyers, how do we translate the conceptual, analytic idea

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* Alan A. Stone Professor of Law and Director of the Systemic Justice Project at Harvard Law School.

** Associate Professor of Law and Director of the Institute for Justice Reform and Innovation at Drake Law School. Acknowledgements are at the end of this preface.

[1] Martin Luther King, Jr., Letter From the Birmingham Jail (1963).

[2] James Boyd White, The Legal Imagination 862–63 (1973 & 45th anniv. ed. 2018).

[3] *See infra* text accompanying notes 67–68.

of order, which for our purposes is synonymous here with the rule of law, into the narrative, primitive idea of justice? How do we link the two; how, in short, does law produce justice rather than injustice? How might law seek to cure the exercise of power to produce harm or inequality without legitimacy?

Those questions are essential and unavoidable for courts and for the legal profession as a whole. As we explore at the very beginning of this series, judges and lawyers incessantly link law to justice: we brand and market the entire profession and enterprise as seeking justice through law. Very often, though, we then deliver only law, which then begets more law through interpretations of statutes or constitutional rules and analogical thinking distinguishing one judicial precedent from others. Justice often gets lost. Indeed, even the promised linkage between law and justice gets lost. Or, worse, it gets buried deliberately.

We law people—those of us who spend our careers within the legal industry and its systems—could have spent the last half century or more trying to answer these broader questions of law's linkage to, obligation to, justice as a central norm. Such a path would have been a continuation of exactly what the Warren Court was doing often—animating justice in landmark decisions like *Gideon v. Wainwright*[4] and *Brown v. Board of Education*[5]—in the mid-twentieth century. But conservative indignation over justice-based jurisprudence frustrated these aims and moved the conversation away from justice entirely. Instead, decades ago, law people started focusing their legal energy onto a "Great Debate" between living constitutionalism and originalism,[6] foreclosing any deeper discussion we might have had on justice. That was the "Great Debate that never was." We hope to have it now.

The "Great Debate"[7] that did happen began in the 1970s,[8] initiated by critics of the Warren and early Burger Courts. Their motivations were political at their core but legalistic on the surface. The Warren Court's jurisprudence provoked a broad coalition of conservative politicians, corporate interests, religious leaders, and legal academics who viewed it as a threat to existing arrangements of property, race, sex, and religious authority.[9]

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[4] 372 U.S. 335 (1963).

[5] 347 U.S. 483 (1954).

[6] The Federalist Society, The Great Debate: Interpreting Our Written Constitution: Foreword (Nov. 1, 1986), https://fedsoc.org/commentary/publications/the-great-debate-interpreting-our-written-constitution [https://perma.cc/5E8F-SPWC].

[7] *See infra* note 35 and accompanying text.

[8] For a deeper history of the emergence of originalism itself, *see generally* Jon Hanson & Dean A. Strang, *Justice Deferred*, 21 Harv. L. & Pol'y Rev. (Issue 1, forthcoming 2026) [hereinafter Hanson & Strang, *Justice Deferred*] (tracing conservative movements' use of judicial injustice stories to consolidate power in the judiciary).

[9] For a fuller account, see *id.* at Part II; *see also* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 555 (2006) (arguing that originalism "empowered conservatives to criticize past Supreme Court decisions" while it "simultaneously advanced 'nearly every plank in the conservative platform that might become involved in litigation'") (quoting Leonard W. Levy, Original Intent and the Framers' Constitution 374 (1988)); *id.* at 549 (concluding that originalism's "current ascendancy does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement"); *id.* at 572 (identifying the conservative constituencies mobilized by originalism as responding to perceived threats to "religious beliefs, sexual mores, gender roles, family, or

Years prior, Richard Nixon's 1968 presidential campaign ran on blaming the Supreme Court for being soft on crime, and promising to appoint "strict constructionists" to the bench.[10] Reagan, working with his long-term friend and eventual Attorney General, Edwin Meese III, expanded upon Nixon's strategy, complaining about an unprincipled, lawless, petty, and "political" Court to push for a jurisprudential mode that would loudly claim to respond to those criticisms while quietly justifying conservative outcomes.[11]

Meese, judge and scholar Robert H. Bork, and their colleagues gave the effort an academic-sounding name: originalism.[12] What was needed, they and Reagan stressed, was a rigorous judicial philosophy that would hold justices true to the original meaning of the text and restore the Court to its historical status as the "least dangerous" branch. Beneath all that, Reagan and his allies sought to undo the Warren Court's stubborn legacy. They depicted the justices who had read the Constitution broadly to protect abortion, secure equal rights, and uphold dignity under Chief Justice Warren as lawless, unrigorous, and even tyrannical. And in their minds, justices following in the Warren Court's footsteps were making matters worse. By refusing to follow originalism, Reagan and his associates implied, those justices were putting themselves and their liberal worldview above the Founding Fathers and the American people.[13]

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property"); Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol'y 599, 601 (2004) (describing originalism as "a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts").

[10] Mark Kozlowski, The Myth of the Imperial Judiciary: Why the Right is Wrong About the Courts 30 (2003) (recounting Nixon's promise to appoint "strict constructionists" to the federal bench as a signal that he would shift the courts from liberal activism toward conservative law and order, and noting that the phrase became a conservative buzzword for the preferred judicial style in the years that followed).

[11] *Cf.* Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 23 (2016) (comparing parallel positions of Nixon and Reagan on crime policy and, in response to the *Furman v. Georgia* opinion, the death penalty); *id.* (stating that "Richard Nixon made the death penalty a foot soldier in his war on crime."); *id.* (quoting Reagan's campaign comment that "our cities are jungle paths after dark" and explaining that Reagan supported the reinstatement of the death penalty).

[12] Frank Cross refers to "[o]riginalism . . . as a Reagan era conservative reaction to the Warren Court era and the desire to restrain what was perceived as judicial activism." Frank B. Cross, *Originalism—The Forgotten Years*, 28 Const. Comment. 37, 37 (2012). Mitch Berman explains that it was "conservative critics of the Warren Court who birthed modern Originalism . . . ." Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 88 (2009). James Fleming describes originalism as "a conservative ideology that emerged in reaction against the Warren Court." James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1347 (1997). Pam Karlan calls it "a primary theory of constitutional interpretation [that] had its origin in the conservative attack on various Warren Court decisions." Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. Davis L. Rev. 385, 396 (2009); *see also* Whittington, *supra* note 9, at 599–601 (attributing originalism to reactions to the Warren Court).

[13] That framing has been remarkably persistent. *See* Bernard Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. Times (Oct. 22, 1985) (quoting President Reagan promising to appoint judges "who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism"); Edward Meese III, Remarks, Joseph Story Awards Banquet, at 3 (Mar. 24, 1988), https://www.ojp.gov/pdffiles1/Digitization/110590NCJRS.pdf [https://perma.cc/KLL3-YBSY] (attacking "non-interpretivism, a species of judicial activism" as "deeply anti-democratic" and claiming that "today's conservatives" were left "to do what yesterday's progressives did: defend democracy"); Robert H. Bork, Coercing Virtue 52 (2003) (criticizing "virulent judicial activism" and

Speaking to the House of Delegates of the American Bar Association in July 1985, Meese set out to exorcise the Warren Court from American jurisprudence. He cast the Court as an institution captured by *de facto* monarchs who deviated from the founding ideal of a "government of laws and not of men."[14] Instead, he argued, justices should follow a rigorous science of turning to the intentions of the founders to secure the single best meaning of the text that derives from a shared original meaning.

Meese's tenure empowered conservatives to criticize the Court's egalitarian bent—and the antiracist, justice-oriented decisions—under the guise of a neutral academic theory. The Department of Justice served as an effective instrument for realizing those political ends. Under Meese, the DOJ advanced originalism through filing cases and amicus briefs advocating for a resurrection of the "original meaning of constitutional provisions and statutes as the only reliable guide" for judicial interpretation.[15] Meese additionally enlarged the DOJ's public affairs department, hosting "regular internal seminars on constitutional interpretation attended by leading conservative thinkers," and was instrumental in pushing public discussion about the appropriate method of constitutional interpretation.[16]

The Reagan Administration had set the terms of a major public and political battle. Whether consciously or not, those who joined the fray—such as Justice Brennan with his "living constitutionalism"[17]—did so on those methodological terms. Where the Warren Court had assumed that justices should actively pursue just outcomes, the Great Debate decoupled ends from means, shifting attention from the substance of judicial results to the methodology of judicial reasoning. Questions about judicial ideology—regarding a judge's proper role and methods of interpretation—became central

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complaining that "Americans are force-fed a new culture and a new definition of virtue, all in the name of a Constitution that neither commands nor permits such results"); George W. Bush, Remarks on a Proposed Constitutional Amendment To Protect Marriage, Am. Presidency Proj. (June 5, 2006), https://www.presidency.ucsb.edu/documents/remarks-proposed-constitutional-amendment-protect-marriage [https://perma.cc/G6RY-ZZ4D] (supporting a constitutional amendment to restrict marriage to heterosexual couples in response to what Bush called "activist judges"); *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) (condemning "constitutional revision by an unelected committee of nine" as robbing the People of "the freedom to govern themselves"); *id.* at 734 (Thomas, J., dissenting) (warning that the majority's decision "short-circuits" the political process "with potentially ruinous consequences for religious liberty"); Sen. Cruz: We Must Not Submit Our Constitutional Freedoms, and the Promise of Our Nation, to Judicial Tyranny, Ted Cruz U.S. Sen. (June 6, 2015), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-we-must-not-submit-our-constitutional-freedoms-and-the-promise-of-our-nation-to-judicial-tyranny [https://perma.cc/M647-QEX8] (claiming "the Constitution finds itself under sustained attack from an arrogant judicial elite"); *In His Own Words: The President's Attacks on the Courts*, Brennan Ctr. Just. (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts [https://perma.cc/GPA5-ZZMD] (collecting President Trump's complaints about "Judicial Activism and Interference").

[14] Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), *in* Elizabeth H. Slattery, William H. Pryor, Jr., & Edwin Meese III, The Originalism Revolution Turns 30: Evaluating Its Impact and Future Influence on the Law 8 (Elizabeth H. Slattery, ed., 2016).

[15] Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455, 465–66 (1986).

[16] Seth Stern & Stephen Wermiel, Justice Brennan: Liberal Champion 504 (2010).

[17] *See infra* Part II.

in our politics, our culture, and in legal education and the profession alike. The "Great Debate" became undebatable.

Debates about judicial ideology have been, by design, a distraction. The deeper question, and the one that interests us throughout this series, is what norms judges center and act upon in their work. In the last half century, that question has quietly narrowed to one of legal formalism: what is the correct methodology for interpreting legal text? Framed that way, the enterprise considers only law for law's sake. Shall the judge adopt one method of interpreting text, or another? Either way, the exercise begins and ends with the rule of law for the sake of the rule of law. The method of arriving there becomes her norm. And that method, for fifty years, has been text-centered formalism.[18] Note, too, that formalistic legal reasoning serves as cover, because unlike questions answered in terms of normative justice, lay people—the broader public—cannot evaluate coded, formal legal reasoning. That formalist cloak can shroud decisions that serve unstated interests (like existing power allocations or preserving inequities) from public accountability.

And so, the legal profession has opted for legalistic order over justice, fastidious procedure over the hard work of identifying and confronting illegitimate power and its consequences. The result has been a judiciary focused entirely on umpiring, calling balls and strikes,[19] but disregarding the broader integrity and outcome of the game. Moreover, it shows no interest in the structural fairness of the league: in how resources are allocated among competing teams, in the advantages and disadvantages that persist over time. Distinguishing pitches has its place, but if that is all law people do, they miss entirely the context and consequence of the game, ignoring their impact on lives beyond the diamond. Like it or not, in a country that empowers judges—and by extension, the entire legal profession—to administer the rule of law and to link law to justice, law people are tied to injustice and justice inseparably.[20]

This series treats justice not as empty decoration but as the essential point. In it, we place judicial philosophy or methodology where it belongs: in the background. We advance to the spotlight more vital questions about judicial accountability, the social contract (however non-ideal[21]), and the relationship of law to people and their quest for justice. The series calls for restoring justice as the law's normative imperative and conceding that justice never

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[18] *See infra* note 26.

[19] The prominent formalist and originalist Chief Justice John Roberts is just one of many who has relied on this analogy. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

[20] Law schools, courts, prosecutors' offices, public defenders' offices, law firms, regulatory agencies, and the legal academy form an interconnected system in which each institution shapes the others: law schools train the students who become the prosecutors, defenders, judges, regulators, and scholars who in turn shape the norms that law schools teach. Because every institution in that system both produces and is produced by the legal culture surrounding it, we consider the legal profession—law people—as a whole in our arguments, from law schools on up. At their broadest, our arguments divide society into just two groups: a larger group of lay people, and a smaller group of law people.

[21] *See infra* text accompanying note 55.

held that place fully or securely. Judges, we argue, should strive to identify and redress injustice, and their opinions should speak to that effort and end. It is not enough to explain why rules, precedents, or procedural constraints dictate an outcome and call that "law." Instead of cloaking or even denying their agency, judges must acknowledge that agency (and promissory obligation) and direct it toward justice. Judges and law people more broadly can and will disagree on what justice requires or means in a given case. But justice must be their end.

I. The Conservative Legal Movement's Success

To understand any one of these articles individually or as a series, it is helpful to understand the recent intellectual history of the profession and its judicial institutions. In the last half century, more or less, that history has shifted away from the roughly two decades of an open, if inconsistent, acceptance of justice as a norm of law. We are not alone in calling that a liberal phase, for want of a better label, although it would not have to carry the current political or partisan valence of that term.[22] It was "liberal," if only sometimes, in the sense that it often was humanistic, centered on individual liberty rather than collective or institutional interests, and demonstrated a willingness to examine and alter power imbalances to reduce disadvantage to the poor and relative outsiders (effectively or not).

That brief liberal phase gave way to an intentional rejection of justice as a norm in favor of elevating law (or the rule of law, to dress it up) as a purportedly more objective norm, in a conservative backlash that continues today. That purported objectivity begins in a renunciation of the norm of justice itself. In its place, we see norms of textual fidelity and methodological consistency that ask everything about law and nothing about justice.

This conservative shift (by its proponents' own description) in the recent intellectual history of law, and in the composition of its institutions, has been enormously successful. We turn now briefly to an overview of how it happened.

A. The Right's Dual Strategy: Offense and Defense

The paradigm shift that now dominates American legal thought did not emerge from a single brilliant article, charismatic author, or great debater.

[22] Whether praising it or condemning it, almost all commentary on the Warren Court has described that era as a "liberal" one for the Supreme Court. For just a few examples, *see generally* Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform (1968); Peter P. Schauer, The Warren Court and the Constitution: A Critical Review of Judicial Review (1970); G. Edward White, Earl Warren: A Public Life (1982); Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court (1992); Lucas A. Powe, Jr., The Warren Court and American Politics (2000); Morton J. Horwitz, The Warren Court and the Democratic Constitution (2007); Steven Teles, The Rise of the Conservative Legal Movement (2008); Geoffrey R. Stone & David A. Strauss, Democracy and Equality: The Enduring Constitutional Vision of the Warren Court (2020).

It was constructed in layers, the product of a movement, comprising prominent business people, benefactors, and corporate interests who organized to create coalitions, networks, and institutions.[23] All that took time. The right at first struggled to challenge the left's "moral monopoly"[24] and to root their aims in "a theory of justice that attracted people to the cause."[25] Eventually, however, the right landed on an effective dual strategy.

First, it disarmed the left and discredited the Warren Court by attacking and delegitimizing *justice* as a proper guide for constitutional interpretation. Conservative intellectuals and their political allies portrayed justice as subjective, vacuous, naïve, and partisan—an *unjust* threat to democracy itself.

Second, after neutralizing its opponents' guiding norm of justice, the conservative movement developed its own affirmative theories, including originalism, textualism,[26] and law and economics, that masqueraded as

[23] Elements of this history are elaborated in Hanson & Strang, *Justice Deferred*, *supra* note 8; *see also* Jon Hanson, *The Injustice Playbook, Part I: The Corporate Origins of the Counternarrative for Justifying Harm*, 70 How. L.J. (forthcoming 2026); Jon Hanson, *The Injustice Playbook, Part II: The Corporate Capture of American Law and the Authoritarian Crisis it Helped Produce*, 70 How. L.J. (forthcoming 2027) [hereinafter Hanson, *The Injustice Playbook, Part II*]. One important catalyst or call to arms for that movement was the 1971 confidential memorandum that Lewis F. Powell, Jr.—a prominent corporate lawyer, former president of the ABA, and soon an Associate Justice on the Supreme Court—sent to the U.S. Chamber of Commerce. Powell titled his memorandum "Attack on American Free Enterprise System" and argued that the business community collectively must defend capitalism and mount a counter-attack against not just the usual opponents on the far left, but also the media, universities and colleges, some religious groups, intellectual journals, and other cultural institutions that Powell viewed as increasingly captured by the political left. *See* Hanson, *The Injustice Playbook, Part II, supra*; *see generally* Lewis F. Powell, Jr., The Memo: Attack on American Free Enterprise System (Aug. 23, 1971), *reprinted by* Wash. & Lee U. Sch. of L. Scholarly Commons, https://scholarlycommons.law.wlu.edu/powellmemo/1/ [https://perma.cc/96BC-TVYS].

[24] Michael Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms*, Sarah Scaife Found. 1 (1980) (on file with authors).

[25] David Daley, Antidemocratic: Inside the Far Right's 50-Year Plot to Control American Elections 41 (2024).

[26] Throughout this series, we use "originalism" and "textualism" as related but distinct terms. Modern originalism, sometimes called "new originalism," holds that constitutional provisions should be interpreted according to their original public meaning at the time of ratification. Textualism holds that legal texts should be interpreted according to the ordinary meaning of their words, without resort to legislative history or other extra-textual sources. In practice, the two overlap considerably: both reject judicial appeals to justice, evolving values, or contemporary social needs as legitimate grounds for interpretation, and both claim to constrain judicial discretion through fidelity to fixed textual meaning. Indeed, leading proponents have embraced both labels. Justice Scalia described himself as "first of all a textualist, and secondly an originalist," explaining that he takes the words of the Constitution as bearing "the fairly understood meaning of those words" as "promulgated to the people of the United States." James Burling, *What Is the Difference Between Originalism vs. Textualism vs. Living Constitutionalism?*, Pac. Legal Found. (Apr. 27, 2022), https://pacificlegal.org/originalism-vs-textualism-vs-living-constitutionalism/ [https://perma.cc/G4LV-7Q59] (quoting Justice Scalia). Justice Gorsuch has similarly identified as both a "proud textualist" and a proponent of originalism as "the best approach to the Constitution." *Id*. Under modern originalism, as even proponents acknowledge, "the theory maps very neatly onto textualism" and "[t]he difference between them is one of scope, not philosophy." *Id*. Because the two approaches share normative commitments and interpretive methods to such a degree, our criticisms of one generally apply to the other, and we often refer to them together. Where the distinction matters to a particular argument, we note it.

For one illustration of how the two can diverge, consider a claim that trespassing police officers searched for evidence of a crime in areas of a farm or yard that were outside the curtilage of a home. To the textualist, this might well be a "search" within the meaning of the Fourth objective, determinative modes of finding and interpreting law. While those views varied in emphasis, they shared legalist and formalist commitments: they rejected justice in favor of formal norms that purported to restrain judicial discretion, all serving social *stasis*. In the intervening decades, many key decisions of the United States Supreme Court have tended to preserve or restore a prior social order and power hierarchy.[27]

B. How the Right Built Its Intellectual Infrastructure

Beginning in the 1970s, the conservative legal movement succeeded through sustained, coordinated funding and institution-building: the Heritage Foundation, the American Legislative Exchange Council, the Cato Institute, and the Federalist Society were among the many politically aligned institutions that sprung up between 1972 and 1982. The network created workshops, peer-reviewed journals, and law school courses that put originalism and law-and-economics on the map, gave these ideas credibility, and made them seem both brilliant and inevitable.

That momentum built off the theoretical groundwork laid by conservative advocates in law reviews and casebooks. Robert Bork's first major piece on originalism appeared in the *Indiana Law Journal* in 1971, the published version of a lecture he delivered there.[28] Richard Posner's groundbreaking casebook, *Economic Analysis of Law*, was published in 1973.[29] Foundational law-and-economics scholarship appeared at about the same time in the

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Amendment, which then would have to be assessed for its reasonableness. But to the originalist, the common law rule as to "open fields," which would have been familiar (and perhaps uncontroversial) to the Framers, puts that trespass outside the scope of a "search" for Fourth Amendment purposes. *See* Hester v. United States, 265 U.S. 57, 59 (1924) (summarily adopting that distinction between a house and open fields for it is "as old as the common law"; combing open fields is not a "search"). For the originalist, the issue is not the plain meaning of the word, "search," but rather its accepted legal meaning at the time of the framing—with a subsidiary issue being what historical evidence the originalist considers and accepts on that issue.

[27] For four examples from the 1970s to today, consider Buckley v. Valeo, 424 U.S. 1, 39 (1976) ("[A] primary effect of these [campaign] expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."); *see also id.* at 49 ("[T]he concept that [the] government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) ("[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. . . . [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights")); Citizens United v. FEC, 558 U.S. 310 (2010) (finding that corporations are "persons" for purposes of the First Amendment's protection of political speech); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (overturning *Roe* because nineteenth century state statutes did not establish a tradition of a right to abortion), *see also id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The majority's core legal postulate, then, is that we . . . must read the Fourteenth Amendment just as its ratifiers did . . . . But, of course, 'people' did not ratify the Fourteenth Amendment. Men did.").

[28] *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing for the adoption of a general theory of neutral principles derived from the Constitution over judicial value judgments to preserve the Supreme Court's legitimacy).

[29] Richard A. Posner, Economic Analysis of Law (Little Brown and Co. 1973).

peer-reviewed *Journal of Law and Economics* and the *Journal of Legal Studies*,[30] both of which were housed at the University of Chicago and funded by the conservative John M. Olin Foundation.[31] A floodtide of derivative and repetitive support for these first broad efforts followed over the years since. Ideas led; infrastructure came next; and mainstream acceptance followed.[32]

The movement also succeeded in building an institutional pathway to the judiciary. The Federalist Society, since soon after its founding in 1982, has been the juggernaut of that success. Funded primarily by conservative foundations, large corporations, and wealthy right-leaning philanthropists,[33] it created both lawyers' chapters and student chapters at law schools, actively recruited, groomed, and mentored potential federal judicial nominees, and built networks within the judiciary, Congress, and the executive branch that propelled its candidates to the federal bench.[34]

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[30] *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & Econ. 249 (1976) (developing an empirical method for analyzing legal precedent derived from the analysis of capital formation and investment); Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. Legal Stud. 527 (1979) (arguing that the common law approach to false advertising is consistent with the principle of efficiency).

[31] *See The Olin Foundation and Support for Law and Economics Research*, U. Chi. L. Sch. (Oct. 11, 2011), https://www.law.uchicago.edu/news/olin-foundation-and-support-law-and-economics-research [https://perma.cc/E26X-GHCS]. Centers for Law and Economics were similarly established at, e.g., Harvard and Yale. *Id.*

[32] *See, e.g.*, Amanda L. Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution 10–11 (2015) (describing the Federalist Society as a "political epistemic network" meaning "an interconnected network of experts with policy-relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy"); Amanda Hollis-Brusky, *Making Fusionism Great Again: Authoritarian Means to Christian Nationalist Ends*, 713 Annals Am. Acad. Pol. & Soc. Sci. 16 (2025) (explaining a central function of the Federalist Society as "legitimating conservative legal thought" by building "'credibility capital'" so that "when judges and justices make revolutionary rulings that align with these ideas or draw on these conservative theories, the legal profession and wider publics don't view them as completely 'off-the-wall' or 'positively loony'"); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L.J. 1407 (2001) (arguing that "[t]he more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from 'positively loony' to 'positively thinkable,' and ultimately to something entirely consistent with 'good legal craft.'").

[33] These have included, among others, the John M. Olin Foundation, *John M. Olin Foundation (1953–2005)*, Duke Sanford Ctr. for Strategic Philanthropy and Civ. Soc'y, https://cspcs.sanford.duke.edu/cspcs-publication/john-m-olin-foundation-1953-2005/ [https://perma.cc/5YAH-XYBJ] ("Prominent grants: … Established the Federalist Society."); the Sarah Scaife Foundation, *Sarah Scaife Foundation Inc., 2021 Form 990-PF*, ProPublica, https://projects.propublica.org/nonprofits/organizations/251113452/202223189349101212/full [https://perma.cc/K2RG-KX7M]; Koch Industries, Inc., *2023 Annual Report* 56, The Federalist Soc'y (2023), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/E8hyL8Jt2iPPUEC2pKukNVoAar3
V0h2jVAbg25wG.pdf [https://perma.cc/RD4B-928R] (listing Koch Industries under $100,000 or more in donations); and corporate donors like ExxonMobil, *id.* ($100,000 or more in donations); Meta, *id.* ($50,000 to $99,999 in donations); Google, *2019 Annual Report* 48, Federalist Soc'y (2019), https://s3.documentcloud.org/documents/20500582/federalist-society-2019-ar.pdf [https://perma.cc/RD4B-928R] ($100,000 or more in donations); and others. Organizations including the Bradley Impact Fund have funded the broader conservative legal infrastructure to which the Federalist Society belongs. *See* Isabela Dias, *How a Few Secret Donors Are Fueling the New Right-Wing Infrastructure*, Mother Jones (Apr. 30, 2024), https://www.motherjones.com/politics/2024/04/bradly-impact-fund-michael-flynn-stephen-miller-culture-war-project-veritas-american-first-legal-cpi/ [https://perma.cc/56G6-TSBG].

[34] Less than fifty years after the Federalist Society's founding in 1982, the organization currently boasts approximately 90,000 members, over 200 law school chapters, and over 100 metropolitan lawyers chapters. *See About Us*, Federalist Soc'y, https://fedsoc.org/about-us

II. The Progressive Vacuum

Since the conservative legal movement successfully discredited justice as a judicial value, those opposed to the pro-corporate and conservative trends have lacked what one American Constitution Society (ACS) blog post termed an "ism": an affirmative theory to rally around and use to advance just outcomes. Instead, they have been playing defense, struggling to shore up Warren and Burger Court precedent, poking holes in originalism, exposing contradictions in textualism, and decrying the hypocrisy of transparently political decisions masked as neutral.

[https://perma.cc/9QW2-DT5Q]. The Federalist Society's 2024 Annual Report—the most recent report publicly available—includes statistics like the following: in 2024, the Student Division of the organization hosted 1,374 speaker events and over 700 social events with a total of over 74,000 attendees; and the Lawyers Chapter was comprised of 125 chapters, hosted sixteen state conferences, and held over 480 programs. *See 2024 Annual Report*, Fed. Soc'y (2024), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/SuKMo8FadwvYcNCN-7zDQLsjQgZJ43dGlxCyl4fAV.pdf/ [https://perma.cc/3THB-Y85X].

This influence extends to judicial appointments. The Federalist Society offers "the definitive endorsement of a potential judge's conservative bona fides." *See* The Week Staff, *How conservatives built a powerful judicial pipeline*, The Week (Aug. 27, 2018), https://theweek.com/articles/791928/how-conservatives-built-powerful-judicial-pipeline [https://perma.cc/LF5E-H3TL]. All six of the current conservative Supreme Court justices have at some point been members. *Id*. During his 2016 presidential campaign, Donald Trump promised that if elected president, his judicial nominees would all be "picked by the Federalist Society." *See* Lawrence Baum & Neal Devins, *Federalist Court*, Slate (Jan. 31, 2017), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [https://perma.cc/3UEG-QGM5]. Of the 51 new appellate judges confirmed during Trump's first term as of March 2020 (with the final number at 54), all but eight had ties with the Federalist Society. *See* Rebecca Ruiz, Robert Gebeloff, Steve Eder, & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. Times (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/WH5X-XCH4]. The conservative movement's effort to create and advance conservative judges starts in law school: Curt Levey, the president of the conservative group Committee for Justice, stated that "[y]ou have to have that army before you can credential them," in reference to developing a generation of younger legal conservatives that would assume positions of power. *See* Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. Times (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/supreme-court-conservatives-trump.html [https://perma.cc/4L73-VBNH]. The Federalist Society acts covertly vis-a-vis non-members regarding their clerkship process, but it has been noted that affiliation with the Federalist Society is often correlated with accelerated clerkship attainment with conservative judges. Sierra R. Pape & Uy B. Pham, *Conservative Judges' Early Hiring Fuels Two-Track Clerkship System at Harvard Law*, Harv. Crimson (Apr. 14, 2026), https://www.thecrimson.com/article/2026/4/14/federal-clerkships-earlier-timeline/ [https://perma.cc/PL5J-PANP].

Further, the Federalist Society benefits from shadow funding. The conservative legal movement tends to operate in secrecy where possible regarding their funding sources. A Washington Post investigation published in 2019 revealed that Leonard Leo—the Federalist Society's former vice president and current co-chairman of the board of directors—and his allies "collected more than $250 million in [donations for nonprofits under IRS rules did not have to be disclosed]" "between 2014 and 2017 alone." *See* Robert O'Harrow Jr. & Shawn Boburg, *A conservative activists' behind-the-scenes campaign to remake the nation's courts*, Wash. Post (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/92D8-T96N]. Leo was also the subject of controversy in 2023, when it was reported that he "obtained a historic $1.6 billion gift for his conservative legal network via an introduction through the Federalist Society." Heidi Przybla, *Leonard Leo used Federalist Society contact to obtain $1.6B donation*, Politico (May 2, 2023), https://www.politico.com/news/2023/05/02/leonard-leo-federalist-society-00094761 [https://perma.cc/DK9P-3QME]. The Federalist Society "received $5.6 million in grants in 2020 and $3.5 million in 2021 from The 85 Fund," a conservative organization associated with Leo. *Id*.

To be sure, opponents of the rightward trends have tried to produce an alternative to the new formalisms. Indeed, the "Great Debate" is shorthand for the few years in which Justice William J. Brennan expounded his "living constitutionalism" as the answer to Attorney General Edwin Meese's originalism. That those few exchanges earned the label "The Great Debate" is an artifact of the victor's privilege. The debate was "great" to those who named it, we believe, only because it marked the moment that originalism was recognized within elite legal circles as a plausible theory that could be openly advocated while serving as cover for political ends, and then became dominant.[35]

Since then, every other contender meets a similar set of criticisms. There is originalism and textualism—framed as neutral and apolitical—and there is the laundry list of potential, putatively plastic alternatives developed by the left: living constitutionalism,[36] living originalism,[37] democratic constitutionalism,[38] pragmatism,[39] popular constitutionalism,[40] inclusive constitutionalism,[41] liberal common-good constitutionalism,[42] and anti-oligarchy constitutionalism.[43] Given that frame, the conservative legal movement's infrastructural

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[35] The Federalist Society published the collected speeches under the title "The Great Debate" and now celebrates the exchange as originalism's founding triumph. *See* The Great Debate: Interpreting Our Written Constitution (Federalist Society Occasional Paper No. 2, 1986). The exchange between Attorney General Meese and Justice Brennan was unprecedented. As one contemporaneous account noted, it had been "rare" for executive branch officials to assail the Court directly, and "virtually unheard of for members of the Court off the bench to criticize the constitutional views of top executive branch officials." Stuart Taylor Jr., *Administration Trolling for Constitutional Debate*, N.Y. Times, Oct. 28, 1985, at A12. That conservatives have claimed the moniker as their own and now celebrate the exchange as a vindication of originalism, is itself telling. *See* Josh Blackman & John Malcolm, *How "Originalism" Became the Prevailing View at the U.S. Supreme Court*, Heritage Found. (Oct. 8, 2025) (declaring that "we can pronounce a winner" and that "Justice Brennan and living constitutionalism lost"); Josh Blackman, *The Inaugural Edwin Meese III Originalism Lecture*, Heritage Found. (Mar. 24, 2022) (making the same declaration nearly verbatim three years earlier); *see also* Steven G. Calabresi & Gary Lawson, The Meese Revolution: The Making of a Constitutional Moment (2024) (arguing that Meese was "the most significant attorney general in American history" and that his speeches began a "constitutional moment" culminating in an originalist Supreme Court majority).

[36] *See, e.g.*, David A. Strauss, *The Living Constitution*, Univ. Chi. Law (Sept. 27, 2010), https://www.law.uchicago.edu/news/living-constitution [https://perma.cc/WE5U-3UAG].

[37] *See, e.g.*, Jack M. Balkin, Living Originalism (2011).

[38] *See, e.g.*, David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 Tex. L. Rev. 1969 (2013); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007).

[39] *See, e.g.*, Stephen Breyer, Reading the Constitution: Why I Chose Pragmatism, Not Textualism (2024). Judge Posner, a founder and giant of the Law & Economics school and its purported objectivity, declared himself a pragmatist relatively late in his judicial career. *See* Richard A. Posner, Law, Pragmatism, and Democracy (2005). The 2008 financial crisis a few years later reinforced that break with his earlier efficiency-based work. *See* Richard A. Posner, A Failure of Capitalism (2009).

[40] *See, e.g.*, Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy,* 92 Cal. L. Rev. 1027 (2004).

[41] *See, e.g.*, Madiba K. Dennie, The Originalism Trap: How Extremists Stole the Constitution and How We the People Can Take It Back (2024).

[42] *See, e.g.*, Linda C. McClain & James E. Fleming, *Toward a Liberal Common Good Constitutionalism for Polarized Times*, 46 Harv. L. & Pol'y Rev. 1123 (2023).

[43] *See, e.g.*, Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution (2022).

advantages, and the intuitive appeal of the claim that words have precise, discernible, and definitive meaning, no challenger has gained traction.

"[T]he liberal legal academy hasn't come up with an easily digestible rival idea [to originalism]," explains Professor Evan Mandery.[44] Many preeminent scholars, including Professors Reva Siegel and Jack Balkin, have attempted to unify constitutional interpretation for the left, most notably through their book, *The Constitution* in 2020.[45] But progressives remain fractured. Dahlia Lithwick notes that instead of affirmatively putting forward a constitutional theory, the left has been stuck "saying, 'Whatever we're for, we know we're not for [Supreme Court Justice Antonin] Scalia and originalism.'"[46] As Justice Goodwin Liu has put it with pithy brevity, the left has not come up with its "bumper sticker."[47]

Without uniting around an alternative theoretical framework, progressives have lacked the tools to implement an affirmative vision; they have lacked the tools for playing offense. Admittedly, justice can be hard to make concrete in an analytic or conceptual mode of writing or speech—its rhetorical strength often is expressed through storytelling. And it is not the case that all progressives accept justice as a central norm of law or recognize its absence from most judicial work. Many progressives, too, have become inured to formalism and to the rule of law as the only end. As Post and Siegel observe, progressives have been "maneuvered into upholding the very detachment of law from politics that is the central premise of the jurisprudence of originalism."[48]

Ideologically, we will suggest in the articles that follow several reasons for this defensive, and sometimes passive, posture. As we noted above, progressives have not coalesced around one counter-theory to originalism: they have advanced several over time, most of which just add an adjective that softens originalism and formalist philosophies. In part, we suspect that many have been spooked by the success of conservatives in presenting justice as taboo; as a hopelessly subjective, empty norm that would leave judges wholly unconstrained and ruling only on their sense of the "feels."

More specifically, progressives have split on how to frame injustice stories themselves. Should they adopt judicial or legalist injustice narratives that invariably are incrementalist? That may address a surface or obvious

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[44] Evan Mandery, *Why There's No Liberal Federalist Society*, Politico (Jan. 23, 2019), https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033/ [https://perma.cc/BTV5-3ECA].

[45] Ari Shapiro, *Conservatives Have 'Originalism'; Liberals Have . . . ?*, NPR (June 23, 2009, at 10:00 ET), https://www.npr.org/2009/06/23/105439966/conservatives-have-originalism-liberals-have [https://perma.cc/5HLG-DM4X] (discussing The Constitution in 2020 (Jack M. Balkin & Reva B. Siegel, eds. 2009)).

[46] *Id.*

[47] *Id.* Some interpretation theories from the left have focused on addressing particular injustices. For example, Professors Joseph Fishkin and William E. Forbath have proposed an "Anti-Oligarchy Constitution," that focuses on interpreting the constitution with an eye to economic inequality specifically. *See* Fishkin & Forbath, *supra* note 43, at 19–21. But other proposals have focused on the meta scripts of injustice and constitutional interpretation. Liberal Common Good Constitutionalism, proposed by Professors Linda McClain and James Fleming, focuses on developing a theory of constitutional interpretation that addresses systemic injustices as they relate to a plethora of social issues. *See* McClain & Fleming, *supra* note 42, at 1128.

[48] Post & Siegel, *supra* note 9, at 572.

concrete injustice but leave deeper, structural causes of injustice unchallenged? Reformers and moderates usually have taken this approach. Or should they instead look beneath the surface and question patterns and structural imbalances that foreordain, as a practical matter, more pervasive injustice? In general, this has been the approach of critical theorists of all stripes and some others. With that schism, the left has not in the last half century achieved anything like the methodological consensus that the right has, on originalism or at least textualism.[49]

There also are institutional factors working against the liberal or progressive side. The American Constitution Society itself began overtly as a counterweight to the Federalist Society; as a reaction, not an independent action.[50] It never has achieved the funding or membership levels of the Federalist Society, either.[51] Perhaps for some combination of these reasons, or others, the ACS also has not proven to be the same wide-bore pipeline to the judiciary that the Federalist Society has.[52]

III. This Project as a Response

This serial collection of articles is an attempt to fill a void and to bridge the gap between law or legalism and justice. This void is one that has long vexed the progressive legal community and progressives more generally: an affirmative vision of justice that negates injustice as workably defined, rather than a purely defensive plaint bemoaning dishonest legalism. In all, the series seeks to challenge or even repel the right's attack on justice while, more importantly, offering justice itself as a revived goal, a framework for legal theory that can function both as sword and shield.

The stakes are existential. As our series describes, the abandonment of real justice has had predictable consequences on people's lives and attitudes. Public confidence in legal institutions has reached historic lows, with many

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[49] ACS President Phil Brest said as much in February 2026: "We have to have an affirmative message around constitutional interpretation in the same way there has to be an affirmative message around elections and politics," he told me. "And it can't just be, 'We're not originalists' in the same way that A.C.S. can't just be, 'We're not the Federalists.' That's not how I view the organization, and that's not how I want to be part of the solution to countering originalism. There has to be an affirmative piece there." Jeffrey Toobin, *The Plan for a Radically Different Supreme Court is Here*, N.Y. Times (February 16, 2026), https://www.nytimes.com/2026/02/16/opinion/alternative-federalist-society.html [https://perma.cc/8B45-DLYQ].

[50] Charlie Savage, *Liberal Legal Group Is Following New Administration's Path to Power*, N.Y. Times (Dec. 10, 2008), https://www.nytimes.com/2008/12/11/us/politics/11network.html [https://perma.cc/SQW4-XGY5].

[51] By 2008, ACS had 165 student chapters, 30 city chapters, and about 22,000 affiliates, around half the number claimed by the Federalist Society. *Id*. Today, the Federalist Society continues to dominate ACS. In 2024, it drew $22.5 million in revenue, as compared to ACS's less than $6 million. *See* Toobin, *supra* note 49.

[52] Obama placed less of an emphasis on judicial nominations than ACS and other progressives had hoped, making its goal to rival the Federalist Society in curating judges more difficult. Even as Biden mirrored Obama's efforts, his judicial appointments reflected a weaker loyalty than Republican presidents had for the Federalist Society: Only twenty-five percent of Biden's appointees were recommended by or affiliated with ACS. *Id.* Further, none of the three Democratic appointees now sitting on the Supreme Court were ever ACS members.

viewing the courts less as guardians of justice than as instruments of power. The social contract that depends on perceived legitimacy frays further with each promise made and broken.[53]

Obviously, we cannot replicate the right's wealth and infrastructure. But we can offer a systematic alternative theory, grounded in cross-disciplinary scholarship. Our work draws on history, psychology, sociology, political science, philosophy, and law itself. Each of these disciplines illuminates different aspects of the problem of justice, and helps us to see how the legal profession and its institutions promise and then either pursue or abandon a norm of justice.

Our project at heart, then, is to insist that there is and must be a North Star in the legal constellation, and that it is and must be justice. Mostly, for fifty years (and indeed, for most of American history before the Warren Court) it has been lost or obscured.

That claim should not suggest any disrespect for the judicial philosophies and methodologies we discuss. Indeed, our own injustice framework touches on many of those ideas. But law is not a refuge from justice or a knock-off that will suffice in its place. Law and the entire structure of the legal profession should be simplifying the effort to achieve justice and always pressing justice as the central norm of the whole enterprise. In doing that, law and courts should be helping people to expand their conception of justice, rather than inviting their cynicism about, or despair of, its possibility.

For us, that project starts where our series does: with the "injustice framework." As we will explain at greater length—and one of us has in earlier foundational work[54]—the injustice framework is a reciprocal relationship in which *power* produces *harm or inequality* without *legitimacy*. Today, this framework rests on social contract theory, and draws most from the non-ideal social contract work of people like Charles W. Mills and Carole Pateman.[55] But the injustice framework also would thrive on, and support, more ideal social contract theory, like the one that John Rawls spent a lifetime refining.[56]

We recognize, too, that there are both cognitive and structural social obstacles to implementing our injustice framework. Injustice is difficult to talk about, let alone to reach agreement on entirely: power often is hard to see and operates invisibly through institutions and systems (which we think of as composed of interlocking or sequential institutions). Further, people who gain advantage—or at least do not suffer disadvantage—from institutions

[53] Jon Hanson & Mara Kipnis, *Courting Injustice: The Roberts Court and the Justice Crisis*, 21 Harv. L. & Pol'y Rev., Part I.A.2 (symposium issue, forthcoming 2027) [hereinafter Hanson & Kipnis, *Courting Injustice*]; Jon Hanson & Lica Porcile, *The Law Crisis and the Authoritarian Turn*, 21 Harv. L. & Pol'y Rev., Part II (symposium issue, forthcoming 2027) [hereinafter Hanson & Porcile, *The Law Crisis*]; Jon Hanson, Mara Kipnis, Matt Kristoffersen, & Lica Porcile, *Inside the Justice Crisis*, 21 Harv. L. & Pol'y Rev., Part II.D.2 (symposium issue, forthcoming 2027) [hereinafter Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*].

[54] Jon Hanson & Jacob Lipton, *Occupy Justice: Introducing the Injustice Framework*, 15 Harv. L. & Pol'y Rev. 333 (2015).

[55] Carole Pateman, The Sexual Contract (1988); Charles W. Mills, The Racial Contract (1997).

[56] John Rawls, A Theory of Justice (1971); John Rawls, Justice as Fairness: A Restatement (Erin Kelly ed., 2001).

and systems are prone to attribution error and commonly construct legitimizing stories that focus on some harms or power while ignoring others. This is human. The problem becomes not so much accepting justice as a norm, but digging deeper and managing both discomfort and outright cognitive dissonance.

In overview, then, the series is this. *The Justice Promise* begins where the legal system begins, with a promise. The Article reviews the universal lure of the legal profession and its institutions. These are courts of justice; this is the Department of Justice; some of the judges are, literally, "Justices"; the statues outside the courthouses and the inscriptions inside assert justice as the goal; and the public comments of judges, prosecutors, law school deans, and other lawyers assure the world that justice is the mission. These promises start in law school and culminate in the judiciary, with everyone in between, all of the law people, parroting them continually. Yet even as we promise justice, we substitute law for it at every opportunity and then implicitly (or explicitly) pass them off as the same. Students drawn to the profession by the prospect of pursuing justice learn only law. The justice promise, in practice, amounts to a bait-and-switch: an insincere offer to sell one item in order to induce the buyer to purchase another.[57]

That observation raises a question: why does the gap between promise and performance matter? *The Justice Imperative* answers by establishing that the genuine pursuit of justice is necessary for any legal system that hopes to or deserves to maintain authority. Drawing on social psychology, anthropology, history, and political philosophy, the Article introduces "justiphilia," our description of the deep and widely shared human craving for justice that shapes how people evaluate institutions and decide whether to accept or resist authority. That craving operates regardless of whether people agree on what justice requires, and institutions that ignore it do so at their peril. From there, the Article reconstructs social contract theory on non-ideal foundations, showing how the government's failure to honor its justice commitments has historically provoked resistance and rebellion, and explaining why the judiciary's breach of the justice promise represents a particularly consequential betrayal.[58]

Justice Deferred then asks what happened to justice as a judicial end. During the Warren Court era, justice served as an explicit, if inconsistent, goal of the legal system. The Article traces the campaign to discredit justice as a guide for legal decision-making and to supplant it with a purportedly objective legalism, principally originalism. That campaign, we argue, was at its roots racial. Opponents of desegregation reframed their resistance in constitutional language even before the 1970s, arguing that the Court had exceeded its authority rather than that racial equality was wrong. That coded strategy found expression in originalism. King's moderates had

[57] *See* Jon Hanson & Dean A. Strang, *The Justice Promise*, 20 Harv. L. & Pol'y Rev. 335 (2026).

[58] *See* Jon Hanson & Dean A. Strang, *The Justice Imperative*, 21 Harv. L. & Pol'y Rev. (Issue 1, forthcoming 2026).

discovered jurisprudence. Bork, Meese, Scalia, and other thought leaders on the ideological right refined it into a sophisticated theory, telling an injustice story of illegitimate judicial conduct as cover for preserving the substantive injustices their preferred jurisprudence helped to protect.[59]

Courting Injustice examines what that conservative backlash produced. By rejecting justice as a judicial norm, the Roberts Court made itself vulnerable to three interconnected forms of capture: political, corporate, and theoretical. Political capture operates through anti-democratic biases in constitutional design, compounded by strategic manipulations like the Garland blockade and the Barrett rush confirmation. Corporate capture, financed through dark money networks and coordinated largely through the Federalist Society, has produced the most business-friendly Court in over a century. Theoretical capture has established originalism as both a legitimating narrative and a gatekeeping credential, serving as a proxy for ideological commitments while masking the injustices it helps produce. Together, those forms of capture produced systematic patterns of injustice that favored power for power's sake, existing allocations of wealth, and existing distributions of social advantage. Injustice dissonance became increasingly visible during that era, as justices sensed a need to contrive improbable explanations to justify or deny the widening gap between law and justice. The Court reached what we call a justice tipping point, where an institution moves from being perceived as imperfect at pursuing justice to being recognized as an active abettor of injustice, producing a legitimacy debt evident in historically low public confidence.[60]

Inside the Justice Crisis turns from institutional analysis to the justices themselves, examining how they navigated the crisis through their rhetoric, opinions, and public remarks. The Article treats judicial language as motivated performance designed to manage injustice dissonance: the psychological discomfort of promising justice while facing mounting claims that the Court is enabling large-scale injustice. Conservative justices responded by foregrounding selective injustice stories offered to redirect attention from the systemic harms their rulings help produce. Liberal justices sharpened their dissents by exposing contradictions in conservative claims and highlighting the broader injustices those claims obscured. By refusing to confront the consequences of the Court's own decisions and insisting that questioning judicial authority was itself the problem, the conservative majority created the conditions for what came next: a law crisis, in which law has lost much of its independent hold over both the powerful and the wider population.[61]

The Law Crisis and Authoritarian Turn takes up that deterioration and brings us up to today. The Article focuses on the Supreme Court's role in producing the ongoing law crisis, a condition in which law itself loses its normative grip except where compliance happens to align with the interests of the powerful. Central to this account is the concept of justice capital: the accumulated trust that institutions earn through just outcomes, which the Court drew down over decades until a point of insolvency. *Trump v. United States*, granting

[59] *See* Hanson & Strang, *Justice Deferred*, *supra* note 8.
[60] *See* Hanson & Kipnis, *Courting Injustice*, *supra* note 53.
[61] *See* Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 53.

a former president broad immunity from prosecution, marks a critical turning point, the moment when the Court's accommodation of executive power visibly accelerated the transition from the justice crisis into a law crisis.[62]

Inside the Law Crisis continues the analysis of the current Court through the lens of "deep stories," felt injustice narratives that shape how justices understand the present moment and what paths they see forward. The displacement injustice story harnesses state power to restore a prior order, treating the crisis as the product of cultural usurpation. The legal injustice story, in both conservative and liberal versions, appeals to law itself as a bulwark, seeking to restore legitimacy through legalistic constraint. The outcome injustice story looks to justice as the touchstone from which law must derive its authority, urging courts to confront power and harm directly. Together, those narratives reveal how a captured Court operates: vacillating between openly serving consolidated power and selectively resisting it to protect the image of both the Court and the powerful actors it serves.[63]

Why Not Justice? returns to specific objections that have long been leveled against justice as a judicial norm. For decades, originalists and their allies have argued that justice lacks shared meaning, that it reduces to subjective preference, that people disagree about it too much for it to constrain judges, and that unelected judges lack democratic warrant to pursue it. The Article takes up each objection and finds that none withstands scrutiny, particularly when compared to the alternatives. The arguments that rendered justice taboo were never as compelling as their repetition made them seem. With those objections cleared away or reduced to their proper size, the path forward becomes visible.[64]

The series concludes with *Taking Justice Seriously*, which makes the affirmative case for a justice-centered jurisprudence and finds signs that one already is emerging. Justice and its pursuit, in some form, always has operated beneath the surface of legal reasoning, even when judges claimed otherwise. The acceptance and application of legalistic abstractions are every bit as incomplete, contradictory, and shaped by worldviews as justice is alleged to be. The difference is that justice moves to the foreground factors that formalism conceals, frames its ends in a language that engages rather than excludes the public, and fosters the popular movements and democratic accountability that pure legalism forecloses. The Article points to the opinions of current dissenters, particularly Justices Sotomayor and Jackson, as modeling what that justice-centered jurisprudence looks like in practice: identifying forms of power and inequality as causal forces, attending to consequences, and deciding cases in ways that reduce institutional capture and create conditions for democracy and equality.[65]

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[62] *See* Hanson & Porcile, *The Law Crisis*, *supra* note 53.

[63] *See* Jon Hanson & Matt Kristoffersen, *Inside the Law Crisis: Deep Injustice Stories Driving the Law*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027).

[64] *See* Jon Hanson & Dean A. Strang, *Why Not Justice?*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027).

[65] *See* Jon Hanson & Dean A. Strang, *Taking Justice Seriously*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027).

IV. Why the *Harvard Law and Policy Review*?

If there is one publication equipped to develop progressive legal theory systematically, it should be and is the *Harvard Law & Policy Review* (HLPR). As the American Constitution Society's journal, HLPR is understood as the progressive counterpart to the Federalist Society's *Harvard Journal of Law & Public Policy*. It has the mission and the credibility to carry this kind of theory-building project, and its audience, from progressive law students and practitioners to academics and judges, is the one we hope to reach.

For nearly two decades, ACS has undertaken the formidable task of serving as an intellectual counterweight to the Federalist Society and the movements it has spawned.[66] We believe that egalitarian law people have always had more in common than their opposition to the capture and politicization of the judiciary. What unites them, whether consciously or not, is the norm of justice. In a landscape where those law people tend to be fractured, and at a moment when inequality and authoritarianism have swelled, we are committed to strengthening the institutions already serving that cause. This series represents our effort to help fill a debilitating gap by offering a theory that can give that shared commitment a common framework, vocabulary, and a direction toward justice.

We attempt to provide a version of what justice-oriented legal scholarship has lacked: an affirmative theory of justice that moves past the selective preoccupation with legalistic abstraction and recenters the law's relationship with, and consequences for, those subject to its authority. We mean a theory that can reorient judicial reasoning and outcomes, reshape legal education and the profession, and help ensure that the legal system fulfills its promise and the social contract upon which its legitimacy depends. HLPR, we believe, is where that theory belongs.

A serial publication of this scope in a single law journal, comprising what might otherwise fill a book, has no precedent that we know. We chose that form because the moment, too, is unprecedented. The institutions and norms this series examines are under siege, and the pace at which they are being dismantled or distanced from democratic accountability outstrips the ordinary

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[66] *See* Crystal Nix Hines, *Young Liberal Law Group is Expanding*, N.Y. Times (June 1, 2001), https://www.nytimes.com/2001/06/01/us/young-liberal-law-group-is-expanding.html [https://perma.cc/FDK7-RQ4J].

In 2007, ACS launched HLPR. The inaugural issue's introduction framed the journal as a response to an era dominated by "ideology." Recognizing the consequences of law on people's lives, HLPR would serve as a needed "arena for frank debate" rooted in pragmatism and progressive principles "founded upon the universal respect for human dignity and rights, a commitment to equal access to justice and opportunity, and the proposition that where an individual starts in life must not determine where she finishes." Michael Negron & James Weingarten, *By Way of Introduction*, 1 Harv. L. & Pol'y Rev. 1 (2007). One of its first published articles more explicitly outlined the stakes at hand and called progressives to action. In "Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century," Professor Dawn Johnsen argued that, in the face of a rightward shift in judicial appointments and constitutional doctrine, progressives "must articulate even more clearly and persuasively their own theories of constitutional interpretation and change," and appoint judges rooted in those theories. Dawn E. Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 Harv. L. & Pol'y Rev. 239 (2007).

timeline of academic publishing. Books take years. Articles in a coordinated series can move faster, reaching readers while the arguments still have a chance to matter. Although the U.S. has abandoned any semblance of a commitment to justice, there may still be benefits to understanding that history and to taking justice seriously beginning now. And even if that commitment to democracy and justice continues to unravel, we hope this collection of articles will offer useful lessons to future generations willing to take up the great experiment again: constructing democratic government and a legal system with justice as their paramount norm.

We have designed the series so that readers can follow its arc from beginning to end or enter at any point. The articles follow a chronological and causal logic, and we have tried to ensure that each piece is in conversation with the others, both forward and backward. Footnotes in each article make reference to the other eight articles and connect related arguments and evidence across them. The series also introduces and develops a set of recurring concepts and terms, so we offer definitions and cross-references within each piece.

At the same time, each article is meant to stand on its own, offering independent contributions as we draw on different academic disciplines from one piece to the next: psychology and anthropology in some, political philosophy and history in others, constitutional law and judicial behavior throughout.

Conclusion

Narrative or primitive speech makes it easy to grasp injustice and justice. Readers feel the bite, the loneliness and internal corrosion, of racial discrimination in Lorraine Hansberry's *A Raisin in the Sun*; we know the cruelty, arbitrariness and abuse of power that the unwanted suffers individually in Arthur Miller's *The Crucible* or that an unwanted whole ethnic group suffers in Khaled Hosseini's *The Kite Runner*. We grasp the structural doom and desperation of social position, the alienation and craving for meaning, of Willy Loman in Miller's *Death of a Salesman*.[67] We know the intrinsic wrong of it all in these narratives. They make injustice visceral. And more, they make it universal: cutting across all the superficial accidents of race, place, sex, and more.

For James Boyd White, Aeschylus' three plays that compose *The Oresteia* capture the transition from narrative to conceptual speech (and thinking) about the idea of justice. They did that at an active time in Athenian intellectual history, as they traced generations of vengeance—cycles of retaliatory justice—to the emergence of a "foundation of a public institution for trial and punishment, a way in which the community can bring the narrative of perpetual destruction to a close."[68] Together, those plays used narrative to deliver us to the conceptual and analytic.

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[67] Lorraine Hansberry, A Raisin in the Sun (Methuen Drama 2009) (1959); Arthur Miller, The Crucible (Penguin Book 2015) (1953); Khaled Hosseini, The Kite Runner (2003); Arthur Miller, Death of a Salesman (Penguin Books 1996) (1949).

[68] White, *supra* note 2, at 862–63. Aeschylus wrote The Oresteia trilogy in the middle of the fifth century BCE. Aeschylus, The Oresteian Trilogy (Philip Vellacott trans., Penguin Classics 1956).

Aeschylus' push to produce an analytic account of justice suggests a recognition that injustice narratives by themselves offer only an imperfect way to confront the complex, interlinked, and sometimes layered injustices of the real world. People's sense of injustice can be manipulated, manufactured, or mistaken. Injustice stories can be weaponized to serve powerful interests, and the injustices suffered by less privileged groups are often normalized or ignored, creating unseen injustices. That, we show, is not a reason not to engage seriously with questions of justice.

Readers fairly can—and should—ask why, when history's greatest philosophers[69] and theologians[70] have failed to achieve consensus on the meaning or content of justice, we would suppose that we could succeed. More, we have promised a conceptual and analytic approach, not a narrative one, which only makes the task of building consensus on justice and injustice harder. The ideas of "order" or "rule of law" are easy to grasp in conceptual or analytic speech, as we noted at the outset and as Dr. King demonstrated in one letter from a jail cell. Not so the idea of justice.

While we do think that the injustice framework and viewing justice as negating injustice are invaluable tools for advancing justice, our effort is not to define justice forever. Nor is it to insist that any person's or institution's intuitions about what counts as injustice, including our own, should be given undue deference. Rather, our goal is to describe why the pursuit of justice is essential to judicial legitimacy—in the deep, normative sense—and the legal profession as a whole. Courts and law people cannot renounce justice as the central norm of our work; they must embrace it. Put differently, justice, and not mere order, must be the goal.

Our account of justice operates on two levels. The first is the injustice framework itself. The second is prescriptive: how courts should engage with questions of justice, openly and in dialogue with the public. A judiciary committed to outcome justice, one that engages seriously with questions of power, harm, and legitimacy, and aims that engagement towards the *demos*, would build on the legacy of the Warren Court rather than repudiate it. A court that renders its thinking legible to the public would be more humble, accountable, and democratic, than a court that shields its motivations beneath doctrine,

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[69] *See, e.g.*, Plato, The Republic (Benjamin Jowett trans., Oxford Univ. Press 1894); Aristotle, Nicomachean Ethics bk. V (W.D. Ross trans., Oxford Univ. Press 1925); Confucius, The Analects (D.C. Lau trans., Penguin Books 1979); Mencius, Mengzi (Bryan W. Van Norden trans., Hackett Publ'g Co. 2008); Alfarabi, The Principles of the Opinions of the People of the Virtuous City (Richard Walzer trans., Oxford Univ. Press 1985); Ibn Khaldun, The Muqaddimah: An Introduction to History (Franz Rosenthal trans., Princeton Univ. Press 1967); John Stuart Mill, Utilitarianism (George Sher ed., Hackett Publ'g Co. 2001); Mohandas K. Gandhi, Hind Swaraj (Anthony J. Parel ed., Cambridge Univ. Press 1997); John Rawls, A Theory of Justice (rev. ed., Harvard Univ. Press 1999); Amartya Sen, The Idea of Justice (Harvard Univ. Press 2009).

[70] *See, e.g.*, Augustine of Hippo, City of God (Harvard Univ. Press 2014) (426); Thomas Aquinas, Summa Theologiae (Brian Davies & Brian Leftow eds., Cambridge Univ. Press 2006) (1274); Howard Thurman, Jesus and the Disinherited (Beacon Press 1996) (1949); Abraham Joshua Heschel, The Prophets (1962); Shmuly Yankowitz, Pirkei Avot: A Social Justice Commentary (2018); Sayyid Qutb, Social Justice in Islam (Islamic Publications Int'l 2000) (1949); Kautilya, Arthasastra (L.N. Rangarajan ed., Penguin Books India 1992) (150).

jargon, and legal formalism. The ultimate arbiter of whether courts honor the promise of justice must be the people.

We offer this series in the hope that it can contribute, however modestly, to a judiciary, profession, and education system willing to face that judgment. Law people must not remain what Dr. King warned of: more devoted to order than to justice. And, indeed, even a negative peace—with all its seductive stability for those not harmed—cannot hold indefinitely when justice is abandoned.[71]

So we end here where we will begin the articles that follow. Every court, indeed every member of the legal profession, faces a choice. Will we pursue justice through law or not? The judiciary and the profession have promised incessantly that we will, linking law to justice at every public opportunity. If instead we choose another central norm—objectivity, neutrality, economic efficiency, whatever—still we cannot avoid that promise of justice. Or if we elevate a methodology that abjures or even renounces justice as a goal in favor of, for example, fidelity to yesterday's conceptions of textual meaning, again we cannot avoid that public desire for, and expectation of, justice today and tomorrow. If we choose not to pursue justice through law, then, we unavoidably choose to pursue, perpetuate, or at very least permit injustice through law.

Acknowledgments

This project has been over a decade in the making. It began a few years before Dean joined it, although he was pursuing similar ideas all along. It is the product of years of conversations and collaborations with colleagues, students, friends, and loved ones. For all those who contributed along the way, we cannot do them justice. Still, in the spirit of this series itself, we want to try. We begin this series, then, by acknowledging the key role that a number of those people and institutions have played.

For generous research support, we thank Harvard Law School and Drake University Law School. For helpful feedback and comments, we are grateful to Enumale Agada, Lisa Dicker, Justin Hansford, Susannah Knox, Tolu Lawal, Michael McCann, Tamara Piety, Jothie Rajah, Barry Sullivan, and Christina White. Along the way, several individuals have been invaluable in creating and refining ideas developed across the series, including Kathleen Hanson and Jacob Lipton. For institutional support, we owe thanks to Maya Bergamasco, Rebecca Lutkenhaus, and, in great measure, Carol Igoe. For invaluable research assistance spanning the series to this point, we thank Anisha Ariff, Stephen Dai, Hannah Dawson, Elaina Katz, Mara Kelly, Cristina Kester, Seoyeon Kim, Abby Kleiman, Philippa Marks, Shaw Mettler, Tara Mou, Tanvi Oswal, Reya Singh, Juvaria Shahid, Samantha Slack, Gauri Sood, Elsa Westerlund, and Kayla Zamanian. For extraordinary research assistance

[71] As one of us has written before, "the rule of law is essential, yes; but law without justice is only rule, and oppression awaits there also." Dean A. Strang, Keep the Wretches in Order: America's Biggest Mass Trial, the Rise of the Justice Department, and the Fall of the IWW 259 (2019).

that has shaped this project in ways large and small, we are especially grateful to Troy Brown, Mara Kipnis, Matt Kristoffersen, Strong Ma, Sam Perri, Lica Porcile, Simone Unwalla, and Carson Whitesell, several of whom joined as co-authors on individual articles. For her friendship, encouragement, and insightful foreword to this series, we thank Nancy Gertner. We also are grateful to the editors of the *Harvard Law & Policy Review* for their painstaking work, commitment, and willingness to take on a very unusual serial publication like this. Among them, we extend special thanks to Zane Daniels, Jesse Davis, Landry Irumva, Meghna Sinha, Skylar Wiseman, and, especially, Sarina Divan and Mara Kipnis, whose energy, care, and judgment have already exceeded what we could have hoped for, and with whom we look forward to seeing this project through.

One of us offers his deepest gratitude to Jannea Wood. Although she has not lived with this project for all of its ten years to date, she has proven rock-solid during that same unexpected decade for other reasons, too. The other offers his to Kathleen Hanson, who for half a century has been a patient and generous sounding board, an intellectual companion and collaborator, and an enduring champion and believer in the value of these ideas. Their influence runs through every page of this series. Only the mistakes and weaknesses are ours.

The Justice Promise

Jon Hanson and Dean A. Strang***

Table of Contents

* Alan A. Stone Professor of Law and Director of the Systemic Justice Project at Harvard Law School.
** Associate Professor of Law and Director of the Institute for Justice Reform and Innovation at Drake Law School. Acknowledgements can be found in the preface to this series, cited in note 1, *infra*.

Introduction[1]

> *"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. . . ."*
>
> —James Madison (Federalist No. 51)[2]

A. The Promise

In the 1989 American movie about South African apartheid, *A Dry White Season*, Marlon Brando's character, the barrister Ian McKenzie, explains at one point, "Justice and law . . . are often just—well they're, I suppose they can be described as distant cousins. And here in South Africa, well, they're simply not on speaking terms at all."[3] The line is so striking because, in the United States public imagination,[4] law is the profession most tied to the pursuit of justice, just as the clergy is the profession most linked to spirituality and the incorporeal, and medicine to health and the corporeal.

Unlike the other two professions, law is a core function of government itself, integral to how state power is exercised.[5] Most importantly here, as a

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[1] This Article is the first of nine that comprise our larger series on justice. An overview of that larger project appears in our preface. *See* Jon Hanson & Dean A. Strang, *The Justice Series: A Preface*, 20 Harv. L.& Pol'y Rev. 313 (2026) [hereinafter Hanson & Strang, *The Justice Series*]. In that preface, we gratefully acknowledge the colleagues, students, friends, and loved ones whose years of conversation and collaboration made this series possible.

Both this initial article and others in the series make unconventional use of epigraphs—placing them at the start of sections and subsections more frequently than is typical in legal scholarship. Because the legal system has long promised justice but often fails to deliver it, we hope the epigraphs will serve as persistent reminders to readers of the many ways in which that promise has been expressed and justice has been depicted as the paramount normative goal of law. Legal readers, trained to seek precedent and authority, may also appreciate the role of the epigraphs as a kind of reminder that our claims are not novel. The epigraphs confirm our position that the justice promise, as we're calling it, had long been taken for granted—that is, until it wasn't. In any event, our stylistic choices align with the series of articles' broader ambition: to reclaim for justice the central position in legal discourse by making it difficult to ignore.

[2] The Federalist No. 51, at 122 (James Madison) (Michael A. Genovese ed., 2009); *see also id.* ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves. . . .").

[3] A Dry White Season, DVD (Davros Films & Sundance Productions 1989); *see also* Jeanne Cooper, *"Dry White" Cracks a Whip*, Wash. Post (Sept. 22, 1989) (reviewing *A Dry White Season* and quoting McKenzie's line: "justice and law could be described as distant cousins, and here in South Africa, they're not even on speaking terms"), https://www.washingtonpost.com/archive/lifestyle/1989/09/22/dry-white-cracks-a-whip/abbfa9aa-ed36-4cd1-a6c7-3a963afdf91e/ [https://perma.cc/XW2H-BHJY].

[4] Whatever our hunches about the universality of much of what we say here—after all, people are people—our experiential, academic, and cultural competence is confined to the United States. We mean our observations and arguments as focused domestically for that reason.

[5] In countries with nationalized health care systems, like the United Kingdom, Canada, and others, medicine is a direct principal activity of government. *See generally* Lawrence D. Brown, *Comparing Health Systems in Four Countries: Lessons for the United States*, 93 Am. J. Pub. Health 52 (2003), https://pmc.ncbi.nlm.nih.gov/articles/PMC1447691/#sec5 [https://perma.cc/5E89-5HXY]. In the U.S., health care is an important but still indirect governmental function, with

matter of norms, justice is a promise that government makes through its principal legal institution, the judiciary. At the ideal level, as much as law is the principal function of government, justice is the principal end of law. Little wonder, then, that justice becomes the adopted promise of those who serve the judiciary: of lawyers and law people, from law school through the rest of their professional lives.

More specifically, for much of U.S. history, the judiciary has been the governmental branch to which Americans most look for justice and where they least anticipate the sort of bargaining, compromise, bluffing, and political deal-making common in the other two branches.[6] People expect the judiciary to marshal both its own institutions and the correlated executive branch institutions or parliamentary ministries—including, the police, prosecutors, probation offices, and corrections departments—into an assemblage that works collaboratively as a functional system: a justice system. When every other government branch or office may fail them, people turn to courts in the end to render justice, or at very least to be committed sincerely to that objective.[7] The judiciary, then, is more than another arm of the government; it's the most essential guardian of one of government's greatest aspirations, justice for all.

Relatedly, judges, the judiciary, and indeed law people more generally tell lay people all the time that the law and its institutions are devoted to serving justice. Even if justice is not paramount among shared social and political goals, it reigns supreme as a stated goal within the law. The judiciary asserts itself as our system's steward of justice. The fact that nobody defines justice

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both federal and state governments carrying the costs of much health care delivery through taxation, but not its direct delivery outside the Veterans Administration and the Indian Health Service within the U.S. Department of Health & Human Services. *See* Roosa Tikkanen et al., *International Health Care System Profiles: United States*, The Commonwealth Fund (2020) https://www.commonwealthfund.org/international-health-policy-center/countries/united-states [https://perma.cc/XRW4-GM73].

[6] The Federalist No. 78, at 236 (Alexander Hamilton) (Michael A. Genovese ed., 2009) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."); *see also* Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 Pol. Psych. 597, 597–98 (2006) (surveying scholarly analyses which indicate the public believes the judiciary operates above the "ideological bargaining and compromise of everyday politics."); *but see* Jon Hanson & Mara Kipnis, *Courting Injustice: The Roberts Court and the Justice Crisis*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027) [hereinafter Hanson & Kipnis, *Courting Injustice*] (assessing trends in public attitudes regarding the U.S. Supreme Court and, more specifically, the growing legitimacy crisis and sense that the Court is moved by political ideology).

[7] Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1670 (1985) ("People turn to courts when they are at the end of the road."). In his own way, Raoul van Canaegem, the important comparative legal historian (who also had a background in sociology), got at the same broad point in an even more universal way. In his work on the twelfth century origins of English common law, and specifically in comparing trials by ordeal, compurgation, and jury as modes of adjudication, he wrote that the study of that evolution:

> [i]s a field that belongs to psychological as well as legal history. It demonstrates the true position of law in the general context of civilization: not as a marginal, abstruse technique of interest to specialists only, but part and parcel of the culture of any given period and one of its most important elements.

R.C. Van Canaegem, The Birth of the English Common Law 62 (2d ed. 1988).

concretely—nobody ever has been able to do that, at least with any broad consensus—gets overlooked.

Even undefined, and perhaps in part because it is undefined, justice is to law, and particularly to the judiciary, what hamburgers are to McDonald's, what basketball shoes are to Nike, and what online shopping is to Amazon, except that the law by design has no acknowledged competitors. "Justice for All" seems as much like a branding slogan as "I'm Lovin' It," "Just Do It," and "From A to Z" do. Based upon the design and decoration of its public-facing edifices, the legal system appears to be in the justice business.[8] The scales of justice are as recognizable as the golden arches, the swoosh, or the smiling arrow. Each serves as an institutional signature with strong cultural associations.[9]

Indeed, the judiciary has more than one unmistakable and iconic symbol, including the gavel, the scales, and Lady Justice herself. Comparably well-known symbols don't exist for other branches of government.[10] Yet it doesn't strike most people as peculiar that only the judiciary enjoys such specific and well-known symbols, or that only judges (unlike legislators and executives) don black robes, much like priests, when engaged in their public roles perched on throne-like benches above the disputants and their advocates. By outward appearances, then, the goal of justice in the judiciary is supreme. That nobody knows exactly what the judiciary, like the profession, means by justice makes it an even more convenient brand and marketing ploy: there is no metric for success, no means of objective accountability.

B. The Injustice Framework

This Article is part of a broader series examining justice in American law and legal institutions. An introductory preface to this series provides a complete overview of the project's scope, arc, key concepts, and methodology.[11]

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[8] *See infra* text accompanying notes 36–57.

[9] Note that those cultural associations then get enacted in popular culture. Police procedurals or books, films, and shows about the legal system almost invariably depict cases as being resolved by trials, with all of the courtroom trappings featured. In reality, of course, almost no civil cases go to trial in the U.S. today, and fewer than five percent of criminal cases get tried. John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, Pew Research Center (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/ [https://perma.cc/RK6C-PQYK] (about 2.3 percent of federal criminal defendants went to trial in the 2022 federal fiscal year). Civil trials were even rarer. Again, as to federal cases, from 2010–2019, only 1.3 percent of federal civil cases in which one party made a jury trial demand in fact ended with such a trial. Overall, during the same period only 0.7 percent of federal civil cases resulted in a jury trial. Kristin A. Garri & Emery G. Lee III, *Jury Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019*, 1–2 Federal Judicial Center (June 2022), https://www.fjc.gov/sites/default/files/materials/07/Jury%20trial%20demand%20final.pdf [https://perma.cc/RZ2C-S3BH]; Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 Judicature 26, 28 (2017) (assessing federal and state civil case data to support the claim that civil trials are extremely rare).

[10] *Cf.* James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & Soc'y Rev. 837 (2014) (discussing the resonance of the judiciary's symbols in everyday citizens' opinions of the legitimacy of the courts).

[11] *See* Hanson & Strang, *The Justice Series, supra* note 1.

Here, we focus on establishing the foundation: documenting how legal institutions promise justice through symbols, language, and institutional design and how they systematically break that promise, starting in legal education.

In other work in this series, we describe and develop a widely shared and pragmatic way of assessing justice in law based on the "injustice framework." [12] The challenge of defining justice has long stymied legal theorists and philosophers. From Plato to Rawls, a dominant approach has been "ideal theory": the search for a blueprint of a perfectly just society, abstracted from our actual world.[13] That search, to us, has proven a dead end for developing a usable normative metric for law.[14]

Our project pursues a different path. Drawing on non-ideal theory, we begin with the world as it is and pursue justice by identifying and addressing existing injustices. As detailed in other work,[15] people's sense of injustice is activated when they perceive three key factors in relation to a given causal agent and outcome: (1) the causal agent's *power*[16] produces (2) some *harm*, *suffering*, or *inequality*, and (3) either the power of the causal agent or the resultant inequality *lacks legitimacy*.[17] More succinctly, people experience a sense of injustice when they perceive power producing harm without legitimacy.

Justice, we argue, then is best understood as the negation of injustice—and that conception captures what people commonly mean when they invoke justice in practical terms. Further, that is a process, not a terminus; a goal, not a present result. In other words, this conception understands fighting or rectifying injustice as pursuing or achieving justice. That mates with people's ordinary narrative or storytelling mode of speech and writing that in everyday life makes injustice (and therefore justice) easy to see and understand.

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[12] *See* Jon Hanson & Jacob Lipton, *Occupy Justice: Introducing the Injustice Framework*, 15 HARV. L. & POL'Y REV. 335, 342–48 (2021).

[13] *See, e.g.*, PLATO, THE REPUBLIC (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000) (c. 375 B.C.E.) (proposing an ideal, albeit fictional, political state); *see also* Leif Wenar, *John Rawls* § 2.3, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2025), https://plato.stanford.edu/entries/rawls/ [https://perma.cc/RD54-8ANU] (evaluating Rawls's "ideal theory," which, when thoroughly plumbed, can provide lessons for reforming non-ideal environments like those in the real world).

[14] This essentially is the premise for Charles W. Mills' *The Racial Contract*, and for Carole Pateman's *The Sexual Contract* before it. Mills explained our point in brief in CHARLES W. MILLS, THE RACIAL CONTRACT 4–7 (1997), referring to CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

[15] *See* Hanson & Lipton, *supra* note 12, *passim*.

[16] Different forms of power, ranging from overt and coercive force to subtle and systemic influence, are more or less salient and thus correspondingly more or less likely to activate a sense of injustice.

[17] There are a variety of ways in which power and harm might be legitimized, such as, the consent of an individual harmed, the approval of some cultural authority, or consistency with some tradition, norm, precedent, sound reason, or fair process.

C. The Broken Promise

But under virtually any definition of justice,[18] we can evaluate whether legal institutions make good on their elaborate promises of justice. They do not. To cut to the chase, the entire apparatus of legal education and the profession make a promise of justice—or at least its pursuit—both explicitly and implicitly. Then the apparatus in practice breaks that promise. Furthermore, that apparatus or system, as people like to call it, defeats performance and thus the promise itself. This is a system in which "[l]egalism rules concern for justice out of bounds," and "justice becomes 'not the worry' of the law student or scholar." It follows that justice will "not [be] the worry of the legally trained professional."[19]

This leads to what we call *injustice dissonance*: a psychological discomfort experienced by law people to reconcile the gap between law and justice.[20] Certain subsets of legal actors suffer more from this psychological tension, especially those who make or shape decisions that profoundly affect the lives of litigants for the worse or, more broadly, inequitably alter power or material conditions for communities, groups, or interests in society. It is a discomfort made acute by the legal system's promise of justice.[21] Lawyers and judges display signs of that dissonance often: sometimes equating (and conflating) law rigidly with justice, for instance, and other times protesting that justice is ineffable and unattainable, or denying the utility of the concept of justice altogether.[22] The dissonance in those who have been so socialized reveals itself in a variety of ways, including self-blaming humor. As Professor John Bliss, who studies "public interest drift," describes, "You often hear it as a sort of gallows humor among lawyers: 'I came to law school to save the world, and then I sold out to make money.'"[23] Did they sell out, or were they attracted to a bait-and-switch?

The problem with a legal system and legal profession failing to meet its obligations to advance justice is an old one. Deborah Rhode began her book

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[18] That is, so long as one is operating with a meaningful definition or framework for justice, rather than treating "justice" as a loose label for unspecified intuitions or emotional reactions.

[19] Robin West, Teaching Law: Justice, Politics, and the Demands of Professionalism 66 (2013).

[20] The concept of injustice dissonance is employed and developed across this series. *See* Hanson & Strang, *The Justice Series*, *supra* note 1.

[21] Judges feel both an internal urge and external pressure to perceive and portray themselves as advancing justice, regardless of the truth of the matter. Jon Hanson & Dean A. Strang, *The Justice Imperative*, 21 Harv. L. & Pol'y Rev. (Issue 1, forthcoming 2026) [hereinafter Hanson & Strang, *The Justice Imperative*]; Jon Hanson, Mara Kipnis, Matt Kristoffersen, & Lica Porcile, *Inside the Justice Crisis*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027) [hereinafter Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*]; Jon Hanson & Matt Kristoffersen, *Inside the Law Crisis: Deep Injustice Stories Driving the Law*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027) [hereinafter Hanson & Kristoffersen, *Inside the Law Crisis*].

[22] *See infra* text accompanying notes 251–252.

[23] John Bliss, *Drifting Law Students: Public Interest Caught in the Law Firm Pipeline*, The Practice, May – June 2018, https://clp.law.harvard.edu/knowledge-hub/magazine/issues/finding-the-lawyer-identity/drifting-law-students/ [https://perma.cc/3YJU-APC5].

on the legal profession[24] by pointing out that "Over two thousand years ago, Seneca observed advocates acting as accessories to injustice, 'smothered by their prosperity,' and Plato condemned their 'small and unrighteous souls.'"[25] She summarized the resultant dissonance of lawyers and the public as follows:

> Many lawyers are, in Auden's apt phrase, "trudging in tune to a tidy fortune," but they have lost their connection to the values of social justice that sent them to law in the first place. These problems of professionalism are compounded by problems in the justice system. . . . [including] an increasing gap between rich and poor and a declining willingness to subsidize assistance for those who can least afford it. These inequalities in legal representation have magnified inequalities in adversarial processes. The result is aptly captured in a New Yorker cartoon picturing a well-heeled lawyer asking his client: "So, Mr. Pitikin, how much justice *can* you afford?"[26]

While the contradiction between law's facade and its interior has been observed by many scholars, law students, and lawyers, the legal profession has still failed to acknowledge that this contradiction matters, representing a broken or rigged social contract with profound implications for our laws and those subject to them.[27]

At one level, that is puzzling. The law itself enforces contracts and assigns liability to those who breach promises. As Professor Charles Fried argued, contract law is fundamentally rooted in the moral principle of promise-keeping.[28] Indeed, the law also holds liable those who obtain the contractual assent of others by misrepresenting material facts or fraud in the inducement. Less commonly, but still with some doctrinal foundation, the law seeks to remedy abuse of gross disparities in bargaining power by declining to enforce a few contracts of adhesion that are flatly unconscionable,[29] or other contracts against public policy.[30]

Legal doctrine goes further. For promises to be enforceable, they do not have to be perfect or based upon mutual consideration. Contract law will enforce contracts even when they lack "a manifestation of mutual assent to the exchange and a consideration."[31] In promissory estoppel cases, the law enforces such promises in order to protect reliance interests—and thus to promote justice or prevent injustice.[32] For example, the Restatement (Second) of Contracts § 90 states that such a promise is binding if it is "reasonably

[24] Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession (2000).

[25] *Id.* at 1.

[26] *Id.* at 2.

[27] *Cf.* Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section I.C. (describing the relationship of justice to ideal and non-ideal social contract theory).

[28] Charles Fried, Contract as Promise: A Theory of Contractual Obligation 1 (2d ed. 2015).

[29] Restatement (Second) of Contracts § 208 (Am. L. Inst. 1981).

[30] *Id.* at § 178.

[31] *See id.* at § 17.

[32] *See, e.g.,* Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (applying the rule of promissory estoppel to require a contractor to perform paving work according to a bid he had submitted); *see generally* Orit Gan, *The Justice Element of Promissory Estoppel*, 89 St. John's L.

expected to induce action or forbearance" and if "injustice can be avoided only by enforcement of the promise."[33]

Exploring that promise, and then thinking about how to enforce it, is our entire project here. To reiterate a point we mentioned above, this Article's initial argument does not depend on embracing any particular theory of justice. Whatever justice means, the legal system and its most prominent spokespeople proclaim it as their paramount goal and repeatedly promise it as their end. Yet, they never define it and even more importantly, in practice they consistently and quietly abandon justice for mere law (or, when *gravitas* seems especially important, for "the rule of law"). Indeed, they seem to exploit the very ambiguity surrounding justice—the lack of any broadly accepted definition—to evade accountability for actually realizing that goal.[34]

Rev. 55 (2015) (discussing promissory estoppel's capacity for promoting justice and its current shortcomings in doing so).

[33] Restatement (Second) of Contracts § 90 (Am. L. Inst. 1981). In some cases, courts have even been willing to de-emphasize questions of reliance for certain kinds of public-serving promises, where justice is at stake, such as charitable subscriptions. Justice ranks with charity as a virtue worthy of procedural favor. *See, e.g.*, I. & I. Holding Corporation v. Gainsburg, 12 N.E.2d 532 (N.Y. 1938) (finding an enforceable contract in a subscription made to assist a hospital in humanitarian work, and finding reliance in that hospital continuing that work); *cf.* Nelson Mandela, *Address for the "Make Poverty History" Concert* (Feb. 3, 2005), http://www.mandela.gov.za/mandela_speeches/2005/050203_poverty.htm [https://perma.cc/8TCD-NXH5] ("[O]vercoming poverty is not a gesture of charity. It is an act of justice."); Martin Luther King, *Beyond Vietnam: A Time to Break Silence* (Apr. 4, 1967), https://www2.hawaii.edu/~freeman/courses/phil100/17.%20MLK%20Beyond%20Vietnam.pdf [https://perma.cc/M7Y3-5MWM] ("True compassion is more than flinging a coin to a beggar. It comes to see that an edifice which produces beggars needs restructuring."). That is, if a donor who pledges money to a university is held accountable even absent reliance, then surely the legal system's explicit and continuous promise to serve justice carries some weight. Accordingly, the justice pledge would seem to require an even higher standard. *See* U.S. Oil Co. v. Midwest Auto Care Servs., Inc., 440 N.W.2d 825, 828 (Wis. Ct. App. 1989) ("In addition, the plaintiff must prove that enforcement of the promise is necessary to avoid an injustice. . . . [This] is a policy question to be decided by the court in the exercise of its discretion." (citations omitted)).

In fact, the first clause of § 90, which makes clear the provision's goal of "avoid[ing]" "injustice . . . by enforcement of the promise," should render self-enforcing the law's promise to deliver justice. Restatement (Second) of Contracts § 90 (Am. L. Inst. 1981). Regarding that justice pledge, it seems definitionally true that the "injustice can be avoided only by enforcement of the promise." *Id.*

[34] The legal system does sometimes articulate other goals alongside justice. The Federal Rules of Civil Procedure, for instance, state that they "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. One might argue that justice is simply one value among many to be optimized or traded off against competing concerns like efficiency and cost.

Several problems undermine that defense. First, while goals like speed and economy matter to any functioning system, they appear secondary to and interwoven with justice rather than in tension with it. "Efficiency" is not a word one will find chiseled on courthouse facades or courtroom walls. Indeed, speediness matters precisely *because* it matters to justice: undue delay or cost in addressing injustices are themselves elements of that injustice, captured by concerns about "access to justice." Judges themselves understand this relationship. When surveyed about their priorities, judges emphasized that "justice for litigants makes everything else pale in comparison" and that justice must supersede other goals lest there be merely a 'uniformity of bad results." *See infra* text accompanying notes 232–246 (discussing judicial survey findings). Some judges who initially ranked values like clarity or uniformity over justice were careful to describe those qualities as a "means to justice." *Id.* In short, when judges articulate multiple goals, they typically view justice as paramount and treat efficiency and related values as instrumental to it rather than as competing concerns requiring tradeoffs.

Our project is premised on the belief that this evasion is untenable. If law and its spokespeople consistently promise justice as their guiding ideal, they have an obligation to do the hard work of giving the term enough content to render the legal system accountable. This larger project attempts both to describe and meet that challenge. In short, as we begin to demonstrate in this Article, one cannot simply dismiss the promise of justice as empty rhetoric, or useful only on ceremonial occasions, and move on. If the law insists on promising justice, it must take seriously the work of giving meaning to, and making good on, that promise.

D. *Article Preview*

Part I of this Article explores the variety of ways the legal system signals its commitment to justice, revealing how even physical spaces reinforce the notion that the judiciary is committed first and foremost to advancing justice. That Part also examines how the promise of justice manifests in legal language—from official titles to judicial rhetoric—and considers how such rhetorical choices shape public perceptions.

Part II examines the role of prominent legal-institutional actors in articulating, reinforcing, and repeating the justice promise. It traces the justice promise across the echelons of the legal profession, working downward from the benches of the highest courts and the courts below them, to the practicing attorneys who advocate for their clients within those courts, and finally to the law schools where lay people endure the three-year challenge to become law people. Regarding the judges, it considers their oaths, written opinions, and public statements on justice, supplemented by polling data on their self-perceived role. Part II then examines the role of lawyers and bar associations, tracing the professional and ethical commitments to justice, with special attention to prosecutors, whose outsized discretion is paired with an elevated duty to pursue justice. Part II finally considers the important role of law schools in marketing law and lawyering as justice-centered.

Part III begins an argument that will continue in other work: the law doesn't keep this fundamental promise, raising questions about whether the legal system genuinely values justice or merely deploys it as a justifying

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Second, while the legal profession routinely teaches practitioners how to balance competing values in other contexts, it offers no robust attention to—much less training in—how to balance justice against other goals. Learned Hand's famous "B<PL" formula for ascertaining negligence liability, for example, epitomizes cost-benefit balancing and is a staple of legal education. Yet without a working definition of justice, which the legal system declines to provide, it is impossible even to identify what would be traded off in any balancing exercise involving justice, much less how to optimize among competing values. This asymmetry suggests that justice occupies a different status altogether—one that resists the kind of commensuration that balancing requires. Indeed, Judge Hand himself arguably recognized this distinction: "If we are to keep our democracy there must be one commandment: Thou shalt not ration justice." Whitney North Seymour, *Tribute to the 'Old Chief' of the Bench; Learned Hand Has Set a Record of Fifty Years as a Federal Judge, but the Breadth of his Career Is Even More Noteworthy than its Length,* N.Y. Times (Apr. 5, 1959), https://www.nytimes.com/1959/04/05/archives/tribute-to-the-old-chief-of-the-bench-learned-hand-has-set-a-record.html [https://perma.cc/XS9C-ZZJC].

narrative. This Part looks specifically at the special role of legal education, in what amounts to a bait-and-switch for law students promised justice but taught only law, and how that enculturation process, in turn, shapes legal professionals and the law. Part III also begins to consider the consequences of a breached promise, asking how the legal system's authority might be reconsidered if its justice claims prove insincere.

Finally, the conclusion begins to sketch some of the possible reasons why our legal system goes to so much trouble making a promise to which, behind the scenes, it ignores and often even disparages. It begins to explore why, and how, the system, and the people in it, break the promise of justice.

I. The Justice Promise

We turn initially to examining some evidence of the justice promise, in both its implicit and explicit forms. Section A begins by considering the message communicated by legal buildings—that is, by their architecture, statuary, and inscriptions. Section B then looks at how justice and the justice promise become manifest in the language of law itself.

A. Architecture

"[I]f you want justice, you go to a courthouse."

—State Supreme Court Justice[35]

As federal courthouses go, Boston's is a new one. It opened in 1998. Facing and welcoming the city's waterfront, the courthouse is home to the U.S. Court of Appeals for the First Circuit and to the U.S. District Court for the District of Massachusetts.

Outside and throughout the courthouse, more than thirty granite engravings on tablets with raised stone letters set the tone. All speak to high aspirations. At least seven proclaim something explicit about justice. The following quotations—a sample of the engravings—nicely illustrate the diversity and breadth of those messages and authors.[36] They include this 1776 gem from John Adams: "The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend upon an upright and skillful administration of justice."[37] This aphorism from Louis Brandeis:

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[35] Rick A. Swanson, *Judicial Roles in State High Courts*, 94 Judicature 169, 172 (2011) (survey of state court judges on appropriate judicial roles); *see infra* text accompanying notes 232–246.

[36] *See* James D. St. Clair Court Pub. Educ. Project of the Boston Bar Found., The Art and Craft of Justice: A Guide to the Stone Carvings and Inscriptions of the John Joseph Moakley United States Courthouse, Boston, Massachusetts (2nd ed. 2002), https://www.mad.uscourts.gov/history/pdf/Inscriptions.brochure.2E.pdf [https://perma.cc/5JSU-8V8E] (depicting photographs of and describing the inscriptions of the Courthouse).

[37] *Id.* at 6. The quotation in the engraving deviates slightly from the quotation in other sources. *See, e.g.*, John Adams, *III. Thoughts on Government, April 1776*, Founders Online, https://founders.archives.gov/documents/Adams/06-04-02-0026-0004 [https://perma.cc/2DHB-5KMB] ("The dignity and stability of government in all its branches, the morals of

"Justice Is But Truth in Action."[38] This tribute to diversity and inclusion from the first woman to be admitted to the Massachusetts bar, Lelia Josephine Robinson[39]: "the best administration of justice may be most safely secured by allowing the representation of all classes of the people in courts of justice."[40] And this sobering warning, from Frederick Douglass: "Where justice is denied and any one class is made to feel that society is an organized conspiracy to oppress, rob, and degrade them, neither persons nor property will be safe."[41]

Images of blind justice, holding aloft balanced scales, also share space in the courthouse—just as those images or statuary of Lady Justice appear in almost every federal, state, and local courthouse in the country.[42]

At the Suffolk County Courthouse, also in Boston, this "JUSTICE FOR ALL" relief stands, complete with swords and scales, just above the main door (Figure A).

Figure A.[43]

the people and every blessing of society, depends so much upon an upright and skillful administration of justice.").

[38] St. Clair, *supra* note 36, at 44.

[39] *Id.* at 7; Jill Norgren, Rebels at the Bar: The Fascinating, Forgotten Stories of America's First Women Lawyers 156–84 (2013).

[40] St. Clair, *supra* note 36, at 7.

[41] *Id.* at 10.

[42] Equality, liberty, and law get prominent billing, too. But justice is the central theme. *See id.* at 6–41; *see generally* Martha J. McNamara, From Tavern to Courthouse: Architecture and Ritual in American Law 1658–1860 (2004) (exploring how purpose-built colonial courthouses in Massachusetts not only professionalized the legal system but also visually and spatially conveyed judicial authority, civic order, and the administration of public justice).

[43] Daderot, *Justice for All Relief—Suffolk County Courthouse, Boston, Massachusetts, USA*, Wikimedia Commons (Jan. 1, 2013), https://commons.wikimedia.org/wiki/File:Justice_for_All_-_Suffolk_County_Courthouse_-_Boston,_MA_-_DSC04713.JPG [https://perma.cc/J9JB-3XHB].

Courtrooms and courthouses throughout the United States (and elsewhere) echo the justice motif through architecture, statues, monuments, inscriptions, and hagiography.[44] Consider finally the United States Supreme Court Building, which stands as the law's great cathedral or temple,[45] an architectural symbol, with its edificial statuary and inscriptions rendering legible the legal system's deepest and most abiding commitments and promises.

On either side of the forty-four steps leading to the main entrance of the building, atop "nearly fifty-ton marble blocks" are two immense statues, chiseled by James Earle Fraser.[46] One he titled "Authority of Law," and the other, "Contemplation of Justice."[47] As Fraser explained, the latter represents "a realistic conception of what I consider a heroic type of person with a head and body expressive of the beauty and intelligence of justice."[48] Beneath her left arm is a book of laws, and she holds in her right hand a figure of blindfolded Justice.[49] (See Figure B below.)

Figure B. "Contemplation of Justice" by James Earle Fraser[50]

[44] *See generally* Judith Resnick & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (2011) (tracing the history of and development of icons and public spaces related to justice).

[45] *See infra* note 55.

[46] Office of the Curator, Supreme Court of the United States, Statues of Contemplation of Justice and Authority of Law: Information Sheet (2010), https://www.supremecourt.gov/about/FraserStatuesInfoSheet.pdf [https://perma.cc/ANQ4-ZMHT].

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Daderot, *File: Contemplation of[]Justice by James Earle Fraser, US Supreme Court.jpg*, Wikimedia Commons (July 4, 2008), https://commons.wikimedia.org/wiki/File:Contemplation_ofJustice_by_James_Earle_Fraser,_US_Supreme_Court.jpg [https://perma.cc/KMR4-Y2XV].

In what is probably the most famous phrase describing the U.S. legal system, the words "Equal Justice Under Law" are inscribed on the front portico of that building.[51] Chief Justice Charles Evans Hughes in the end was responsible for that wording on the pediment. Much as a biased umpire applying fair rules will produce unfair outcomes, Hughes observed that both the law and those who apply it must be just.[52] Thus understood, the commitment to justice in the phrase "equal justice under law" capaciously includes the letter or substance of the law, the spirit of those who apply it, and the process through which it is applied.[53]

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[51] *See* Barrett McGurn, *Slogans to Fit the Occasion*, *in* Yearbook 1982, 104, 104 (Supreme Court Historical Society 1982) ("Few legal phrases are better known than the four words engraved above the front portico of the Supreme Court Building."). An interesting and somewhat revealing history underlies the use of that phrase. At the time of its selection, 1932, it had at least one prominent detractor. Then Chief Justice Charles Evans Hughes, who tentatively agreed to the phrase and who had de facto control over such matters, was challenged by a prominent journalist, Herbert Bayard Swope, who was the executive editor of the *New York World* and three-time winner of the Pulitzer Prize. *See* E.J. Kahn, The World of Swope 260–77 (1965). Swope, also apparently a friend of the Chief Justice, argued that the word "equal" was redundant. McGurn, *supra*, at 104. He "accuse[d] the . . . Court of having permitted tautology, verbosity and redundancy, each of which is an abomination in good usage." *Id.* The critique seems sound: "Justice under Law" would convey the same meaning with fewer words; that is, equality is implied in "justice."

Though he was ultimately unpersuaded and "quashed" Swope's "indictment," *id.* at 105, Chief Justice Hughes was discomfited. In a response to Swope, he encouraged the newsman to put down his "blue pencil," and "consider the history of the law," in which "'Equal Justice' is a time-honored phrase." *Id.* Hughes quoted President Thomas Jefferson's first inaugural, which "spoke of '*equal and exact justice* to all men." *Id.* (emphasis in original). He also pointed to the first Judiciary Act of 1789, which contains an oath taken by federal judges: "I . . . do solemnly swear . . . that I will administer justice without respect to persons, and do equal right to the poor and rich." *Id.* at 106 (emphasis omitted). According to the Chief Justice, "probably no sentence in our Reports is more frequently quoted" than "equal justice," and, had he more time, he could provide "a host of illustrations of the use of the phrase 'equal justice.'" *Id.*

[52] McGurn, *supra* note 51, at 104. As we argue in our other work, this distinction between just outcomes and just application of underlying rules, and the notion that courts should aim for both, is critically important to keep in mind and is too often confused. *See* Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section III.B; Jon Hanson & Dean A. Strang, *Justice Deferred*, 21 Harv. L. & Pol'y Rev. (Issue 1, forthcoming 2026) [hereinafter Hanson & Strang, *Justice Deferred*].

[53] A lawyer and former pupil of Chief Justice Hughes, Clarence P. Cowles, sought to provide more support for the Chief Justice's choice and assembled a broader collection of historical precedents that together might make clear the pedigree of the principle "Equal Justice Under Law." Cowles assembled twenty-four pages that arguably vindicated Hughes's claims and that, in any event, provide indirect support for this Article's thesis regarding the law's promise of justice. Barrett McGurn, then the Supreme Court Press Secretary, provided this summary of Cowles's painstaking work:

- Hammurabi (circa 2130 to 2088 B.C.). In his Code he called upon the strong to deal justly with "the weak, the orphan and the widow."
- Pericles' Funeral Oration (circa 404 B. C.), quoted by Thucydides, and translated by Richard Crawley: "If we look to the laws, they afford equal justice to all in their private differences."
- God's voice in Ezechiel, chapters 18 and 33 (King James Revised Standard edition): "Is not My way equal?", thus equating equality and justice.
- St. Paul to the Colossians (same edition), chapter 4: "Masters, give unto your servants that which is just and equal."
- Aristotle (340-321 B.C.) in Book 5 of the Nicomachean Ethics: "the equitable is just."

It is with such elevating imagery and aspiration in mind that Justice Stephen Breyer has written, "[T]he significance of the court's front entrance extends beyond its design and function. . . . To many members of the public, this court's main entrance and front steps are not only a means to, but also a metaphor for, access to the court itself."[54]

Beyond even those obvious symbols, the architecture of courthouses and courtrooms often conveys a more general message about the connection between law and justice, about judges as priests of justice, and about courthouses as temples of justice.[55] As architectural historian John C. McConnell explains, "It is these images of great columns, staircases, polished corridors, statuary, and the like, that are also the embodiment of justice for us. By remembering architectural forms in association with ideas about justice . . . we create archetypes—physical forms that have meanings defined by their associational value."[56]

So, across all echelons of our stratified judiciary (and across history[57]), justice reigns. Or so it would appear to those looking at the architecture of legal institutional edifices from the outside.

- The judicial oath prescribed by King Saint Louis (1226-1270), requiring all magistrates to swear that "without regard to persons they will do Justice according to the laws of this Kingdom."
- Blackstone's Commentaries on the Laws of England (1768), Volume III, chapter 27: "Equity is synonymous with Justice."
- Sir Frederick Pollock's volume, "A First Book of Jurisprudence" with its comment that "Justice administered according to the law . . . seems capable of being reduced to Generality Equality and Certainty"
- Justice Pliny Merrick's decision during the March 1859 Term of the Supreme Judicial Court of Massachusetts in Fitchburg Railroad Company v. Addison Gage (quoted in 12 Gray 393-1866): "The principle derived from (common law) is very plain and simple. It requires equal justice to all."
- As a proud Vermonter Mr. Cowles cited one other precedent from his own Green Mountain state. The Vermont Constitutional oath, required of all judges, is a pledge to do "equal right and justice to all men. . . according to law."

McGurn, *supra* note 51, at 107–08.

[54] Breyer, J., *Statement Concerning the Supreme Court's Front Entrance*, J. of the Sup. Ct. of the U.S., Oct. 2009, at 831, https://www.supremecourt.gov/orders/journal/jnl09.pdf [https://perma.cc/AK3Q-GQ8W].

[55] *See* Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (2011) (examining how courthouse facades, courtroom design, and judicial iconography convey institutional messages linking law to justice); Lucille A. Roussin, *The Temple of American Justice: The United States Supreme Court Building*, 20 Chap. L. Rev. 51, 53–55 (2017) (describing Chief Justice Taft's view that courthouse architecture should impress upon the judge "that he is a high-priest in the temple of justice"). Notably, one of the current exhibitions at SCOTUS is "The Supreme Court Building: America's Temple of Justice." *Current Exhibitions*, Supreme Court of the United States, https://www.supremecourt.gov/visiting/TempleOfJustice.aspx [https://perma.cc/NK3L-GMQG] (last visited Nov. 4, 2025).

[56] John C. McConnell, The Houses of Law: A History of Superior Court Architecture in Massachusetts (1984).

[57] *See* McGurn, *supra* note 51.

B. Language

That branding also pervades the language around and about our legal system, a system that styles itself, and is commonly referred to, as the "justice system" or the "system of justice." The centrality of justice is further suggested by the fact that the most powerful and authoritative members of that system, the jurists occupying the nine seats of the United States Supreme Court bench, are titled "Justices," as are the highest judges in most states. Meanwhile, in Delaware at least, lower-status magistrates are sometimes referred to as "justices of the peace."[58]

The word "justice" finds its way into every element of the system. There's "criminal justice" and "civil justice." There's the problem of "access to justice," when individuals cannot afford a lawyer.[59] There is the current euphemism for people re-entering society after prison or jail: "justice-involved."[60] When a person, group, or institution seeks justice, each knows—indeed, is more or less required—to turn to the law for vindication. When an individual evades accountability to the law, that person is a "fugitive from justice."[61] The act of interfering with the law and its procedures is called "obstruction of justice."[62] An apparent error or failure within the system is called a "miscarriage of justice."[63] Other lay conceptions of justice—justice with modifiers—

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[58] *See Magistrate Screening*, Delaware Division of Professional Regulation, https://dpr.delaware.gov/boards/magistrate/ [https://perma.cc/ZH95-VC88] (last visited Nov. 4, 2025) (explaining screening for Delaware's Justices of the Peace (Magistrates)).

[59] *See Resource Center for Access to Justice Initiatives*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/ [https://perma.cc/3RMT-QMNR] (last visited Nov. 4, 2025) (ABA web page describing their initiative to serve "judicial, private bar, and legal aid leaders who work together to provide people of low and modest income with meaningful access to their justice systems."); Access to Justice Lab, https://a2jlab.org/ [https://perma.cc/K3F5-B3NU] (last visited Nov. 4, 2025) (A2J Lab works to transform the U.S. justice system through empirical research).

[60] Re-entry programs now often use this term, gentler than "convict" or "criminal" and designed to destigmatize people who already face many obstacles—both judicial and cultural—to establish normalcy. For example, the California Department of Health Care Services is one such initiative. *See, e.g., Justice-Involved Reentry Initiative,* Cal. Dep't of Health Care Servs., https://www.dhcs.ca.gov/CalAIM/Justice-Involved-Initiative/Pages/home.aspx [https://perma.cc/V2Y4-G5BP] (last visited Nov. 4, 2025). The Center for Health Law and Policy at Northeastern University Law School's "Changing the Narrative" project argues for the use of the phrase "justice-involved." *Justice-Involved People*, Changing the Narrative, https://www.changingthenarrative.news/justice-involved-people [https://perma.cc/5QLC-75YP] (last visited Nov. 4, 2025). Similarly, North Carolina State University's Institute for Emerging Issues has a lengthy briefing that highlights the term. Brodie Smith, *The Employment of Justice-Involved Persons*, Inst. Emerging Issues (May 22, 2023), https://iei.ncsu.edu/2023/05/22/the-employment-of-justice-involved-persons [https://perma.cc/PL2V-YLNE].

[61] *See* 18 U.S.C. § 921(a)(15) ("The term 'fugitive from justice' means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding."); Reed v. State ex rel. Ortiz, 947 P.2d 86, 113 (N.M. 1997) (Minzner, J., concurring) ("Thus, justice, in the phrase 'fugitive from justice,' does not mean the 'administration of what is just' or fair; it means the administration of law").

[62] *See* 18 U.S.C. § 1503(a) (defining obstruction of justice as an act that "corruptly, or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.").

[63] *Miscarriage of Justice*, Black's Law Dictionary (12th ed. 2024) (defining the term as "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.").

are interpreted as inferior to the undiluted form produced by law. "Vigilante justice," "frontier justice," "street justice," "mass justice," "mob justice," and the like, are all identifiable and identified as constituting the sort of problematic 'settling of accounts' that occurs outside the law.[64] Often, indeed, those means to justice are punishable by law itself, as a matter of "justice."

The language and symbolism of justice is inescapable, a physical and mental image impressed on every person who enters the courthouse. The power of this branding is so strong that it extends beyond the word's common meaning in marketing; it leaves a permanent mark burnt into the institution of the courts, an ineffaceable promise to serve the people by engaging not just the law, but the core goal of justice. This preoccupation extends beyond the architecture and language of the courts, and directly into the courts' people, the living organs of the legal system.

II. Justice's Promisors

"We are the servants of society, the bond-servants of justice."

—Woodrow Wilson[65]

What then of the people whom the law brands as servants of justice?[66] It is within these actors that we find the core goal of justice beginning to waver; justice lives in our hearts much more as flickering candlelight than the burning flame that courts proclaim. Yet actors within this system still cling to justice as a core motivation, both internally and externally. That is most obvious at the base: in the law schools and their students, the nation's future lawyers. But it persists, to at least some extent, on up to the pinnacle: from lawyers generally and bar associations, to the special case of prosecutors, up to judges as top-level decision-makers. Yet as we ascend to each level, it becomes obvious how the goal of justice is increasingly obscured, changed, or transmuted within the minds of legal actors.

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[64] *See, e.g.*, Interview with Judge Denny Chin *in* Joel Cohen, Blindfolds Off: Judges On How They Decide 41–58 (2014).

[65] Woodrow Wilson, The Lawyer and the Community, Annual Address before the American Bar Association (Aug. 31, 1910), *in* 192 N. Am. Rev. 604, 622 (1910), https://www.jstor.org/stable/pdf/25106795.pdf [https://perma.cc/WKL3-ADYV].

[66] Note importantly that we, the authors, are ourselves entirely voluntary participants in various roles within the legal system and profession. We are not among the involuntary participants—the accused, the victims of crime, family members, the citizen witnesses, the injured plaintiffs or the civil defendants—all of whom have distinct voices that go unheard most of the time. *See, e.g.,* Abbe Smith, Guilty People (2020) (assessing how guilty criminal defendants move through the criminal justice system); Chanel Miller, Know My Name: A Memoir (2019) (describing the author's experience as a victim of sexual assault); Shaka Senghor, Writing My Wrongs (2017) (providing an incarcerated individual's first-hand perspective of American prisons); Six by Ten: Stories from Solitary (Taylor Pendergrass & Mateo Hoke, eds., 2018) (collecting perspectives from incarcerated individuals in solitary confinement); Jarvis Jay Masters, That Bird Has My Wings: The Autobiography of an Innocent Man on Death Row (2010) (describing the author's experiences facing the threat of execution for a crime he says he did not commit).

A. Law Schools

> *"A law student at the outset of his studies ought first to know the derivation of the word jus. Its derivation is from justitia. For . . . the law is the art of goodness and fairness. . . . Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham."*
>
> —Digest of Justinian Volume 1[67]

> *"The students . . . will prove themselves to be leading orators and servants of justice."*
>
> —Digest of Justinian, The Whole Body of Law[68]

Law schools across the United States portray themselves as promoting justice by educating their students in the means and methods of justice.[69] Similarly, many students opt to attend law school in order to prepare themselves for a career of advancing justice.[70] This section examines the way that law schools, in that way, constitute the institutional intersection of demand and supply of justice education.

1. Legal Education Generally

Legal education serves many critical roles in our legal system and society. In addition to providing most of the key personnel and professional participants in our judicial branch, law school is a common launching pad for political careers. Historically, most U.S. presidents, vice presidents, and members of Congress have come from legal backgrounds.[71] While that percentage has declined in recent decades, nearly forty percent of the 2017 U.S. Congress attended law school.[72] The judiciary, needless to say, is made up entirely of lawyers other than at the lowest local level of justices of the peace, who may

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[67] Dig. 1.1.1 (Ulpian, Institutes 1).

[68] Dig. (Justinian, The Whole Body of Law) ("The students are to have nothing concealed from them, therefore, when these arcane matters have been revealed to them; and after perusing all the works we have composed . . . , they will prove themselves to be leading orators and servants of justice.").

[69] *See* Note, *Alienation in Law School*, 137 Harv. L. Rev. 958, 965, n. 49 (2024).

[70] *Id.* at 963 ("Making the world a more just place is an important commitment of some incoming law students. One may hope to advance a particular cause; to zealously represent the interests of individuals; or simply to practice law well, out of a conviction that doing law *is* doing justice.").

[71] Nick Robinson, *The Decline of the Lawyer-Politician*, 65 Buff. L. Rev. 657, 658 (2017).

[72] *Id.* at 659.

or may not need a law degree as a prerequisite to holding the job, depending on the state.[73]

Legal education matters most, however, because law schools are the place where lay people become law people, where they are professionalized, and where they seek to learn not just about the law but, importantly, how to "think like a lawyer." Through that process, law students are prepared to interpret, apply, enforce, and maybe even make laws within our larger system of justice.[74]

What law schools teach, what they don't teach, how they teach, what they value, what they do not value, what questions they center, what behaviors they model, the explicit and implicit curricula of legal education—they all have a profound effect on who applies to law school, on the perspectives and lives of their students and graduates,[75] and in the end, on the legal profession, on the laws and legal system, and, on society itself.[76] The impact of law schools and legal education on law and the legal system was summarized well by then-Professor (later Supreme Court Justice) Felix Frankfurter, who wrote: "In the

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[73] *Cf.* Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 Colum. L. Rev. 1287, 1345–88 (2022) (aggregating data from all fifty states and the District of Columbia regarding the extent to which, if at all, each state allows non-lawyers to serve as judicial officers and finding that thirty-two states allow at least some level of adjudication without a law degree).

[74] *See* Mary Ann Dantuono, *A Citizen Lawyer's Moral, Religious, and Professional Responsibility for the Administration of Justice for the Poor*, 66 Fordham L. Rev. 1383, 1390 (1998) ("Law schools are the portals through which all new members of the profession must pass, and attendance at law school may be the single most unifying experience of our profession.").

[75] Many have observed that, for better or worse, law schools transform the minds, values, and futures of their students. *See, e.g.*, Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. Legal Educ. 48, 48 (2003) ("Students arrive at law school full of excitement about the law's capacity to further social justice. Yet many leave law school disillusioned, perceiving the law as a value-neutral instrument and lawyers as persons who wield that instrument without regard for its impact on society."); Robert V. Stover, Making it and Breaking it: The Fate of Public Interest Commitment During Law School 5, 74–75 (1989) (concluding that law school is as much a professional socialization experience as it is a scholarly and skills-building enterprise, and business interests have driven how we train lawyers and continue to dominate our curriculum and our assessment of who we are).

[76] *See* William M. Sullivan, et al., The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law 2–4 (2007) ("Law school provides the single experience that virtually all legal professionals share. . . . they are also the place where the profession puts its defining values and exemplars on display . . ."); Elizabeth Mertz, *Inside the Law Classroom: Toward a New Legal Realist Pedagogy*, 60 Vand. L. Rev. 483, 512 ("Despite its façade, the law school classroom is the site of more than lessons about technical law. Educational research in other settings has demonstrated that the structure of classroom interactions affects how we 'create settings in which students can learn lessons of caring, justice, and self-worth.' Clearly, in a field such as law, these lessons are even more obviously part of what students will carry away with them." (quoting Carol Weinstein, *The Classroom as a Social Context for Learning*, 42 Ann. Rev. Psychol. 493, 519 (1991)); Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" 5 (2007) ("Legal training focuses students' attention away from a systematic or comprehensive consideration of social context and specificity. Instead, students are urged to pay attention to more abstract categories and legal (rather than social) contexts, reflecting a quite particular, culturally driven model of justice."). Bethany Henderson summarizes the power and import of legal education as follows:

> The values and norms both implicit and explicit in students' law school experience greatly affect their perception of the legal profession. . . . As law teachers encounter prospective lawyers before their impressions of the legal profession are fully formed, they "have a unique opportunity to influence the attitude of the nascent lawyer committed to their classrooms at the embryonic stage of his legal career." Law schools have long recognized their socialization capacity; they have served as the "primary cultural and ideological device[s] in the making and shaping of the American legal profession" since the late nineteenth century.

last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."[77] Thus law schools not only teach what the law is; they help determine what the law will become.

A good place to discover a law school's core values and goals might seem to be in its mission statement,[78] which one legal scholar describes as "a statement of the fundamental reason for an organization's existence."[79] A survey of law school mission statements—as well as their mottos, vision statements, and stated core values—suggests that "justice" is a major priority for law schools.[80]

There are far too many law schools and mission statements to inventory here; for a sample, however, consider this list of some schools whose names begin with the letters "A," "B," or "C" in the United States:

- Albany Law School's mission and vision statements includes the commitment to students to "promote the rule of law, equity, and access to justice in their professional pursuits and advance their careers using a sophisticated understanding of the law to improve society" and to "prepare graduates . . . who will . . . fundamentally transform the practice of law

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Henderson, *supra* note 75, at 49–50 (quoting John R. Peden, *Goals for Legal Education*, 24 J. Legal Educ. 379, 382 (1972) and Robert Granfield, Making Elite Lawyers: Visions of Law at Harvard and Beyond 27–29 (New York, 1992)).

[77] Letter from Felix Frankfurter, Professor, Harvard Law School, to Harold Rosenwald 3 (May 13, 1927), as quoted in Rand Jack & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers 156 (1989). In 1980, Chief Justice of the United States Supreme Court Warren E. Burger similarly highlighted the influence of legal education on law and the legal profession:

> Every law school has a profound duty—and a unique opportunity—to inculcate principles of professional ethics and standards in its students. This duty should permeate the entire educational experience beginning with the first hour of the first day in law school. The failure to do this is, perhaps, even more serious than the failure to relate legal theory to practice.

Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 Clev. St. L. Rev. 377, 377 (1980); *see also* Harlan F. Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 14 (1934) (describing how the character of law schools shapes the character of profession).

[78] In reality, mission statements probably are not especially revealing, a fact that is consistent with the basic thesis of this project, that prominent institutions and actors in the legal system do not practice what they preach. *See* Gordon T. Butler, *The Law School Mission Statement: A Survival Guide for the Twenty-First Century*, 50 J. Legal Educ. 240 (2000) (explaining that "[e]very law school approved by the ABA is required to have a mission statement, but not every school does. Those that do seldom review their mission statement between accreditations. And most law schools do not make their mission statements readily available. They are seldom in the catalog or on the Web site").

[79] Butler, *supra* note 78, at 240. A law school's ABA accreditation depends upon it having a mission statement and requires schools to develop and periodically revise self-studies to evaluate "the strengths and weaknesses of [their] program in light of the school's mission." *Id.* at 241.

[80] In addition, the most influential organizations that help define or aggregate collective goals of law schools and legal educators—that is, the Association of American Law Schools (AALS) and the American Bar Association (ABA)—have mission statements, in which "justice" is integral. *See* ABA Mission and Goals, American Bar Ass'n, https://www.americanbar.org/about_the_aba/aba-mission-goals/ [https://perma.cc/8JEN-LXJN] (last visited Jan. 11, 2026) (describing the ABA's mission: "To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession"). *See infra* notes 99–101 and accompanying text (describing the similar stated goals of AALS).

and related professions to help create a more just, fair and equitable world."[81]

- Barry University's Dwayne O. Andreas School of Law embraces a core commitment to prepare "all members of our community to accept social responsibility to foster peace and nonviolence, to strive for equality, to recognize the sacredness of Earth, and to engage in meaningful efforts toward social change. The University promotes social justice through teaching, research and service."[82]
- Boston College Law School, in part because of its roots "in the Jesuit tradition of service to God and others," "recognizes its commitment to social and economic justice, and strives to advance this commitment both through its curricular offerings and in the extracurricular projects that it supports."[83]
- Boston University School of Law is an atypical law school that does not mention justice in its mission statement. Rather, the school proclaims, "In our teaching, we aim to prepare a diverse body of students for the ethical practice of law around the globe at the highest levels of quality and integrity and to serve the public interest."[84]
- The vision statement of Campbell University's School of Law emphasizes a "community of faculty and students whose aim, guided by transcendent values, is to develop lawyers who possess moral conviction, social compassion and professional competence, who view the practice of law as a calling to serve others and to create a more just society."[85] That vision is informed by a "Christian perspective on law and justice," according to which "[p]articular emphasis therefore is given to practicing the highest ideals of integrity and civility, seeking transformative justice, promoting reconciliation, and helping those who are most in need of our assistance. In this way, our graduates can become effective advocates for legal and social justice, both in their local communities and in other parts of the world."[86]

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[81] *Strategic Plan*, Albany L., https://www.albanylaw.edu/about/strategic-plan [https://perma.cc/27QL-QDSR] (last visited Nov. 4, 2025).

[82] *Dwayne Andreas School of Law*, Barry Univ., https://www.barry.edu/en/academics/law/ [https://perma.cc/CV4Y-44BS] (last visited Nov. 4, 2025).

[83] *History and Mission*, B.C. L., https://www.bc.edu/bc-web/schools/law/about/history-mission.html#mission [https://perma.cc/FML4-X6TK] (last visited Nov. 4, 2025).

[84] *Law School Mission Statement*, B.U. Sch. of L., https://www.bu.edu/law/about/mission-statement/ [https://perma.cc/RV2P-KQNT] (last visited Nov. 4, 2025).

[85] *Our Vision*, Campbell L., https://law.campbell.edu/about/our-school/our-vision/ [https://perma.cc/HWV6-2V92] (last visited Nov. 4, 2025).

[86] *Id.*

- The mission of the Cleveland-Marshall College of Law at Cleveland State University distills to two imperatives: "Learn Law. Live Justice."[87]
- The Columbus School of Law (part of the Catholic University of America) mission includes the "core commitment to," among other ideals, "justice rooted in the common good."[88]
- Cornell Law School retains the mission articulated at its founding 120 years ago: "to produce . . . well-trained, large-minded, morally based lawyers in the best sense," more recently specifying that it aims for its graduates to be able to "[e]xercise with due care the role entrusted to them as officers of the legal system and public citizens, having special responsibility for the quality of justice."[89]

While not every law school places justice at the core of its mission or identity, that sample illustrates just how common the goal is among a variety of law schools, from big to small, from national to regional, and from public to private.[90] It illustrates that many of the institutions devoted to educating lawyers and preparing them for participation in our legal system place—or at least purport to place[91]—justice at the heart of their purpose and reason for being. And even many of those law schools that do not explicitly name justice nonetheless embrace missions that resonate with justice.[92]

[87] *Mission and Vision*, Clev. St. U. L., https://www.law.csuohio.edu/meetcsulaw/about/missionvision [https://perma.cc/S92W-H85B] (last visited Nov. 4, 2025).

[88] *Columbus School of Law: Mission Statement*, Cath. U. Am., https://www.law.edu/about-us/mission/index.html [https://perma.cc/H57S-D4FZ] (last visited Nov. 4, 2025).

[89] *Registrar's Office: Learning Outcomes and Mission Statement,* Corn. L. Sch., https://www.lawschool.cornell.edu/life-at-cornell-law/registrar/ [https://perma.cc/34ZC-A43X] (last visited Nov. 4, 2025).

[90] The two law schools at which we serve on the faculty similarly place justice high on their list of priorities in their mission statements. Drake Law School's mission statement begins as follows: "Drake Law School prepares graduates to promote justice, serve their communities, and uphold the ideals of ethics and professionalism." *About: Mission Statement*, Drake L. Sch., https://www.drake.edu/law/about/ [https://perma.cc/L6S7-2FUL] (last visited Nov. 4, 2025). As of 2000, their mission statement was "[a] diverse community of students and faculty [to] join together to produce a legal culture that seeks to promote justice, improve the law, and respond to the call of public service." Butler, *supra* note 78, at 254. Harvard Law School's mission statement and seal are described below. *See infra* text accompanying notes 107–120.

[91] *See supra* note 80.

[92] The mission statement for Berkeley Law School, for instance, includes this description: "Through service, the law school tackles some of the most important, challenging and timely problems facing the state, nation and world, harnessing our excellence in teaching and research to improve government, business and society." *Mission and Learning Outcomes*, U.C. Berkeley L., https://www.law.berkeley.edu/about-us/mission-learning-outcomes/ [https://perma.cc/57SR-CLHK] (last visited Nov. 4, 2025). Before 2008, the mission of St. Thomas University School of Law, part of a university sponsored by the Roman Catholic Archdiocese of Miami, used to emphasize the goal of "teach[ing] and prepar[ing] its students, in a personalized, caring environment under Catholic auspices, . . . contribut[ing] their talents to concerns for peace, freedom, justice, the dignity of the individual, and the betterment of humanity." Butler, *supra* note 78, at 243. More recently it was altered such that "justice" is no longer explicit. *Mission Statement and Learning Outcomes*, St. Thomas U. Coll. L., https://www.stu.edu/law/academics/mission-and-learning-outcomes/ [https://perma.cc/QMX2-BZBE] (last visited Nov. 4, 2025). Still, according to the newer mission statement, "the Law School remains committed in teaching,

Beyond mission statements, an analysis of law school websites—the online public presentation of the law school where potential students, potential donors, and others can acquire a sense of the institution's priorities and achievements—suggests that many law schools publicly are "all in" on advancing justice and the public interest.

Students notice. An article by Luna Martinez G. analyzed the messaging on Berkeley Law's website, where she was a student.[93] Martinez describes, among other things, a video embedded on Berkeley Law's admissions website. The video begins, she writes, by asserting that "students come here because they want to make the world a better place," followed by a student explaining how, "within three weeks of starting class, I was able to start advocating for low-income community members . . . and help people in the ways that I came to law school to do."[94] The video also contains a montage of images from "the school's clinics, a Black Lives Matter die-in, and a student arguing a motion at an eviction case in court. It closes with a view of the Bay and the words 'the biggest thing is helping people.'"[95] Based upon those and similar examples,[96] Martinez concludes that:

> The school's self-image and mission seem to embrace the idea of legal training as a vehicle to advance ideals of justice and fairness in society. In fact, one of its learning outcomes is "using the law to solve real-world problems and to create a more just society." It's clear then that the school purports to advance certain ideas of political and social justice through the work of students. More important than these individual aspirations, however, is the school's self-identification with a broader social project to use the law as a tool to build a more just and equal society.[97]

Berkeley is not at all unusual in its public commitments. Reviewing the "Top 14 law schools' admissions websites," Martinez found "similar aspirational language about using a law degree to better society and change the world."[98]

The Association of American Law Schools (AALS), with its more than 170 institutional members, is the largest and, by far, most significant and influential association of law schools and legal educators in the U.S.[99] "Its member schools enroll most of the nation's law students and produce the

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scholarship, and service, to fostering a public order of human dignity, to training lawyers sensitive to the needs of the region's underrepresented communities . . . ." *Id.*

[93] Luna Martinez G., *An Identity Problem: Can Law School Be A Tool for Social Change?*, 29 Berkeley La Raza L.J. 31, 34–35 (2019).

[94] *Id.* at 34.

[95] *Id.*

[96] *See, e.g.*, *id.* (describing the school's Prospectus, which includes this message from the Dean: "We want students who . . . bring their passions—for justice, for social change, for the law.").

[97] *Id.* at 34–35 (footnotes omitted).

[98] *Id.* at 35 n.10.

[99] *About AALS*, Ass'n Am. L. Schs., https://www.aals.org/about/ [https://perma.cc/UA2C-X2LN] (last visited Nov. 4, 2025).

majority of the country's lawyers and judges, as well as many of its lawmakers."[100] The AALS supports its mission, "to uphold and advance excellence in legal education" by promoting "core values of excellence in teaching and scholarship . . . while seeking to improve the legal profession, to foster justice, and to serve its many communities."[101]

Several of the best-known teaching organizations of law faculty also emphasize "justice" as a top priority. The Society of American Law Teachers (SALT) includes "law teachers, law school administrators, librarians, academic support experts, students and affiliates" from more than one hundred U.S. law schools.[102] SALT, as highlighted on the front page of its website, is "committed to advancing teaching excellence, social justice and diversity."[103] Similarly, the Clinical Legal Education Association, which "exists to advocate for clinical legal education as fundamental to the education of lawyers" seeks, among other goals, to "pursue and promote justice and diversity as core values of the legal profession."[104]

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[100] *Id.*

[101] *Id.*

[102] *About SALT*, Soc'y Am. L. Tchrs., https://www.saltlaw.org/about/ [https://perma.cc/4A6E-BTVX] (last visited Nov. 4, 2025).

[103] Soc'y Am. L. Tchrs., https://www.saltlaw.org/ [https://perma.cc/HG3P-QFZ2] (last visited Nov. 4, 2025).

[104] *Mission Statement*, Clinical Legal Educ. Ass'n, https://www.cleaweb.org/mission-statement [https://perma.cc/N39J-CXPS] (last visited Nov. 4, 2025). Some law professors (particularly clinical law professors) have stressed the primacy of justice in law and legal education, as the following examples illustrate:

- In 1968, Calvin Woodward argued that "students must be trained to regard themselves as agents of justice as well as officers of the court. More important, they must be shown precisely what this responsibility entails. And establishing a course of instruction that will serve this purpose should be the great issue in legal education today." Calvin Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 Va. L. Rev. 689, 736–37 (1968); *see also id.* at 737 (emphasizing that "Justice . . . must take precedence over law").
- In 1984, Professor Richard Burke wrote: "Truth, justice, and fairness, both in means and ends, are paramount on the scale of legal values, and when those are at stake, the other values must yield." Richard K. Burke, *"Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law*, 38 Ark. L. Rev. 1, 22 (1984).
- Professor Anthony D'Amato argued in 1990 that "[j]ustice is the purpose and goal of law. It is the reason that law exists. It animates and breathes life into the law." Anthony D'Amato, *Rethinking Legal Education*, 74 Marq. L. Rev. 1, 35 (1990).
- UK Professor Andrew Boon argued in 1998 that "[t]he integration of skills and knowledge should assist practitioners in achieving the good of legal professions; achieving justice. The development of virtues consistent with this social good must be a central goal of legal education." Andrew Boon, *History is Past Politics: A Critique of the Legal Skills Movement in England and Wales*, 25 J. L. & Soc'y 151, 167 (1998).
- In 2007 Professor Roy Stuckey wrote: "All professional values deserve attention by law schools, but teaching students to strive to seek justice may be the most important goal of all." Roy Stuckey, *Can We Assess What We Purport to Teach In Clinical Law Courses?*, 9 Int'l J. Clinical Legal Educ. 9, 25 (2014).

Based upon the explicit mission of those institutions and associations devoted to legal education, it seems quite clear that the advancement of justice is touted as a—perhaps *the*—top priority.

It is important to highlight that the mission statements of universities and other schools within those universities (e.g., physics, business, education, and divinity schools[105]) often do not include the promotion of justice. Harvard is a rare terse exception.[106]

Again, it's the law and legal system that promises justice, and that promise is a core part of what distinguishes the law from other institutions.

2. *Harvard Law School Specifically*

> *"IUSTITIAM NAMQUE COLIMUS ET BONI ET AEQUI NOTITIAM PROFITEMUR"*[107] *("for we cherish justice and profess knowledge or goodness"*[108]*)*
>
> —Inscription, Langdell Reading Room, Harvard Law School

For just one specific illustration of the justice promise, consider these examples illustrating the centrality of "justice" as the purported primary goal at Harvard Law School. Until recently, Harvard Law School's "mission" had been "[t]o educate leaders who contribute to the advancement of justice and [the] well being of society."[109] When Harvard Law School's new seal, featuring the words "Veritas Lex et Iusticia," was unveiled a few years ago, then-Dean John Manning explained the words' significance: "Harvard Law School," he proclaimed, "stands for truth, law, and justice."[110] At that same time, Harvard Law School's Instagram page similarly told its 135,000 followers and countless

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[105] The Harvard Divinity School mission statement is to "educate[] students for intellectual leadership, professional service, and ministry. . . ." *History and Mission*, Harv. Divinity Sch., https://www.hds.harvard.edu/about/history-and-mission [https://perma.cc/PEQ5-BCCM] (last visited Nov. 4, 2025). However, its vision statement does include a nod toward justice: "To provide an intellectual home where scholars and professionals from around the globe research and teach the varieties of religion, in service of a just world at peace across religious and cultural divides." *Id.*

[106] *See, e.g.*, *Mission Statements of Top Universities in 2024*, Ivy Coach (June 8, 2024), https://www.ivycoach.com/the-ivy-coach-blog/college-admissions/mission-statements-universities/ [https://perma.cc/Y3RJ-ZGJ3] (highlighting mission statements of "top universities" in 2024; only Harvard refers to justice, promising to "strive for a more just, fair, and promising world"); Chris Drew, *23 University Mission Statement Examples*, HelpfulProfessor.com, (Oct. 5, 2023), https://helpfulprofessor.com/university-mission-statement-examples/ [https://perma.cc/25KV-E2ZG] (providing a word cloud of 23 different university mission statements, where the following words were most common and justice was not visible: Students, Research, Learning, Knowledge, Community, Global / International / World, Lead, Classroom and beyond, Creative, Excellence).

[107] Dig. 1.1.1 (Ulpian, Institutes 1)

[108] Our translation is from Louis P. Pojman, *Equality and Desert*, 72 Phil. 549, 549 (1997) (providing more of the pertinent quotation: "Law is the art of goodness and justice. By virtue of this [lawyers] may be called priests, for we cherish justice and profess knowledge or goodness and equity, separating right from wrong and legal from the illegal.").

[109] Pete Davis, *A Mission in Winter*, Harv. L. Rec., (Jan. 7, 2016), https://hlrecord.org/a-mission-in-winter/ [https://perma.cc/4ZNG-LQLX].

[110] *Harvard Law Sch. Unveils New Shield*, Harv. L. Today (Aug. 27, 2021), http://hls.harvard.edu/today/harvard-law-school-unveils-new-shield/ [https://perma.cc/6SYT-NAFH].

visitors that "HLS is dedicated to advancing the cause of justice all over the world."[111] The same message is inscribed in Latin along the ceiling of the grand reading room in the Langdell Library.[112]

Justice as the paramount goal of legal education and the mission of Harvard Law School has been a common refrain among the law school's deans. In the late 1970s, for instance, Harvard Law School's ninth dean, James Vorenberg, emphasized that the law school provided "good training" for lawyers to play "heroic roles in the quests for racial equality, for arms control, for children's rights, for environmental protection, and for international human rights."[113] In one orientation welcome speech, he encouraged the fresh 1Ls to use their education to "concern" themselves with "crucial questions about whether and how the law can be an instrument of a just society," asking: "If lawyers [who] build their livelihoods on those processes are not morally obliged to serve as their guardians, who does have that obligation?"[114]

In 2009, when Martha Minow became the school's twelfth dean, she amplified that commitment, vowing to make Harvard Law School "a justice school as much as a law school."[115] And, in 2017, the year of Harvard Law School's bicentennial, as Dean Minow was stepping down, she offered these reflections about her vision for law, legal education, and Harvard Law School. "I have long wondered why we call the enterprise a law school and not a justice school." After all, as she declared, "the point of law . . . [is] to serve society," and "the law school every day is pursuing justice, as well as studying law."[116]

When John Manning was named her successor, Dean Minow praised the selection: "Harvard Law School will be fortunate to have at the helm such an outstanding person whose . . . devotion to justice and the rule of law exemplify the School's highest aspirations."[117] Dean Manning followed that prediction by repeatedly stressing the goal of promoting justice. When appointed, he immediately put the moment in context by underscoring the remarkable influence of Harvard Law School and emphasizing his hope that Harvard Law School would, under his leadership, "further the best ideals of law and justice."[118] He continued to deliver similar messages throughout his

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[111] Harvard Law School (@harvardlaw), Instagram (Mar. 2022) (screenshot on file with authors from spring of 2022).

[112] *See supra* text accompanying note 107–108.

[113] Robert Granfield & Thomas Koenig, *Learning Collective Eminence: Harvard Law School and the Social Production of Elite Lawyers*, 33 Socio. Q. 503, 507 (1992).

[114] *Id.* at 507–08.

[115] *The 'Upstander,'* Harv. L. Today (Feb. 27, 2017), https://hls.harvard.edu/today/the-upstander/ [https://perma.cc/4MJ8-HF2G] ("She accepted a five-year appointment after deciding that the job would give her the opportunity to continue to lead the school as Kagan and her predecessor, Robert C. Clark, had done—with students at the top of the priorities list, and with a mission to be a justice school as much as a law school.").

[116] Emily Newburger, *'What justice demands of us, no one person can do alone.'*, Harv. L. Bull. (Spring 2017), https://today.law.harvard.edu/feature/justice-demands-us-no-one-person-can-alone/ [https://perma.cc/F8VB-JDEP] (interview with Martha Minow, reflecting on her time as dean)

[117] John S. Rosenberg, *John Manning Appointed Dean of Harvard Law School*, Harv. Mag. (June 1, 2017), https://www.harvardmagazine.com/2017/06/harvard-law-names-john-manning-dean [https://perma.cc/S2UC-C66P].

[118] *Id.*

tenure.[119] In the summer of 2020, during the nationwide protests unfolding in response to the murder of George Floyd, Dean Manning reminded the HLS community of its values and purpose as follows: "[T]he tragic injustices our country has witnessed . . . have underscored, for our nation and our community, the urgent necessity of identifying, addressing, and remedying the racism, inequality, and abuse of power that have haunted this nation for so long. . . . We at HLS must . . . play a part in bringing about the needed change."[120]

The message is clear. The purpose of legal education, and specifically Harvard Law School, is not simply to teach students the law, how to pass the bar, and how to serve clients. The purpose and the public promise of legal education is the more transcendent goal of teaching and preparing students to advance justice. So law schools would have us believe.

B. Lawyers and Bar Associations

In numerous ways, as young lawyers emerge from law school and the bar exam to join the legal profession, the bar continues—publicly—to assert justice as its core value and ultimate purpose.[121] Prominent academic experts on the legal profession also emphasize justice as the profession's primary goal. Scott Cummings explains that lawyers "are asked, in short, to be 'public citizens' with a special obligation to promote the 'administration of justice.'"[122] Likewise, Richard Abel, when writing about the role of lawyers and the legal profession, refers to the "justice that law promises."[123]

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[119] For example, in his inaugural (2017) opening address to first-year students, Manning noted that "in a complex and often frightening world, good lawyers make indispensable contributions to law and justice." John F. Manning, *quoted in* Christine Perkins, *Dean Manning: 'There Are Lots of Good Ways To Do this Thing Called Law School: Your Job Is To Find the One That's Right for You,'* Harv. L. Today (Sept. 6, 2017), https://hls.harvard.edu/today/dean-manning/ [https://perma.cc/L2MV-3ARY]. In a welcome letter he emphasized that Harvard Law School is a community in which "to study, to teach, to write, to debate, to explore, to question, to innovate, to litigate, to advocate, and to pursue the highest ideals of law and justice." John F. Manning, *Dean's Welcome*, Harv. L. Sch., https://perma.cc/2396-94PP (last visited Jan. 11, 2025). Similarly, in his first decanal commencement address (to the class of 2018), Manning sent the graduates forward with a "wish for all of you [] that you will know the satisfaction of serving that high calling and of pursuing the highest ideals of law and justice." John F. Manning, *quoted in* Shona Simkin, *Dean Manning Shares 'Canons of Construction for Life,'* Harv. L. Today (May 30, 2018), https://hls.harvard.edu/today/commencement-address-dean-manning-shares-canons-construction-life-video/ [https://perma.cc/VJ2X-N27J].

[120] John F. Manning, *From the Dean: A Year Unlike Any Other*, Harv. L. Today, Aug. 13, 2020, at 3.

[121] Judge Margaret Robb of the Indiana Court of Appeals compiled the attorneys' oaths of admission to the bar for all fifty states. Many of them include a sworn promise to pursue justice. Those that do not refer to related values, like truth and honesty. Margaret Robb, *Oaths of Admission for All 50 States*, https://cdn.ymaws.com/www.inbar.org/resource/resmgr/litigation/Oaths.pdf [https://perma.cc/U3S8-KLT2] (reviewed Nov. 6, 2025). Interestingly, the official oath of admission to federal courts requires the lawyer only to aver conduct "according to law" and that "will support the Constitution of the United States." Administrative Office of United States Courts, *Form AO-153*, https://www.uscourts.gov/sites/default/files/ao153_0.pdf [https://perma.cc/FXK4-CTRN], reviewed Nov. 6, 2025.

[122] Scott L. Cummings, *What Good Are Lawyers*, *in* The Paradox of Professionalism: Lawyers and the Possibility of Justice 1, 1 (Scott L. Cummings ed., 2011).

[123] Richard L. Abel, *Just Law?*, *in* The Paradox of Professionalism: Lawyers and the Possibility of Justice 296, 315 (Scott L. Cummings ed., 2011).

Indeed, lawyers are purportedly under an ethical duty to advance justice. The first clause of the American Bar Association (ABA)'s Model Rules of Professional Conduct preamble states that, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[124]

The legal profession's leading self-regulatory organizations—that is, their bar associations—underscore their devotion to justice as a core objective.

The ABA[125] was founded in 1878 alongside the rise of modern legal education.[126] Since then it has emphasized its twofold commitment to liberty and justice. At its second annual meeting in 1879, the fledgling organization articulated this principle: while "virtue is the parent of liberty and the main-spring of free government, . . . the best grown of liberty is the law."[127] The report elaborated:

> The product of order, [the law] is a constant science. It vindicates the right and condemns the wrong; it upholds just authority, and forbids and punishes tyranny. It is the dispenser of justice; the exponent of public and private morality; the shield of innocence; the guardian of the defenceless; the comfort of and consolation of the good, and the confusion of the wicked. By its regular course and operation, the fruits of peace are secured, and the evils of war are diminished and assuaged by it. Without it a republic is impossible.[128]

The profession's rhetorical allegiance to liberty and justice remains as fervent today as it was 1879.[129] With nearly half a million members,[130] the ABA is now the largest professional association for lawyers in the U.S. It centers the advancement of justice at the heart of its mission: "To serve equally our members, our profession and the public by defending liberty and *delivering justice* as the national representative of the legal profession."[131] That devotion to justice is echoed across the ABA's website. For instance, the website's "About" page begins by affirming that the ABA "stands committed

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[124] Model Rules of Pro. Conduct Preamble: A Lawyer's Resp. (A.B.A 2025) (emphasis added). The distinction between the lawyer as "representative of clients" and the lawyer as "an officer of the legal system and a public citizen" will turn out to be fundamental. *Id.*

[125] The ABA is a voluntary association of U.S. lawyers. A.B.A., https://americanbar.org [https://perma.cc/76X7-7BT6] (last visited Nov. 4, 2025). Its roles include setting academic standards for law schools and promulgating the model ethical codes for the legal profession. *About the American Bar Association*, A.B.A., https://www.americanbar.org/about_the_aba/ [https://perma.cc/XZ3Q-3HCX] (last visited Nov. 4, 2025).

[126] See Paula A. Monopoli, *Remembering the Origins of Modern Legal Education*, 85 U. Pitt. L. Rev. 305 (2023).

[127] Carleton Hunt, *Report of the Committee on Legal Education and Admissions to the Bar*, *in* Report of the Second Annual Meeting of the American Bar Association 233 (1879).

[128] *Id.*

[129] *See supra* text accompanying note 127–128.

[130] The ABA describes itself as "the largest voluntary professional association in the world." *Consumer FAQs,* A.B.A., https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/consumer_faqs/ [https://perma.cc/PW65-UDB4] (last visited Nov. 4, 2025).

[131] *ABA Mission and Goals*, A.B.A., https://www.americanbar.org/about_the_aba/aba-mission-goals/ [https://perma.cc/8JEN-LXJN] (last visited Nov. 4, 2025) (italics added).

to its mission of defending liberty and pursuing justice" and "works tirelessly to uphold the ideals of liberty and justice #ForAll."[132]

Other major national professional organizations appear similarly committed to justice. The mission of the American Association for Justice (AAJ), principally an organization of the plaintiffs' personal injury bar, begins with this clause: "AAJ promotes justice and fairness for injured persons."[133] Their logo (Figure C), like so many law-related images and logos, includes a pair of scales—that is, "the scales of justice."

Figure C. Logo of the American Association for Justice[134]

We could continue, but the point should not be controversial enough to warrant additional space.[135] The legal profession and lawyers' organizations frequently and conspicuously promise justice.[136]

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[132] *The American Bar Association*, A.B.A., https://www.americanbar.org/about_the_aba/ [[https://perma.cc/XZ3Q-3HCX] (last visited Nov. 4, 2025).

[133] *About Us*, Am. Ass'n for Just., https://www.justice.org/about-us [https://perma.cc/89UL-4LHX] (last visited Nov. 4, 2025).

[134] *Id.*

[135] For instance, the National Association of Criminal Defense Lawyers (NACDL) "works to activate the voices of members of the criminal defense bar and others in the broader community concerned about criminal justice reform to most effectively root out *systemic injustice* within the criminal legal system; to place all forms of inequities, including systemic racism, at the forefront of criminal justice reform." *Mission and Vision*, Nat'l Ass'n of Crim. Def. L., https://www.nacdl.org/Landing/Mission-and-Vision [https://perma.cc/8KTE-MKYK] (last visited Nov. 4, 2025) (emphasis added).

To be sure, some law-related professional organizations do not embrace "justice" as central to their mission or as a core value. For example, the National Creditors Bar Association (NCBA), formerly the National Association of Retail Collection Attorneys, is "dedicated to serving law firms engaged in the practice of creditors rights law." *About National Creditors Bar Association*, Nat'l Creditors Bar Ass'n, https://www.creditorsbar.org/about-ncba [https://perma.cc/ZAD4-ZCFS] (last visited Nov. 4, 2025). But even among those organizations that did not expressly name "justice," many emphasized aspirations—"fairness," "equality," and the like—that resonate with widespread conceptions of justice. For example, the mission of the National Lawyers Guild "is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests." *About*, Nat'l L. Guild, https://www.nlg.org/about/ [https://perma.cc/53U6-LWKJ] (last visited Nov. 4, 2025).

[136] Prominent academic commentators on the legal profession also emphasize justice as the profession's primary goal. *See* Cummings, *supra* note 122, at 1 ("They [lawyers] are asked . . . to be 'public citizens' with a special obligation to promote the 'administration of justice.'"); Abel, *supra* note 123, at 315 (in writing about the role of lawyers and the legal profession, referring to "justice that law promises").

C. The Special Case of Prosecutors

While all lawyers are implicated by the promise to advance justice, the justice duty (or, relatedly, expectation) imposed on some lawyers is greater than others. Chief among those to whom a greater duty to pursue justice is imputed are prosecutors, who often are rhapsodized in the U.S. as "ministers of justice."[137] Whatever the limits of that encomium, here we highlight the evidence that prosecutors, more than other lawyers, make a robust pledge to advance justice.

1. The Problem of Too Much Power

Prosecutors undeniably constitute a special category of lawyers who wield extraordinary power—which includes an ability to activate the coercive elements of the state without early or consistent accountability.[138] While judges are expected to justify publicly their decisions with reasons, most prosecutorial decisions appear as bureaucratic fiat out of a thick fog of discretion. Prosecutorial power often is unconstrained by even the facade of limitations, much less the threat of meaningful accountability.

As Michelle Alexander observes, "the prosecutor is the most powerful law enforcement official in the criminal justice system."[139] "It is the prosecutor, far more than any other criminal justice official," Alexander points out, "who holds the keys to the jail-house door" and who controls the most consequential decision points in the criminal system, not police or judges. [140] The prosecutor

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[137] Model Rules of Pro. Conduct r. 3.8 cmt. 1 (A.B.A. 2025) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate"); *see also* Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 Geo. J. Legal Ethics 1301, 1301–05 (1996) (tracing the history of the phrase). *But see* Bennett L. Gershman, *The Prosecutor as a "Minister of Justice"*, 60 N.Y. St. Bar J. 8, 9 (May 1988) (evaluating the inaccuracy of the common phrase in practice). Berger v. United States, 295 U.S. 78, 88 (1935), offers an especially famous rendition of this imputed obligation without using the exact phrase: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." This passage in *Berger* has additionally been held to extend a heightened responsibility to seek justice to *all* government attorneys, not just prosecutors. *See* Freeport-McMoRan Oil & Gas Co. v. F.E.R.C., 962 F.2d 45, 47 (D.C. Cir. 1992) (holding that an obligation "that justice shall be done" applies "with equal force to the government's civil lawyers."). Thus, a "government lawyer in a civil action or administrative proceeding has the responsibility to seek justice" and "should refrain from instituting or continuing litigation that is obviously unfair." Model Code of Pro. Resp. EC 7–14 (A.B.A 1981).

[138] There are numerous fairly recent efforts, employing different media, to describe the problem of prosecutorial power. *See generally, e.g.*, Emily Bazelon, Charged: The New Movement To Transform American Prosecution and End Mass Incarceration (2019); Andrew Cockburn, *Power of Attorney*, Harper's Mag., Oct. 2019; *Home Page - The Appeal*, The Appeal, https://theappeal.org/ [https://perma.cc/Q4VH-G4N8] (last visited Mar. 12, 2025); *The Power of Prosecutors*, Am. C.L. Union (Apr. 5, 2018), https://www.aclu.org/issues/smart-justice/power-prosecutors [https://perma.cc/6WC2-79CF].

[139] Michelle Alexander, The New Jim Crow: Mass Incarceration In The Age Of Colorblindness 87 (2010).

[140] *Id.*

decides what charges to bring, what plea bargains to offer, what sentences to recommend.

Legal scholar and criminal law specialist Angela Davis reinforces this point. Prosecutors, who "control the direction and outcome of all criminal cases, particularly through their charging and plea-bargaining decisions" "are the most powerful officials in the American criminal justice system."[141] What makes prosecutorial power especially troubling is its near-total insulation from oversight and the fact that most "prosecutorial power" operates "behind closed doors, shielded from public view."[142]

Philadelphia District Attorney Larry Krasner, one of the sometimes valorized—and often disputed or challenged—group of "progressive" prosecutors, highlights the immense and often unchecked power local prosecutors hold compared to lawmakers.[143] "They unilaterally decide," he writes:

> whether or not to use the law to try to kill people, take their freedom, take their clean records and good reputations, take their future employability and their livelihoods, take their ability to form and provide for families, take them away from their families, and take their peace of mind and their money. Chief prosecutors have the latitude to offer favorable or unfavorable deals for guilty pleas on heavy or light charges, to offer diversion programs that avoid convictions, to drop cases, to try cases the right way or the wrong way, and to present honest or untruthful witnesses.[144]

In short, writes Krasner, "[i]t's a lot of power."[145] He was by no means the first prosecutor to raise these concerns. In 1940, then-Attorney General of the United States Robert H. Jackson called the men gathered at the second annual gathering of United States Attorneys "one of the most powerful peace-time forces known to our country,"[146] explaining that prosecutors possess "tremendous" discretion and "more control over life, liberty, and reputation than any other person in America."[147] Jackson offered this inventory of concrete powers:

> He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more

[141] Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 Droit et Cultures 55, 55 (2005); *see id.* (adding that "[t]hese decisions have greater impact and more serious consequences than those of any other criminal justice official.'"); *see also* Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 31–33 (2007).

[142] Davis, *supra* note 141, at 55; see also *id*. at 55 (noting that "the prosecutor's charging and plea-bargaining decisions are totally discretionary and virtually unreviewable.").

[143] Larry Krasner, For the People: A Story of Justice and Power 9–10 (2021) ("[M]y thirty years as a lawyer told me that even lawmakers' powers were slow and limited compared to the power a local chief prosecutor wielded. Legislators had little control over chief prosecutors' decision making—their discretion to decide how to handle their cases.").

[144] *Id*. at 10; *see also id*. (noting that "thirty years in courthouses had taught me the sad truth that most chief prosecutors have abused it."). For some short, but excellent videos on the topic of excessive prosecutorial power and the related injustices, see *The Power of Prosecutors*, *supra* note 138.

[145] Krasner, *supra* note 143, at 10.

[146] Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940) (address to Conference of United States Attorneys, Washington, D.C., April 1, 1940).

[147] *Id*.

> subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[148]

Jackson noted mordantly, immediately before he made that plea, that "those who need to be told would not understand it anyway."[149] For reasons that we clarify below, the great power of prosecutors is precisely what enhances their duty to advance justice.

2. *The Promise of More "Justice"*

The federal executive agency tasked with enforcing laws is called the United States Department of Justice or, more simply, the Justice Department. Until very recently, the Justice Department's mission statement included ensuring the "fair and impartial administration of justice for all Americans,"[150] and, still, the Latin motto on its seal—"Qui Pro Domina Justitia Sequitur"—translates loosely to "who prosecutes on behalf of justice."[151] The famous saying, "The United States wins its point whenever justice is done its citizens in the courts" is inscribed in the office rotunda of the Attorney General.[152] In a speech midway through the Biden Administration, Attorney General Merrick Garland stressed the importance of that commitment as follows:

> Like the Attorneys General who came before me, I begin every day by walking through a rotunda outside my office, where these words are inscribed: "The United States wins its point whenever justice is done its citizens in the courts." The message of course, is that this is true regardless of whether the outcome is the one that the government favors.

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[148] *Id.*

[149] *Id.*

[150] *See* Seth Wood, *Introduction*, 69 DOJ J. Fed. L. & Prac., no. 5, 2021, at 1, 1 (quoting this language). It appears that, since the beginning of the second Trump Administration, that mission statement has changed to the following: "To uphold the rule of law, to keep our country safe, and to protect civil rights." *About DOJ*, U.S. Dep't of Just., https://www.justice.gov/about [https://perma.cc/U9YT-97WR] (last visited Jan. 11, 2026).

[151] *DOJ Seal - History and Motto*, U.S. Dep't of Just., https://www.justice.gov/about/history/doj-seal-history-and-motto [https://perma.cc/2CRN-8NM5] (last visited Mar. 13, 2025).

[152] *See infra* note 153 and accompanying text. To similar effect, *see* Berger v. United States, 295 U.S. 78, 88 (1935) (as a sovereign, the United States' interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

> This is what distinguishes our justice system from those of many other countries. And it is what distinguishes our Justice Department from the law enforcement agencies of many other countries.
>
> We are responsible not only for enforcing the law, but for upholding the Rule of Law. We are responsible for protecting civil rights and for pursuing justice for all Americans.[153]

The special promise of "justice" made by the Department of Justice may compensate, consciously or not, for the extraordinary discretion and power that prosecutors in our system possess as well as the special role they play in representing the state. More concretely, the law purports to rein in the outsized power of all prosecutors through a variety of professional codes, ethical rules, and exhortative judicial opinions all claiming to limit prosecutorial discretion by heightening a prosecutor's duty to "seek justice" or "do justice" over and above the adversarial urge to rack up convictions.[154] In many states, the weight of this responsibility is formalized through an oath that goes beyond what is required of other lawyers[155]—an extra pledge, a heightened ethical standard—that underscores the singular role prosecutors play in safeguarding fairness.[156] These measures promise to curb prosecutorial overreach by elevating duty over ambition or moral obligation over institutional rewards.

And the formal ethical strictures did not start with the current ABA Model Rules of Professional Conduct. The former Model Code of Professional Responsibility also laid it out plainly: "The responsibility of the public

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[153] *Attorney General Merrick B. Garland Delivers Remarks at the Office of Access to Justice's Gideon Celebration*, U.S. Dep't of Just. (Mar. 17, 2023), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-office-access-justices-gideon [https://perma.cc/V92R-TCHF].

[154] *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 612 (1999). Subsequent portions of this project will detail more fully the relationship between power and justice.

[155] The problem of "too much power" paired with the solution of a heightened obligation to do justice has been offered as well for come civil lawyers representing especially powerful private clients. *See* William Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1090, 1123–25 (1988) (arguing that lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them, with the basic consideration being whether assisting the client would further justice); David Luban, Lawyers And Justice: An Ethical Study 65–66 (1988) (arguing that lawyers have a duty to challenge injustice and prioritize the public good, rather than blindly serving client interests or adhering strictly to professional role obligations); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255, 258–66 (1990) (arguing that lawyers have an obligation to incorporate public interest considerations into their professional responsibilities and decision-making).

[156] Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. Tex. L. Rev. 773, 773 (2006). The New Jersey Code, for example, provides that every person appointed county prosecutor shall, before entering upon the duties of his office, take and subscribe before the clerk of the county for which he has been appointed, or before a judge of the Superior Court, the following oath: "I, . . . , do solemnly promise and swear (or affirm), that I will faithfully, justly and impartially execute the duties of county prosecutor of this State, in and for the county of . . . , to the best of my abilities and understanding. So help me God." N.J. Stat. § 2A:158-3 (2024). The federal oath of office, as outlined in 5 U.S.C. § 3331, requires prosecutors to "support and defend the Constitution of the United States" and to "faithfully discharge the duties of the office." This oath is consistent across federal positions and does not specify the unique responsibilities of prosecutors and so does not delineate the special responsibilities of a prosecutor to "seek justice."

prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[157] Elsewhere, the American Bar Association echoes this, describing the prosecutor as "an administrator of justice" whose "primary duty is to seek justice within the bounds of the law, not merely to convict."[158]

Some states take it even further, reinforcing ethical codes with statutory mandates. The Texas Code of Criminal Procedure, for example, is unequivocal: "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done."[159]

Those norms and mandates seem to imply that, for prosecutors, "winning" isn't everything. It's not even the main thing. Instead, the pursuit of justice stands as the guiding principle, the ultimate measure of prosecutorial performance. The problem of prosecutorial power and discretion has long been understood as the basis of this heightened obligation to focus on "justice" over law or other goals.[160] As the Michigan Supreme Court wrote in 1872,

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[157] Model Code of Pro. Resp. EC 7-13 (A B.A. 1981); *see also* Model Rules of Pro. Conduct r. 3.8 cmt. 1 (A.B.A 2025) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[158] A.B.A. Standards Relating to the Admin. of Crim. Just., Standard 3-1.2(C). In at least three ways, the ABA standards give content to that duty. First, they warn prosecutors against being unduly swayed by institutional pressures or incentives, such as "interests in personal advancement or aggrandizement," A.B.A. Standards, Conflicts of Interest, Standard 3-1.7., or tempted "to hide an injustice or material flaw in the case which is undisclosed to the defense," A.B.A. Standards, Waiver of Rights as Condition of Disposition Agreements, Standard 3-5.8, or daunted by "excessive" "workload," A.B.A. Standards, Appropriate Workload, Standard 3-1.8, or prone to insufficient "diligence, promptness and punctuality," A.B.A. Standards, Diligence, Promptness and Punctuality, Standard 3-1.9 (capitalization removed), or deterred by poor "coordination of the prosecution policies of local prosecution offices." A.B.A. Standards, Prosecution Offices, Standard 3-3.1.

Second, the A.B.A. standards repeatedly list "manifest injustice" as an overriding exception to other prosecutorial norms. The risk of manifest injustice, for instance, limits the norm against "offer[ing] commentary regarding the specific merits of an ongoing criminal prosecution or investigation." A.B.A. Standards, Relationship with the Media, Standard 3-1.10 ("The prosecutor should not offer commentary regarding the specific merits of an ongoing criminal prosecution or investigation, except in a rare case to address a manifest injustice and the prosecutor is reasonably well-informed about the relevant facts and law."). Similarly, the standards provide that waivers of rights are to include "an exception for manifest injustice based on newly discovered evidence, or actual innocence." A.B.A. Standards, Waiver of Rights as Condition of Disposition Agreements, Standard 3-5.8. Finally, the A.B.A. standards offer justice as a decisional metric to be employed throughout the prosecutorial process. So the "interests of justice" determine when "[p]rosecutors may exercise supervision over law enforcement personnel," A.B.A. Standards, Relationships With Law Enforcement, Standard 3-3.2, when a "prosecutor should seek or file criminal charges," A.B.A. Standards, Minimum Requirements for Filing and Maintaining Criminal Charges, Standard 3-4.3, "whether an adverse ruling should be appealed," A.B.A. Standards, Appeals—General Principles, Standard 3-8.2, and how "to respond to a collateral attack on a conviction," A.B.A. Standards, Collateral Attacks on Conviction, Standard 3-8.5.

Third, the question of whether "a miscarriage of justice" has occurred should determine whether a prosecutor should "defend a conviction," A.B.A. Standards, Duty To Defend Conviction Not Absolute, Standard 3-8.1, and a prosecutor's "response[] to new or newly-discovered evidence or law," , should be "consistent with . . . the duty to pursue justice." A.B.A. Standards, Responses to New or Newly-Discovered Evidence or Law, Standard 3-8.3 (capitalization altered).

[159] Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 2005).

[160] This emphasis on justice, we argue, is a reflection of the injustice framework and a heightened justice anxiety about and by prosecutors, given their conspicuous power and discretion to do harm. *See* Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section II.C (discussing further the injustice dissonance experienced by law people, particularly those empowered with significant discretion over outcomes).

"[t]he prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply 'justice' and compromising that end is itself 'unjust and dangerous to the whole community.'"[161]

3. *Public Promises of Justice from Prosecutors*

Courts and the overseers of the bar are not alone in ascribing to prosecutors a special duty to seek justice. Especially when addressing a lay audience, or seeking to explain themselves publicly, some prosecutors do it themselves. Of course, most prosecutors speak primarily to law people, not to lay people, at least apart from remarks to juries in those rare cases that go to trial or during campaigns by elected top prosecutors. But some few acquire enough popular visibility that they can speak to a larger audience of lay people.

We offer two examples only. From 2009 to 2017, Preet Bharara served as U.S. Attorney for the Southern District of New York, which he described as "the premier public law office in the country, if not the world."[162] Bharara has a significant popular presence and following, particularly in New York and among viewers of cable news networks.[163] His tenure as the U.S. Attorney in the Southern District of New York also inspired the five-season Showtime hit, *Billions*, in which Bharara's fictional character, Chuck Rhoades, was played by Paul Giamatti.[164]

Bharara's 2019 memoir explains what he believes he was doing as a prosecutor. Indeed, the book, a *New York Times* best seller, is titled *Doing Justice*: *A Prosecutor's Thoughts*.[165] In over 368 pages, the word "justice" appears more than two hundred times.[166] Recounting his years leading a powerful team of prosecutors, Bharara claimed, "I can't recall a time when we didn't think hard about what we were doing, why we were doing it, and whether it was in the interests of justice."[167] After all, he explained, being a prosecutor is "not just any job; it's the job of delivering justice."[168] Bharara described treating his "duty"[169]

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161 Hurd v. People, 25 Mich. 404, 415–16 (Mich. 1872); see also Wellar v. People, 30 Mich. 16, 22–23 (Mich. 1874) ("[A] public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty.").

162 Preet Bharara, Doing Justice: A Prosecutor's Thoughts on Crime, Punishment, and the Rule of Law at xiii (2019).

163 *See* Julie Hinds, *Preet Bharara, a Cable News Legal Star, Brings His Podcast to the Royal Oak*, Detroit Free Press (Nov. 10, 2019) https://www.freep.com/story/entertainment/television/2019/11/10/preet-bharara-cable-news-legal-star-podcast-royal-oak/2531473001/? [https://perma.cc/FZD8-LV9V].

164 *See* Erica Orden, *Manhattan U.S. Attorney Preet Bharara's Office Gets Hollywood Treatment in Showtime Series*, Wall St. J., (Feb. 4, 2016), https://www.wsj.com/articles/manhattan-u-s-attorney-preet-bhararas-office-gets-hollywood-treatment-in-showtime-series-1451947972 [https://perma.cc/7KR6-UUUS].

165 *See generally* Bharara, *supra* note 162.

166 *See generally id*. This is a ballpark number. We did not count and discount the number of times that the author might have been referring to a justice as a title or honorific. We did, however, check the first fifty pages and found only one time out of dozens, when the word was used as part of a title.

167 *Id*. at xiv.

168 *Id*. at 112.

169 *See id*. at 57–58 (discussing the importance of a sense of duty).

to "do justice" as his central, ultimate, and paramount goal. In his words, "We are prosecutors. . . . We take our victims as we find them and try to get them justice. That is my real reward for doing the work that I love to do and, hopefully, doing it well enough to make a small difference in someone's life. That was and is the mission."[170]

If genuine, that is as it should be. Justice is what our laws and legal system promise.[171] Providing justice is how the *Justice* Department institutionally brands itself.[172] And doing justice is what the various applicable ethical standards governing prosecutors purport to require and ensure.[173]

Larry Krasner came to prosecution after Preet Bharara. He is a local state prosecutor, not a federal prosecutor.[174] Although his jurisdiction is a large city, Philadelphia, it does not have the same reach or cachet as Bharara's former office.[175] Among certain circles, however, Krasner may be better known, not just for his ideas and actions as a thirty-year defense lawyer turned prosecutor, but also for the "progressive prosecution" trend that he, with others, helped to inspire.[176] Probably for that reason, Independent Lens chose him as the principal subject of its bingeable, eight-part documentary series, *Philly, D.A.*, which followed Krasner through his first four-year term.[177]

At the same time, in *For the People: A Story of Justice and Power*, Krasner published an autobiographical account of his "lifelong journey through the streets and courtrooms and election precincts of one American city all the way up to his swearing-in ceremony."[178] From the outset, Krasner insists that the pursuit of justice was the driving purpose of his candidacy:

> The platform summarized the lessons I had lived and learned and heard by listening closely in my time in the justice system. It was what I knew to be true and what needed to happen if we were to move

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[170] *Id.* at 221.

[171] *See supra* Section I–II.B.

[172] *See supra* notes 150–153 and accompanying text.

[173] *See supra* notes 154–161 and accompanying text. In her book, *Charged*, Emily Bazelon, "explore[s] the history of the American way of prosecution and the macro forces that could reshape it." Bazelon, *supra* note 138, at xxix. To tell her story, Bazelon focuses on two D.A.s, including Memphis D.A. Amy Weirich. *Id.* When asked about what values drive the prosecutorial decisions in her office, Weirich responded: "Our job is to do justice . . . and sometimes that justice is going to trial and presenting the best case you can, and putting it in the hands of the jury. Oftentimes that justice is dismissing charges, or giving a first-time offender an opportunity to get on the right path." *Id.* at 19.

[174] *See* Krasner, *supra* note 143, at 10.

[175] *Id.*

[176] The progressive prosecutor movement encourages prosecutors to work to reform the criminal legal system from within. *See generally* Laurie L. Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 Am. Crim. L. Rev. 1495 (2023). "[Progressive prosecutors] are committed to doing whatever they can, consistent with public safety, to make the system fairer for all." *Id.* at 1496. While there is significant internal and academic debate on what the progressive prosecutorial movement is or should be, scholars agree that progressive prosecutors seek for reform of the criminal justice system to a better imagined ideal. *See* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 Minn. L. Rev. 1415, 1426–28 (2021).

[177] PBS, Philly D.A. (PBS television broadcast Apr. 21, 2021), https://www.pbs.org/independentlens/documentaries/philly-da/ [https://perma.cc/V92D-MMHV].

[178] Penguin Random House, *For the People*, https://www.penguinrandomhouse.com/books/612136/for-the-people-by-larry-krasner/ [https://perma.cc/5JR9-SAZC] (last visited Mar. 13, 2025).

> toward a truly just justice system. We are all equal and deserving of our government's protection, provided with transparency, respect, and restraint. In such a system, equal treatment is justice. And that kind of justice restores society—restores the relationship between people and government, and makes us safer. Safety and justice are symbiotic and complementary, not trade-offs between opposing forces, as the status quo would have us believe.[179]

Krasner described entering the race because he believed that the "criminal justice system is broken; it is unjust. . . ."[180] Krasner's specific criticisms of conventional norms and existing policies of the criminal legal system center on their injustice. In decrying the harsh effect of sentencing guidelines, for instance, he attacked the common justification for the guidelines—that is, to produce "consistency across different jurisdictions and among different judges"[181]:

> [C]onsistency alone is not justice, and consistency codified in excessively lengthy guidelines is terribly unjust when it forces judges to impose consistently excessive sentences. Individual justice is justice's goal, even when it appears or occasionally results in outcomes that are somewhat inconsistent.[182]

He repeated the "oath to pursue justice" theme throughout his book and on numerous topics. In one instance, he observed:

> [I]t is uniquely the prosecutor's sworn *oath* to seek justice for the people. Seeking justice for everyone moving forward presents its challenges. Prosecutors weren't there when a crime occurred, no matter how committed, persuasive, or certain they may be. They do not necessarily know what uncertainties, mistakes, motivations, biases, or games may be in play. But they should be trying really hard, all the time, to find out and to get it right, because that is what justice requires.[183]

Like Bharara, then, Krasner publicly embraced the paramount purpose and normative metric of a prosecutor as "doing justice." "The oath is to seek justice,"[184] he urged, and, "[t]here is no higher calling for a criminal justice

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[179] Krasner, *supra* note 143, at 26.

[180] *Id.*

[181] *Id.* at 95.

[182] *Id.*

[183] *Id.* at 133. Krasner further narrates that, "Every day, when criminal proceedings start in jurisdictions all over America, lawyers stand up to identify themselves first and then identify their clients to the judge and on the court record, by name. Criminal defense lawyers state their client's first and last name: 'For Jack Smith.' Prosecutors identify their clients. They say: 'For the people.' There are a lot of people. It is uniquely the prosecutor's job to represent everyone in that jurisdiction, including Jack Smith." *Id.*

[184] *See Philadelphia District Attorney Exonerates 9 People in 19 Months*, CBS News This Morning (Sept. 3, 2019), https://www.cbsnews.com/news/philadelphia-district-attorney-larry-krasner-exonerates-nine-people-in-19-months/ [https://perma.cc/9W99-CE98]. Krasner added: "When somebody sits in a jail cell for a crime they did not commit, that is an injustice." *Id.*

system than to focus holistically on . . . doing justice for everyone," for "the job of the prosecutor is to achieve justice."[185]

D. Judges

Finally, judges as a category represent the pinnacle of the legal profession and their power as actors in, and spokespeople for, the law reflects that elevated status.[186] As described above, the cultural association between judges and justice is longstanding—a connection deliberately cultivated by prominent legal institutions and actors.[187] This section examines whether and how judges embrace, affirm, and perform that connection.

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[185] Krasner, *supra* note 143, at 177.

[186] *See, e.g.*, Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 Wis. L. Rev. 249, 250–51 (2018) (calling judges "the most powerful actors in this system"). Most polling suggests that public confidence in the neutrality and legitimacy of the judiciary is rapidly fraying. *See* Hanson & Kipnis, *Courting Injustice, supra* note 6, Section II.C; *see also, e.g.*, Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, Gallup (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx [https://perma.cc/N7XB-2LLE] (indicating that in 2024, only 35 percent of Americans said they trusted courts, a significant drop from prior years); Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, Pew Research Center (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/AD6X-5X8M] (describing Americans' recent souring on the Supreme Court).

There are more subtle indications, too. For example, mass media in recent years have taken to identifying federal judges by the president who appointed them, suggesting unmistakably a presumption of partisan preference and the newsworthiness of bucking the trend. *See, e.g.*, Zach Montague, *The Reagan-Appointed Judge Fast-Tracking Trump to Trial*, N.Y. Times (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/judge-william-g-young-trump.html [https://perma.cc/P2SM-GA5M] (taking care to mention that a judge who is presiding over a Trump trial was appointed by a Republican president, and going on to mention "other federal judges, including several Trump appointees, who have dealt a legal blow to Mr. Trump's agenda," perhaps as a signal of the newsworthiness of a judge appointed by a party handling cases which may be politically deleterious to that party); Daniel Wiessner, *US Judge Invalidates Biden Rule Protecting Privacy For Abortions*, Reuters (June 18, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/us-judge-invalidates-biden-rule-protecting-privacy-abortions-2025-06-18/ [https://perma.cc/8SGL-QEJ3] (indicating that U.S. District Judge Matthew Kacsmaryk, who struck down a federal regulation which provided more privacy protection to transgender patients and women seeking abortions, was "appointed by President Donald Trump"); Christal Hayes, *It's Not Just 'Obama Judges': Here Are Republican Appointees Who Have Ruled Against Trump*, USA Today (Nov. 24, 2018), https://www.usatoday.com/story/news/politics/2018/11/24/five-times-republican-appointed-judges-ruled-against-president-trump/2083399002/ [https://perma.cc/Z7ZM-BFW4] (listing instances of judges appointed by the Republican party making rulings that seem adverse to Republicans' interests, likely as a signal of the unexpectedness, or at least the newsworthiness, of such actions).

[187] *See supra* text accompanying notes 50, 58, & 61.

The term "Justice" as a title is itself revealing, representing a choice or a branding decision of sorts. After all, the Constitution never calls Supreme Court members "Justices." Article III refers only to "the judges, both of the supreme and inferior courts." U.S. Const. art. III, § 1. Article II likewise speaks of appointing "Judges of the supreme Court." U.S. Const. art. II, § 2, cl. 2; but see U.S. Const. art. I, § 3, cl. 6 (providing the lone exception in referring to "the Chief Justice" presiding over impeachment trials).

So, Congress chose that term when promulgating the Judiciary Act of 1789, which created a "Chief Justice" and "Associate Justices" of the Supreme Court. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73; *see also* 28 U.S.C. § 1. So before the Court issued a single opinion, Congress branded its members with a title that personified justice rather than adjudication.

1. *The Judicial Oath*

Judges begin their service with a public promise—a sworn oath—about how they will handle their responsibilities and the power conferred by their position. Since 1789, every federal judge has taken this oath, or one similar to it, pursuant to the Judiciary Act of 1789:

> I, _________, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _________, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.[188]

Legal scholars seem to agree that judicial oaths matter and can be effective in shaping the behavior of the public officials who swear to them.[189] Erik Encarnacion and Guha Krishnamurthi argue that the oaths compel judges "to discharge their responsibilities to the best of their abilities and understanding."[190] Because "oaths involve an official[] voluntarily undertaking an obligation to discharge her responsibilities in good faith," the commitment extends beyond simply "the obligation to always get the right answer or to never make a mistake."[191] After all, they explain:

That choice carried rhetorical and institutional weight. As Jason Boatright has detailed, the Latin *justitia* signified in the standard Latin lexicons "justice, equity, righteousness, uprightness"—"the condition of being provided with *jus*." Jason Boatright, *The History, Meaning, and Use of the Words Justice and Judge*, 49 St. Mary's L.J. 727, 735–36 (2018). In contrast, *judex*—the root of "judge"—was simply the one who "shows or proclaims *jus*." *Id.* at 737. "A *judex* tells people what *jus* is," Boatright writes, "but *justitia* is a representation of *jus* itself." *Id.*

The title of "Justice" thus associated the Court's members not with neutral craft, but with the embodiment of justice—the likes of equity, fairness, right—as such. Congress borrowed that moral mantle at the founding in what appears to have been an effort to bestow a bit more legitimation on the Court.

[188] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (emphasis added) (codified as amended at 28 U.S.C. § 453 (2018)). In ways irrelevant, that oath was amended under the Judicial Improvement Act of 1990. *See* 28 U.S.C. § 453 (2018); Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 404, 104 Stat. 5089, 5124 ("Section 453 of title 28, United States Code, is amended by striking out 'according to the best of my abilities and understanding, agreeably to' and inserting 'under.'").

State judges sometimes take oaths that mirror the federal oaths in terms of their commitment to justice. *See, e.g.*, O.C.G.A. § 15-6-6 (2024) (Georgia superior court judges swear to "administer justice without respect to person and do equal rights to the poor and the rich"). For discussion of how electoral pressures facing many state judges can complicate fulfillment of these promises, see *infra* note 267.

[189] *See, e.g.*, Evan D. Bernick & Christopher D. Green, *What is the Object of the Constitutional Oath?*, 128 Penn State L. Rev. 1 (2023). Professors Bernick and Green observe that oaths "are commonplace in America today, just as they have been commonplace throughout American history." *Id.* at 18. They point out that presidents, legislators, as well as judges all take an oath and often emphasize that they take "the same" oath. *Id.* at 6. Moreover, they devote pages to illustrations "from all over the political spectrum in current culture" of politicians and jurists going out of their way to emphasize the shared commitments that the "the same oath" entails. *Id.* at 10–21.

[190] Erik Encarnacion & Guha Krishnamurthi, *The Oath Doesn't Require Originalist Judges*, 15 Harv. L. & Pol'y Rev. 571, 572 (2021).

[191] *Id.* at 579.

> It is a much more serious charge to claim that a judge has violated her constitutional oath than to claim that she made a mistake of law. Lower courts make the latter type of mistake all the time; that's why we have courts of appeal. To err is human. But it would be intuitively far more troubling if judges systematically failed to discharge their duties in good faith.[192]

In short, the goal—and arguably an effect—of judicial oaths is to ensure that judges set aside personal interests and strive to "administer justice" to the best of their ability. As the next subsection argues, judges often fail to deliver on that promise.

2. *Judges while Judging: Judicial Opinions*

The link between justice and the judiciary has been widely accepted and actively promoted, so it's unsurprising that in published opinions, judges sometimes explicitly and more often implicitly invoke justice in their reasoning.

The United States Supreme Court, the nation's highest judicial authority, has long emphasized justice as its core value and norm. In *Marbury v. Madison*—the landmark case defining the judiciary's role in the U.S. constitutional system—Chief Justice Marshall cited Lord Mansfield's holding that the writ of mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one," adding that "this court ought to assist by mandamus, upon reasons of justice."[193]

In 1837, Chief Justice Shaw of the Massachusetts Supreme Judicial Court proclaimed that in "a court of justice," the mandates of "reason and justice" must prevail.[194] U.S. Supreme Court Justice Brown, writing in 1898 on the meaning of "due process of law," pointed to "certain immutable principles of justice" as the defining touchstone.[195]

Nearly a century later, Justice Thurgood Marshall described the "two seemingly incompatible notions" that animate our criminal justice system: "the adversary model, and the state's primary concern with justice."[196] Similarly, Justice Brennan described in grand terms the superiority of our system over those in which justice yields to mob violence, corruption, or tyrannical power:

> Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social *justice* and peace. History has known the breakdown of lawful penal authority—the feud, the vendetta, and the terror of penalties meted out by mobs or roving bands of vigilantes. It has known, too, the perversion of that

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[192] *Id.*

[193] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169 (1803) (citing Rex v. Barker (1762) 97 Eng. Rep. 823, 824; 3 Burr. 1265, 1266).

[194] Thayer v. City of Boston, 36 Mass. (19 Pick.) 511, 515 (1837).

[195] Holden v. Hardy, 169 U.S. 366, 384, 389 (1898).

[196] United States v. Bagley, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting).

> authority. In some societies the penal arm of the state has reached individual men through secret denunciation followed by summary punishment. In others the solemn power of condemnation has been confided to the caprice of tyrants. Down the corridors of history have echoed the cries of innocent men convicted by other irrational or arbitrary procedures. These are some of the alternatives history offers to the procedure adopted by our Constitution. The right of a defendant to trial—to trial by jury—has long been cherished by our people as a vital restraint on the penal authority of government. And it has never been doubted that under our constitutional traditions trial in accordance with the Constitution is the proper mode by which government exercises that authority.
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> . . . [T]oday, as in Lincoln's time, a man may ask 'whether (this) nation or any nation so conceived and so dedicated can long endure.' It cannot endure if the Nation falls short on the guarantees of liberty, justice, and equality embodied in our founding documents.[197]

Beyond describing justice as the deep goal of the law or its interpretation, the Supreme Court sometimes frames standards of decision or statutory construction around the less demanding aim of avoiding manifest injustice. As Justice Blackmun wrote in *Bradley v. School Board of Richmond*, "[a]n appellate court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice."[198] Similarly, at the level of trial courts, the standard for granting a mistrial is "manifest necessity" to avoid injustice.[199]

Judges sometimes justify their rulings by portraying specific outcomes as dictated by justice.[200] In fact, federal court decisions reflect this pattern clearly. A Westlaw search[201] reveals that 52 opinions use the homely phrase "justice necessitates," 545 include the phrase "justice dictates," 1,353 cases use "justice demands," and more than 10,000 include "justice requires," including 214 decided by the U.S. Supreme Court. The implication in those opinions is

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[197] Illinois v. Allen, 397 U.S. 337, 347–48 (1970) (Brennan, J., concurring) (emphasis added).

[198] Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 697 (1974) (citing Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 281 (1969)); *see* Willard v. Tayloe, 75 U.S. (8 Wall.) 557, 567 (1870) ("In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties."); United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1869) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and it will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character.").

[199] *See, e.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[200] For example, in *Skilling v. United States*, three justices sum up the basis for their dissent from the conclusion that Enron CEO Jeff Skilling received a fair trial with the phrase, "justice demands trials that are fair in both appearance and fact." Skilling v. United States, 561 U.S. 358, 464 (2010) (Sotomayor, J., concurring in part and dissenting in part) (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

[201] https://legal.thomsonreuters.com/en/products/westlaw/edge (sign in; then search selecting "all federal" for jurisdiction field and search separately for "justice necessitates," "justice dictates," "justice demands," and "justice requires.") (last visited Mar. 13, 2025).

that the norm of justice—not the judge, and perhaps not even the law—is the driving force.[202]

3. *Judges on Judging: Personal Narrative*

> *"In all times and places he has had a sense of justice and a desire for justice. Any child expresses this fact of nature with his first judgment that this or that 'isn't fair.' A legal system is simply a mature and sophisticated attempt, never perfected but always capable of improvement, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force."*
>
> —Chief Justice Earl Warren[203]

Judge Richard Posner once observed, "[r]emarkably little is known to the general public, or even to the practicing legal profession, about judges—the way they decide cases."[204]

There are, of course, countless academic theories attempting to explain judicial decision-making, often offering conflicting views of the ideal or actual judicial decision-making process. This Article is not concerned with the sort of theoretical work that has kept law professors busy and law review editors

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[202] On legal determinacy, see, for example, Duncan Kennedy, A Critique of Adjudication (fin de siècle) (1997); Mark Tushnet, *Survey Article: Critical Legal Theory (without Modifiers) in the United States*, 13 J. Pol. Phil. 99, 108–12 (2005).

The justice promise is evident not only in judges' explicit statements but also in the absence of statements to the contrary. Judges rarely, if ever, claim to sacrifice justice, much less promote injustice. Even in the rare instances when a judge acknowledges a gap between a legal ruling and justice, such admissions are typically framed as exceptions—unfortunate but temporary consequences of institutional constraints, role-based obligations, or jurisdictional limits. While this section emphasizes the frequency with which judges affirm the importance of justice—supporting the notion of a meaningful justice promise—it is equally notable that judicial opinions almost never suggest an intentional rejection of justice as a guiding principle. When judges acknowledge tensions between formal legal constraints and just outcomes, they typically do so with reluctance, portraying such conflicts as an unavoidable but regrettable consequence of legal formalism. *See generally* Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 131–49 (1984); *but see* Hanson & Strang, *Justice Deferred*, *supra* note 52, Part II (arguing that certain judicial methodologies openly reject justice as a norm of any relevance to judicial decision making). For an example of a rare explicit rejection of justice as a relevant judicial consideration, *see* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) ("'Manifest injustice,' I fear, is just a surrogate for policy preferences."); *see also id.* (Talking about 'justice'" is akin to discussing "mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result.").

[203] Earl Warren, *The Law and the Future*, Fortune, Nov. 1955, at 106.

[204] Richard Posner, *Foreword* to Cohen, *supra* note 64, at xv–xviii. There are many explanations for that knowledge gap. One is that judges themselves are often unwilling to share openly or are themselves unaware of what moves them. As Judge Posner himself has argued, "Many judges would say that nothing outside 'the law,' in the narrow sense that confines the word to the texts of formal legal documents, influences *their* judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves." Richard A. Posner, Reflections On Judging 130 (2013). This Article will not examine or challenge the veracity of what judges say moves them, in large part because our focus here is, in a way, more legalistic than that. It is examining whether and to what extent the legal system's spokespeople "promises" justice, whether or not it intends to disregard or breach that promise.

buried in manuscripts since the early twentieth century.[205] Most of that work, incidentally, does not center justice in its theory or analysis, although there are exceptions.[206] Instead, we look specifically to the words spoken by prominent jurists, when positioned outside their robes and often speaking to a wider audience, about the role and significance of justice as their ultimate goal.[207]

To make the task manageable, we limit our focus in this section primarily to historical book ends—drawing extrajudicial commentary from the origins of U.S. jurisprudence and then leapfrogging to reflections shared by judges today.[208]

Digging down to the roots of American law, the period that Roscoe Pound dubbed the "formative era,"[209] two names stand out as the most influential of their generation: Chancellor James Kent and Justice Joseph Story. Each left their mark as both jurists and legal scholars.

Chancellor Kent of New York "inaugurated legal education at [Columbia]," where he was appointed as professor of law in 1793.[210]

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[205] One minor symptom of the profession's ills is the lack of connection, mostly, between practicing lawyers and academic lawyers. Almost no practitioners and few judges ever will find this Article—or anything else published in a law review. For their part, most law professors never again will see a deposition conference room in person, let alone a courtroom, if they ever did. But practitioners sometimes come close to our concern here in a different argot, one that the former judge who wrote *Anatomy of a Murder* used well: "Judges, like most people, may be divided roughly into four classes: judges with neither head nor heart—they are to be avoided at all costs; judges with head but no heart—they are almost as bad; then judges with heart but no head—risky but better than the first two, and finally, those rare judges who possess both head and a heart." "Robert Traver" (John D. Voelker), Anatomy of a Murder 313–14 (1958). Voelker (1903–1991) was a Michigan Supreme Court justice; he wrote this best-selling novel (later an Otto Preminger film of the same name) under the *nom de plume* Robert Traver). Judges in that rare fourth group offer the best chance of keeping the justice promise, as we explain it here.

[206] For example, Ronald Dworkin's work represented a notable if only partial exception in addressing justice as an explicit norm in judging. *See generally, e.g.*, Ronald Dworkin, Law's Empire (1986). The larger body of work stretches at least from classic American writers like Oliver Wendell Holmes, Jr. (The Common Law (1881)), through the legal realists (for example, Karl N. Llewellyn's The Bramble Bush (1930)), to positivists, critical scholars, and many more. A very recent contribution in this vein is Chad M. Oldfather, Judges, Judging, and Judgment: Character, Wisdom, and Humility in a Polarized World (2025).

[207] We note here a book, now more than thirty years old, that collects the thoughts across a range of judicial subjects of an important subset of judges, Black men and women on the bench. *See generally* Linn Washington, Black Judges on Justice (1998). Perhaps unsurprisingly, the interviews in the book demonstrate a deep acculturation: these judges mostly sound like other judges, albeit with a strong sense of the effects of race and class on legal outcomes. Often, for example, their views of crime are highly dispositionist, seeing crime as rooted in bad choices or individual evil, whatever the background circumstances attending it. *See, e.g.*, *id.* at 41, 50, 66, 87, 88, 95–96, 107, 109, 174–77 (an especially strong law-and-order dispositionist view, from Judge Henry Bramwell). The rule of law also gets much praise, and efficiency is another favored quality. *Id.* at 17 (rule of law), 20 (efficiency, meaning quick trials). But discussion of justice as a norm is sparing, with law and practical or programmatic issues, like funding, getting more attention. *But see id.* at 29, 30–31, 42 (repeated references to justice by Judge Veronica S. McBeth), 56 (brief discussion of fairness by Judge Joseph B. Brown, Jr., a Shelby County, Tennessee, judge who went on to become a reality television personality on the show *Judge Joe Brown*), 95, 96, 105 (brief references by Judge Reggie B. Walton), 124 (brief paean to "equal justice under law" by Judge Damon J. Keith), 149 (retired Judge George W. Crockett, Jr.).

[208] Future portions of this project will examine the role that the justice norm has purportedly played in judicial decision-making in between.

[209] *See generally* Roscoe Pound, The Formative Era of American Law (1938).

[210] John H. Langbein, *Chancellor Kent and The History of Legal Literature*, 93 Colum. L. Rev. 547, 548 (1993).

Kent eventually authored *Commentaries on American Law*, a four-volume compendium of U.S. law,[211] which became "the most influential American law book of the antebellum period."[212] By then, Kent had devoted twenty-five years to serving on the New York bench, and "was already a famous figure in American law."[213] Reflecting on his time as a judge, Kent described to a friend the central place of justice in shaping his decisions:

> I saw where justice lay and the moral sense decided the cause half the time, and I then sat down to search the authorities until I had exhausted my books, and I might once and a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case . . . .[214]

At least on this account, for Kent justice came first; the laws and cases were the malleable building blocks with which he constructed just legal outcomes.

Justice Joseph Story, a contemporary of Kent's, juggled even more roles. While serving as an associate justice on the U.S. Supreme Court, he simultaneously led Harvard Law School—rescuing it from collapse and transforming it into "a school for a national elite, an aristocracy not of wealth or breeding, but of intelligence, hard work, and character."[215] As Dan Coquillette and Bruce Kimball explain, Story's influence within the university was unmatched, for he held "a position within the university so powerful that it would be unthinkable today."[216] On top of that, he authored the seminal three-volume treatise, *Commentaries on the Constitution of the United States*.[217]

Story stands out among U.S. judges and scholars "as possibly the most learned and influential defender of the natural law tradition."[218] He emphasized the importance of justice in the law, arguing that the "the welfare of the whole community," depended upon "the actual administration of justice," which, in turn, depended upon the legal profession.[219] The lawyer, Story claimed, "stands alone, to maintain the supremacy of law against power, and numbers, and public applause, and private wealth."[220]

In *Commentaries on the Constitution of the United States,* Story emphasized the centrality of justice to the success of any legal system. "[E]stablish[ing]

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[211] *See* James Kent, Commentaries on American Law (1826–30).

[212] Langbein, *supra* note 210, at 548.

[213] *Id.*

[214] Letter from James Kent to Thomas Washington, Esq. (Oct. 6, 1828), *in* James Kent, *An American Law Student of a Hundred Years Ago*, 2 Am. L. Sch. Rev. 547, 552 (1911).

[215] Daniel R. Coquillette & Bruce A. Kimball, On the Battlefield of Merit: Harvard Law School, The First Century 143 (2015).

[216] *Id.* at 157.

[217] *See* Joseph Story, Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution (1833).

[218] James McClellan, *Joseph Story's Natural Law Philosophy*, 5 Benchmark 85, 85 (1993).

[219] Joseph Story, *Discourse Pronounced Upon the Inauguration of the Author as Dane Professor of Law in Harvard University* (Aug. 25, 1829), *reprinted in* The Legal Mind in America: From Independence to the Civil War 180 (Perry Miller ed., 1962).

[220] *Id.*

justice," he stressed, "must forever be one of the great ends of every wise government; and even in arbitrary governments it must, to a great extent, be practi[c]ed, at least in respect to private persons, as the only security against rebellion, private vengeance, and popular cruelty."[221] Whether reliably or not, the ideal of justice also guided his judicial decisions. As James McClellan explains: "In many of Story's constitutional opinions, he frequently prefaced his remarks with the bold assertion that his reasoning was based upon the principles of 'natural justice.'"[222]

Rise to today, and judges continue to stress the primacy of justice in their public reflections on the judicial role, reinforcing the image of judges as stewards of fairness and equity. In *Blindfolds Off: Judges on How They Decide*,[223] Joel Cohen captures judges candidly discussing the tension between legal formalism and the pursuit of just outcomes. Judge Emmet Sullivan, for instance, distills this dual responsibility through symbols, explaining, "Those scales of justice behind the bench are behind my bench [the judge physically pointing] for a reason. And they're always balanced. That's what I stand for—a fair system of justice."[224] Sullivan adds, "I take very seriously the oath that I took to administer justice,"[225] highlighting the notion that judges are charged with more than simply enforcing the letter of the law.

Judge Leonie Brinkema echoes that view: "your job is to ensure that the case is tried fairly . . . and that justice gets done."[226] Judge Denny Chin amplifies this ethos, rejecting the idea that courts operate without a "soul." Chin argues that "justice necessarily implicates having a soul. I think that if you have a soul you're more likely to achieve justice."[227] Known for presiding over Bernie Madoff's sentencing, Chin hopes to be remembered not for the 150-year sentence, but for the judge's prioritization of justice. "My goal," he explained "from the beginning was to do justice. . . . I think people who were there thought that the proceedings were conducted in a just way."[228]

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[221] Story, *supra* note 217, at 463–464 §482.

[222] McClellan, *supra* note 218, at 91; In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815), for instance, Story wrote: "[W]e think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States." *Cf.* Morgan D. Dowd, *Justice Joseph Story: A Study of the Legal Philosophy of a Jeffersonian Judge*, 18 Vand. L. Rev. 643, 657 (1965) ("For Story, the supposed task of the justice was to discover the law and once having found it-to make it conform to his own concept of the public will.").

Later in this series, we intend to come back to the relationship—the similarities, differences, and overlap—between the notion of "natural justice," as used by Joseph Story, and "justice" as we are defining and using the term. For an implicit initial step in that effort, see Hanson & Strang, *The Justice Imperative*, *supra* note 21, Part I (summarizing some of the deep roots of the yearning for justice).

[223] Cohen, *supra* note 64.

[224] *Id.* at 238.

[225] *Id.* at 250.

[226] *Id.* at 8–9.

[227] *Id.* at 36.

[228] *Id.* at 39.

Trial judges, closer to the legal front lines than their appellate counterparts, may feel more viscerally the responsibility of navigating hard cases in a just way. In *Tough Cases*, a compilation of essays by trial court judges, the contributors give voice to "the struggles of conscientious trial court judges to find justice within the confines of the law when the path is either unmarked, or is clearly marked but pointing in the wrong direction."[229]

Trial judges also must grapple with the looming specter of appellate review—and the tension between their personal sense of justice and the strictures of the law. One judge recounts a moment of anguish over sending a defendant to prison despite believing in his innocence: "I could see a miscarriage of justice coming down soon."[230]

Reflecting the wiggle room that the law itself allows, another judge describes bending the law to avoid an unjust outcome:

> A judge takes an oath to follow the law, an oath I take very seriously and like to think I have always done to the best of my ability. I skirted the line in this case and rejected the jury's prerogative to determine guilt or innocence to avoid what I thought would be a miscarriage of justice. Was justice ultimately done? I think, in the end, it was, but at a cost to my fidelity to the law. I don't think I would do it again.[231]

Those reflections shine a light on the conflict some judges confront between the demands of law and the pull of justice. The next section suggests that this tension is widely felt.

4. Judges on Judging: Surveys

Surveys of judges on the topic, of which there have been very few, support the hypothesis that judges perceive the advancement of justice as a primary—even paramount—duty.

In 2011, Rick Swanson published a study of state judges, in which he interviewed or surveyed seventy-eight jurists from the highest courts of thirty-five states.[232] The survey asked respondents to rank the "possible roles of a state supreme court justice in order of their importance," among the following four options: (a) "[t]o achieve clarity of unclear law"; (b) "[t]o achieve justice for litigants"; (c) "[t]o establish statewide uniformity of law"; or (d) "[t]o achieve good public policy."[233]

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229 Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made 2 (Russell F. Canan, Gregory E. Mize & Frederick H. Weisberg eds., The New Press 2018).

230 *Id.* at 39.

231 *Id.* at 56.

232 Rick A. Swanson, *Judicial Roles in State High Courts*, 94 Judicature 169, 170 (2011).

233 *Id.* at 170 (emphasis in original).

Of the seventy-eight respondents, "[t]wenty-nine judges (37.2 percent) ranked justice as the highest goal."[234] According to Swanson, those respondents:

> described justice as "crucial," "fundamental," "*ipse dixit*," and "obviously" most important. Justice is "why we're here," "what we're really all about," "the business we're in" and "what I'm paid to do." Two other judges explained "we are the *justice* system" and "if you want justice, you go to a courthouse." One judge speculated "most people would put [justice] first." Several of these judges elaborated that justice is about "making sure people are given their day in court." As one judge remarked, "That's what I think I was hired to do by the people of the state . . . ." Another judge agreed:
>
> The mission of the judicial system is to render equal justice for all under the law. That's most important to me. Whether you're poor, handicapped, your gender, your status in life, is immaterial when it comes to achieving justice for all . . . done with compassion and mercy.[235]

Several judges also emphasized the role of justice as a motivating factor for litigants, noting that:

> litigants are "our customers" and that "even losers feel satisfied if they received a fair hearing." The need for justice is especially important at the high court level because it is "the end of the line" and "the last opportunity" for most litigants, especially when "life itself" is at issue. As one judge explained, "Justice for litigants makes everything else pale in comparison . . . it's the most important thing I *could* do . . . we have the death penalty—what could be more important than that?" And, justice must supersede uniformity or else merely a "uniformity of bad results" might occur.[236]

Moreover, some of those jurists who ranked clarity or uniformity over justice were careful to emphasize that those qualities should be thought of as a "means to justice."[237] It is possible that many of the judges who saw their role as simply applying the law, presumed law was itself just. Or, relatedly, perhaps they were focused on a narrower conception of justice: equality or consistency of outcomes across similar cases. "Providing justice," from that perspective, meant producing clear, uniform precedents that would enable lower courts to apply the law consistently and efficiently.[238] Professor Swanson quoted one judge who, for instance, observed that "if you follow the law, it usually is fair" and another who explained that "to have justice, you have to have uniformity

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[234] *Id.* at 172. The group that ranked "justice" first consisted of twenty-nine judges, behind only the group that ranked "clarity" first (thirty-four judges). In comparison, the groups that ranked "uniformity" and "public policy" first trailed behind at fifteen judges and six judges respectively. *Id.* at 171.

[235] *Id.* at 172 (emphasis in original).

[236] *Id.* (emphasis in original).

[237] *Id.* at 171.

[238] *Id.*

of law."[239] And still another asked, "How can you say achieving justice is not your most important question? But how do you achieve justice? You obtain clarity in the law, you obtain statewide uniformity of law, you make good public policy."[240] In short, as Swanson summarized, "many judges viewed clarity, uniformity, and justice as either similar or mutually supportive concepts, not conflicting concepts."[241]

Other judges were not so sanguine about the law, as is, and were even willing to identify a potential gap between the law as written and justice.[242] Indeed, several justice-preferring judges indicated a willingness to bend the law toward justice.[243] According to Swanson, one judge noted that the juridical process is "not just following rules" but also involves abiding by a sense of justice, observing that judges are moved by lawyers who "win[] the reader's heart" and "show his mind how to get there."[244] Still another noted that "if the law is outdated, we achieve justice by changing the law . . . sometimes the law needs changing and you need to say the law was in error."[245]

In sum, Swanson's evidence and analysis suggests that most jurists understand their role of providing justice and understand the provision of justice as the ultimate, or at least an important, goal of the law.[246]

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[239] *Id.*

[240] *Id.* These explanations are consistent with the notion of "procedural justice" to, or even as a substitute for, substantive justice. For a helpful literature review of research on procedural justice, see Dale Miller, *Disrespect and the Experience of Injustice*, 52 Ann. Rev. Psychol. 527 (2001) (defining "procedural justice" as "the fairness of the methods, mechanisms, and processes used to determine outcomes as opposed to the fairness of the outcomes themselves.").

It may be worth clarifying that these narrower conceptions of justice are not inconsistent with our broader framework; indeed, they are often micro-applications of the same underlying goal of negating harms produced by power without legitimacy. Consider consistency, for instance, even concepts like "rule of law" can be understood as manifestations of a commitment to justice. To call for consistency across cases is to call for a kind of equality: treating similar situations similarly. Failing to do so produces a form of injustice because inconsistency suggests an inequality without legitimacy—arbitrary differential treatment that cannot be justified.

In that way, narrow forms of injustice, can serve as a flawed and distracting substitute for outcome justice. *See* Hanson & Strang, *Justice Imperative*, *supra* note 21, Parts III.A–D (mapping different types of injustice, including the difference between real justice and legal justice. For instance, consistency by itself, is not itself justice, a point stressed by Larry Krasner above. *See supra* note 182 and accompanying text (regarding sentencing guidelines). As we make clear later in the series, there is a deeper and broader conception of justice that is imperative for the system to ultimately be true to its promise and to the social contract. *See, e.g.*, *id*. at Part I. Seemingly fair processes, consistent outcomes, or strict application of the law do not themselves constitute the fulfillment or advancement of justice unless the outcomes produced are also substantively just.

[241] Swanson, *supra* note 232, at 171–72. Even justices who did not rank "justice" so highly often apologized with phrases like "'I don't mean to be so hard-hearted' or 'I know that sounds bad,' or 'It's terrible to say.'"

[242] *Id.* at 172.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] Again, though, some of Swanson's survey respondents "viewed clarity, uniformity, and justice as either similar or mutually supportive concepts," *Id.* at 171–72. For a cursory description of some of the problems with that perspective, see *supra* note 240.

III. The Broken Promise

> "*The gold of her promise*
> *has never been mined / Her borders of justice*
> *not clearly defined / Her crops of abundance*
> *the fruit and the grain / Have not fed the hungry*
> *nor eased that deep pain.*"
>
> —Maya Angelou[247]

> *"There is no greater tyranny than that which is perpetrated under the shield of the law and the name of justice."*
>
> —Charles de Montesquieu (apocryphal)[248]

A. "It's Law all the Way Down"

But for all of the architecture, stylized language, and aspirational signals of law people, lay people and law people in training would discover that judges and lawyers only occasionally gesture at justice and then only to maintain appearances when they sense that outside lay people are watching closely. The law people rarely demonstrate an actual commitment to justice.[249]

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[247] Maya Angelou, America, *in* The Complete Collected Poems of Maya Angelou 85 (1994).

[248] This quotation is widely attributed to Montesquieu but does not appear in the book where it is usually cited, in *The Spirit of the Laws*. *See generally* Montesquieu, The Spirit of the Laws (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748). In any event, people tend to understand and value the quotation and its meaning, whatever its source.

[249] This might seem to contradict some of the survey evidence and statements reviewed above, in which, for instance, judges proclaimed justice as a primary aspiration. As later portions of this series will make clear, however, the sort of paeans to justice so common in law tend to be, especially recently, paper thin, even if chiseled in granite. *See generally* Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section III.B; Hanson & Strang, *Justice Deferred*, *supr*a note 52, Section II.B; Hanson & Kipnis, *Courting Injustice*, *supra* note 6, Part II.

Markus Dubber's philosophical analysis of how a "sense of justice" informs legal opinions provides one explanation for this puzzling phenomenon. After surveying judicial usage, he concludes that, even when judges invoke justice sincerely, that "sense of justice," properly understood, operates as a formal capacity that "does not decide cases, or determine action"; instead, it only, "sets the framework within which justice is possible." *See* Markus Dirk Dubber, *Making Sense of the Sense of Justice*, 53 Buff. L. Rev. 815, 857 (2005); *see also* Markus Dirk Dubber, The Sense Of Justice: Empathy In Law And Punishment 75 (2006) ("As a formal capacity shared by all persons as such, rather than by some substantive community or other, the sense of justice is the prerequisite for judicial decision making as well as for jury deliberation, for legislative action as well as for police behavior. It does not decide cases or determine action; it sets the framework within which justice is possible."). The sense of justice, in other words, is a precondition for recognizing that justice matters and that others deserve just treatment, but it provides no substantive guidance about what outcomes actually serve justice in particular cases. *See id.* at 51 ("The sense of justice can only play a *formal* role, as a necessary precondition for a theory of justice and for the existence of a legal system," functioning merely as "the moral sentiment which allows and motivates us to act justly" without providing substantive guidance about what justice requires. (emphasis in original)). His moral psychology perspective illuminates how judges can genuinely invoke justice while deciding cases purely legalistically.

Owing to that dissonance and the psychological motives shaping how judges cope with it, many judges have come to understand themselves as advancing justice precisely by ignoring

Indeed, law people sometimes privately eschew "justice" altogether. The criticism, in essence, is that because justice has no shared meaning, it cannot be employed as a metric in law, lest it be used simply as cover for subjective judicial discretion. Some of the most influential scholars and jurists of the last century have offered that criticism as a basis for disregarding the goal of justice.[250]

Oliver Wendell Holmes, Jr. "hate[d] justice" for that reason, explaining that "I know if a man begins to talk about [justice], for one reason or another he is shirking thinking in legal terms."[251] The even more influential Richard Posner similarly complained to a journalist that terms "like fairness and justice. . . 'have no content.'"[252] But again, most judges and lawyers do not attack or belittle justice; they just do not speak of it at all.

Yet the tension between promise and practice has not been static. While the legal system has too often served as an instrument of power and purveyor of injustice, by design, there is always a battleground on which people

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outcome justice. As we detail in Hanson & Strang, *Justice Deferred, supr*a note 52, Section II.B "judicial injustice" focuses narrowly on process, constraint, and democratic legitimacy to justify ignoring the consequential injustice of judicial outcomes; judges rationalize that it would be unjust for unelected officials to consider whether outcomes are substantively just. That narrow conception of injustice, in fact, has been the cornerstone of the conservative legal movement's attack on justice-oriented jurisprudence and promotion of law and economics, textualism, and originalism. *See id*.

A key broader point, developed across this series, however, is that judges never truly escape justice concerns. Even those claiming justice has no role in law typically root their arguments in injustice narratives (for example, about judicial overreach or democratic legitimacy) or adjust their attributional causal stories, or alter, ignore, or conceal the inconvenient facts or the disconcerting consequences of what they are doing to avoid having to confront their role in promoting injustice. *See, e.g.*, Jon Hanson & Dean A. Strang, *Injustice Narratives in Criminal Law: The Specific Role of Dehumanisation in* Citizens, the State and Justice: A Multidisciplinary Perspective 100–14 (Dan Jasinski & Noel McGuirk eds., 2026).

For justice to serve its proper end of reducing actual injustice rather than merely managing judicial self-perception, a true devotion to justice requires more than goodwill or abstract commitments. It demands a meaningful framework for assessing injustice beyond legal categories, doctrines, and processes, coupled with systematic attention to causes and accountability for consequences, all embedded within institutions and structures designed to facilitate and reward that effort among judges trained for that purpose.

[250] *See generally* Hanson & Strang, *Justice Deferred, supr*a note 52, Part II.

[251] Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), *in* Justice Holmes to Dr. Wu: An Intimate Correspondence, 1921-1932 53 (1935).

[252] Paul M. Barrett, *Influential Ideas: A Movement Called "Law and Economics" Sways Legal Circles*, Wall St. J., Aug. 4, 1986, at 1, col. 1 ("Judge Richard A. Posner has little use for words like fairness and justice. 'Terms which have no content,' he calls them. What America's lawyers and judges need . . . is a healthy dose of free-market thinking."). When Posner wasn't complaining that "justice" was a vacuous concept, he argued that it *did* have a precise meaning: efficiency. *See, e.g.*, Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757, 777 (1975) (writing on "justice" that "the most common [meaning] . . . is simply 'efficiency.' When we describe as "unjust" convicting a person without a trial, taking property without just compensation, or failing to require a negligent automobile driver to answer in damages to the victim of his carelessness, we can be interpreted as meaning simply that the conduct or practice in question wastes resources."); *see also* Nicholas Mercuro & Steven G. Medema, Economics and the Law: From Posner to Postmodernism and Beyond 105–06 (Princeton Univ. Press, 2006) ("The Chicago school's reliance on efficiency is in part due to the belief that it is a legitimate and important goal for legal-economic policy, but it also reflects their concern as to what can 'come in' under the name of 'justice' or 'fairness,' neither of which has a unique definition that commands universal acceptance. As a consequence, Chicagoans are skeptical of the motives of those who invoke its use. . . .").

and organizations can fight for at least marginal justice. Moreover, the judiciary has sometimes systemically trended toward justice but, more consistently, back toward injustice. As we detail in *Justice Deferred*, recent decades have witnessed a massive, coordinated, and extended campaign against justice as a norm or consequence of the judiciary and legal system.[253] Beginning in the late twentieth century, leading political actors, legal scholars, and judges participated in a well-funded effort to delegitimize justice as a normative guide for constitutional interpretation.[254] That campaign, decorated in the rhetoric of neutrality and judicial humility, worked to portray justice as subjective, partisan, or naïve, and to elevate conceptions of legal decision-making that denied justice any independent role.[255] The promise of justice was reframed as a threat to legal legitimacy itself, as unjust, and the pursuit of justice came to be labeled improper, unprofessional, or even lawless.[256]

Justice Elena Kagan's 2010 Supreme Court confirmation hearing illustrated the triumph of that campaign.[257] Then-Solicitor General Kagan was questioned by Senator Jon Kyl, who was eager to discern her opinions on "the standard for judges in approaching cases."[258] Kyl opened by referencing President Obama's view that, in the toughest cases, justices must rely on more than just legal texts—they must consider something like their own sense of justice. Kyl elaborated:

> [Obama] has used a couple of different analogies. One was to a 26-mile marathon and said that in hard cases, adherence to precedent and rules of construction and interpretation will only get you through the first 25 miles. And he has said that while the law is sufficient to decide 95 percent of cases, in the last 5 percent, legal

[253] *See generally* Hanson & Strang, *Justice Deferred*, *supr*a note 52, Part II.

[254] *See id*.

[255] *Id*. There now have been many historical accounts of that extensive campaign. *See e.g.*, Michael Avery & Danielle McLaughlin, The Federalist Society: How Conservatives Took the Law Back from Liberals (2013); Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016); Amanda Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution (2015); Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law (2010). Leading figures on the political right from the late 1960's into the 1980's included Attorney General Edwin Meese, III (before, during, and after that role), Prof. Robert Bork and U.S. Supreme Court justice Antonin Scalia. Edwin Meese III, U.S. Att'y Gen., *Address Before the American Bar Association* (July 9, 1985) https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf [https://perma.cc/TW8J-289U]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971) (a seminal article—perhaps the seminal article—in this movement, and widely cited since it appeared); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 1 (1990) (his well-known popular work); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 863 (1989).

[256] *Id*.

[257] This is but one illustration of the transformative effect of the conservative legal movement's attack on justice. For more evidence of that anti-justice campaign, see Hanson & Strang, *Justice Deferred*, *supr*a note 52; Hanson & Kipnis, *Courting Injustice*, *supra* note 6; Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 21.

[258] *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1, 103 (2010) [hereinafter *Kagan Nomination Hearings*] (question of Senator Kyl, Member, S. Comm. on the Judiciary), https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf [https://perma.cc/PG9Q-4786].

> process alone will not lead you to the rule of decision. He says the critical ingredient in those cases is supplied by what is in the judge's heart or the depth and breadth of the judge's empathy.[259]

Then came the challenge: "Do you agree with him that the law only takes you the first 25 miles . . . and that the last mile has to be decided by what is in the judge's heart?" Kagan's reply reflects what has become the axiomatic judicial response to such questions[260]:

> I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is, and this is true of constitutional law and it's true of statutory law, the question is what the law requires. Now, there are cases in which it is difficult to determine what the law requires . . . . and people can disagree about how the constitutional text or precedent—how they apply to a case. But it's law all the way down, regardless.[261]

Kagan repeated that "law all the way down" response numerous times throughout her hearings.[262] Implicitly, then, Kagan was agreeing with Holmes, rejecting the notion that justice plays an independent role in judicial decision-making.

Kagan's response, again, represented what had become the dominant perspective: a full embrace of law as self-justifying and a categorical rejection of justice as having any independent role in judicial reasoning. [263] If it's "law all the way down," then justice is, at best, an incidental byproduct, present or recognizable only when it happens to align with the legal outcomes determined by other means.[264] This stance directly repudiates not only President

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[259] *Id.*

[260] *See* Hanson & Strang, *Justice Deferred*, *supr*a note 52, Section II.D.

[261] *Kagan Nomination Hearings*, *supra* note 258, at 103 (response of Elena Kagan).

[262] *See, e.g.*, *id.* at 160 (Elena Kagan responding to Senator Cornyn) ("I think that judges are always constrained by the law. They're . . . always constrained by the law. It's law all the way down."); *id.* at 173 (responding to Senator Durbin) ("So—so to say that something is law all the way down, which is absolutely the case, that it would be completely improper for a judge to import personal, or moral, or political preferences into the occasion."); *id.* at 203 (responding to Senator Klobuchar: "I said yesterday on a couple of different occasions it is law all the way down. You know, you are looking at the text, you are looking at structure, you are looking at history, you are looking at precedent. You are looking at law and only at law, not your political preferences, not your personal preferences."); *id.* at 299 (responding to Senator Grassley) ("It is law all the way down, I think is what I said yesterday, and that is what I believe. It is not personal views. It is not moral views. It is not political views. It is law all the way down.").

[263] In other articles in this series, we argue that, despite its promises and rhetorical invocations of justice, the law ultimately rejects justice as a guiding principle or endpoint. *See, e.g.*, Hanson & Strang, *Justice Deferred*, *supr*a note 52, Part II. As we will explain there, this occurs in part through an emphasis on "legal justice" over "real justice." Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section III.B. The shallow nature and limited extent of the judiciary's commitment to justice, both in theory and in practice, are exemplified by this section and the preceding section discussing the role of justice in judicial rhetoric.

[264] *Cf.* Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 21 (describing Justice Kagan's prioritization of law over justice today). We acknowledge, too, that Justice Kagan's confirmation hearing was in part performative, an attempt by the senators in making speeches and asking questions and by the nominee in offering responses that were

Obama's suggestion that justice might matter in hard cases, but implicitly the promises documented throughout Section II of this Article. By 2010, when Kagan testified, such repudiation had become the price of confirmation, a ritual performance in which nominees were required to demonstrate allegiance to text, original meaning, and "law" while disavowing "justice" as the judiciary's guiding light.

Justice Deferred details the history of the attack on justice.[265] And several articles map the system-wide consequences of that anti-justice turn—patterns of widespread and still-growing injustice attributable to a judiciary and legal apparatus that have renounced justice as the key norm and supplanted it with anti-justice jurisprudential approaches.[266]

For the balance of this Article, however, we focus on the entry point into that structure: legal education. As will become clear, the legal system's elevation of formalistic reasoning over meaningful commitment to justice starts with what students encounter at the outset of their professional formation. Legal education trains lawyers to perform publicly as if legal disputes that find their way into the legal system are decided ultimately according to applicable law. The claim that it's "law all the way down" serves as an excuse for ignoring harms and inequalities, normalizing the very injustices advanced throughout our system by many of its most prominent actors, including prosecutors, judges, and even Supreme Court justices.[267] At its extreme, this may even be an alibi of sorts: lawyers and judges claiming that they have no business with justice, but only law, so they were somewhere else, so to speak, when injustice occurred.

B. Bait and Switch in Legal Education

This section documents how being comfortable in the law's duplicity is a fundamental part of what it means to become a lawyer and, more important, to "think like a lawyer."[268] Indeed, conventional legal education enacts a kind of bait and switch, involving an "insincere offer[] to sell one item in order to induce the buyer to purchase another."[269] In the case of legal education, the promise is to prepare students to advance justice while, in fact, delivering

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shaped by the highly politicized public setting in which certain queries and answers have become expected. *See id.*

[265] Hanson & Strang, *Justice Deferred*, *supr*a note 52.

[266] *See* Hanson & Kipnis, *Courting Injustice*, *supra* note 6; Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 21; Jon Hanson & Lica Porcile, *The Law Crisis and the Authoritarian Turn*, 21 Harv. L. & Pol'y Rev. (symposium issue, forthcoming 2027) [hereinafter Hanson & Porcile, *The Law Crisis*]; Hanson & Kristoffersen, *Inside the Law Crisis*, *supra* note 21. For a summary of those articles and others in this series, see Hanson & Strang, *The Justice Series*, *supra* note 1.

[267] *See also* Jon Hanson & Dean A. Strang, *Injustice Narratives in Criminal Law: Introducing the Framework*, *in* Citizens, the State and Justice: A Multidisciplinary Perspective 7–19 (Dan Jasinski & Noel McGuirk eds., 2026).

[268] *See, e.g.*, Frederick Schauer, Thinking Like a Lawyer (2012).

[269] David Adam Friedman, *Explaining "Bait-and-Switch" Regulation*, 4 Wm. & Mary Bus. L. Rev. 575, 575 (2013).

them an education in practicing law, often in ways that ignore or perpetuate injustice.

1. *The Bait*

As we detailed above, law schools commonly and elaborately present themselves as institutions dedicated to justice, preparing students to pursue justice and contribute to a more just society.[270]

2. *Taking the Bait*

This justice promise aligns closely with the aspirations of many applicants who decide to attend law school for that very reason. Ever since legal education became a subject of scholarly study in the mid-twentieth century,[271] several studies have examined student motivations for attending law school. Those studies consistently find that many—sometimes most—students attend law school with justice-related aspirations, such as helping others, reforming social structures, or serving the public interest, rather than, for example, pursuing personal wealth by advocating on behalf of corporate clients.[272]

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[270] *See supra* text accompanying notes 69–106.

[271] *See* James R. P. Ogloff, David R. Lyon, Kevin S. Douglas, & V. Gordon Rose, *More than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 Creighton L. Rev. 73, 78 (2000) (observing that, as of 2000, "there have been well over one-thousand scholarly articles, and a large number of books, devoted to the topic of legal education since 1965.").

[272] *See, e.g.*, Robert Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 551, 559–60, 576–77, 579 tbl.14b, 624 (1973) (analyzing student motivations across eight law schools between 1960 and 1972 and finding that seventeen percent of students cited a desire to serve the underprivileged, while thirty-one percent considered a desire to restructure society as greatly important); Robert V. Stover & Howard S. Erlanger, Making It and Breaking It: The Fate of Public Interest Commitment During Law School 3 (1989) (finding that, in the late 1970s, one-third of entering University of Denver law students intended to work in public interest law as their first full-time job); Craig Kubey, *Three Years of Adjustment: Where Your Ideals Go*, 6 Juris Dr. 34, 36 (1976) (reporting that thirty-seven percent of entering students at UC Davis Law in 1975 expected to work as movement, poverty, or public interest lawyers after graduation); Robert Granfield, Making Elite Lawyers 37–38, 48 (1990) (finding that a significant number of Harvard Law School students attended for altruistic reasons and that seventy percent of incoming students expressed a preference for public-interest careers); Suzanne Homer & Louis Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women's L.J. 1, 52 tbl.6 (1989) (reporting that, in a 1988 study at UC Berkeley Law, forty-one percent of women and thirty percent of men intended to work in public interest or public sector jobs at the time of admission); Howard S. Erlanger, Mia Cahill et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 Law & Soc'y Rev. 851, 853–54 (1996) (finding that over half of entering University of Wisconsin law students aspired to work in fields with an explicit social reform component, such as poverty law, consumer or environmental protection, or affirmative action); Lynn A. Addington & Jessica L. Waters, *Public Interest 101: Using the Law School Curriculum to Quell Public Interest Drift and Expand Students' Public Interest Commitment*, 21 Am. U.J. Gender Soc. Pol'y & L. 79, 83 (2012) (reviewing studies indicating that between thirty-three percent and thirty-seven percent of entering law students intended to pursue public interest careers); Jenée Desmond-Harris, *"Public Interest Drift" Revisited: Tracing the Sources of Social Change Commitment Among Black Harvard Law Students*, 4 Hastings Race & Poverty L.J. 335, 370 (2007) (surveying Black Harvard Law students in the mid-2000s and finding that roughly eighty percent were motivated to attend law school, in part, by a desire to serve society).

Those findings comport with the experience of law professors who have written about legal education and the common mismatch between student hopes and expectations and student experience. As Duncan Kennedy put it in his now-classic, and still-widely read polemic on legal education, "A surprisingly large number of law students go to law school secretly wishing that being a lawyer could turn out to mean something more, something more socially constructive than just doing a highly respectable job."[273] More recently, Sam Moyn observed, "Many students believe that they are doing something more than enrolling in a trade school to solve other people's legal problems for (often tremendous) pay. Students are also hoping to advance or even incarnate certain ideals of political and social justice."[274]

Between those temporal bookends is a sizable library of related observations by law professors. Deborah Maranville describes "the passion for justice and enthusiasm for helping other people" that provides law students "their strongest initial motivations for wanting to become lawyers."[275] Robert Solomon describes how students "come to law school filled with passion, with morality, with a sense of justice."[276] And so on.[277]

In sum, it may appear that those providing and receiving legal education are interacting in a marketplace of shared purpose, where institutions provide the justice-centered training and career opportunities that students seek. But that is not the case.

3. *The Switch*

Conventional legal education undermines students' ability to pursue justice-centered aspirations and sustain their moral commitments in at least three key ways. First, it relegates discussions of justice and related norms and concepts to the margins, treating them as beyond the bounds of the curriculum. Second, it instills a mode of legal reasoning that attends to surface-level

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[273] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Ed. 591, 592 (1982).

[274] Samuel Moyn, *Law Schools Are Bad for Democracy: They Whitewash the Grubby Scramble for Power*, Chron. of Higher Educ., Dec. 16, 2018, https://www.chronicle.com/article/law-schools-are-bad-for-democracy [https://perma.cc/C9UF-CMQZ].

[275] Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. Legal Educ. 51, 51 (2001).

[276] Robert A. Solomon, *Teaching Morality*, 40 Clev. St. L. Rev. 507, 508 (1992).

[277] *See, e.g.*, West, *supra* note 19, at 47 (describing students' initial "public service" "career goals" of "doing the people's justice" be it in the form of "legal aid work for poor people, cause lawyering for community organizations, public defense of indigent criminal defendants, or simply government lawyering at any level"); Stuart A. Scheingold & Austin Sarat, Something To Believe In: Politics, Professionalism, and Cause Lawyering (2004) (discussing the role of cause lawyering in legal education and practice); Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 Fordham L. Rev. 1563, 1566 (2002) (observing that "many students are attracted to law by a desire to serve their own conceptions of the public interest"); Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Students' Public Interest Aspirations*, 7 Conn. Pub. Int. L.J. 95, 95 (2008) (noting that "a great deal of . . . [law school] graduates entered law schools with aspirations of engaging in public interest work following graduation"); Louis S. Rulli, *Too Long Neglected: Expanding Curricular Support for Public Interest Lawyering,* 55 Clev. St. L. Rev. 547, 548 (2007) (discussing the need for greater curricular emphasis on public interest lawyering).

legal questions, obscuring the causes and consequences of injustice while displacing and subtly discrediting students' pre-existing moral and justice-based intuitions. Third, it inundates students with a heavy workload, including reading and other coursework, extracurricular obligations, job-search pressures, and often bar exam preparation, leaving little room for independent exploration or meaningful critique of the system. A full defense of these claims must await future work, but for now, it is sufficient to highlight the broad consensus among scholars and practitioners who have studied the topic: traditional legal education breaks its promise to focus on justice or to prepare students to advance justice in their careers.

Legal scholar Robin West describes legal education's bait and switch from justice to law as follows: although "[j]ustice is carved into building on legal campuses"[278] and heralded as the end of legal education, it's actually the law itself that serves as both the means and end of legal education. "Justice," she writes, is "widely hailed on commencement, Law Day, and Constitution Day speeches as the point of the legal enterprise,"[279] but justice otherwise has little or no role in legal education. "[I]nside the law schools, inside the classrooms, and inside the pages of law reviews," she explains, there is "no indication whatsoever that justice and what it might require is even marginally relevant to the study of law, much less central to it."[280]

In his "Letter to a Law Student Interested in Social Justice," Professor William P. Quigley reflects on the experiences of law students who arrive at law school motivated by justice, but leave disillusioned with law.[281] Quoting one student's reflections about that process—"the first thing I lost in law school was the reason that I came"[282]—Quigley describes the bait and switch as follows:

> Many come to law school because they want in some way to help the elderly, children, people with disabilities, undernourished people around the world, victims of genocide, or victims of racism, economic injustice, religious persecution or gender discrimination. Unfortunately, the experience of law school and the legal profession often dilute the commitment to social justice lawyering. The repeated emphasis in law school on the subtleties of substantive law and many layers of procedure, usually discussed in the context of examples from business and traditional litigation, can grind down the idealism with which students first arrived.[283]

It's not just that justice is omitted, Quigley points out. It's that justice is discouraged: "Those who practice social justice law are essentially swimming

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[278] West, *supra* note 19, at 26.
[279] *Id.*
[280] *Id.*
[281] William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DePaul J. for Soc. Just. 7, 8 (2007).
[282] *Id.* at 8.
[283] *Id.* at 9.

upstream while others are on their way down."[284] Notwithstanding any public promises that law schools might make about advancing justice, "[t]he actual message from law school," Quigley observes, "is that justice work, if done at all, is done in the margins or after the *real* legal work is done."[285]

The displacement of justice by law is no accident. Nearly a century ago, famed Professor Karl Llewellyn offered what would become a classic articulation of that point in his 1930 book, *The Bramble Bush: On Our Law and Its Study*.[286] In it, Llewellyn emphasized the distinction between hard, analytic law thinking and mushy, vacuous justice thinking:

> [Year one of law school] aims, in the old phrase, to get you to "think like a lawyer." The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along the ages. You are to acquire the ability to think precisely, to analyze coldly, to see . . . and manipulate the machinery of law. It is not easy thus to turn human beings into lawyers.[287]

Like Holmes, Llewellyn had disdain for moral considerations in legal reasoning. He described legal education as the necessary corrective, acculturating students to "think like a lawyer." Law school achieved that end largely in the first year, when each student is bifurcated into two selves: their former lay selves and their burgeoning law selves. Law school, done well, numbs the new students' "sense of justice"—supplanting it with precise technical lenses of law. The purpose and effect of legal education, then, is to transform "human beings into lawyers," cogs within "the machine of law."

As stark and yellowed as Llewellyn's rendering might appear, it has continued to resonate in the structures and culture of legal education since. In 1992, David Barnhizer summed up legal educational norms (disapprovingly) this way: "Most faculty in American law schools would deny the appropriateness of any mission that requires them to either understand or advance justice."[288] Moreover, even the small portion that might accept such a mission

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[284] *Id.* at 10.

[285] *Id.* at 11.

[286] Karl N. Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law School 174 (11th prtg. 2008); *see also* David V. Wilson II, Bramble Bush: The Classic Lectures on the Law in Law School Karl N. Llewellyn Oxford University Press, 2008 Edition, Hous. Law., November/December 2008, at 45 ("It is only a slight exaggeration to state that anyone who has graduated from law school in the United States since 1930 has at least heard of *The Bramble Bush*."). Note as well that Llewellyn personally supported human rights and briefed such cases. *See* William Twining, Karl Llewellyn and the Realist Movement 110 (1973) (describing Llewellyn's involvement with opposing the Sacco-Vanzetti executions and with the NAACP and ACLU).

[287] Llewellyn, *supra* note 286, at 101.

[288] David Barnhizer, *The Justice Mission of American Law Schools*, 40 Clev. St. L. Rev. 285, 286 (1992).

"would dissipate abruptly if anyone attempted to be specific in terms of the obligation."[289]

Martha Minow, who has long been one of those professors, and who as dean of Harvard Law School routinely affirmed the centrality of advancing "justice" in legal education,[290] admits that in practice, "law school quickly gives the message that law is not about justice."[291] Those students who attempt to raise justice considerations quickly get the message that, in Minow's words, "[j]ustice is for the sentimental, the immature, or, in any case, not for lawyers."[292]

Similarly, in their 2004 book, Professors Stuart Scheingold and Austin Sarat echoed Llewellyn by likening the process of "learning to think like a lawyer" to "learning to leave one's personal moral political views behind" and "to think analytically about the fit between facts and rules."[293]

In 2005, Professor John Breen similarly stressed that the acculturation process begins early: "From almost the first day of law school, most prospective lawyers are taught to separate their most fundamental moral beliefs (including their beliefs about justice) from their understanding of the law."[294] "Even the suggestion that moral discourse about the law might contribute to the education of future lawyers," he added, "causes some law professors to bristle."[295]

The 2007 Carnegie Report, "Educating Lawyers," explains that students, "[i]n their all-consuming first year, . . . are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses."[296]

Also in 2007, legal anthropologist Elizabeth Mertz wrote that law school teaches students "that questions of . . . justice are peripheral to the central business of law."[297] In her studies of law school dynamics, Mertz found that

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[289] *Id.* at n.3; see also James R. Elkins, *Thinking Like A Lawyer: Second Thoughts*, 47 Mercer L. Rev. 511, 515 (1996) ("[e]very law school probably has teachers who puzzle over the troubled relation of law and justice with students," but those "students now that the 'justice agenda' is not what law school is all about. While law implicates justice, the implications are often assumed to be beyond the limits of what law schools can, or should, try to teach").

[290] Emily Newburger, *'What Justice Demands of Us, No One Person Can Do Alone': Looking Back and Ahead with Martha Minow*, Harv. L. Today (May 17, 2017), https://hls.harvard.edu/today/justice-demands-us-no-one-person-can-alone/ [https://perma.cc/AA4V-Q3WY]. ("I have long wondered why we call the enterprise a law school and not a justice school. Look, medical schools are not called health schools. But we need to remember that the point of law and the point of medicine are to serve society, not simply to advance expert knowledge systems and the states of those with expertise.").

[291] Martha Minow, *Introduction: Seeking Justice*, *in* Outside the Law: Narratives on Justice in America 1, 1 (Susan Richards Shreve & Porter Shreve eds., 1997).

[292] *Id.*

[293] Stuart A. Scheingold and Austin Sarat, Something to Believe In: Politics, Professionalism, and Cause Lawyering 51 (2004).

[294] John Breen, *Justice and Jesuit Legal Education: A Critique*, 36 Loy.U.Chi. L.J. 383, 385 (2005).

[295] *Id.*

[296] William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 6 (Carnegie Found. for the Advancement of Teaching 2007), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf [https://perma.cc/9EKV-H34Q].

[297] Mertz, *supra* note 76, at 507.

"students who attempt to raise issues of fixed values or non-legal morality do not generally get very far in the classroom exchanges."[298]

Again, the effect of law school is to anesthetize (if not euthanize) students' sense of justice. As Dean Jane Aiken lamented in 2012, "[t]ypical law school classes have the effect of teaching students they have little power to affect justice in society."[299]

Robin West explained in her 2013 book on "Teaching Law" that "law professors, both as scholars and teachers, have long eschewed the study of the concept of justice, as a guiding principle of law, law teaching, or legal scholarship."[300] Consequently, "what law students almost never receive is even an introduction to what *justice* . . . might require of the substance of law."[301] The problem isn't simply that justice is omitted, it's that "[s]tudents are explicitly discouraged from mentioning 'justice' in the classroom, and are never rewarded for discussion of its requirements on exams."[302] This censorship of justice, West continues, does not exactly put students' former justice-aspiring selves to sleep. Rather it leaves "them with the distinct impression that those intuitions are of no relevance to their education, and hence to their work as lawyers. Adversarial ethics—according to which they should align their talents, work, and interests with those of their clients, whatever the justice of doing so—wins by default."[303]

Students and recent law graduates are the most likely to notice this bait-and-switch. The broken promise of justice is crucial for law students.[304] Some of them came into law school skeptical already, if they grew up in communities or in an economic stratum in which law often fails to serve their families and neighbors. In a sense, then, law school may move their peers in the same direction. Legal education presents itself as a training ground for justice but instead, we argue, prepares students to reduce or manage the dissonance produced by the wide gap between law and its consequences, on the one hand, and justice and its aspirations on the other through a set of motivated tactics.[305]

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298 *Id.* at 508.

299 Jane Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & Soc. Just. 231, 234–35 (2012).

300 West, *supra* note 19, at 26.

301 *Id.* at 56.

302 *Id.* at 89.

303 *Id.*

304 *See supra* Section III.B.2.

305 Students learn an arsenal of dissonance-reduction strategies: justifying unjust outcomes by telling particular sorts of outcome-affirming attributional stories; invoking legal rules and precedents as normative and controlling; downplaying justice as an unrealistic, naïve, or even dangerous concern; disregarding contextual factors shaping the outcome, avoiding confronting the human consequences of legal doctrines and judicial outcomes; and denying personal responsibility for resultant systemic harms by framing themselves as mere technicians doing their job and applying law rather than as moral agents shaping outcomes. For a more detailed description of that dissonance, the remarkable psychological impact it often has, and common psychological and institutional responses to it, see Hanson & Strang, *The Justice Imperative*, *supra* note 21, Section II.C.

The misrepresentations mislead justice-oriented young people who flock to law schools in hope of making the world more just[306]; they also stifle efforts to shape a legal system that would fulfill that promise.

In sum, despite the surface-level praise for and promise of justice, law schools deliver only law. Students must discover after they're already attending and paying for their legal education that justice is "unimportant," "irrelevant," "inappropriate," "of little concern or importance," "of no relevance," "in the margins," "peripheral," "beyond the limits," "sentimental," and "immature" and that they must therefore learn to "anesthetize," "lop off," "knock . . . "abandon" "put aside," "eschew," "leave . . . behind," "separate," the sort of "cloud[y]," "fuzzed," and "woozy thinking" associated with justice. Worse, regarding justice, they have "little power" and if they dare raise the topic, they are destined not to "get very far," while being "never rewarded" and "explicitly discouraged."

Professor Angela Harris has summed up the bait and switch phenomenon built into legal education this way: "Justice is the reason why many of my students have come to law school. But justice is not what the law provides."[307] Our legal education system is thus nearly devoid of the "moral value that should be the lifeblood of the entire curriculum."[308] Only by acknowledging the legal system's duplicity can we begin to imagine, reform, or rebuild a legal order that centers justice.

4. Consequences

What this all means is that justice is not the actual priority of legal education; it instead is the casualty. In Llewellyn's terms, generations of young "human beings" eager to make the world a more just place have been drawn into the legal profession, only to be socialized through a legal educational process that separates them from that ambition and turns them into law-centered "lawyers" who "think like a lawyer."

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[306] We write during a period of rapid change. Today's law students may belong to a cohort unusually skeptical of established institutions. In some respects, they are not unlike the generation that arrived in law schools during the late 1960s and early 1970s, shaped by civil rights struggles, Vietnam protests, urban unrest, political assassinations, and Watergate. In both eras, once-settled ground shifted beneath people's feet, creating openings for new assumptions, expectations, and theories for understanding law. We will examine the distinctive qualities of this current moment and its potential to reshape legal education and the legal profession in later parts of this series. E.g., Hanson & Kipnis, *Courting Injustice*, *supra* note 6; Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 21.

For now, we note that this Article aims to capture what has been the dominant model and experience in legal education for at least the last half century, not necessarily the flux and ferment of this particular moment. The legal educational system still operates largely on the inertia of that established model, even as the world around it has been transforming. The patterns we document below, including the bait-and-switch, reflect traditional curricular and pedagogical practices and assumptions that, until very recently at least, long have defined legal training. Whether this cohort of students will accept or challenge those norms remains to be seen. But understanding what they're being asked to accept requires first understanding the system as it has long operated.

[307] Angela P. Harris, *Teaching the Tensions*, 54 St. Louis U. L.J. 739, 743 (2010).

[308] West, *supra* note 19, 89.

Accepting as true Felix Frankfurter's observation—that "the law and the lawyers are what the law schools make them"[309]—the harm of a legal education system that strips the profession's incoming members of their desire and ability to advance justice is plain: a legal system that is less just and a world with more injustice. That manifests in numerous ways. Most obviously, it distorts what jobs law school graduates go on to do.[310] Less obviously, it leaves lawyers unprepared to identify injustice and to use their talents, training, and energy to resist it, even as they become the personnel that is charged with that mandate. Robin West explains: "[L]egalism is so encompassing a world view . . . that it 'crowds out' the law student's or scholar's *inquiry* regarding . . . the justice or injustice, of a law . . . . It crowds out worries over whether an entire swath of law, or an entire legal system, is just or unjust."[311] No wonder, as Professor Deborah Rhode observed: "Many lawyers . . . have lost their connection to the values of social justice that sent them to law in the first place."[312]

It may be tempting to suppose that many of the greatest champions of justice have been lawyers, trained in traditional ways. We accept that it is possible for justice-oriented law students to navigate their way through law school in a way that enables them to fight for justice. But that perspective belies the broad and system-wide effects of legal education and its effects on the legal profession. Some may be able to swim against the tide of law to get to justice, but the currents and the gravitational forces producing them are still shaping how many take up that effort, how many succeed in that struggle, and how far they get.[313] Indeed, a common lament of lawyers renowned for their work in fighting injustice is that law school was an obstacle to that work.[314]

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[309] *See supra* text accompanying note 77.

[310] *See, e.g.*, Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 Law and Social Inquiry 677, 698–701 (2006) (finding that two-thirds of the students entering law school in the hopes of seeking a government or public interest work do not end up doing that work); Pete Davis, Our Bicentennial Crisis 36–37 (2018) ("Indeed, if you walk through the halls of Harvard Law School, less than 20 percent of the students you meet—students being equipped and empowered by a Harvard Law education—will put their degrees to use in organizations dedicated to advancing the legal interests of those outside of a small group of the most wealthy and powerful corporations and individuals.").

[311] West, *supra* note 19, at 66.

[312] Rhode, *supra* note 24, at 2.

[313] As Jacob Reisberg, now a public interest lawyer, then a third-year law student, complained in 2015, "I can say with total certainty that as a student at Harvard Law School, it's incredibly easy to avoid ever having to think about racial injustice; it's incredibly easy to avoid ever having to talk about, in your classroom, issues of social injustice or broader power inequality." Christina Pazzanese, *After Ferguson, the Ripples Across Harvard*, Harv. Gazette (Mar. 4, 2015), https://news.harvard.edu/gazette/story/2015/03/after-ferguson-the-ripples-across-harvard/ [https://perma.cc/2BQ4-TA6C] (comment during a community symposium, "Law School or Justice School: Connecting the Dots Between Harvard and Ferguson").

[314] In his memoir, civil rights attorney Bryan Stevenson wrote about his disappointment with law school: "The courses seemed esoteric and disconnected from the race and poverty issues that had motivated me to consider the law in the first place," leaving him "feeling adrift." Bryan Stevenson, Just Mercy: A Story Of Justice And Redemption 4–5 (2014).

In her autobiographical book, *Becoming Abolitionist*, lawyer, organizer, and writer Derecka Purnell describes how she discovered bait-and-switch. Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom (2021). "At orientation, the dean welcomed the class by saying that Harvard was not simply a law school, but a 'justice school.'" *Id.* at 52. "I immediately filled with hope," she continues, "because that's exactly what I came to law

This means that even the most justice-oriented lawyers feel they arrive at their work despite their legal education, not because of it.

They feel that way because judges, lawyers, law people generally breach the profession's promise with impunity; as we have noted, some legendary and influential judges have renounced it outright. Yet by the law's own reasoning,[315] the legal system should not be permitted to promise justice without also offering real accountability. In the United States—and in most other places—it always has.[316]

Conclusion: The Import of the Justice Promise

At the core of this Article is an analysis of the ways in which the judicial system brands and markets itself as the *justice system*, and the implications of that concerted effort. All of this branding and marketing begin to explain more about why justice is important; why it is important for its own sake, of course, but also why it has acquired a vast secondary social importance.

When, as now seems increasingly clear, the justice promise does not hold, the question that follows is no longer whether the law serves justice,

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school seeking: justice. But I did not find any justice in the hundreds of pages I read each night for class. Nor was it in any of the lectures I attended." *Id.*

Michelle Alexander, attorney, civil rights activist, and author of *The New Jim Crow,* had this warning for prospective law students in 2020: "[L]aw school is a place where you learn the rules of the game and how to play it. But it isn't a place where people think deeply about justice." David Remnick, Host, Ten Years After "The New Jim Crow" (Interview with Michelle Alexander), in The New Yorker: The New Yorker Interview (Condé Nast Jan. 17, 2020), https://www.newyorker.com/news/the-new-yorker-interview/ten-years-after-the-new-jim-crow [https://perma.cc/2BQ4-TA6C]; *see also id.* (adding that although that may not be "true for every law school, . . . it's true for too many of them.").

[315] *See supra* text accompanying notes 28–33.

[316] Student motivations undoubtedly vary across the legal education landscape. The studies we cite tend to skew toward relatively "elite" law schools, as conventionally characterized. At some non-elite (and elite) institutions, students may be particularly drawn by prospects of career advancement or by opportunities to serve their communities in practical ways: drafting wills, handling real estate transactions, providing accessible legal services. We do not claim that all law students arrive seeking to transform society or pursue "big J" justice.

To be sure, too, some schools openly advertise themselves as trade schools to train students to provide routine legal services. For example, Massachusetts School of Law, the lowest ranked law school in Massachusetts (and not accredited by the American Bar Association) adopted a mission statement that does not mention justice, instead stating that its goal is:

> to provide an academically rigorous affordable legal education emphasizing ethics, advocacy, leadership, and professional skills . . . . MSLAW prepares its graduates to use their skills to help their clients while providing its graduates the societal advancement and influence that a law degree has traditionally provided.

Massachusetts School of Law, *About*, https://www.mslaw.edu/about/ [https://perma.cc/UB36-LJ55].

Still concerns remain. First, many non-elite law schools commonly make explicit justice promises in their mission statements and marketing materials. *See supra* notes 80–92 and accompanying text. Second, the scholars and students we quote throughout this section represent a reasonably wide range of legal educational institutions, not just elite law schools. Professor Quigley's observations, for one example, emerge from his experience at Loyola University New Orleans College of Law, not a top-ranked institution.

but whether it was ever intended to.[317] Bluntly, it may be past time for judges, lawyers, and law schools to answer this: have we made this justice promise, over and over, in good faith? Or has it all been fraud in the inducement?

Our project will continue to address those questions.[318] The next article in particular, *The Justice Imperative*, will take up the questions of why we must prioritize justice and how to understand the norm concretely, by addressing *injustice*.[319] We will examine, among other topics, the psychological power and effects of perceptions of injustice and the anxiety—produced by the cognitive dissonance that attends causing or ratifying injustice while promising justice, what we have called injustice dissonance—apparent in the work of judges. We will explore how judges cope with that dissonance, often in ways that are duplicitous or deceptive, probably even to themselves.

That injustice dissonance, though, does not fulfill the justice promise; it only seeks to obscure the breach. When a promise eventually is exposed as illusory, manipulative, or fraudulent, trust in that promise, and in those behind it, can erode swiftly. We may be there now.

To understand how we arrived at this moment, it is essential first to recognize the existence of the justice promise and the legitimate expectation it creates that law will advance justice. Only then can we fully grasp how an unjust system could appear to function over time, quietly producing conditions that eventually expose the deception in sudden, stark relief. Only then can we comprehend the gravity of breaching the justice promise. And only then can we begin to imagine what it would take to build a judicial system in which justice is not merely promised, but genuinely pursued and advanced. That is our task in the Articles that follow.

[317] Hanson & Kipnis, *Courting Injustice*, *supra* note 6; Hanson, Kipnis, Kristoffersen, & Porcile, *Inside the Justice Crisis*, *supra* note 21.
[318] *See* Hanson & Strang, *The Justice Series*, *supra* note 1.
[319] *See* Hanson & Strang, *The Justice Imperative*, *supra* note 21.

Criminal Justice and Employment Discrimination: Improving Fair Chance Hiring Laws

Maria Granik and Marianne DelPo Kulow***

Abstract

One in three adults in the U.S.—nearly eighty million people—have some type of criminal record that may appear on a routine background check for employment. Arrest, conviction, and incarceration substantially interfere with a person's ability to find a job. Almost half of unemployed men in the United States have a criminal conviction by the time they turn thirty-five, and sixty percent of people who have been incarcerated remain unemployed one year after release—a critical period at the crossroads between community reengagement and new criminal activity. Since employment is a key factor for decreasing the likelihood of re-offense, policies that expand access to jobs for people with records lower incarceration rates, decrease taxpayer costs of prisons and government assistance programs, and create safer communities. This article examines an important strategy for improving employment opportunities for justice-involved individuals: laws that address hiring discrimination that is based on criminal background checks. Thirty-seven states and over 150 cities and counties have adopted such laws to encourage hiring based on the applicants' skills and qualifications, while discouraging employment decisions based on pre-conceived notions about people with records. The laws remove questions about criminal history from job applications, increasingly delay background checks until after interviews or conditional job offers, at times prohibit the use of arrest or juvenile records in hiring, and in some states require a legitimate business reason for rejecting candidates based on their criminal history. These laws play a crucial role in providing access to employment for applicants with records, while also expanding the talent pool for employers.

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* Assistant Professor of Law, Bentley University.

** Gregory H. Adamian Professor of Law, Bentley University. We are grateful to Emma Fisher, Kendall Woodcock, and Anmol Somaiya for their excellent research assistance. We would also like to thank the editors at the *Harvard Law and Policy Review* for their insightful suggestions and for all their hard work on the article. This research was supported in part by a grant from the Bentley University Research Council.

Introduction

Fair Chance hiring laws and policies create work opportunities for people with a record of arrest, conviction, or incarceration so they can provide for themselves and their families. For those who have served time in prison, employment is a precondition of successful reentry and significantly reduces the chances of future encounters with the criminal justice system.[1] Yet, job applicants with records "are much less likely to hear back from [a] potential employer."[2] Employment discrimination against people with criminal records also perpetuates racial discrimination because of disproportionately high rates of criminal justice involvement for people of color.[3] Barriers to employment

[1] *See* Nat'l Emp L. Project, *Fact Sheet: Research Supports Fair Chance Policies*, 2 (Apr. 17, 2024), https://www.nelp.org/app/uploads/2024/04/Research-Supports-Fair-Chance-Policies-Apr.2024 .pdf [https://perma.cc/F8CM-7DUG] (hereinafter "*Research Supports Fair Chance Policies*") (noting "employment [is] the single most important influence of decreasing the likelihood of rearrest" and that "nearly twice as many employed people had avoided rearrest as compared to those who did not find employment" two years after release) (citing Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism,* 28 Just. Q. 1, 2 (2011)).

[2] *Id.* at 4.

[3] *See* Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 71 (2017). Indeed, Pager argues that black ex-offenders may be "doubly disadvantaged" by being both more likely to be incarcerated than whites, and more strongly affected by the stigma of a criminal record in seeking employment. Although the topic of racial discrimination in the criminal justice system is closely related to the issues we discuss, a detailed

affect millions of people and their families in the United States, where nearly one in three adults—or about eighty million people—have some criminal record and more than 550,000 return to communities every year after release from state or federal prison.[4]

Advocates have been promoting legal reforms to address these challenges for several decades. One approach has focused on limiting the use of background checks in hiring by prohibiting employers from including questions about criminal records on job applications. These policies are known as Ban the Box (BTB) because they remove the check box to disclose past arrests and convictions from job application forms. Ban the Box was the starting point for reform, but many of these laws have evolved to "adopt other best practices" aimed at "diminishing the harmful effects of hiring policies that exclude people with criminal records."[5]

These best practices, which several jurisdictions have implemented in recent years, include delaying background checks until after an interview or a conditional employment offer, preventing employers from using irrelevant or old convictions to reject candidates, and ensuring that applicants have the opportunity to provide evidence of mitigating circumstances and rehabilitation.[6] Laws that encompass these types of additional employer restrictions are generally called Fair Chance laws. Thirty-seven states and over 150 cities and counties have adopted some form of a Fair Chance or Ban the Box law with the goal of encouraging employers to "consider a job candidate's qualifications first—without the stigma of a conviction or arrest record."[7]

Despite the progress that these laws represent, qualified job applicants with records continue to struggle to find employment. The need for additional legal and policy reforms is clear, and organizations like Just Leadership USA (JLUSA), the National Employment Law Project (NELP), and many others have been at the forefront of the work to advance reform efforts.[8] This article seeks to contribute to the fight against employment discrimination by articulating the policy reasons for Fair Chance laws, responding to some recent

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discussion of it is beyond the scope of this paper. For a seminal work on this topic, *see* Michelle Alexander, The New Jim Crow (2010).

[4] *Research Supports Fair Chance Policies*, *supra* note 1, at 1.

[5] Rachel M. Kleinman & Sandhya Kajeepeta, Thurgood Marshall Inst. at NAACP Legal Def. Fund, Barred from Work: The Discriminatory Impacts on Criminal Background Checks in Employment 12 (2023), https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf [https://perma.cc/S7PM-QZ8D]. *See infra* Section II for a detailed discussion of the way Ban the Box laws have evolved. We use the term "Fair Chance" laws to refer to the broader range of laws aimed at preventing unjustified bias against job applicants with records. These include Ban the Box laws, which prohibit questions about criminal records from job applications, but also encompass broader protections for workers with records.

[6] *See* Beth Avery & Han Lu, Nat'l Emp. L. Project, Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions 3 (2021), https://www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide/ [https://perma.cc/BPL6-WK7L].

[7] *Id.* at 2.

[8] *See About Us*, JustLeadershipUSA, https://jlusa.org/about/ [https://perma.cc/NZ89-KU75] (last visited Nov. 21, 2025). Formerly incarcerated people continue to spearhead this work. In fact, JLUSA "was founded on the principle that the people closest to the problem are the people closest to the solution, but furthest from resources and power." *Id.*

criticisms of these laws as ineffective, and proposing legal reforms designed to improve employment prospects for justice-involved individuals.

Part I begins with an overview of the challenges that people with criminal records face in the employment context and the primary reasons for employers' resistance to hiring them. This part also discusses the taxpayer cost of unemployment and the positive emotional impact of work for those with criminal records. Part II provides an overview of existing state and federal laws designed to address employment discrimination against people with criminal records. Part III analyzes the claim that Ban the Box and Fair Chance laws are ineffective and shows that the evidence of ineffectiveness is inconclusive and does not support a turn away from this policy approach. The shortcomings of these laws should not undermine their legitimacy; instead, these flaws provide an impetus for additional reform efforts. Finally, Part IV provides a discussion of reforms that can make Fair Chance laws and policies more effective, arguing that the following four strategies hold the most promise: (1) meaningful incentives for employers such as tax credits, liability insurance, and federal contract preferences; (2) employer education about the benefits of fair chance hiring to help combat stigma; (3) more effective implementation of Fair Chance laws by employers; and (4) better enforcement by state and federal administrative agencies. Nic Watson, the director of a Philadelphia workforce development non-profit, eloquently summarized the benefits of Fair Chance laws: "[s]econd-chance hiring isn't just the right thing to do—it's one of the most effective tools we have to improve public safety, grow our economy, and reduce long-term poverty."[9] This article strives to articulate the most productive legislative path for achieving these benefits.

I. Scope of the problem

As U.S. incarceration rates have risen since the 1980s to surpass those of every other independent democracy in the world, many Americans today have had some type of involvement with the criminal justice system.[10] Analysts estimate that about one third of adults in the United States have a criminal record.[11] Some numeric comparisons help to grasp the magnitude of the problem vividly:

> America now houses roughly the same number [of] people with criminal records as it does four-year college graduates. Nearly half of black males and almost 40 percent of white males are arrested by

[9] Nic Watson, *"Second Chance" Hiring is Good for the City's Future*, Phila. Citizen (May 1, 2025), https://thephiladelphiacitizen.org/guest-commentary-second-chance-hiring-is-good-for-the-citys-future/ [https://perma.cc/M9FC-WY9X].

[10] *See* Emily Widra, *States of Incarceration: The Global Context 2024*, Prison Pol'y Initiative (June 2024), https://www.prisonpolicy.org/global/2024.html [https://perma.cc/4CWB-WM9F].

[11] Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, Brennan Ctr. For Just. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/9KWG-H3V5].

> the age 23. If all arrested Americans were a nation, they would be the world's 18th largest. Larger than Canada. Larger than France. More than three times the size of Australia.[12]

The collateral effects of incarceration follow families of people with convictions as well; nearly half of U.S. children have at least one parent with a record.[13] A history of criminal justice system involvement carries significant stigma, undermining the ability of those with a criminal record to find a job. At the same time, until April 2025, the United States was experiencing a labor shortage.[14] Although that gap has largely closed, labor shortages remain in many places and industries and many economists believe that the problem will continue to worsen as demographics shift.[15] Some commentators have suggested that employers should turn to people with criminal records in order to successfully address labor shortage issues.[16] In this section we explore the wide-ranging effects of the high rates of unemployment among people with criminal records[17] and analyze the misconceptions underlying employers' reluctance to hire those who have been arrested, convicted, or incarcerated.[18]

A. Criminal Records and High Unemployment Rates

1. Barriers to Employment for Applicants with Records

The vast majority of U.S. employers use criminal background checks as part of the hiring process. A 2012 Society for Human Resource Management survey revealed that nearly seventy percent of employers conduct criminal background checks on all their applicants.[19] In another survey, "over 70% of job applicants nationwide reported undergoing a criminal background check."[20] Employers use background checks to screen out applicants with records for a variety of reasons that we explore in greater detail below.[21] Their widespread use leads people with records to be shut out of employment at extremely high rates. According to a 2009 Justice Department study, any criminal conviction

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[12] *Id.*

[13] *Research Supports Fair Chance Policies*, *supra* note 1, at 3.

[14] *See* Stephanie Ferguson Melhorn & Isabella Lucy, *America Works Data Center: The U.S. Workforce by the Numbers*, U.S. Chamber of Com., (Nov. 11, 2025), https://www.uschamber.com/workforce/america-works-data-center [https://perma.cc/22LH-F2BS].

[15] *See id.* ("Up until April 2025, the U.S. remained in a worker shortage: There were more open jobs than available workers, meaning that if every unemployed person in the country found a job, we would still have open jobs. That is still the case in many industries, but nationally the gap has largely closed… One big challenge for workforce participation: the American workforce is aging. Following the Great Recession, birth rates in the U.S. experienced a decline, ultimately reaching a historic low in 2020.").

[16] *See generally* Jeffrey D. Korzenik, Untapped Talent: How Second Chance Hiring Works for Your Business and the Community (2021) (arguing that people with criminal records can be loyal and productive employees and giving examples of businesses that have successfully implemented second chance hiring practices).

[17] *Infra* Section I.A.

[18] *Infra* Section I.B.

[19] Friedman, *supra* note 11.

[20] Kleinman & Kajeepeta, *supra* note 5, at 4.

[21] *Infra* Section I.B.

lowers the chances of a job applicant receiving an offer of employment by fifty percent.[22] The National Employment Law Project reports that about sixty percent of people who are released from prison are unemployed a year after their release.[23] Moreover, the jobs that people with records are able to secure are generally not desirable or well-compensated. According to NELP, "[e]ven when people with records find employment, they are often offered the most unstable, dangerous, and underpaid jobs."[24]

Racial discrimination in the criminal justice system, which is "both well-documented and staggering,"[25] leads to a more pronounced negative impact of criminal history on employment for Black applicants. Indeed, "disproportionately high rates of criminal justice involvement for black people, combined with persistent racism and discrimination, make it particularly difficult for black job seekers to secure employment."[26] Racial disparities in incarceration rates are themselves a result of well-documented history of discrimination and bias in the criminal justice system.[27] Studies also demonstrate the existence of racial disparities in post-incarceration employment. For example, the "working-age 'prison penalty' increases unemployment rates by 14 percentage points for white men, compared with 28 percentage points for Black men and 37 percentage points for Black women."[28] These statistics suggest that racial discrimination persists post-incarceration, making it even harder for Black justice-involved individuals to secure employment than their white counterparts.

At the same time, it is clear that employment—particularly quality employment with fair compensation—is essential to ensure successful reentry into the community after prison and to reduce the likelihood of re-offense.[29] Employment creates the conditions for meaningful participation in society and economic stability, without which a return to criminal behavior is more likely.

2. Economic and Social Costs of Unemployment

Inadequate access to work opportunities for those with a criminal record creates substantial costs for society. A NELP report provides an overview

[22] Friedman, *supra* note 11. *See also* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Socio. 937 (2003).

[23] Beth Avery, Nat'l Emp L. Project, Fair Chance Hiring for Employers Part One: Understanding the Importance of Fair Chance Hiring 3 (2023), https://www.nelp.org/app/uploads/2023/04/Policy-Brief-1-The-Case-for-Fair-Chance-Hiring-by-Employers-NELP.pdf [https://perma.cc/KK7B-PAXA].

[24] *Id.*

[25] *Id.* at 2.

[26] Shawn Bushway et al., *Barred from Employment: More than Half of Unemployed Men in Their 30s Had a Criminal History of Arrest*, 8 Sci. Advances 1, 2 (2022).

[27] *See* Avery, *supra* note 23, at 2.

[28] Kleinman & Kajeepeta, *supra* note 5, at 8 (citing Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol'y Initiative (July 2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/UQV8-DWAH]).

[29] *See* Avery, *supra* note 23, at 2–3.

of these economic losses resulting from the high levels of unemployment among people with criminal records: "The cost of corrections at each level of government has increased 660% from 1982 to 2006, consuming $68 billion a year, and the reduced output of goods and services of people with felonies and prison records is estimated at between $57 and $65 billion in losses."[30] In 2014, the losses to the U.S. gross domestic product from the lack of employment opportunities for people with a history of incarceration or a criminal record amounted to $78 to $87 billion.[31] More recently, a 2020 study estimated that lost wages, in aggregate, cost people touched by the criminal justice system more than $372 billion annually.[32]

The economic costs for individuals and their families are profound as well. A conviction or imprisonment at a young age lowers a person's earnings significantly over their lifetime. Criminal justice involvement impacts the earnings of Black and Latino people to a greater extent, further deepening the racial wealth gap.[33] On average, people who have been incarcerated experience a fifty-two percent reduction in earnings every year.[34] A felony conviction not resulting in prison time leads to an average reduction in annual earnings of twenty-two percent, while a misdemeanor conviction creates a sixteen percent reduction.[35]

Restricted access to economic opportunities hinders social re-integration for people released from prison, while increasing their chances of reoffending. According to a 2011 study, "employment [is] the single most important influence on decreasing the likelihood of rearrest" for those who are released from incarceration.[36] Consequently, improving the chances of employment for people with criminal records will also reduce costs of their additional incarceration and contribute to safer communities.

Furthermore, unemployment "creates dignitary harms: work can be an important source of a person's sense of self-worth, fulfillment, pride, and belonging."[37] The opportunity to engage in meaningful work is an important

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[30] Kleinman & Kajeepeta, *supra* note 5, at 5 (quoting Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp. L. Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment 3(2011), https://www.nelp.org/app/uploads/2015/03/65_Million_Need_Not_Apply1.pdf [https://perma.cc/7QQ8-49M9].

[31] Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Pol'y Rsch, The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies 2–3 (2016), https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf.

[32] Terry-Ann Craigie et al., Brennan Ctr. for Just., Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality 7 (2020).

[33] *Id*. at 6.

[34] Avery, *supra* note 23, at 3.

[35] *Research Supports Fair Chance Policies, supra* note 1, at 2.

[36] Berg & Huebner, *supra* note 1, at 2.

[37] Kleinman & Kajeepeta, *supra* note 5, at 4 (citing L. Randall Wray & Mathew Forstater, *Full Employment and Social Justice in* The Institutionalist Tradition, in Labor Economics 253–56 (Dell P. Champlin & Janet T. Knoedler eds., 2004); *see also* Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 Feminist Econ. 33, 42 (2003).

source of self-respect.[38] Given the central role of work in human experience more generally, it is not surprising that stable employment is crucial for preventing crime and diminishing the lifetime (and inter-generational) impact of incarceration.

The relationship between high quality employment and self-respect also highlights the need to reduce career-advancement barriers for people with records. A history of criminal justice involvement can prevent people from getting hired at the outset, but it can also inhibit them from promotions even if their job performance would otherwise open up those types of opportunities. Fair Chance laws and policies should be designed in a way that not only helps people get their foot in the door but also provides equal opportunity for career advancement.

B. Misconceptions about the Risks of Hiring Employees with Records

1. The Stigma of Arrest or Criminal Conviction

Employers' reluctance to hire people with criminal records stems, at least in part, from the stigma attached to encounters with the criminal justice system. Many commentators have noted that punishment for criminal behavior is not limited to the sentence imposed on offenders. The post-conviction barriers to employment, housing, public benefits, and other opportunities "are generally known as 'collateral consequences' or 'collateral sanctions,' and in 2015 the American Bar Association's National Inventory of the Collateral Consequences of Conviction counted roughly 45,000 of them nationwide."[39] The prevalence of these collateral consequences has led scholars and practitioners to speak of a "new civil death."[40] These restrictions on re-entry express society's moral condemnation of those who have committed criminal offenses. But they also tend to normalize the exclusion of people with records from essential aspects of life, including employment. In other words, employers refuse to consider people with records as part of their talent pool, even when their past criminal behavior bears no relation to their ability to succeed in the job, because they are "manifesting and reproducing stigma that comes with being marked by the criminal justice system as morally suspect and socially other."[41]

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[38] *See generally* Jeffrey Moriarty, *Rawls, Self-Respect, and the Opportunity for Meaningful Work*, 34 Soc. Theory & Prac. 441, 441–59 (2009) (examining John Rawls's account of self-respect and his claim that the opportunity for meaningful work is a social basis of self-respect).

[39] Michael L. Zuckerman, *Irrational Collateral Sanctions*, 20 Ohio St. J. Crim. L. 87, 92 (2023) (citing Am. Bar Ass'n Crim. Just. Sec., Nat'l Summit on Collateral Consequences Conference Report (Feb. 27, 2015); *see* Joy Radice, *The Reintegrative State*, 66 Emory L. J. 1315, 1321, n.15 (2017).

[40] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1815–25 (2012); *see* Alexander, *supra* note 3 at 142–43; *see* Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. Rev. L. & Soc. Change 527, 527–28 (2006); *see also* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L. J. 753, 754–56 (2011).

[41] Naomi F. Sugie, Noah D. Zatz, & Dallas Augustine, *Employer Aversion to Criminal Records: An Experimental Study of Mechanisms*, 58 Criminology 5, 6 (2019) (explaining studies

The best way to combat stigma is through personal contact with individual applicants.[42] These interactions create the space needed for hiring managers to evaluate candidates on their own terms, rather than based on generalized assumptions about what prior contact with the criminal justice system might mean. Another powerful way to challenge preconceived judgments about employees with records is through mentoring by other employers who have built successful fair chance hiring programs.[43] Even if employers can get past their prejudicial views about employees with records, concerns related to safety and job performance remain. We now examine the argument that these concerns, however legitimate at first glance, are in fact not well-grounded.

2. *Risk of Re-offense and Poor Performance*

Researchers have demonstrated that as people age and more time passes since they engaged in criminal behavior, the chances that they will reoffend diminish substantially. Indeed, "more than 25 percent of workers in the active workforce have at least one prior conviction."[44] This statistic supports the claim that "[p]eople with conviction records can be (and are) successful employees."[45] Empirical study of the time it takes for someone with a criminal record to be "redeemed"—or reach a point at which they are no more likely to be arrested than a person from the general population—is ongoing. But the results of studies conducted over the past two decades suggest that there is a measurable timeline for estimating risk of re-offense.

In a 2009 analysis published in the journal *Criminology*, Alfred Blumstein and Kiminori Nakamura analyzed criminal histories of 88,000 people who had been arrested for the first time in New York state in 1980.[46] Blumstein and Nakamura defined the concept of "hazard rate" to mean "the probability, over time, that someone who has stayed clean will be arrested."[47] They found that the time it took for hazard rates to decline to the same level as that for people of the same age in the general population differed depending

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have found that this stigma extends not just to felonies, but to lower-level violations as well); *see also* C. Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 Criminology 627, 627–54 (2014) (showing that for low-level arrests, or what the authors term "the edge of stigma," "the mark of a criminal record is indeed fainter, although still consequential, for the individuals and groups most subject to both arrest and low-wage work [i.e. racial minorities]").

[42] For a discussion of this claim *see* Section IV.B, *infra*.

[43] *See* Korzenik, *supra* note 16, at 151–52 (discussing the impact of meetings with Nehemiah Manufacturing to learn about their second chance hiring program for winning support for such a program at JBL packaging).

[44] Shawn D. Bushway, *Resetting the Record: The Facts on Hiring People with Criminal Histories,* Rand (Jan. 9, 2024), https://www.rand.org/pubs/research_briefs/RBA2968-1.html [https://perma.cc/QBA9-LGP7].

[45] *Id.*

[46] Alfred Blumstein & Kiminori Nakamura, "*Redemption*" *in the Presence of Widespread Criminal Background Checks*, Nat'l Inst. Just. J. 11 (2009), https://www.ojp.gov/pdffiles1/nij/226872.pdf [https://perma.cc/5C5R-Q82X].

[47] *Id*. at 12 (defining hazard rate and providing a detailed analysis).

on the age of first offense and on the type of crime committed.[48] For example, the hazard rate for 18-year olds who committed robbery declined by the time they were 25.7 years old (or 7.7 years after the first offense).[49] For those who had committed burglary at age eighteen, it took 3.8 years post arrest for the hazard rate to decline to general-population level.[50] For aggravated assault, the time-period was 4.3 years.[51] Recent research also corroborates the upshot of these findings. According to a 2024 RAND corporation policy brief, for example, "[t]he single most reliable factor in predicting future behavior is the amount of time that has passed since a person's last conviction; a person's likelihood of reoffending declines rapidly as more time passes without a conviction."[52] This research suggests a growing consensus that over time, the risk of re-offending becomes negligible, and comparable to the risk of someone of the same age who has never offended.

As such, these findings support a current trend in state laws to restrict employer access to information about criminal activity that happened a decade or more before the job application.[53] Employers in these states are still able to access records of more recent offenses. However, for those businesses willing to hire applicants with higher hazard rates, whether due to relatively recent offenses, age at or type of first offense, federal misconduct insurance is available.[54]

Multiple complex factors affect recidivism rates, and a detailed discussion of them is beyond the scope of this article. But it is important to note that several research findings confirm the idea that recidivism rates decline consistently over time, such that the long-term exclusion of people with criminal records from the workforce is not only inhumane but also irrational.[55] Of course, employers' concerns about the risk of re-offense are reasonable in some circumstances, even when convictions are older. Therefore, additional government incentives for those willing to hire employees with records can be important supplemental measures. We discuss some promising types of incentives such as tax credits, liability insurance, and federal contract preferences in detail in Section IV.A, *infra*.

There is mounting evidence that people with records tend to be good employees, based both on empirical studies and individual success stories from fair chance employers. According to NELP, "workers with records stay in their jobs longer and earn promotions faster than other workers."[56] Kleinman and Kajeepeta, authors of the 2023 Thurgood Marshall Institute report titled "Barred from Work: the Discriminatory Impacts of Criminal Background

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[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See* Bushway, *supra* note 44.
[53] *See, e.g.*, Avery & Lu, *supra* note 6, at 27–29 (chart providing comparison of state laws).
[54] This type of insurance is discussed in more depth in Section IV.A.2, *infra*.
[55] *See* Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Times: Robustness Testing, Out of State Arrests, and Racial Differences*, Nat'l Inst. Just. (Nov. 2012) 88, https://www.ojp.gov/pdffiles1/nij/grants/240100.pdf [https://perma.cc/N8KR-UEMX]. *See also* Bushway, *supra* note 44.
[56] *Research Supports Fair Chance Policies*, *supra* note 1, at 5.

Checks in Employment," also cite multiple studies that "provid[e] promising evidence that a criminal record has little to no negative association with job performance and, if anything, may be linked with higher retention rates."[57] Of course, these findings will vary by the type of job and the nature of the criminal record that a particular employee might have.[58] However, it is clear that at least in part, the overly negative views of employees with records are based on the stigma of conviction itself rather than on facts about their performance and professional development potential.

Stories from executives who have successfully implemented fair chance programs can be effective in dispelling these misconceptions. For example, Gina Schaefer, the founder and CEO of A Few Cool Hardware Stores, often speaks about her success in hiring and promoting employees with records while building a 50-million hardware store business.[59] In public appearances, Schaefer emphasizes her willingness to help other business leaders who are interested in fair chance hiring succeed as well.[60]

The success of fair chance hiring can depend on providing specific kinds of support that employees with criminal records may need to flourish in the workplace. Accordingly, employers need to develop programs that increase the chances of success for the business and the workers with records. Some best practices include implementing effective onboarding and coaching programs for employees joining a company after prison.[61] The costs of such programs can be offset by an increase in employees' productivity and a reduction in workforce turnover.[62] In addition, government subsidies for employers choosing to implement these structures for their second chance hires would provide much needed incentives. As mentioned above, leaders who have created supports successfully are often willing and even eager to share their strategies with others. As the CEO of one company that has built a thriving second-chance employment program for people with records put it:

> We are very open to helping any other business out there that might have questions. We want to promote this. We feel this is a really great opportunity. Everyone wins with it. The team member wins because they get a job, the business wins because they get an engaged team member, the community wins because we're not sending somebody back to prison.[63]

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[57] Kleinman & Kajeepeta, *supra* note 5, at 10.

[58] *Id.* (noting that the rates of misconduct by employees with records were higher in sales jobs than customer service jobs).

[59] *See, e.g.*, Aspen Inst., *Re-Entry and Good Jobs: Building the Second Chances We All Believe In*, at 22:30 and 43:00 (YouTube, Feb. 26, 2025), https://www.youtube.com/watch?v=Qg0lodsPlUw [https://perma.cc/MJ66-Q24M].

[60] *See, e.g.*, *id.* at 1:10:00 (highlighting the importance of sharing stories from businesses who successfully implement second chance hiring). For a more detailed discussion of business-led efforts to promote fair chance hiring, *see* Section IV.B, *infra*.

[61] *See* Korzenik, *supra* note 16, at 160–64 (discussing the programs implemented by one successful fair chance employer in a chapter titled "Case Study–JBM Packaging.").

[62] *Id*. at 58, 81–82.

[63] *Id.* at 169 (quoting Ohio Dep't of Rehab. and Corr., *ORDC Partnership with JBM Envelope Company*, (YouTube, Mar. 2, 2018), https://www.youtube.com/watch?v=md9GocUP

Improvements to Fair Chance hiring laws, combined with government incentives and voluntary, business-led programs, can have a substantial positive impact.[64]

II. Overview of Existing Laws

The term Fair Chance laws covers a variety of laws that share a common goal of giving those with criminal records an opportunity to gain employment based on merit, rather than being precluded from job consideration due solely to employer bias.[65] Current Fair Chance hiring laws represent a panoply of approaches, which other commentators have described in detail.[66] This section does not aim to provide an exhaustive analysis but rather offers an overview of the current laws for the limited purpose of framing the relevant legal and policy issues for the discussion that follows.

A. Ban the Box and Fair Chance Laws

Hiring is a multi-step process, which typically includes application screening, interviews, and job offer decisions.[67] Each of these steps involves

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Dn4 [https://perma.cc/HW75-2G66]; *see* also *infra* Section IV.A, discussing businesses' eligibility for federal and state tax credits as yet another benefit of these hires.

[64] *See infra* Part IV for a discussion of legal reforms and policy proposals designed to better accomplish these goals.

[65] *See infra* Part II, introduction (explaining the use of the term Fair Chance laws in this article).

[66] *See, e.g.*, Caitlin T. Gaines, *Keeping Fair Chance Laws Fair: Implications for Employers and Employees Given the Expansion and Variety of Fair Chance Laws in the United States*, 72 Cath. U. L. Rev. 535 (2023) (discussing the expansion of Fair Chance laws from Ban the Box laws to include a spectrum of policies aimed at reducing employment barriers for individuals with criminal records); *see* Hannah E. Wissler, *Overlooked and Undervalued: Ex-Offenders in the Employment Market*, 37 A.B.A. J. Lab. & Emp. L. 93 (2023) (advocating for Fair Chance laws and suggesting passing Clean Slate laws and educating defendants on the collateral consequences of a criminal conviction as additional policy solutions); *see* Dallan F. Flake, *Do Ban-the-Box Laws Really Work?* 104 Iowa L. Rev. 1079 (2019) (reporting the findings of an experiment that used a fictitious applicant profile to compare the likelihood of receiving a callback in a BTB jurisdiction and a jurisdiction without BTB legislation); *see* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 Harv. C.R-C.L. L. Rev. 197, 212 (2014) (providing an overview of BTB laws and arguing that the EEOC must continue to play a vital role in advocating for people with criminal records, even in jurisdictions where BTB policies have been implemented); *see also* Lucy Gubernick, *Erasing the Mark of Cain—An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 Fordham Urb. L. J. 1153 (2017) (arguing that existing data about the effects of BTB laws are insufficient, and that data collection efforts must be strengthened to ensure the efficacy of BTB laws).

[67] *See* Deborah Weiss et al., *Do Ban-the-Box Policies Increase the Hiring of Applicants with Criminal Records?*, PLoS ONE 20(4) (2025), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0320736 [https://perma.cc/2FVL-YY52] (identifying three stages of the hiring cycle: (1) a "screening phase"—resume and application review (2) a "candidate assessment process," including "interviews, tests, and additional resume review by hiring managers and other interested parties," and (3) an offer and "background check stage," which in some states is now delayed until after "successful candidates receive an offer that is contingent on the results" of that background check).

a certain amount of subjectivity.[68] As noted in Sections I.A.1 and I.B, *supra*, employer bias against job applicants with criminal records is well-documented.[69] The subjective nature of hiring decisions makes it challenging to determine the degree to which employer discrimination contributes to the low interview and job offer rates for those with criminal records.[70] One way to avoid such discrimination is to ensure that employers are unaware of applicants' criminal records, at least during the preliminary screening and interviewing of applicants.[71] By removing questions about criminal history from job applications, Ban the Box laws force employers to assess applicants and choose interviewees without being immediately biased by someone's history with the criminal justice system.[72] In addition to delaying inquiries about criminal records by banning this question on job applications, many states also delay access until further in the hiring process and some mandate that employers document that they have engaged in "a fairer decision-making process by …consider[ing] the job-relatedness of a conviction, time passed, and mitigating circumstances or rehabilitation evidence."[73] Laws that include any of these additional requirements are generally called Fair Chance laws, a term which has come to be used interchangeably with Ban the Box laws. This use is confusing because Ban

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[68] *See* Robert L. Dipboye, *Developing the Research Basis for Controlling Bias in Hiring*, 22 J. Soc. Issues 153 (2012) (synthesizing decades of research on hiring bias and highlighting that subjectivity influences hiring decisions throughout the process—not just in one stage but across application, interviews, job offers, and promotions).

[69] Friedman, *supra* note 11 (reporting that a Justice Department study revealed that any criminal conviction lowered an applicant's chances of receiving a job offer by fifty percent); Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 Am. Econ. Rev. 560, 560 (2017) (reporting results of an audit study of 2,655 fictitious applications showing that applicants with felony convictions were about sixty percent less likely to receive a callback, across race, crime type, and industry).

[70] Noah Zatz, *Criminal Records Exclusion, "Rational Discrimination," and Ban the Box*, On Labor (July 22, 2020), https://onlabor.org/criminal-records-exclusion-rational-discrimination-and-ban-the-box/ [https://perma.cc/P9PF-XK42] (discussing how employer discrimination stems from broad stigmatization and subjective bias, not just risk-based decision making, complicating detection and accountability).

[71] *See* Avery & Lu, *supra* note 5 at 2; Weiss et al., *supra* note 67, at 2, 5, 18. It may seem extreme to keep employers in the dark about what could be quite relevant hiring information. However, even when laws postpone access to criminal records until the very end of the hiring process, i.e., after employers have made a job offer, employers still have an opportunity to reject those job applicants with relevant criminal records by making job offers conditional. *Id.* Furthermore, fair chance laws provide for exceptions to delaying record disclosure in jobs where criminal history is relevant.

[72] Christopher Herring & Sandra Susan Smith, Inst. for Rsch. on Lab. & Emp. at the Univ. of Cal., Berkeley, The Limits of Ban the Box Legislation, 1 (2022), https://irle.berkeley.edu/wp-content/uploads/2022/03/The-Limits-of-Ban-the-Box-Legislation-1.pdf [https://perma.cc/AV5W-VLNL] (stating that Ban the Box laws are "designed to encourage employers to consider a job candidate's qualifications first—without the stigma of a criminal record—in the hopes of reducing barriers to employment that justice-involved individuals face."). Certain employers are exempt from Ban the Box requirements because the law prohibits them from hiring workers with records. For example, jobs at childcare centers or some financial institutions typically fall under this exception. *See, e.g.,* Mass. Office of the Attorney General, *Guide to Criminal Records in Employment and Housing*, https://www.mass.gov/guides/guide-to-criminal-records-in-employment-and-housing [https://perma.cc/29PP-RY4Q] ("There are a few limited exceptions for certain types of jobs in specific industries (for example, jobs at day cares and certain financial institutions) where employers can ask about criminal records on job applications because they are legally prohibited from hiring people with criminal records for those jobs.").

[73] Avery & Lu, *supra* note 6, at 3.

the Box laws are classified separately from Fair Chance laws in some of the literature and, at best, are only one type of Fair Chance law.[74] In this article, we use the term "Ban the Box" for laws that mandate only the removal of the checkbox on job applications. We use the broader term "Fair Chance" for laws that have additional requirements.

1. *State laws*

In 1998, Hawaii became the first state to pass a Fair Chance law.[75] Subsequent efforts to pass Ban the Box and Fair Chance laws in other jurisdictions were spearheaded by formerly incarcerated people and their families through a grassroots organization, All of Us or None, which started its work in San Francisco and Alameda County in 2005.[76] Today, thirty-seven states, the District of Columbia, and over 150 cities and counties have adopted laws to protect job applicants with criminal records from discrimination.

Many states provide more extensive protections because bare bones BTB laws alone are easily circumvented. [77] If employers remove the "box" from their application forms but still request criminal records for all job applicants *before* interviews, they are likely to remain biased against applicants with records.[78] Therefore, over twenty states now have laws that delay employer access to criminal records until later in the hiring process, typically *after* interviews or *after* conditional job offers.[79] Hawaii's 1998 law was the first to prohibit

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[74] Michelle Natividad Rodriguez & Zoe Polk, Nat'l Emp. L. Project, Best Practices in Fair-Chance Enforcement, 1 (2015), https://www.nelp.org/app/uploads/2015/06/Best-Practices-Fair-Chance-Enforcement.pdf [https://perma.cc/LJ46-SZN3] ("Removing conviction inquiries from job applications is known as 'ban the box.' Fair-chance hiring policies include ban-the-box *and other policies* that create a structured hiring process to ease barriers.") (emphasis added); Michelle Natividad Rodriguez & Anastasia Christman, Nat'l Emp. L. Project, The Fair Chance-Ban the Box Toolkit, 4 (March 2015), https://www.nelp.org/app/uploads/2015/04/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf [https://perma.cc/5UEM-G4HX] ("'Ban the Box,' the rallying cry . . . refers to the policy of removing the conviction history check-box from job applications. … NELP advocates for a 'fair chance' hiring policy that includes removing the check-box, *plus a robust set of fair hiring policies* to ease employment barriers.") (emphasis added).

[75] Haw. Rev. Stat. § 378-2.5 (2020); Avery & Lu, *supra* note 6, at 12–13. This statute also included prescient provisions, such as delaying employer access to criminal records until after a conditional offer. In this way, the law was more than merely a Ban the Box law, but it is characterized as such in compilations of state laws.

[76] Kleinman & Kajeepeta, *supra* note 5, at 12. *See also*, Gaines, *supra* note 66, at 539.

[77] *See* Avery & Lu, *supra* note 6, at 3.

[78] *See* Flake, *supra* note 66, at 1089 (explaining that some early BTB statutes only barred the question on the paper/online application and did not regulate when employers could run background checks. Using Connecticut as the example, Flake notes the law "prohibits [criminal-record questions] only on the employment application itself," which *left open the possibility that an employer could ask immediately after submission—or even make disclosure a pre-condition to applying*. He also points out that Illinois allowed inquiry "as soon as the applicant is selected for an interview." Taken together, these examples illustrate that simply removing the checkbox did not stop employers from requesting criminal-record checks early (including before interviews), thus limiting BTB's effectiveness.).

[79] Avery & Lu, *supra* note 6, at 27–29. For example, at least eighteen states delay until after interview (AZ, DE, IL, KY, LA, ME, MD, MN, NV, NH, NJ, NY, NC, ND, OR, RI, UT, VA) and as many as eight states (CA, CO, HI, IL, LA, MN, NV, UT) and D.C. postpone access until post-offer, at least in some circumstances, (e.g., there is no interview), although the states vary in

employers from accessing criminal records until after a conditional offer.[80] Other state laws began with less stringent prohibitions but have now amended their laws to delay access until later in the hiring process.[81]

Postponement of employer access to criminal records serves two purposes. First, as noted above, it prevents employer efforts to circumvent the "banned box." This forces employers to engage not only in application review but also interviewee selection and interviews untainted by criminal record information. Second, delaying criminal background checks until at least after the direct contact of an interview provides further unbiased input into employer hiring decisions.[82] The laws that further delay access to applicant records until after an employer makes a conditional job offer force employers to engage in the third hiring cycle step before learning about a chosen candidate's criminal history. This latter approach is particularly important where job offer decisions are made by multiple people, including some who did not participate in interviews.

Early effectiveness research supports this extension of the access timeline.[83] Intermediate delay laws—those that postpone access only until after an interview—often seem merely to result in delayed employer discrimination.[84] Under such laws, employers will commonly request background checks on promising interviewees after completing all interviews.[85] With this information in hand, employers can still engage in discriminatory hiring decisions by choosing to offer the job to another finalist with roughly equivalent skills.[86]

whether these laws apply to the private sector or only the public sector. *See id.* at 9–28 (detailing the requirements of fair chance laws state-by-state).

[80] Margaret Colgate Love, Collateral Consequences Res. Ctr., The Many Roads from Reentry to Reintegration: A National Survey of Laws Restoring Rights and Opportunities After Arrest or Conviction 102 (2022), https://web.archive.org/web/20230623015440/https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTR_8.24.22.pdf [https://perma.cc/NS3Z-VN8H].

[81] For a detailed discussion of the different approaches to Ban the Box and Fair Chance Laws in each states, *see* Wissler, *supra* note 66, at 103–09 (discussing variations on ban the box laws and classifying them into "highly protective," "moderately protective," and "low protective" laws) and at 111–15 (discussing fair chance laws that limit the ways in which employers can use information about the applicants' criminal records and classifying these laws into highly, moderately, and low protective).

[82] Weiss et al., *supra* note 67, at 2 ("BTB proponents suggest that employers are less likely to view criminal records as conclusively disqualifying after meeting applicants in person: 'Rejection is harder once a personal relationship has been formed.'") (quoting Love, *supra* note 40, at 774).

[83] *See Research Supports Fair Chance Policies*, *supra* note 1, at 6; *see also* Michael Hartman, Nat'l Conf. of State Legislatures, Ban the Box: Policy Snapshot 2 (2021), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Ban-the-Box-Policy-Snapshot.pdf [https://perma.cc/7LTL-R3S9].

[84] Flake, *supra* note 66, at 1085 (noting that critics argue ban-the-box "merely delays an employer's inevitable decision not to hire an ex-offender, often until after both the employer and applicant have heavily invested in the job-hiring process").

[85] Lesley E. Schneider, et al., *Before and After Ban the Box: Who Complies with Anti-Discrimination Law?*, 47 Law & Soc. Inquiry 749, 774 (2022) (finding that after ban-the-box laws are implemented, employers can continue to use background checks as gatekeeping at the next legal stage (e.g., post-interview or at final background check stages)).

[86] *See* Flake, *supra* note 66, at 1123.

Applicants with records, even if they have the financial means to sue,[87] then have no way to effectively prove discrimination.

Job candidates and government enforcement agencies have better ammunition to challenge an employer's hiring behavior if an employer cannot access criminal record information until after making a conditional offer. At that point in the hiring process, it is much more apparent that the most likely reason for the rescinded offer is the employer's new knowledge about the applicant's criminal background.[88] In addition, the increased direct contact with the applicant and the timing of the disclosure are likely to ensure that employers are sufficiently committed to hiring that person such that only meaningfully relevant criminal records will cause an employer to reconsider its hiring decision and rescind its job offer.

To be clear, all employers can legally withdraw offers based on criminal records if the situation fits within an exception to laws that otherwise outlaw discrimination.[89] One type of such an exception are individual assessments that establish a rational relationship between an applicant's offense and the duties and responsibilities of the position sought.[90] An example of an individualized assessment is a school's rescission of a conditional employment offer to someone who pled guilty to indecent exposure two years before applying for the job.[91]

Another type of exception involves employer compliance with federal and state laws that exclude those with specific offenses from employment in specific jobs.[92] In its 2012 Guidance, the EEOC provides several examples of statutory compliance: a county rule prohibition from employing anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration; a federal ban of ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from working in a bank; and the Maritime Transportation Security Act's provision that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism be permanently disqualified from obtaining a Transportation Workers Identification Credential (TWIC).[93]

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[87] *See* Samuel K Baier, *Reducing Employment Barriers for People with Criminal Records*, 46 J. Corp. L. 220, 229 (2020) (noting that "[f]ew private plaintiffs can muster the legal resources" to bring a discrimination lawsuit without the financial support of a federal agency, such as the EEOC).

[88] Herring & Smith, *supra* note 72 at 6 (noting that "Having a conditional offer withdrawn after a criminal background check was performed was far and away the form of discrimination experienced most transparently.").

[89] *See* Wissler, *supra* note 66, at 105 (summarizing exception/exclusions common in state ban the box laws).

[90] *See* Haw. Rev. Stat. § 378–2.5 (2020); *see also* Hartman, *supra* note 83, at 1.

[91] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, 24 (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [https://perma.cc/F7EU-LH87].

[92] *Id*. at 24.

[93] *Id*. at 22.

Nonetheless, employers can still hide illegal reasons for rescinding an offer behind pretexts or they can choose to risk litigation, since that risk is so low. Therefore, to encourage compliance, as well as to prevent wasted time and resources on lawsuits challenging legitimate employer exclusion of candidates, some states require documentation of the employer's reasons for offer rescissions.[94] Still others provide opportunities for applicants to explain their criminal records, and some offer an appeal process for rejected applicants.[95] These additional rules aim to further deter illegal hiring decisions.

There are other important differences between the many state and local Fair Chance laws. For example, laws have varying threshold numbers of employees that a company must have to be subject to the law.[96] In addition and importantly, most statutes apply only to public employers. Of the thirty-seven states and 150 municipalities that have BTB or broader Fair Chance laws, only fifteen states and twenty-two cities have laws that include private employers.[97] Another key difference between the state and local laws is which records employers may access. Categories of excluded information vary but increasingly these include arrests that did not lead to convictions, misdemeanors, non-violent crimes, crimes irrelevant to the sought-after job, expunged records and/or convictions more than a decade old.[98] Exclusion of older convictions is strongly supported by research discussed in Section II.B.2, *supra*.

2. *Federal laws*

Although states took the lead in passing Ban the Box and Fair Chance laws, the federal government has also taken steps to improve employment rates of those with criminal records. The Second Chance Act of 2007, signed into law by President Bush, sought to reduce recidivism by authorizing federal grants to government agencies and nonprofit organizations to provide reentry services and programs.[99] In so doing, the Second Chance Act provided a vital

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[94] *See, e.g.*, Avery & Lu, *supra* note 6, at 9 (stating that the California fair chance law "requires written preliminary notice to the job applicant of the employer's intent to rescind the conditional job offer; time for the applicant to respond with evidence of inaccuracies in the record, rehabilitation, or mitigating circumstances; and final written notice rescinding the job offer.").

[95] *Id*. at 9–28 (providing a summary for each state's fair chance law).

[96] *Id*. at 27–29 (providing a chart to illustrate the variety in Fair Chance laws amongst states). For example, Minnesota requires job screening if the conviction "directly relates" to the position, where other states, like Pennsylvania, have job screening questions that allow for consideration of convictions to the "extent to which they relate to the applicant's suitability for the position" in general).

[97] Avery & Lu, *supra* note 6, at 2–3.

[98] *See id*. at 27–29 (chart providing comparison of state laws); Collateral Consequences Res. Ctr., *50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing,* https://web.archive.org/web/20260206111645/https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/ [https://perma.cc/TL5C-LMJ3] (last visited Feb. 6, 2026) (hereinafter "50-State Comparison") (in a state by state listing, stating that Arizona and Oklahoma do not allow release of information about non-violent crimes, and at least six states do not allow access to misdemeanor information in at least some circumstances: Arizona, Arkansas, Massachusetts, Michigan, Minnesota, and Nevada).

[99] Pub. L. No. 110-199, 122 Stat. 657, 660 (2008).

first step towards lowering unemployment among those with criminal records by including job training and job acquisition support services in its list of programs eligible for funding.[100]

In late 2015, President Obama issued a directive to federal agencies to desist from asking most job applicants about criminal records on job applications and to allow federal agency inquiries about and access to these applicants' criminal records only post-offer.[101] This federal policy directly mirrored state Ban the Box and Fair Chance laws. In 2018, President Trump signed into law the First Step Act which sought to reduce the size of the federal prison population.[102] One mechanism included in this federal statute was reauthorization of the Second Chance Act.[103] Congress subsequently codified the Obama administration's federal policy and expanded it to cover federal contractors, by passing the Fair Chance to Compete for Jobs Act (Fair Chance Act) of 2019, which President Trump signed into law.[104]

The Fair Chance Act incorporated many of the best practices test-driven by state laws.[105] Extending fair chance hiring to federal contractors has a greater reach than might be apparent because the federal government employs a substantial number of people through contractors. In fact, contractors and their employees now outnumber federal employees more than two to one.[106]

Further federal actions extending Fair Chance laws to state public and private employers would expand state anti-discrimination laws to include

[100] *Id.* § 101(d)(3)(C).

[101] *Fact Sheet: White House Announces New Commitments to the Fair Chance Business Pledge and Actions to Improve the Criminal Justice System*, Off. of the Press Sec'y, The White House, (Nov. 30, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments-fair-chance-business [https://perma.cc/5XX2-P5QJ].

[102] *See* Second Chance Reauthorization Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220 (2018) (codified as amended in scattered sections of 34 U.S.C.). *See also* Nathan James, Cong. Rsch. Serv., R45558 The First Step Act of 2018: An Overview (2019).

[103] Second Chance Reauthorization Act §§ 501–02, 132 Stat. at 5222–37. The Second Chance Reauthorization Act of 2018 reauthorized appropriations for and expanded the scope of some grant programs that were initially authorized under the Second Chance Act of 2007 (Pub. L. No. 110-199). The reauthorized programs include, among other programs, Careers Training Demonstration Grants and the Community-Based Mentoring and Transitional Service Grants to Nonprofit Organizations Program. *Id.*

[104] 5 U.S.C. § 9202; *The Fair Chance to Compete for Jobs Act*, U.S. Dep't of Health and Human Services, Office of Inspector Gen. (Nov. 6, 2024), https://oig.hhs.gov/careers/the-fair-chance-to-compete-for-jobs-act/ [https://perma.cc/EY4U-YFK8]. The Fair Chance Act passed as part of the National Defense Reauthorization Act. *The Fair Chance to Compete Act*, U.S. Dep't of Treasury, (stating that on "December 20, 2019, the president signed into law the National Defense Authorization Act, which includes the Fair Chance to Compete for Jobs Act of 2019 ("Fair Chance Act" or "the Act").") https://home.treasury.gov/about/careers-at-treasury/the-fair-chance-to-compete-act [https://perma.cc/J3SP-TWPM] (last visited Feb. 2, 2026).

[105] *See* § 9202 (taking effect in 2021 and delaying inquiry until a conditional offer is extended but creating exceptions); 5 CFR § 920.202(a) (providing guidance on the law, effective in 2023). *See also* Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Issues Enforcement Guidance: Commission Updates Guidance on Employer Use of Arrest and Conviction Records* (Apr. 25, 2012), https://www.eeoc.gov/newsroom/eeoc-issues-enforcement-guidance [https://perma.cc/E3EG-RF8T] (providing initial guidance).

[106] Ellie Kamarck, *Is Government Too Big? Reflections on the Size and Composition of Today's Federal Government*, Brookings Inst. (Jan. 25, 2025), https://www.brookings.edu/articles/is-government-too-big-reflections-on-the-size-and-composition-of-todays-federal-government/ [https://perma.cc/D349-DB7K].

employers in the thirteen states that currently lack any type of Fair Chance law (including Ban the Box law). Such a federal law would also provide uniform minimum requirements among states on issues such as when during the hiring process employers may legally access applicant criminal records and which parts of those records employers may legally access.

B. Clean Slate Laws

Clean Slate laws are so named because they seek to provide a fresh start for many with criminal records by wiping the slates of documented criminal activity at least partially clean. By requiring automatic sealing or expungement of certain criminal record items,[107] Clean Slate laws avoid discrimination based on minor, old, and/or inaccurate criminal histories.[108] These laws focus on the criminal records themselves, rather than on delaying employers' access to those records. They are not meant to, nor should they, supplant Ban the Box or Fair Chance laws. Instead, they are intended to complement them.[109]

When properly implemented, these record-focused laws limit the number of job applicants with any discoverable criminal history. For example, if an applicant's record contains only minor infractions committed more than a decade before their job application, in some Clean Slate law states an employer's inquiry would reveal no criminal record.[110]

1. State laws

Clean Slate laws exist in thirteen states and the District of Columbia.[111] Each of these laws requires the state to seal eligible criminal records without any action by the justice-impacted individual. This is a major improvement to current systems that require an individual to petition for expungement of

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[107] *Clean Slate in States*, The Clean Slate Initiative, https://www.cleanslateinitiative.org/states [https://perma.cc/62M3-TR9V] (last visited Jan. 6, 2026); *See also* Sharon Dietrich & Rebecca Vallas, *One Strike and You're Out*, Ctr for Am. Progress (Dec. 2, 2014), https://www.americanprogress.org/article/one-strike-and-youre-out/ [https://perma.cc/AQ4L-BKX6]. Clean Slate emerged as a policy recommendation from a December 2014 paper written by Sharon Dietrich of Community Legal Services and Rebecca Vallas of the Center for American Progress.

[108] *See Clean Slate Advocacy Toolkit*, Cmty. Legal Services and Ctr for Am. Progress (Oct. 2017), https://www.nelp.org/app/uploads/2017/11/Clean-Slate-Advocacy-Toolkit.pdf [https://perma.cc/7J2K-AMXP] (detailing the types of information to be expunged and using Philadelphia's law as an example).

[109] *See* Rodriguez & Polk, *supra* note 74, at 1.

[110] *See* Riia O'Donnell, *What You Need to Know About Clean Slate Laws,* Critical Rsch., (2023), https://criticalresearch.com/faqs/clean-slate-laws/ [https://perma.cc/89V3-N5FF] (last visited on Sep. 21, 2025).

[111] *See Clean Slate in States*, *supra* note 107. *See also* 50-State Comparison, *supra* note 98 (providing details that illustrate that 40 states also have some form of statutory mechanism for record-sealing or expungement, though most of these require affirmative action by the record-holder and vary significantly in terms of which parts of criminal records can be sealed or expunged).

their criminal records, often one item at a time.[112] Automated record clearing is efficient and reduces costs because it avoids the time and expense of manual record review.[113]

By putting the impetus on the state and shifting the burden from the justice-impacted individual, Clean Slate laws can be a powerful and affordable tool to improve the fairness of job applicant selection. Nonetheless, the approach is not without limitations. There are practical and cost issues involved in states acquiring the necessary computer systems and coordinating these across multiple jurisdictions within and across states.[114] Even where this has been or can be achieved, there is disagreement about which information should be sealed.[115] For example, some people support sealing all non-violent felonies, while others may support expungement only of old convictions, misdemeanors, and juvenile records.[116] Accordingly, current statutory sealing requirements are limited to those crimes upon which a majority of a state's lawmakers can agree.[117]

2. *Federal laws*

No federal Clean Slate laws have been passed to date, though two relevant federal bills are pending. The bipartisan co-sponsored Clean Slate Act would create a process for automatic expungement of some non-violent federal convictions.[118] More specifically, the Clean Slate Act would "empower[] courts to automatically seal criminal records related to simple possession of

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[112] *See Clean Slate Advocacy Toolkit, supra* note 108, at 1 (noting that the current system of petitions for expungement is "untenable" due to its "sheer volume," which is overwhelming to both petitioners and courts).

[113] *Id.* (stating that "by relying on automated query that can identify cases that qualify for sealing, a state can achieve the policy goal of sealing virtually all qualifying electronic records immediately without simultaneously overwhelming the courts").

[114] *See* Anne Teigen & Michael Hartman, *Lawmakers Discuss Ways to Make Clearing a Criminal Record Easier*, Nat'l Conf. State Legislatures (May 31, 2023), https://www.ncsl.org/state-legislatures-news/details/lawmakers-discuss-ways-to-make-clearing-a-criminal-record-easier [https://perma.cc/LU5N-JJJB] (identifying implementation challenges). *See also*, *e.g.*, Legislative Fiscal Estimate, S. 4154, 218th Leg., 1 (N.J. 2019) (stating that it would cost new Jersey an estimated $10 million for technological development); Noah Denkler et al., *Cost Benefit Estimate of Clean Slate Laws in Florida*, Fla. State Univ. (2023), https://cosspp.fsu.edu/economics/wp-content/uploads/sites/10/2023/08/Clean-Slate-in-Florida.pdf [https://perma.cc/8HCV-N45R] (estimating the one-time implementation costs of Clean Slate laws in Florida to total $4.7 million). John S. Hollywood & Zev Winkelman, RAND, Improving Information-Sharing Across Law Enforcement: Why Information Integration Remains a Challenge 3 (noting that the cost of records management systems (RMSs) and computer-aided dispatch (CAD) systems and the complexity of interoperability standards remain significant barriers to information sharing).

[115] *See* Teigen & Hartman, *supra* note 114; *see* O'Donnell, *supra* note 110 (giving examples of types of items that Clean Slate laws in various states will remove or seal).

[116] *See* O'Donnell, *supra* note 110 (giving details about which types of convictions can be sealed under various states' Clean Slate laws).

[117] *See Clean Slate Advocacy Toolkit, supra* note 103, at 1.

[118] *See* Clean Slate Act of 2023, H.R. 2930, 118th Cong. (2023) (requiring automatic sealing of federal records for simple possession and other nonviolent marijuana offenses, establishing a petition process for additional record sealing, mandating automatic sealing of certain arrest records within 180 days, authorizing public defenders to assist indigent petitioners, and shielding employers from liability for misconduct tied to sealed records).

a controlled substance, any nonviolent offenses involving marijuana, and an arrest for an offense that did not result in a conviction after one year of completing imprisonment, probation, or supervised release."[119] Since offenses involving marijuana in particular are very prevalent,[120] many people could rely solely on this automation to have their records sealed, avoiding the necessity to separately petition for modification of their records, as they would have to do for some other offenses.[121]

In contrast to the Clean Slate Act, which only applies to federal criminal records, the bipartisan co-sponsored Fresh Start Act would focus on financial support for state Clean Slate laws.[122] This law, most recently reintroduced in 2025, would simplify and expedite the expungement process by permitting states with Clean Slate laws to apply for federal funds to implement those laws.[123] The grant program would include financial support for automating state record-sealing systems, greatly increasing efficiency and removing even more of the burden from individual record holders.[124] As noted above, these types of costs and implementation details currently stand as significant roadblocks in getting state Clean Slate laws passed.[125] Removing these barriers would be a significant step.

III. Critiques and Responses

In this section, we examine three main types of criticisms leveled at Ban the Box and Fair Chance laws and offer counterarguments for each of them. First, several researchers have suggested that Fair Chance laws are ineffective or even harmful. However, most studies to date have focused only on the effects of BTB laws because only these have been around long enough

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[119] Abou Ndiaye, Cong. Black Caucus Found. & Nat'l Racial Equity Initiative for Soc. Just., The Clean Slate Act: A Pathway to Criminal Justice Reform 2 (2023), https://www.med.unc.edu/fammed/nctac/wp-content/uploads/sites/1256/2024/02/2023_CBCF_CPAR_NREI_A-Pathway-to-Criminal-Justice-Reform_1.2mkj.pdf [https://perma.cc/TU6E-L79N].

[120] *Clearing Criminal Records for Cannabis Offenses,* Nat'l Conf. State Legislatures (2020), https://www.ncsl.org/civil-and-criminal-justice/clearing-criminal-records-for-cannabis-offenses [https://perma.cc/PLY6-D54Q] (stating that over seven million people were arrested for marijuana possession from 2001 to 2010); *Drug Related Crime Statistics*, Nat'l Ctr. for Drug Abuse Stat. (NCDAS), https://drugabusestatistics.org/drug-related-crime-statistics/ [https://perma.cc/AZ4P-V9YY] (last visited Sep. 10, 2025) (stating that 244,000 people are sent to prison annually for drug-related offenses); *How Many Federal Marijuana Prisoners Are There?,* Marijuana Pol'y Project, https://www.mpp.org/policy/federal/how-many-federal-marijuana-prisoners-are-there/ [https://perma.cc/DWF7-VHDP] (last visited Sep. 11, 2025).

[121] Clean Slate Act of 2023, *supra* note 118, at § 3560A ("Sealing of certain records upon petition.").

[122] *See* Fresh Start Act of 2025, S. 2590, 119th Cong. (2025) (authorizing funding to help states automate record expungement and sealing, prohibiting states that delay record expungement or sealing due to fines or fees from receiving grant funding, and requiring states to report sealing and expungement data disaggregated by race, ethnicity, and gender).

[123] *Id.*at § 3(c).

[124] *Id.* at § 4.

[125] *See supra* Section II.B.1.

to produce sufficient data for analysis.[126] The results of these studies remain inconclusive and do not support a move away from Fair Chance laws, and especially from laws that have not yet been adequately studied.[127] Second, Fair Chance laws are not just an easy way to score political points; rather, they help serve a central goal of criminal justice reform, which is to improve reintegration of people with convictions into the community and to lower recidivism rates.[128] Finally, some commentators argue that Fair Chance laws do not go far enough in expanding work opportunities for applicants with records. Even so, these laws are compatible with other reforms and remain an important tool for combatting discrimination.[129] As such, policymakers can pursue a "both/and" approach rather than abandoning Fair Chance laws.

A. Questions of Effectiveness

Although several economic impact studies have attempted to quantify the effects of BTB laws, the results have been mixed so far. Doleac and Hansen conducted a study, published in 2020, that found a negative impact on employment rates among young, low-skilled Black and Hispanic men.[130] They concluded that employers used race as a proxy for criminal conviction when BTB laws prevented them from accessing applicants' criminal history, thereby disadvantaging Black and Latino applicants, including those without criminal histories.[131] A 2021 study by Sabia, McKay, Nguyen and Dave also found that BTB laws produced unintended consequences, namely that they lead to an increase in property crime rates.[132] More specifically, the authors argue "that BTB laws are associated with an approximately 16 percent increase in criminal incidents involving working-age Hispanic men, driven by property crimes."[133] Notably, despite this negative impact finding, the study did not find such an increase for working-age African-American men, even though according to Doleac and Hansen's study this group also faced increased statistical discrimination in the wake of BTB laws.[134]

Such conflicting outcomes call into question the claims that BTB laws increase racial discrimination in hiring. A recent paper by Anne Burton and David Wasser underscores the inadequacies of previous studies that found

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[126] *See* Sharon S. Oselin et al., *Fair Chance Act Failures? Employers' Hiring of People with Criminal Records*, 23 Criminology & Pub. Pol'y 361, 363 (2024) ("[g]iven there are even fewer policies that endorse EEOC protective guidelines, the body of research on the efficacy of 'fair chance' policies is particularly sparse, leaving substantial room for assessment about their implementation and impact.").

[127] *Infra* Section III.A.

[128] *Infra* Section III.B.

[129] *Infra* Section III.C.

[130] Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. Lab. Econ. 321, 324–25 (2020).

[131] *Id.* at 324.

[132] Joseph J. Sabia et al., *The Unintended Effects of Ban-the-Box Laws on Crime*, 64 J. L. & Econ. 738, 801 (2021).

[133] *Id.* at 815.

[134] *Id.*

that BTB laws result in statistical discrimination.[135] The authors provide a thorough analysis of such studies and conclude that "the effects of BTB on the employment of those most likely to be statistically discriminated against are more ambiguous than previously portrayed."[136] They demonstrate particular flaws in the Doleac and Hansen study, arguing that the small sample size in the Current Population Survey (CPS) dataset used in that study calls their conclusions into question.[137] Burton and Wasser argue that when using a different dataset, the American Community Survey (ACS), the results suggest that "removing 'the box' may not actually negatively affect the hiring of workers from the groups [they] study." [138] Indeed, according to the U.S. Bureau of Labor Statistics, "[d]ata from the ACS . . . provide more extensive geographic and demographic coverage, and have smaller sampling errors."[139] In sum, Burton and Wasser's study demonstrates that the "unintended consequences" theories are still equivocal, at best.

To be sure, these types of findings are concerning, but there are strategies to address unintended discriminatory consequences if they do exist. For example, employers who use race as a proxy for criminal history in the absence of "the box" on the application violate civil rights law, and the unlawful practices could therefore be addressed through better enforcement of well-established laws such as Title VII of the Civil Rights Act of 1964. In any case, since there is not yet a definitive showing of harm, concerns about racial inequities should serve as an impetus for improvement rather than an argument against Fair Chance laws broadly. This is even more compelling in the face of other studies that reveal neutral or positive impacts of BTB laws.

In their 2024 article titled "Ban-the-box Laws: Fair and Effective?," Robert Kaestner and Xifei Wang note that the "study of the effect of BTB laws is relatively sparse" and the research findings so far are of a "mixed nature."[140] The authors focused their study on young (ages twenty-five to forty-four) men with low levels of education. Their results suggest that earlier "findings[] of a negative effect of BTB laws on young Black men's employment . . . may be spurious" or may reflect differences in labor market conditions over time, rather than a causal connection between BTB laws and higher unemployment rates in this demographic.[141] Overall, their study did not document either positive or negative quantitative effects of BTB laws, finding that "BTB laws have not been beneficial in terms of increasing employment, but they have not been harmful either."[142]

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[135] Anne M. Burton & David N. Wasser, *Revisiting the Unintended Consequences of Ban the Box*, 250 J. Pub. Econ. 1, 2 (2025) (concluding that the evidence for negative unintended consequences of BTB laws is "even more mixed than previously understood").

[136] *Id*. at 9.

[137] *Id.* at 2.

[138] *Id*. at 8.

[139] *Id*. at 7 (quoting U.S. Bureau of Labor. Stats. *Notes on Using Current Population Survey (CPS) Subnational Data* (Mar. 17, 2023), https://www.bls.gov/lau/notescps.htm [https://perma.cc/5Z2D-2LXC]).

[140] Robert Kaestner & Xufei Wang, *Ban-the-Box Laws: Fair and Effective?*, 78 Int'l Rev. L. & Econ. 1, 2 (2024).

[141] *Id*.

[142] *Id*.

Other studies have reached similar conclusions about the lack of negative effects of BTB laws. For example, economist Evan Rose concluded that Seattle's 2013 BTB law "had small effects on the employment and earnings of ex-offenders."[143] The "net zero" effect is, of course, not what advocates hope to achieve, but the absence of harm is encouraging. Indeed, the lack of positive impact may be due to circumstances that lend themselves to mitigation. Rose posits that the negligible effect can be attributed to two factors: first, "most ex-offenders know which jobs require a clean record and do not apply to them," and second, "even under BTB employers still check criminal records and reject all ex-offenders later in the interview process."[144] More comprehensive Fair Chance laws, along with better enforcement and stronger public information campaigns, could help address some of these concerns.[145]

Some studies have found modest positive effects as well. In a 2020 article titled "Ban the Box, Convictions, and Public Employment," labor economist Terry-Ann Craigie found that "BTB policies raise the probability of public employment for those with convictions by 4 percentage points" in general, which "represents about 30%" average increase in the probability of a public employment for this population.[146] This result further illustrates that the study of BTB laws must continue and that definitive conclusions as to their lack of effectiveness are premature. The quantitative assessment of stricter Fair Chance laws is even less complete, given that this type of legislation is newer and that several jurisdictions are only beginning to implement such laws.[147]

This brief overview of the economic studies is far from exhaustive, but it suffices to illustrate that the effect of BTB or Fair Chance laws—whether positive or negative—cannot yet be clearly established. For example, labor market conditions can affect the results in ways that are difficult to quantify.[148] As discussed in Section II, *supra*, Fair Chance laws are still evolving, and many more detailed studies will be needed to figure out the impact of these laws on employment when datasets become large enough to break out the data by variables such as labor market conditions, industry, job type, the type of employer, age, race, gender, education level of applicants, etc. Policy analysts and lawmakers should continue to closely monitor the data that economic researchers gather as more time passes. In the meantime, where there is no evidence of harm, the potential of Fair Chance laws to effect change supports their continued implementation and enforcement. This is particularly true because we do not yet have sufficient data to measure whether Fair Chance laws that delay access to records until after a conditional offer, coupled with other best practices discussed in Section II.A.1, *supra*, will lead to quantifiably positive results. Further, better implementation by employers, as well as more

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[143] Evan K. Rose, *Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example,* 39 J. Lab. Econ. 79, 111 (2021).

[144] *Id.*

[145] *See infra* Sections IV.B–D.

[146] Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 Econ. Inquiry 425, 426 (2020).

[147] See *supra* Part II (discussion of current trends in BTB and Fair Chance laws).

[148] *See* Kaestner & Wang, *supra* note 140, at 2.

effective enforcement by state and local governments, are likely to increase the effectiveness of Fair Chance laws.[149] Finally, the moral argument in favor of anti-discriminatory employment laws that protect workers with records is strong and counsels in favor of maintaining and improving BTB and other Fair Chance laws.

B. *Fair Chance Laws as Part of Broader Criminal Justice Reform*

If Ban the Box and Fair Chance laws were ineffective, why would so many jurisdictions choose to adopt them? One cynical answer is that they are relatively inexpensive (or cost-free) for elected officials to promote and adopt.[150] Since there has been bipartisan agreement regarding the importance of employment for formerly incarcerated or justice-involved individuals, these laws may be easier for legislators to pass than many others.[151] In the absence of conclusive evidence of ineffectiveness, however, the cynicism is largely unwarranted. Regardless of political motivations, BTB and Fair Chance laws still hold promise for helping job applicants with records to get opportunities to have potential employers assess their qualifications objectively, without the bias that might attach to a past conviction. According to Beth Avery, a senior attorney at NELP: "the ban the box movement—powered by people with records and their families—can be credited with bringing the unfair status quo to the national attention and spurring further nuanced policy discussions."[152] It is of course important to recognize that Fair Chance laws alone cannot solve employment challenges facing people with records. "We should not pretend that such policies are 'magic bullets' that instantly cure complex problems, and the proponents of such legislation cannot walk away assuming the job is done."[153] Nonetheless, while not a panacea, they are an important part of criminal justice reform landscape.

Indeed, public officials who promote Fair Chance laws merely for political gain but do nothing to take the implementation of these "well-intentioned" policies beyond the "surface level"[154] are unlikely to gain any special advantage. Fortunately, this does not appear to be the trend. Rather, lawmakers continue to improve and expand laws that help reintegrate people into civic life after a conviction and incarceration. For example, Washington state expanded its Ban the Box law, effective in July 2026, to prohibit employers from accessing information about criminal records until after a conditional

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149 *See infra* Sections IV.C–D.

150 Open to Debate, *Ban the Box: Should We Banish the Criminal History Check Box from Job Applications?*, at 27:34 (YouTube, Apr. 18, 2024), https://www.youtube.com/watch?v=0887KNibSBI&t=2082s [https://perma.cc/A7NV-RUSF].

151 *See, e.g.*, Korzenik, *supra* note 16, at 201–02.

152 Beth Avery, *People with Records Have Fought Hard to "Ban the Box"*, Nat'l Emp. L. Project (Apr. 23, 2024), https://www.nelp.org/people-with-records-have-fought-hard-to-ban-the-box/ [https://perma.cc/D7NB-P7SL].

153 Korzenik, *supra* note 16, at 201.

154 *See* Michael J. McCusker, *Is Fair Chance Hiring Really Creating a Fair Chance?*, Medium (July 5, 2025), https://michmc1.medium.com/is-fair-chance-hiring-really-creating-a-fair-chance-c3cb86dae28a [https://perma.cc/2775-WA8V].

offer has been extended.[155] This new law prohibits adverse employment actions against applicants with records without a legitimate business reason, creates notice requirements for employers, and imposes increased penalties for non-compliance.[156]

City governments also continue to strengthen their fair chance laws. Philadelphia added protections for applicants and employees with records effective in January 2026, including a four-year lookback period for misdemeanors (reduced from seven years) and enhanced compliance requirements and fines for employers.[157] A Minneapolis ordinance, effective as of August 2025, added "justice-impacted status" to the list of protected classes, prohibiting adverse employment action against applicants or employees with a criminal record, "unless the employer can demonstrate that the history is reasonably related to the duties of the position."[158] Together with the evolution of Fair Chance laws described in Section II.A.1, *supra*, these examples illustrate that these laws continue to expand because they respond to an important public need.

Some argue that Fair Chance laws may become superfluous if employers understand the business advantages of hiring people with records. In his book *Untapped Talent*, Jeffrey Korzenik wants "to make 'Ban the Box' legislation irrelevant" because "[i]f a checked box is not an immediate disqualification for employment, no government policy is needed."[159] Still, he views Ban the Box laws "as a catalyst in the business community to understand how to make the most out of considering people with criminal records."[160] Employers already recognize the benefits of second-chance hires. "A 2021 study by SHRM (Society for Human Resource Management) and the Charles Koch Institute found that: 85% of HR professionals and 81% of business leaders who hired individuals with criminal records reported that they performed the same or better than other employees."[161] Even more than a catalyst for understanding, Ban the Box and Fair Chance laws have an important expressive function in that they convey public recognition of the importance of redemption and rehabilitation, alerting the community to the fact that discrimination based on prior misconduct for which a person has already served fair punishment is

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[155] Wash. Rev. Code § 49.94.020 (2025). For a discussion of current developments in fair chance laws, *see supra* Section II.A.

[156] Wash. Rev. Code *§ 49.94.020* (2025).

[157] Susan M. Corcoran, et al., *'Ban the Box' Expands in Philadelphia – Latest Updates for Employers*, The Nat'l L. Rev., https://natlawreview.com/article/ban-box-expands-philadelphia-latest-updates-employers [https://perma.cc/45AN-W3Z6] (Nov. 14, 2025).

[158] Alonzo Martinez, *Minneapolis Overhauls Civil Rights Law: What Employers Must Know*, Forbes, https://www.forbes.com/sites/alonzomartinez/2025/05/30/minneapolis-overhauls-civil-rights-law-what-employers-must-know/ [https://perma.cc/8XUZ-QYLZ] (May 30, 2025).

[159] Korzenik, *supra* note 16, at 200.

[160] *Id.*

[161] McCusker, *supra* note 154; *see also New SHRM and CKI Survey Highlights Value of Workers with Criminal Records*, Soc'y for Human Res. Mgmt. (May 10, 2021), https://www.shrm.org/about/press-room/new-shrm-cki-survey-highlights-value-workers-criminal-records [https://perma.cc/P63Y-U9GU] (discussing the business benefits of hiring people with criminal records); Kim Gusman, *Finding Untapped Potential in Unexpected Places*, Cal. Employers' Ass'n. (Apr. 11, 2024), https://employers.org/2024/05/01/finding-untapped-potential-in-unexpected-places-2/ [https://perma.cc/67B5-YKS4].

wrong.[162] Thus, these laws can communicate to employers the value of justice-impacted individuals as employees while simultaneously communicating a message to society at-large about dignity, redemption and rehabilitation.

C. Fair Chance and Other Policies Enhance Each Other

Critics of Ban the Box and Fair Chance laws also argue that other policies would be more effective for improving employment prospects for people with records. For example, Doleac and Hansen recommend "providing more information about job applicants with records or improving the average ex-offender's job readiness."[163] To be sure, fair chance hiring has the best shot at achieving its goal of better employment outcomes for people with records if it works together with other legal and policy reforms. We discuss the benefits of such a holistic approach in Section V, *infra*. However, the assertion that Fair Chance laws work better in conjunction with other initiatives does not mean that they are themselves undesirable or dispensable. To the contrary, these laws form the foundation for a shift in hiring practices.[164] For example, in Section II.B.1, *supra*, we discussed an emerging trend in state laws towards automatic record clearing. These Clean Slate laws work in parallel with Fair Chance laws to ensure that the stigma of a criminal conviction does not prevent qualified applicants from securing employment. While these laws serve overlapping goals, they are not mutually exclusive. First, Clean Slate laws have only been implemented in thirteen states and Washington, D.C. so far,[165] while BTB or Fair Chance laws have been adopted by the federal government, as well as by thirty-seven states and over 150 cities and counties, with fifteen state and twenty-two city laws covering private employers as well.[166] Second, there is no uniformity between these laws in terms of what types of convictions and time lapses are prerequisites for expungement. Accordingly, Clean Slate and Fair Chance laws can work together to protect more potential applicants and expand the talent pool for employers.

Like Ban the Box and Fair Chance laws, record clearing legislation aims to minimize the collateral consequences of a criminal conviction and to expand access to jobs, housing, and education for people who have completed their criminal sentence. All these laws are based on the principles of "fairness, proportionality, and forgiveness."[167] Criminology researchers Sarah Lageson and Alessandro Corda note that "[c]riminal record clearance mechanisms,

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[162] *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024 (1996) (exploring the expressive function of law, which refers to "the function of law in 'making statements' as opposed to controlling behavior directly").

[163] Doleac & Hansen, *supra* note 130, at 362.

[164] *See, e.g.*, *Research Supports Fair Chance Policies*, *supra* note 1, at 4–5 (discussing how fair chance policies can improve employment outcomes for people with criminal records).

[165] *Clean Slate in States*, *supra* note 107.

[166] *See* Avery & Lu, *supra* note 6, at 111–17 (providing a summary of fair chance laws by category as of the time of publication in 2021)*; see also supra* Part II.

[167] Sarah E. Lageson & Alessandro Corda, *Chasing a Clean Slate: The Shifting Roles of Privacy and Technology in Criminal Record Expungement Law and Policy,* 38 Harv. J.L. & Tech. 1, 5 (2024).

such as expungement and sealing, are traditionally understood as rehabilitative, post-conviction or post-dismissal measures meant to ensure that people, once convicted or acquitted of a crime, no longer have records of their arrest or conviction in the public domain."[168] They go on to argue that support for expungement and clean slate laws is also increasingly rooted in data privacy concerns.[169] In this way, BTB, Fair Chance, and Clean Slate laws can each help address different aspects of individual rights. Furthermore, it is important to maintain the legal pressure on employers not to inquire about criminal records where such an inquiry is not appropriate.[170]

IV. Focus on Future Reforms

Efforts to improve the employment rates of those with criminal records should involve both legal carrots and legal sticks. Fair Chance laws serve as sticks, punishing biased employers. Measures that encourage voluntary compliance with Fair Chance laws can work as carrots. It is vital that these two types of approaches be used to complement each other, because even expanded BTB, Fair Chance, and Clean Slate laws will leave some degree of undetected hiring discrimination.[171]

A. Economic Incentives for Employers to Promote Fair Chance Hiring

Economic incentives for employers to comply with Fair Chance laws can augment voluntary hiring policies that open up job opportunities for those with criminal records. There are currently three types of economic incentives available to employers who hire such applicants. These incentives include two federal tax credit opportunities,[172] a number of parallel state tax credits,[173] and a federal bonding program which effectively provides risk insurance to those willing to "risk" employing someone with a criminal record.[174] Each of these programs can be improved to increase effectiveness. An additional and complimentary economic incentive could be to create a federal contract preference for employers who employ people with criminal records.[175]

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[168] *Id.*

[169] *Id.* at 38 ("post-sentence discrimination and the regulation of criminal history information increasingly frame and invoke crucial data privacy questions in today's data-rich environment").

[170] *See infra* Section IV.D (discussing cases where employees had no recourse to legal remedies after voluntarily disclosing their criminal history and the need for interpreting fair chance laws more broadly).

[171] Persistent bias and the subjective nature of hiring decisions can lead employers to discriminate against applicants with records, even when the law prohibits rejecting someone based solely on their criminal history. *See generally supra* Part III; *infra* Sections IV.B–D.

[172] Empowerment Zone Employment Credit, 26 U.S.C. § 1396; Work Opportunity Tax Credit, 26 U.S.C. § 51.

[173] *Infra* Section IV.A.1.

[174] *The Federal Bonding Program*, U.S. Dep't of Lab., https://bonds4jobs.com/ [https://perma.cc/A6CP-H6WT] (last visited Aug. 4, 2025) (hereinafter *The Federal Bonding Program*). *See also infra* Section IV.A.2 (discussing the bonding program in detail).

[175] *Infra* Section IV.A.3.

1. Federal and State Tax Credits

The Empowerment Zone Employment Credit is one of two relevant federal tax programs. This credit provides a tax incentive for employers to hire residents of economically distressed areas.[176] The program allows an employer to claim a twenty percent credit on up to the first $15,000 of wages paid to qualified employees.[177] The credit is not directly targeted at people with criminal records. However, since so many people who have been recently released from prison are severely economically challenged, employers utilizing this tax credit are indirectly also increasing the employment of some formerly incarcerated people.[178]

The Work Opportunity Tax Credit (WOTC) is the federal tax incentive that directly impacts job applicants with criminal records.[179] This tax credit can be particularly useful in encouraging corporate compliance with Fair Chance laws because it explicitly provides tax relief to employers who hire "qualified ex-felon" applicants.[180] Targeted corporate tax incentives have proven to be effective in improving corporate compliance in other areas. For example, the Renewable Energy Investment Tax Credit (ITC) has been a key driver in the growth of business use of solar and wind energy, putting more businesses in compliance with Sustainable Development Goals (SDG) 7 (Affordable and Clean Energy) and SDG 13 (Climate Action).[181] Tax incentives have also

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[176] *Fact Sheet: Opportunity Zones,* Internal Revenue Serv., https://www.irs.gov/newsroom/opportunity-zones [https://perma.cc/CXK3-5ZPY] (last updated April 2022) (defining "opportunity zones" as a "tax incentive, an economic development tool that allows people to invest in distressed areas. This incentive's purpose is to spur economic development and job creation in distressed communities by providing tax benefits to investors.").

[177] *See* 26 U.S.C. §§ 1396(a), (b), (c)(2). Also note that substantially all the services must be provided in the employer's trade or business within an empowerment zone and the employee's principal residence while providing the services must be within the zone. *Id.* § 1396(d)(1).

[178] Adam Looney & Nicholas Turner, Brookings Inst., Work and Opportunity Before and After Incarceration 7, 9, 11, 17 (2018), https://www.brookings.edu/articles/work-and-opportunity-before-and-after-incarceration/ [https://perma.cc/3HLA-DBJG].

[179] 26 U.S.C. § 51. *See generally Work Opportunity Tax Credit*, Internal Revenue Serv., (last updated May 8, 2025) https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit [https://perma.cc/JJ76-ZBDK] (highlighting the legislative history behind the WOTC). Initially passed in 1996 as part of the Small Business Job Protection Act, the WOTC has been extended multiple times. Most recently, "[t]he Consolidated Appropriations Act, 2021 (Section 113 of Division EE P.L. 116-260) authorized the extension of the WOTC until December 31, 2025." *Id.* Although the WOTC's fate after the end of 2025 is uncertain, President Trump, in his last term, consistently supported increasing the employment rates of those with criminal records. One demonstration of this is his issuance of proclamations and statements tying his administration to these goals. One example of a proclamation that publicly declared his promotion of "second chance" employment opportunities and reentry support for people with criminal histories is his *Proclamation on Second Chance Month* in March 2020. This proclamation stated, in part, "help[ing] former inmates find rewarding work" is a way to break the cycle of crime and reduce recidivism and that his administration was promoting second-chance hiring as part of broader criminal justice reform. *Proclamation on Second Chance Month*, 2020, Trump White House Archives, (Mar. 31, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-second-chance-month-2020/ [https://perma.cc/58KH-V8Q3].

[180] 26 U.S.C. § 51(d)(1).

[181] Panseih Gharib, *7 Powerful Tax Incentives to Drive SDG-Aligned Business Practices*, Profile Tree, (June 17, 2025), https://web.archive.org/web/20250620011420/https://profiletree.com/tax-incentives-to-drive-sdg-aligned-business-practices/ [https://perma.cc/

succeeded in encouraging businesses to hire job applicants from other disadvantaged groups. For example, tax credits have worked to increase the hiring of job applicants with disabilities.[182]

The U.S. Departments of Labor and Treasury jointly oversee the WOTC,[183] which is "a federal tax credit available to employers for hiring and employing individuals for certain targeted groups who have faced significant barriers to employment."[184] The statute defines ten such "targeted groups."[185] One of these groups is "qualified ex-felon[s]."[186]

Conceptually, the WOTC—especially when combined with the Federal Bonding Program described below[187]—seems to provide a promising incentive for companies to set aside their reservations and take a chance on a job applicant with a criminal record. However, in its current form, this tax credit is woefully underutilized for the "ex-felon" targeted group.[188] For example, in fiscal year 2024, only 49,661 WOTC credits were issued to businesses for employing "ex-felons."[189] This number represents a mere 3.1 percent of all WOTC credits issued that year.[190] Moreover and significantly, it represents only nine percent of the approximately 550,000 inmates released each year from federal and state prisons.[191]

S7T8-RAZK] (explaining that since its implementation, the ITC has helped expand renewable energy capacity, create thousands of jobs, and reduce carbon emissions); *see also* 26 U.S.C. § 48 (allowing businesses that install solar or wind energy systems to claim a tax credit covering a percentage of installation costs, making clean energy adoption more financially viable).

[182] U.S. Gen. Acct. Office, Business Tax Incentives: Incentives to Employ Workers with Disabilities Receive Limited Use and Have an Uncertain Impact, GAO-03-39 2, 8, 14, 18 (2002) https://www.gao.gov/assets/gao-03-39.pdf [https://perma.cc/4ENL-QPAJ] (noting that, albeit a small number, some employers reported revising hiring practices to increase hiring of disadvantaged workers to claim tax credits).

[183] *Work Opportunity Tax Credit Fact Sheet*, U.S. Dep't of Lab., (Jan. 2023), https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/WOTC-Fact-Sheet-2023.pdf [https://perma.cc/BM4A-KH7D] (hereinafter *Work Opportunity Tax Credit Fact Sheet*) (stating that "the U.S. Department of Labor (DOL) and the U.S. Department of the Treasury, through the Internal Revenue Service (IRS), jointly administer the implementation of the WOTC program" and explaining that Labor (through ETA) provides guidance and grant funding to state workforce agencies and that the IRS administers tax-related provisions and requirements of the credit). Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (providing the originally enacted version of the credit).

[184] *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183.

[185] *See* 26 U.S.C. § 51(d)(1) (providing list target groups for intended benefit of this tax credit program).

[186] *Id.* § 51(d)(1)(C); *see also Work Opportunity Tax Credit Fact Sheet*, *supra* note 183. Note that these groups have evolved since the original statute, but that "ex-felons" were one of the original "targeted groups" and remain one under the current statute. *See* Small Business Job Protection Act § 1201.

[187] *Infra* Section IV.A.2.

[188] *See* Looney & Turner, *supra* note 17835 at 3 (highlighting underutilization of WOTC).

[189] U.S. Dep't of Lab., *WOTC Certifications by Recipient Group: State and National Details For Fiscal Year 2024* 14, https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/State%20and%20National%20Details%20FY%202024.pdf [https://perma.cc/MAN4-K6LK] (last visited Aug. 11, 2025).

[190] *Id.*; *see also* Benjamin Collins & Sarah A. Donovan, Cong. Rsch. Serv., R43729, The Work Opportunity Tax Credit 6 (2018 (displaying data that demonstrates a similar level of utilization in prior years).

[191] *Research Supports Fair Chance Policies*, *supra* note 1, at 1. "[This figure represents the average (mean) number of individuals released from state and federal prison during the most recent five years for which data is currently available." *Id.* at 8 n.2.

Commentators have asserted at least five reasons for this underutilization: (1) the process of acquiring the tax credit is burdensome,[192] (2) many employers are unaware of the WOTC opportunity,[193] (3) the tax credit has too low a cap and too short a duration to sufficiently entice hesitant employers,[194] (4) only a limited class of inmates—"qualified ex-felons"—is eligible for the tax credit,[195] and (5) Fair Chance laws undermine the purpose of the WOTC.[196]

Currently, employers must obtain a government certification that the applicant is indeed a member of a "targeted group" to receive the WOTC.[197] State Workforce Agencies (SWAs) issue these certifications after both the employer and applicant jointly submit a Pre-Screening and Certification Request.[198] The Employment and Training Administration (ETA), overseen by the U.S. Department of Labor, provides SWAs with policy guidance and funding.[199] SWAs and the ETA set short deadlines and strict timeframes

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[192] Tim Cate, *Is the WOTC Worth It?*, Experian (July 7, 2023), https://www.experian.com/blogs/employer-services/is-the-wotc-program-worth-it/ [https://perma.cc/R8XD-P8KU] ("Another reason employers often cite explaining their reluctance to utilize this program is the perception of it being overly burdensome and requiring an onerous amount of administration. There are also worries that candidates may not be comfortable providing information about their potential eligibility for the program."); *see also* Benjamin Priday, *Less Work, More Paper*, Milken Inst. Rev., (Oct. 31, 2022), https://www.milkenreview.org/articles/less-paper-more-work [https://perma.cc/22ER-6L57] (stating that one reason for WOTC underutilization is perceived administrative complexity).

[193] Cassandra Bozelko, *Companies that Hire Ex-Offenders Can Get a Tax Credit, But Very Few Actually Claim It*, Barron's: Economy and Policy (Apr. 23, 2019), https://www.barrons.com/articles/companies-that-hire-ex-offenders-can-get-a-tax-credit-but-very-few-actually-claim-it-51556019056 [https://perma.cc/33TZ-XQNU] (noting that "[a]wareness of the WOTC benefit needs to grow."); Priscillia E. Hunt et al., *Breaking Down Barriers: Experiments into Policies that Might Incentivize Employers to Hire Ex-Offenders*, Rand 7 (Jan. 15, 2018), https://www.rand.org/pubs/research_reports/RR2142.html [https://perma.cc/MVU8-ECL9] (finding employers are often unaware of the WOTC).

[194] *See* Ernst & Young, Economic Activity Supported By the Improve and Enhance the Work Opportunity Tax Credit Act 2, 12–13 (2025), https://smucker.house.gov/sites/evo-subsites/smucker.house.gov/files/evo-media-document/ey-improve-and-enhance-the-work-opportunity-tax-credit-act-report-final-04-21-2025.pdf [https://perma.cc/SA8B-5QWM] (finding that "the maximum qualified wages used to calculate the [WOTC] have not been adjusted for inflation. As a result, the real (inflation-adjusted) value of the credit has declined over time" but that extension and expansion of the WOTC would add significant value); Bozelko, *supra* note 193 (stating that Connecticut employers are likely to respond to expanded tax incentives according to surveys).

[195] *See* Bozelko, *supra* note 193 (asserting that statutory limitation of "qualified ex-felon" is too limited).

[196] *Id.*; Katherine English, *Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box*, 93 Ind. L.J. 513, 530–31 (2018), (claiming the two do not work well together because Ban the Box delays inquiring into criminal records, while WOTC acknowledges the existence of a criminal background and advocates for using ex-felon status to gain employment).

[197] *See* 26 U.S.C. § 51(d)(13) (describing special rules for certification for targeted group); *Fact Sheet: Work Opportunity Tax Credit Fact Sheet*, *supra* note 183; *Work Opportunity Tax Credit supra* note 179.

[198] *See* 26 U.S.C. § 51(d)(13)(A) (establishing local agencies for WOTC employer and employee certification); *see also Work Opportunity Tax Credit Fact Sheet*, *supra* note 183 (calling such agencies "State Workforce Development Agencies").

[199] *See* § 51(d)(13)(A)(ii)(II) (providing flexibility to delegate and create regulations to administer the WOTC); *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183; *Work Opportunity Tax Credit Fact Sheet*, U.S. Dep't of Lab., (Jan. 2024), https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/WOTC-Fact-Sheet-2024.pdf [https://perma.cc/7DJJ-8FJK]; *Work Opportunity Tax Credit*, *supra* note 179.

within which this form must be submitted.[200] This timing limitation is particularly problematic because, unlike the other statutorily "protected groups," identification of an applicant as an "ex-felon" often happens late in the hiring process. Finally, only after an employer obtains the SWA certification can they claim the WOTC as a general business credit, and this process requires submission to the IRS of three distinct forms.[201]

An additional obstacle to WOTC utilization is that many employers are completely unaware of the program.[202] Moreover, even employers who know about the WOTC may be unaware of some recent improvements and therefore continue to perceive the process to be prohibitively onerous. Even for employers aware of the WOTC and open to engaging in the multi-step application process, the low value of the WOTC deters employer utilization. The WOTC for each "ex-felon" is equal to forty percent of annual wages, but only up to $6,000 of those wages.[203] This means that the maximum tax credit per qualified employee is $2,400. In addition, members of all targeted groups can only be claimed during their first year of employment, further limiting the tax credit's value.[204] The relatively low cap on the WOTC, coupled with the multi-step process necessary to obtain it, deters many employers from pursuing a WOTC.

There are at least three potentially effective ways to address these shortcomings. First, the process can be simplified with less bureaucratic oversight and more streamlined digital submission opportunities.[205] Secondly, federal agencies can publish and disseminate information to eligible applicants with records about the availability of tax credits for employers.[206] Further, the ETA and IRS can incorporate information about both WOTC's existence and a streamlined process to obtain the credit into their existing communications with employers and those who prepare corporate tax returns.[207] Efforts already underway to implement these types of changes illustrate that there is agency and legislative openness to such simplifications.[208]

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[200] *See Work Opportunity Tax Credit*, *supra* note 179 (providing deadlines such as twenty-eight days for determination).

[201] *Id.*; *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183.

[202] Hunt, *supra* note 193, at 7; Priday, *supra* note 192 (noting that "[t]here is little awareness of the [WOTC] program.").

[203] 26 U.S.C. §§ 51(a), (b)(3).

[204] *Id*. at § 51(b)(2); *see also id.* § 51(i)(3) (establishing an additional requirement of working at least 400 hours but allowing employers to claim workers who perform 120–400 hours of service at a reduced credit amount equal to twenty-five percent (versus forty percent) of wages). Unlike for "ex-felons" and members of other targeted groups, the WOTC for hiring certain veterans can be as high as $24,000 (versus $6,000) in wages. *Id.* at § 51(b)(3).

[205] *See* English, *supra* note 196, at 527 (suggesting improvements to the WOTC to increase utilization).

[206] *Improving the Work Opportunity Tax Credit (WOTC)*, Legal Action Ctr. (Dec. 2014), https://www.lac.org/assets/files/Improving_the_WOTC_LAC_one-pager.pdf [https://perma.cc/3H35-BB7A] (last visited Aug. 13, 2024).

[207] *See Work Opportunity Tax Credit*, *supra* note 179 (describing process for employers to communicate with SWAs regarding the WOTC and required forms for application process).

[208] English, *supra* note 196, at 527 (describing WOTC reform efforts in Illinois).

Finally, the size of the credit can and should be increased to make the process worthwhile for employers. There is precedent for such an increase since other targeted groups have significantly higher caps. For example, disabled veterans have a cap of $9,600 per hired applicant, rather than $6,000.[209] Parallel credits offered in at least eighteen states create another precedent.[210] These credits, often called "point of hire" or "piggyback" tax credits, mirror the WOTC by providing similar credits for state taxes, with some of these states actually offering greater incentives than the WOTC.[211] For example, Illinois offers employers up to a $1,500 credit for each ex-offender hired within *three* years of release.[212] Iowa allows employers to deduct sixty-five percent of wages paid to ex-offenders (up to $20,000 per employee) in the first twelve months, in addition to the WOTC.[213]

The remaining two areas where relatively minor regulatory tweaks would enhance the effectiveness of the WOTC relate to the overly restrictive definition of qualified employees and the unnecessarily rigid deadlines. First, the definition of a "qualified ex-felon" is extremely narrow.[214] An SWA will only certify an applicant as a member of the "ex-felon" targeted group if they are hired *within a year* of being *convicted* of a *felony* or being released from prison for a felony.[215] Many criminal record holders lack felony convictions[216] and yet many people who do have such convictions remain unemployed much longer than one year post-release.[217] Expanding the definition of a qualified "ex-felon" to include individuals with *misdemeanor* convictions and any

[209] *Fact Sheet on the Returning Heroes and Wounded Warrior Tax Credits,* Off. of the Press Sec'y, The White House, (Nov. 21, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/11/21/fact-sheet-returning-heroes-and-wounded-warrior-tax-credits [https://perma.cc/3PU7-MZEW] (explaining that The Wounded Warrior Tax Credit doubles the existing tax credit for long-term unemployed veterans with service-connected disabilities by maintaining the existing Work Opportunity Tax Credit for veterans with service-connected disabilities and establishing a new credit of forty percent of the first $24,000 of wages (up to $9,600)). *See also* 26 U.S.C. § 51(b)(3); Collins & Donovan, *supra* note 190, at 4.

[210] *State Hiring Incentives*, CTI (2025) https://ctillc.com/state-point-of-hire-credits/ [https://perma.cc/Y7TY-DLEX] (last visited Aug. 11, 2025).

[211] *See id*.

[212] Press Release, State of Ill., *Governor Quinn Signs Legislation to Give Ex-Offenders a Second Chance*, (Apr. 11, 2013), https://www.illinois.gov/news/release.html?releaseid=11407 [https://perma.cc/K5BX-JDSF].

[213] *Income Tax Benefit for Iowa Employers Who Hire Ex-Offenders*, State of Iowa, Dep't of Rev., https://revenue.iowa.gov/taxes/tax-guidance/individual-income-tax/employers-who-hire-ex-offenders [https://perma.cc/4AWN-BUSQ] (last visited Aug. 11, 2025).

[214] *See* Bozelko, *supra* note 193.

[215] *See* 26 U.S.C. § 51(d)(4) (defining an eligible ex-felon "as having a hiring date which is not more than 1 year after the last date on which such individual was so convicted or was released from prison").

[216] Becca Cadoff et al, John Jay College of Crim Just., Criminal Conviction Records in New York City (1980-2019) 20 (2021), https://datacollaborativeforjustice.org/wp-content/uploads/2021/04/2021_04_07_Conviction_Record_Report.pdf [https://perma.cc/AVG6-E3LP] (finding that approximately forty-four percent (328,712 of the 745,924 examined records) of those with criminal convictions have records that contain only misdemeanor convictions) .

[217] *See* Looney & Turner, *supra* note 188, at 13–14 (discussing large-scale post-incarceration unemployment among men); Leah Wang & Wanda Bertmanram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, Prison Pol'y Initiative (Feb. 8 2022), https://www.prisonpolicy.org/blog/2022/02/08/employment/ [https://perma.cc/8HWC-7VHV] (analyzing long-term unemployment for formerly incarcerated individuals

offender hired within *five years* of release, would significantly reduce this statutory limitation.[218]

The rigid deadline for submission of a request for a WOTC certification is also problematic for "qualified ex-felons." Current law requires that employer and applicant together complete the necessary form to request an SWA "qualified ex-felon" certification on or before the day an employment offer is made and then submit the form within twenty-eight days of the applicant's start date.[219] For the WOTC and Fair Chance laws to complement each other better, WOTC timing adjustments are needed.[220] The deadline for submitting the initial certification request should be extended to sixty days. Alternatively, the clock for tax credit certification applications based on hiring "ex-felons" should begin when an employer gains access to an applicant's criminal record, rather than on the employee's start date. This would be impactful, particularly in states where background checks can only be completed after an employer makes a job offer, because gaining access to records takes time.

The turnaround time for receiving an applicant's state criminal record is typically up to one week from the date that the request is submitted, or longer if it includes fingerprints.[221] With a twenty-eight-day WOTC submission deadline, this waiting time cuts off up to twenty-five percent of the twenty-eight-day window from conditional offer to the deadline for submitting a WOTC certification request. In addition, many employers now also request federal criminal background checks. FBI background checks use fingerprints, which increases the processing time. A survey conducted by the FBI Criminal Justice Information Service (CJIS) Division determined that the average time to process a civil fingerprint submission ranged from one day to forty-two days.[222] In the 2006 *Attorney General's Report on Criminal Background Checks*,

post-release, highlighting that thirty-three percent of people released from federal prison remain unemployed four years following their release).

[218] English, *supra* note 196, at 527; *see also* Bushway, *supra* note 44 (noting that "[t]he single most reliable factor in predicting future behavior is the amount of time that has passed since a person's last conviction; a person's likelihood of reoffending declines rapidly as more time passes without a conviction"); Avery, *supra* note 23, at 3 (explaining that one year after release, more than sixty percent of people who have been incarcerated remain unemployed, which highlights the need to lengthen the period of WOTC eligibility).

[219] *See Work Opportunity Tax Credit*, *supra* note 179 (explaining that Form 8850 must be signed under penalty of perjury and submitted to the state workforce agency within twenty-eight days of the job applicant's start date).

[220] *See* Bozelko, *supra* note 193 (suggesting that an application question should change to ask if the applicant is a member of any of the targeted groups that would make the employer eligible for a WOTC, rather than if they are specifically a felon, thereby preserving the confidentiality of the applicant's criminal background). While an interesting idea, one wonders how long an applicant could reasonably postpone revealing which targeted group they belong to.

[221] *See, e.g.*, *Individual and Family Fact Sheet: Pre-Employment Background Check*, State of Conn., Conn. Dev. Servs. (Oct. 2023), https://portal.ct.gov/dds/searchable-archive/selfadvocacyselfdetermination/self-determination-fact-sheets/fact-sheet---criminal-history-background-check?language=en_US [https://perma.cc/N3GF-U5PC] (stating that the "background check is usually completed in approximately five to ten business days. Fingerprint-based checks may take longer to complete than background checks that use only the person's name and date of birth.").

[222] U.S. Dep't of Just., Bureau of Just. Stat., The Attorney General's Report on Criminal History Background Checks 22, 30 (2006), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf [https://perma.cc/TB4E-Y6F9].

the Department of Justice (DOJ) noted that "long[] response times . . . [are] clearly unacceptable" and that "employers typically want screening results back within three business days."[223] Indeed, the DOJ states that a "point made by many submitting comments to the Department on this report is that criminal history checks of the FBI or state repositories that take a long time to return results [are] . . . useless to the employer and unfair to an applicant."[224] To complicate things further, the Report notes that, while approximately ninety percent of these criminal background checks reveal that the job applicant has no record, "additional[] time may be necessary for the screening when the search returns a record, such as where research is necessary to find missing dispositions."[225] Since it is the applicants who do have records that will allow an employer to apply for a WOTC, the longer processing time for these individuals' information can further cut into the short twenty-eight-day window.

In light of these variable processing times, modifying the deadlines would ensure adequate time after a conditional offer for an employer to learn the details about the applicant's criminal record, carefully assess whether to rescind a conditional offer, and to do so only if the record legitimately impacts the hiring decision. In this way, the employer would access the benefits of the tax credit after they have decided that all other factors do not impact their decision to hire the "ex-felon."

Finally, successful Fair Chance laws create a situation where many employers are unaware of a job applicant's criminal history until after making a job offer, or at least until after an interview. Some commentators view this as rendering the WOTC useless because employers cannot actively recruit people with records without being able to identify potential applicants who have criminal records until after the hiring process has begun or even ended.[226]

This critique misses two important facts. First, employers can still "recruit" by advertising job openings in targeted markets and by explicitly stating in those marketing efforts that they support the hiring of people with criminal records. Second, although active recruitment of members of targeted groups is one goal of the WOTC, the overall goal is to increase employment of members of these groups. Recruitment is just one way to accomplish this goal, and it may be more applicable to other targeted groups, for whom early disclosure of their membership in the relevant group carries less stigma than that of a criminal record. In addition, while the WOTC may somewhat limit active recruitment of applicants with records, this does not mean that it cannot contribute to the overall goal of improving their employment prospects. In this way, when coupled with Fair Chance hiring laws that delay employer access to applicants' criminal records until late in the hiring process, the WOTC can serve the important role of curtailing an inclination to rescind a conditional offer. Once an employer has chosen someone as their preferred applicant, their consideration of withdrawing an offer may be sufficiently diminished so that

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[223] *Id.* at 94.
[224] *Id.*
[225] *Id.*
[226] *E.g.*, English, *supra* note 196 at 526.

the tax credit would be enough to tip the scales towards keeping the offer in place. Finally, it is important to remember that many jurisdictions still do not have Fair Chance laws. The WOTC may be particularly useful in these places, since applicants will not have the protection of having their criminal records shielded from employers.

Measures to simplify the WOTC application process, increase employer awareness, raise its cap and duration, tweak its definition of "ex-felons," and modify its application deadlines for "ex-felons" are minimal, straightforward, and attainable—even during these polarized times. The first necessary legislative step is to extend the WOTC's expiration date, which is currently December 31, 2025.[227] Historically, there has been bipartisan support of the WOTC and other laws that aim to increase employment for people with records.[228] For example, bipartisan efforts have extended the WOTC expiration date more than a dozen times over twenty-five years.[229] In fact, many WOTC extensions have occurred in years when different parties controlled the Congress, Senate, and White House, and each extension has passed with bipartisan support.[230] In 2021, Ohio Republican Senator Rob Portman introduced a bill that would have made the WOTC permanent.[231] The bill never made it out of the Senate Finance Committee, but it had five co-sponsors, three of whom were Democrats.[232]

In the current political climate, with the House and Senate proposing and passing a number of tax bills that eliminate or curtail tax credits and the WOTC expiration date rapidly approaching, one might wonder if the WOTC has seen its final days. However, in February 2025, Pennsylvania Republican Representative Lloyd Smucker introduced the latest bill to extend the WOTC.[233] The bill's sixteen co-sponsors include seven Democrats

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[227] Wayne Rotger, *WOTC Renewal: What Employers Should Know During its Hiatus,* https://www.experian.com/blogs/employer-services/wotc-renewal-what-employers-should-know-ahead-2025-expiration/ [https://perma.cc/GEY8-RRW5] (Jan. 13, 2026) (explaining that previous hiatus periods for WOTC included a retroactive period).

[228] *See, e.g.*, Korzenik, *supra* note 16, at 201–02 (noting the rare display of bipartisanship in the passage of the First Step Act by a vote of eighty-eight to twelve by the Senate in 2018 and describing the Act as "the most comprehensive criminal justice reform legislation in decades"); *supra* Sections II.A.2, B.2 (discussing Trump signing into law congressional codification of an Obama administration policy for federal employers). Both the first and second Trump administrations have championed initiatives to improve employment of ex-felons. *See Fact Sheet, President Donald J. Trump Has Championed Reforms that Are Providing Hope for Forgotten Americans*, Trump White House Archives (Feb. 20, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-championed-reforms-providing-hope-forgotten-americans/ [https://perma.cc/NN59-BW27] (highlighting advocacy during first Trump Administration).

[229] Collins & Donovan, *supra* note 190 at 2 (listing the various laws by which Congress passed WOTC extensions).

[230] *Id.* (listing the years during which Congress passed WOTC extensions, which span across periods of shifting party control of the federal government).

[231] Work Opportunity Tax Credit & Jobs Act, S. 269, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/269 [https://perma.cc/5Z38-PA8C].

[232] *Id.* (list of cosponsors available at https://www.congress.gov/bill/117th-congress/senate-bill/269/cosponsors [https://perma.cc/33XU-XB7S]).

[233] Improve and Enhance the Work Opportunity Tax Credit Act (IEWOTC), H.R. 1177, 119th Cong. (2025).

and nine Republicans.[234] In addition to extending the WOTC deadline, the *Improve and Enhance the Work Opportunity Tax Credit Act* (IEWOTC Act) [235] contains provisions that would somewhat modernize and expand the WOTC program. The bill addresses the fact that the WOTC has not been updated in decades, causing its value to decline due to inflation. Among other things, the law would increase the current credit percentage from forty percent to fifty percent of qualified wages and add a second level of credit for employees who work 400 or more hours.[236] Other provisions address at least partial streamlining of the WOTC application process.[237]

The IEWOTC bill has yet to move beyond the House Ways and Means Committee, but this bipartisan support of not only an extension, but also some improvements to the current law, is hopeful. It may mean that the House will soon vote favorably on Representative Smucker's bill and send it to the Senate, where bipartisan support for prior WOTC extensions[238] bodes reasonably well for the bill's passage before the WOTC's year-end expiration. Alternatively, and perhaps more likely, Congress can pass a law in 2026 that extends the tax credit retroactively, as has routinely been done with prior extensions.[239]

2. Misconduct Insurance

The Federal Bonding Program (FBP),[240] created by the U.S. Department of Labor in 1966, provides fidelity bond coverage to employers hiring workers with "backgrounds that pose significant barriers to securing or retaining employment."[241] Employers receive the FBP bonds free-of-charge as an incentive to hire such applicants. The bonds are primarily issued to support the hiring of justice-involved individuals.[242] This group includes people who

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[234] *Id.* (list of cosponsors available at https://www.congress.gov/bill/119th-congress/house-bill/1177/cosponsors [https://perma.cc/HY9C-E7R4]).

[235] H.R. 1177, 119th Cong. (2025); S. 492, 119th Cong. (2025). These bills, originally introduced at the end of 2023, have been reintroduced in the current Congress by Representatives Steven Horsford (D-NV-4), Brian Fitzpatrick (R-PA-01), Mike Kelly (R-PA-16), Vern Buchanan (R-FL-16), and Tom Suozzi (D-NY-03). Senators Bill Cassidy (R-LA) and Maggie Hassan (D-NH) introduced a parallel bill in the Senate.

[236] *Id.*

[237] *See id.*

[238] See Collins & Donovan, *supra* note 190, at 2.

[239] *Id.* at 10, (stating that "The credit has lapsed a number of times before being retroactively reauthorized."); *see also id.* at 14, (noting that "the WOTC for non-veterans lapsed after December 31, 2011, and the WOTC for veterans lapsed after December 31, 2012," but that "The American Taxpayer Relief Act of 2012 . . . [retroactively] extended the WOTC for all eligible populations through December 31, 2013.").

[240] U.S. Dep't of Lab., *Training and Employment Notice* (Mar. 27, 2008) https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEN/2008/TEN37-07acc.pdf [https://perma.cc/6M4U-QAWA] (Stating that DOL created the program); *The Federal Bonding Program*, *supra* note 174; *see also* U.S. Dep't of Just., Analysis of the Federal Bonding Program, Volume 1 – Program History – Final Report (1975), https://www.ojp.gov/ncjrs/virtual-library/abstracts/analysis-federal-bonding-program-v-1-program-history-final-report [https://perma.cc/A53A-JA3T] (giving a summary of the history and objectives of the program).

[241] *The Federal Bonding Program*, *supra* note 174.

[242] Private bonding sources typically label ex-offenders as "not bondable." *Loss of Capacity to Be Bonded, in* Encyclopedia of Community Corrections (Shannon M. Barton-Bellessa, ed., 2012). While there is currently no free insurance or government sponsored insurance policy

have criminal records and are returning to the community.[243] The program has proven promising if underutilized: it has supported more than 56,500 job placements, although it must be noted not all of these placements were for justice-involved individuals.[244]

FBP bonds protect the employer against losses caused by any fraudulent or dishonest acts of the bonded employee.[245] Examples of such acts of employee dishonesty include theft, forgery, larceny, and embezzlement. In this way, the bonds are well suited to address the most prevalent employer concerns about hiring people with records.[246] Unfortunately, each FBP bond has a $5,000 limit, albeit with a zero-dollar deductible, and covers only the first six months of a selected individual's employment.[247] Enhancing this outdated law by increasing the amount and length of coverage could further significantly ease employer concerns.[248]

3. Federal Contract Preference

Federal contract preferences serve as government incentives to influence the behavior of contractors and achieve specific socioeconomic goals. These preferences set aside a certain number of federally funded projects and/or give priority to project bids from designated types of private contractors. Current federal contract preferences include set-asides for small businesses,[249] service-disabled veterans,[250] and women-owned businesses.[251] There is currently no

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for negligent hiring lawsuits, the government sometimes provides reimbursement for professional liability insurance for certain public agencies, like law enforcement or some other federal agencies. *See, e.g.*, Gov't Emp. Benefit Ass'n, *Professional Liability Insurance*, https://www.geba.com/professional-liability-insurance/#section_3 [https://perma.cc/P3F7-LVAD] (last visited on Sep. 21, 2025). Such a model could be expanded to include private employers.

[243] *Id.*

[244] *The Federal Bonding Program*, *supra* note 174.

[245] *Loss of Capacity to Be Bonded*, *supra* note 242 (stating that "[i]f an employee covered under the Federal Bonding Program steals from an employer, the employer will be reimbursed to the extent of the loss, limited by the bond amount, without having to pay any deductible.").

[246] *See* discussion of state statutes that create exceptions for crimes of theft and dishonesty *infra,* Section II.A.1.

[247] *See The Federal Bonding Program*, *supra* note 174.

[248] As of September 2025, the U.S. Dollar Inflation Calculator from the Bureau of Labor Statistics shows that $5,000 from 1966 is equivalent to more than $50,000. This demonstrates that the maximum bond amount has lost a substantial amount of its value over the nearly 60 years since the U.S. Department of Labor created the Federal Bonding Program. *U.S. Bureau of Labor Statistics CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/N57C-TPP6] (last visited on Dec. 30, 2025).

[249] *See e.g.* Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988); Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958); Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494 (1984) and the Small Business Administration HUBZone program, which creates special preferences for small businesses in historically underutilized business zones. Cong. Rsch. Serv., R41268, *Small Business Administration Hubzone Program* 1 (2025) https://www.congress.gov/crs-product/R41268 [https://perma.cc/P9KJ-YRN5].

[250] Veterans Benefits Act of 2003, Pub. L. 108-183, § 308, 117 Stat. 2651, 2662 (2003).

[251] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No.113-291 § 825, 128 Stat. 3292, 3437 (2014); U.S. Small Business Admin., *Women-Owned Small Business Federal Contract Program*, (Nov. 18, 2025), https://www.

policy or law that grants preference in gaining federal contracts for those contractors who employ people with criminal records.

As with the WOTC tax credit, adding a law that would give contract preferences or set-asides to such businesses would add to the economic incentives that promote the hiring of people with records. This type of law may have the potential to impact more applicants than laws banning the box for government jobs, given that federal contractors have more than double the number of employees than the federal government.[252] As discussed in sections IV.B and C., *infra*, creating a set of complimentary legal efforts to encourage employment of those with criminal records offers the most promising approach.

B. *Working Against Stigma: Education and Collaboration*

Outside of the legislative arena, reformers should strive to educate businesses and other institutions on the benefits of hiring justice-involved individuals. The Society for Human Resource Management and the Charles Koch Institute conducted surveys on hiring and working with people with records in 2018 and again in 2021.[253] The later survey found greater openness among business leaders and human resource (HR) professionals towards hiring employees with records. For example, "53% of HR professionals said they would hire individuals with criminal records (up from 37% in 2018)" and "38% of business leaders agreed (up from 33% in 2018)."[254] This trend seems to indicate a move away from the stigma of criminal conviction and towards a more optimistic view that rehabilitation is possible. As some researchers have observed, there has been greater "political support for second chances" in recent decades, as well as an "emergence of more nuanced and even less punitive attitudes."[255]

At the same time, the SHRM and Koch study also found that awareness about Ban the Box and Fair Chance laws among business leaders was still very low. While seventy-eight percent of HR professionals were familiar with the term by 2021 (up from sixty-eight percent in 2018), only thirteen percent of business leaders and eight percent of individuals who participated in the survey knew about it. Increased awareness among business leaders about the purpose and scope of Ban the Box and Fair Chance laws would further contribute to a shift in narrative about applicants with records, especially where the majority of managers and HR professionals who work with such

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sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contract-program [https://perma.cc/AD9T-JDKZ].

[252] *See* Kamarck, *supra* note 106.

[253] *See* Soc'y for Human Res. Mgmt. & Charles Koch Inst., 2021 Getting Talent Back to Work 2 (May 2021), https://www.shrm.org/content/dam/en/shrm/foundation/getting-talent-back-to-work-report.pdf [https://perma.cc/XPP6-DDUP].

[254] *Id*. at 2.

[255] Lageson & Corda, *supra* note 167, at 37 (quoting Michael M. O'Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 Fed. Sent'g. Rep. 47, 47 (2016)).

employees believe that workers with records perform as well or better than workers without records.[256]

Business leaders are making the case for changing the narrative about employers with records.[257] The existence of initiatives like the Second Chance Business Coalition indicates a shift in attitudes such that the advocacy of fair chance hiring is not a controversial moral stance (a business lobbying group that founded the coalition–Business Roundtable–is unlikely to take a position that does not reflect member consensus). The coalition consists of fifty large companies and is chaired by Jamie Dimon, Chairman and CEO of JPMorgan Chase, and Craig Arnold, former chairman & CEO of Eaton.[258] According to a recent report by Eaton, for example, "[m]ore than 11 percent of Eaton's 35,000 new hires from 2019 to 2024 had conviction histories, including over 1,000 second chance applicants hired in 2024 alone."[259] The report indicates that Eaton also requires staffing agencies and other companies in its supply chain to adopt second chance hiring policies.[260] In order to successfully implement second chance hiring policies, businesses partner with re-entry organizations working in the community to help provide services to formerly incarcerated individuals in the form of education, job training, and others.[261]

Applicants with records benefit from greater transparency on the part of employers. Clearly established and stated policies enable them "to focus their job search on employers willing to hire them."[262] For example, in a 2023 report, the EEOC suggested that workers with records are not sufficiently informed about their eligibility to apply for jobs with the federal government. According to the agency, "[i]t is possible that people with incarceration records erroneously believe they are barred from federal employment and self-select

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[256] Soc'y for Human Res. Mgmt. & Charles Koch Inst., *supra* note 253, at 2.

[257] *See* The Business Roundtable, *ICYMI: Business Roundtable Co-Hosts Event at the Wharton School to Advance Second Chance Employment* (Apr. 18, 2024), https://www.businessroundtable.org/icymi-business-roundtable-co-hosts-event-at-the-wharton-school-to-advance-second-chance-employment [https://perma.cc/ZV9S-XHTD] (reporting on roundtable event discussing benefits of hiring workers with records for businesses); Business Roundtable, *The Business Case for Second Chance Employment,* (Apr. 4, 2024), https://vimeo.com/928040533/d762430bd7 [https://perma.cc/V97U-WZHQ] (recording of the panel discussion).

[258] Second Chance Bus. Coal., *About SCBC*, https://secondchancebusinesscoalition.org/about [https://perma.cc/L2CS-2YRM] (last visited Mar. 21, 2026).

[259] Second Chance Bus. Coal., *Leading by Example, Eaton's Commitment to Second Chance Employment* 1 (June 2025), https://brt-second-chance-production.s3.amazonaws.com/EatonCaseStudy-Final-June2025.pdf [https://perma.cc/L66Y-BSJH]. *See also, e.g., Reentry Reemployment Unit - Staff Resources*, MassWorkforce, https://www.mass.gov/info-details/reentry-reemployment-unit-staff-resources [https://perma.cc/QL6K-KD3U] (last visited Sep. 2, 2025) (providing example of how state governments devote resources to connecting employers and applicants with records). In Massachusetts, the Reentry and Reemployment unit at the Executive Office of Labor and Workforce Development's Department of Career Services works with employers to educate them about the benefits of hiring workers with records and to provide support services. *Id*.

[260] Second Chance Bus. Coal., *supra* note 259, at 4.

[261] *See, e.g.*, Korzenik, *supra* note 16, at 130, 149 (discussing how partnerships with nonprofit organizations and state agencies working with reintegration can help create successful second chance hiring programs for businesses).

[262] Jennifer Stocker, *Ban the Black Box: Criminal Background Screening and the Information-Withholding Problem*, 96 Wash. U.L. Rev. 859, 879-80 (2019).

out of the applicant pool."[263] These misconceptions on the part of potential employees are also prevalent in the private labor market. Especially as the attitudes of employers begin to shift (prompted in part by Ban the Box and Fair Chance laws), better information for applicants about employers that will hire and support them would be very beneficial.

C. Implementation Strategies by Employers

While there is some evidence of greater openness on the part of employers to hiring workers with records, it is unclear whether hiring practices have actually shifted significantly. One study of compliance with Ban the Box laws in Minnesota, published in 2022, found that one in five employers were noncompliant with the law and still asked about criminal histories on job applications.[264] The researchers also found that many employers "were either unaware of BTB or informally learned about the policy from other workplaces."[265] Even among those employers who removed the box from applications as the law required, "many continued to use criminal background checks and put stigmatizing criminal background check statements on their applications."[266] In other words, employers discouraged those with records from applying by signaling on the application that they will conduct background checks later in the hiring process. At the same time, the study did not find sufficient enforcement and sanctions for noncompliance. The authors concluded that governments seeking to effect change of hiring practices through BTB laws should invest in resources in notifying businesses about the law and in identifying and sanctioning noncompliance.[267] As discussed in more detail in Section IV.D, *infra*, neither the goal nor the expressive function of BTB and Fair Chance laws can be achieved without appropriate enforcement.

Researchers examined the impact of California's Fair Chance Act of 2018 (CFCA) on hiring practices involving applicants with records in a study published in 2024.[268] This study is based on data collected in 2021, so we might expect that the attitudes and practices of employers will continue to evolve, especially considering the fact that the regulations implementing the law were only finalized in 2020 and that the pandemic may have affected the labor market during that time.[269] California's law is one of the strongest

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[263] Erich Wagner, EEOC*: 'Ban the Box' Policies Are Effective at Federal Agencies, But the Government Needs to Raise Awareness*, Government Executive (Sep. 12, 2023), https://www.govexec.com/workforce/2023/09/eeoc-ban-box-policies-are-effective-federal-agencies-government-needs-raise-awareness/390220/ [https://perma.cc/YP88-8PYW] (quoting U.S. Equal Employment Opportunity Comm'n (EEOC), Rsch., Evaluation, & Applied Data Div., Off. of Fed. Operations, Second Chances Part I: Federal Employment for Workers With Past Arrests or Convictions ii (2023), https://www.eeoc.gov/sites/default/files/2023-09/Second%20Chances%20Part%20I%20Report_final_508.pdf [https://perma.cc/G62C-KVDB]).

[264] Schneider, et al., *supra* note 85, at 763.

[265] *Id.* at 774.

[266] *Id.* at 778.

[267] *Id.*

[268] Oselin et al., *supra* note 126 at 363.

[269] *See* Avery & Lu, *supra* note 6, at 9.

in the U.S. because it applies to both public and private employers, delays background checks until after a conditional offer, and requires employers to consider the particulars of the timing and nature of the conviction, as well as its relevance to the job.[270] CFCA also requires notice of the intent to rescind the offer due to criminal history, an opportunity for appeal, and a final written notice rescinding the offer.[271] The study resulted in three main findings: (1) employers continue to be reluctant to hire workers with records, especially outside of "unskilled, labor-heavy, or non-customer service-facing roles,"[272] (2) nearly eighty percent of employers consider criminal histories through formal or informal inquiries prior to the conditional offer in violation of the CFCA, and (3) the appeals process has a low success rate.[273] These conclusions are pessimistic, but—as the study authors recognize—it is possible that a stronger positive impact of the law will become apparent with more time.

In addition to the educational efforts and community partnerships highlighted in Section IV.B above, more effective implementation requires strong leadership buy-in,[274] transparency about hiring practices,[275] education for HR staff to reduce bias and implement support services.[276] Other measures that can improve second chance hiring include automatic expungement of certain categories of records (such as the one implemented by Clean Slate laws discussed in Section II.B, *supra*, for example), economic incentives (discussed in Section IV.A, *supra*), restrictions on the availability of records, stronger regulations of private background check companies to reduce reliance on faulty records, and increased state and local funding for re-entry services.[277]

D. *Improved Enforcement of Fair Chance Laws by State and Federal Agencies*

Fair chance laws will be more effective if more employers comply with them in meaningful ways. Compliance, in turn, depends on the existence of strong enforcement mechanisms.[278] There are several obstacles in the path of better enforcement. As discussed in section II.B.1., *supra*, there are often insufficient resources at the government level. And, as discussed in Section II.A.1. *supra*, individual plaintiffs with records who are denied employment in violation of the law also lack resources to bring lawsuits. The EEOC and advocacy

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[270] *Id.*

[271] *Id.*

[272] Oselin et al., *supra* note 126, at 385.

[273] *Id.*

[274] *See generally* Avery & Lu, *supra* note 6, at 14–15 (citing Kentucky Governor Bevin highlighting the importance of leading by example at the state government level with hopes that it will push private business leadership to buy-in).

[275] *See, e.g.*, Second Chance Bus. Coal., *supra* note 259, at 3 (noting that "Eaton launched a webpage dedicated to describing its second chance employment program.").

[276] *Id.*; Korzenik, *supra* note 16, at 161 (discussing the successful use of a "change coach" by JBM, a company that implemented a second chance hiring program).

[277] Kleinman & Kajeepeta, *supra* note 5, at 13–14.

[278] *See, e.g.*, Schneider, et al., *supra* note 85, at 778 (noting that "contexts in which legal changes are paired with few to no enforcement mechanisms . . . result in organizational noncompliance and continued discriminatory behavior.").

organizations sometimes step in, but they are also low on resources and not always successful.

Litigation strategy for challenging hiring practices that screen out employees with records are often grounded in disparate impact theories under Title VII of the Civil Rights Act of 1964, whereby plaintiffs argue that "an employer's emphasis on criminal background checks in hiring processes can have [a disparate impact] on minorities."[279] However, "the record suggests a low success rate for these types of challenges in court."[280] Moreover, the EEOC has stopped disparate impact enforcement under the second Trump administration.[281] For example, the agency recently dismissed its enforcement action against Sheetz, a large convenience store chain. The EEOC first sued Sheetz in June 2024, arguing that the company's practice of screening criminal records had a discriminatory impact on Black, Native American, and other minority applicants.[282] In moving to dismiss its own lawsuit in June 2025, the EEOC cited president Trump's Executive Order No. 14281, issued on April 23, 2025, which directed "all agencies [to] deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability."[283] The executive order directs the Attorney General and the EEOC chair to assess all ongoing litigation under the "theory of disparate-impact liability, and [to] take appropriate action with respect to such matters consistent with the policy of [the] order."[284] "Appropriate action" in this context means dismissal of all disparate impact enforcement, so the federal government is not likely to contribute to the enforcement of Fair Chance laws, at least until a change in the administration.

This development on the federal level makes it all the more important for state governments to step up their own enforcement of Fair Chance laws, although that can be complicated in cases where employers operate across state lines.[285] In addition, state Fair Chance laws do not always include clear enforcement mechanisms.[286] States with robust Fair Chance laws that have clear enforcement and sanction provisions have been successful in going after companies for violations. California's Civil Rights Department (CRD) sued

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[279] Gaines, *supra* note 66, at 539.

[280] *Id.*

[281] Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025) ("It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.").

[282] Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Sues Sheetz, Inc. for Racially Discriminatory Hiring Practice* (Apr. 18, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice [https://perma.cc/9F7T-G5W5].

[283] Pl.'s Mot. to Dismiss, U.S. Equal Emp. Opportunity Comm'n v. Sheetz, Inc., No. 3:24-cv-00231 (W.D. Pa. June 6, 2025) (citing Exec. Order No. 14281, § 4, 90 Fed. Reg. at 17538).

[284] Exec. Order No. 14281, § 6, 90 Fed. Reg. at 17538.

[285] *See* Gaines, *supra* note 66, at 551 (noting that "employers operating in multiple states or jurisdictions with differing fair chance laws may have difficulty complying with the various regulations.").

[286] *Id.* at 552 (citing Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize A New Form Of Employment Discrimination*, 83 Fordham L. Rev. 2801, 2826 (2015)) ("[a]t least seven state fair chance laws omit information about what agency or mechanism exists to enforce the new legislation).

Ralphs, a grocery company in 2023 based on allegations that the employer "illegally denied jobs to hundreds of people based on their criminal history."[287] The case against Ralphs was the first lawsuit of its kind based on CFCA violation, and the CRD has ramped up enforcement since. In December 2024, the agency "announced individual settlements with Amazon, Ikea, Kohl's, the Los Angeles Dodgers, The Citizen Hotel, and MPIJet over alleged violations" of the law.[288] In April 2025, the CRD announced a settlement with a trucking and logistic company based in Iowa, which included a $100,000 payment to the applicant for the violation, as well as several remedy measures such as fair chance training implementation, review of company policies, and reports to CRD of any policy changes within forty-five days.[289]

Advocates are also fighting in the courts on behalf of individual plaintiffs. For example, the Third Circuit recently reversed the District Court's dismissal of a complaint filed by an applicant with a criminal record in *Phath v. Central Transport*.[290] At issue in this case was whether the Pennsylvania Fair Chance law protects employees from hiring discrimination if they voluntarily self-disclose their criminal history.[291] Rodney Phath, the plaintiff-appellant, applied to work as a truck driver for Central Transport. He disclosed his fifteen-year-old criminal conviction to his prospective employer after the company told him that they were going to run a background check as part of the hiring process.[292] Central Transport rejected Phath based on this criminal record despite the fact that the offense occurred a long time ago and was not relevant to the job.[293]

The Commonwealth's Criminal History Record Information Act (CHRIA) prohibits employers in Pennsylvania from considering a job applicant's non-job-related criminal history in making a hiring decision.[294] The District Court interpreted CHRIA very narrowly to prohibit employers

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[287] Suhauna Hussain, *Ralphs Illegally Denied Jobs to Formerly Incarcerated people, Civil Rights Lawsuit Alleges*, L.A. Times (Dec. 21, 2023), https://www.latimes.com/business/story/2023-12-21/ralphs-illegally-denied-jobs-to-formerly-incarcerated-people-civil-rights-lawsuit-alleges [https://perma.cc/UN3J-5XES]; Cal. C.R. Dep't v. Ralphs Grocery Co., 2025 Cal. Super. LEXIS 3081 (Cal. Super. Ct. Feb. 6, 2025). In January 2025, the California Superior Court found that California's Fair Chance statute requires at least one named aggravated party in civil enforcement actions to seek individual damages. *See id.* at *18 (granting leave to allow the Civil Rights Department to add names of aggrieved parties and schedule pre-trial conference).

[288] Press Release, Cal. C.R. Dep't, *California Settles with Big Box Retailers, Amazon, and Others Over Alleged Violations of State Fair Chance Act* (Dec. 3, 2024), https://calcivilrights.ca.gov/2024/12/03/california-settles-with-big-box-retailers-amazon-and-others-over-alleged-violations-of-state-fair-chance-act/ [https://perma.cc/7E3J-Y4BB].

[289] *Fair Chance Act Violation Settled by California Civil Rights Department*, JDP (Apr. 16, 2025), https://www.jdp.com/blog/fair-chance-act-violation-settled-by-california-civil-rights-department/ [https://perma.cc/9KAE-GHLC] (citing announcement and settlement); *see also* Press Release, Cal. C.R. Dep't, *Civil Rights Department Secures Fair Chance Act Settlement with Iowa-Based Trucking Company* (Apr. 3, 2025), https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2025/04/2025.04.03-Trucking-FCA-Settlement-Release.pdf [https://perma.cc/PY78-TGU6] (detailing the settlement agreement).

[290] 165 F. 4th 780 (3d Cir. 2026).

[291] *Id.* at 782.

[292] Phath v. Cent. Transp. LLC, No. CV 24-0681, 2024 WL 5204175, at *1 (E.D. Pa. Dec. 23, 2024).

[293] *See id.*

[294] *See* 18 Pa. Cons. Stat. § 9125 (1982).

from using old and irrelevant convictions to deny jobs to applicants only based on official criminal information file requests and dismissed the case.[295] According to the court, "an employer's use of information regarding an individual's criminal history that was volunteered by that individual while applying for a job is not prohibited by CHRIA."[296] The Third Circuit disagreed, rejecting this formalist interpretation and holding that "even though the company learned of the conviction from [the applicant], not from a state agency's files, the law still applies."[297] If employers elicit self-disclosure by announcing that they will conduct background checks as part of hiring, they can circumvent the law's restrictions on discrimination against applicants with records. This interpretation of the law would discourage transparency, which is so central to successful second chance hiring.[298] The Third Circuit's refusal to limit Pennsylvania's Fair Chance law in this way ensures that important protections for job seekers with records remain in place.

In sum, strong enforcement of Fair Chance laws is a key element for their successful implementation. If employers face meaningful sanctions as a result of non-compliance, they will be less likely to ignore legal prohibitions against discrimination for remote or irrelevant criminal histories. With better implementation, Fair Chance laws are likely to yield more promising results for both applicants and organizations searching for talented hires.

Conclusion

The goal of Fair Chance laws is to improve employment prospects for people with criminal records. These policies aim to minimize discrimination in hiring by encouraging employers to choose job applicants on the basis of skill and merit and not based on unfounded assumptions about the influence of past offenses on future behavior. Fair Chance laws are necessary because a criminal record often presents a barrier to employment, even long after a person has served their sentence. And since nearly thirty percent of the adult population in the United States has some criminal record, the difficulty in finding a job after involvement with the criminal justice system affects a very significant number of people. It is well established that high unemployment rates among those with criminal records increase the likelihood of re-offense, thus making neighborhoods less safe and raising taxpayer costs for prisons and unemployment support. At the same time, government organizations, non-profit and for-profit businesses often struggle to find qualified employees. Better access to employment for people with records provides a source of dignity and economic stability for them, while expanding the talent pool for hiring.

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[295] *Phath,* 2024 WL 5204175, at *3.

[296] *Id.*

[297] *Phath*, 165 F. 4th at 782.

[298] *See generally,* Philip Goodman, *Work Your Story: Selective Voluntary Disclosure, Stigma Management, and Narratives of Seeking Employment After Prison*, 45 L. & Soc. Inquiry 1113 (2020) (discussing the dangers of voluntary self-disclosure of a criminal history).

Some researchers have argued that Ban the Box and Fair Chance laws are ineffective—or worse, harmful—because if employers don't want to hire workers with records, they will find a way to reject them even if the law delays background checks or requires a reasonable connection between the job and the conviction to justify rejecting an ex-offender. These advocates argue that our resources are better spent on other approaches such as crime prevention, job training in prisons, and educating employers about the benefits of hiring ex-offenders. As one critic of the BTB strategy puts it, "policy-makers cannot simply wish away employers' concerns about hiring those with criminal records."[299] While recognizing the validity of these concerns and the importance of collecting effectiveness data, we believe that these are not either/or choices and that Fair Chance laws can in fact succeed in promoting their goals. These laws should not be evaluated in isolation but rather utilized as one important tool for combating employment discrimination against people with records. Limiting employers' use of background checks in hiring can work well together with other strategies including training for employees, education for business leaders and HR professionals, greater focus on preventing criminal behavior before it occurs, and developing and improving diversion programs for low-level first-time offenders. In addition, automatic expungement or Clean Slate laws have emerged recently as a promising counterpart to BTB and Fair Chance hiring laws.

Discriminatory behaviors towards job applicants with records are often based on unproven or false assumptions about their risk of re-offense or their ability to perform well at work.[300] Fair Chance laws are crucial for bypassing prejudicial attitudes and requiring employers to act in accordance with fair and reasonable hiring procedures instead. These laws also play a role in transforming perceptions of justice-involved individuals by focusing on their potential to lead productive lives and contribute positively to their communities. Just as Fair Chance laws may have limited impact when standing alone, this is likely also true about Clean Slate laws. Criminal record data might continue to exist "well beyond government-held databases."[301] Policies that prevent employers from relying on such "incomplete and 'dirty data'" can help promote equitable hiring while reformers work to improve data privacy laws as well.[302] Federal, state, and local governments should implement or refine Fair Chance laws by creating stronger economic incentives for second chance hiring, investing in educational programs and community collaborations for employers to support better utilization, and pursuing more robust enforcement strategies to reduce non-compliance. In doing so, they can strengthen communities and businesses alike, while promoting dignity and rehabilitation for individuals.

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[299] Doleac & Hansen, *supra* note 130, at 362.

[300] *See, e.g.*, Kleinman & Kajeepeta, *supra* note 5, at 13 ("Because evidence clearly demonstrates that recidivism risk declines rapidly as time since a conviction passes, background checks should at least be time-limited to a narrowly defined look-back period"); *Research Supports Fair Chance Policies*, *supra* note 1, at 5 (noting that "workers with records stay in their jobs longer and earn promotions faster than other workers.").

[301] Lageson & Corda, *supra* note 167, at 46.

[302] *Id.* at 43.

Harmless Errors Are Harming Our Courts' Integrity: Empirical Lessons from Wrongful Convictions and the Case for Reform

Michael C. Wetmore[*]

Abstract

Harmless error review has long been defended as a necessary tool for preserving finality and avoiding needless retrials. Yet, its modern application cannot be understood without returning to the doctrine's origins.

This article traces the development of harmless error from its English common-law beginnings, through the technical reversals of early American appellate practice, to the Supreme Court's layered constitutional framework. It chronicles how the history steadily shifts in focus: from an inquiry concerned with the effect of an error on a verdict to one increasingly centered on judicial assessments of the defendant's guilt. At the same time, empirical lessons from exonerations demonstrate how this modern, evidence-weighing approach can obscure the very types of errors more associated with wrongful convictions such as eyewitness misidentifications, false confessions, and unreliable forensic evidence.

By aligning the history with the data, this article shows that contemporary harmless error review has drifted from its original rationale and now too often operates at cross-purposes with accuracy. Proposals for realigning harmless error with reliable, thorough review, targeted remand hearings, and procedural reforms capable of accounting for how errors shape the evidentiary landscape, illustrate that appellate courts can more faithfully serve their intended role as safeguards against injustice.

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* Assistant Professor of Law, Albany Law School. J.D., Albany Law School. I thank my research assistants, Madison Card and Aleksandra Smirnova, for their help organizing and verifying sources for this article. I also want to express my gratitude to Associate Dean Raymond Brescia for his unrelenting guidance and support.

Introduction

"A wretched soul, bruised with adversity,
We bid be quiet when we hear it cry;
But were we burdened with light weight of pain,
As much or more we should ourselves complain."

—William Shakespeare[1]

Any person accused of a crime is entitled to a fair trial, even if it is not a perfect one.[2] Any person convicted of a crime may appeal their conviction as a matter of right, and has a right to effective assistance of counsel in that appeal.[3] However, direct appeals rarely address claims of actual innocence.[4] Instead, courts tend to focus on errors during the trial, assessing those errors and their "harmlessness" based solely on the trial record.[5] This means that the likelihood of a reversal on direct appeal typically has no real connection to the likelihood of wrongful conviction.[6] While the current appeals system encourages adherence to trial procedures, it fails to serve as a safeguard against convicting the innocent.[7] The irony lies in the fact that the system is designed to sidestep factual questions, so appellate review standards obscure the issue of actual innocence.[8] Convincing an appellate court to seriously consider claims of factual error—such as a witness lying or making a mistake—is exceedingly

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[1] The Comedy of Errors, act 2, sc. 1, 34–37 (Paul Negri & Susan L. Rattiner eds., Dover Publications, Inc 2002).

[2] Lutwak v. United States, 344 U.S. 604, 619 (1953).

[3] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18–20 (1956) (holding that a state must provide indigent defendants the basic tools for appeal as of right); Douglas v. California, 372 U.S. 353, 357–58 (1963) (recognizing the right to counsel on first appeal as of right); Evitts v. Lucey, 469 U.S. 387, 396–97 (1985) (extending that right to the effective assistance of counsel).

[4] Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 Tex. Wesleyan L. Rev. 391, 391–92 (2011).

[5] *See, e.g.,* Chapman v. California, 386 U.S. 18, 24 (1967) (requiring courts to declare a belief that constitutional error was harmless beyond a reasonable, based on the trial record); Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (holding that habeas courts ask whether trial error had a "substantial and injurious effect or influence" on the jury's verdict); Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2123–25 (2018) (explaining that harmless error review assesses whether trial errors affected the verdict, relying solely on the trial record).

[6] Anderson, *supra* note 4, at 392.

[7] *Id.*

[8] *See* Herrera v. Collins, 506 U.S. 390, 400–01 (1993).

difficult, if not impossible.[9] In Professor Brandon Garrett's study of 200 exonerees whose innocence was proven through post-conviction DNA testing, very few had raised claims of factual innocence during their appeals, and fewer still found success with those claims.[10] Instead, many raised evidentiary and procedural challenges, which were subjected to harmless error review.

Some scholars have proposed reforms that would make appeals more relevant to questions of innocence.[11] This article concentrates on one potential reform to appellate review that could improve the chances of relief for innocent defendants: harmless error analysis. When courts evaluate whether an error was harmless, they come closest to considering questions of innocence on appeal. Although the original focus of harmless error review was on whether an error impacted the verdict, over time, courts have shifted to evaluating whether the defendant was actually guilty—an evolution from what some describe as an "effect-on-the-verdict" approach to a "guilt-based" approach.[12] Yet, even when reviewing the strength of the evidence under various harmless error standards, appellate courts do not adequately factor in what we've learned about wrongful convictions through DNA exonerations.

According to the Innocence Project, the leading cause of wrongful convictions is eyewitness misidentification, followed by unvalidated or improper forensic science, false confessions, and incentivized informants.[13] Unfortunately, current harmless error standards often run contrary to these findings, both in the thresholds required for determining harmlessness and in how courts apply those standards.

I. Wrongful Convictions

These individual stories are not isolated anomalies. Each illustrates a broader pattern revealed by exonerations nationwide, and each case experienced harmless error review.

This section delves into how exonerees ultimately secured DNA tests that led to their exonerations, shedding light on how these errors in justice were eventually corrected. DNA exonerations were selected as empirical data so as not to cloud the analysis with tangential disputes over the exonerees' guilt. These findings underscore that the exonerees represent only a fraction

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[9] Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 99–100 (2008). Garrett updated his findings through 2010 in his book. *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (Harvard Univ. Press 2011).

[10] *Id.*

[11] *See, e.g.,* Anderson, *supra* note 4, at 392; David S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in state Courts*, 47 Ariz. L. Rev. 655, 660–61 (2005); Keith A. Findley, *Defining Innocence*, 74 Alb. L. Rev. 1157, 1165–66 (2011); Nancy J. King & Joseph L. Hoffman, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* (Univ. of Chi. Press 2011).

[12] Anderson, *supra* note 4, at 392; Epps, *supra* note 5, at 2223–25.

[13] The Innocence Project, *Contributing Factors to Wrongful Convictions*, https://innocenceproject.org/the-issues/ [https://perma.cc/9Q92-GHR9] (last visited Aug. 28, 2025) (identifying eyewitness misidentification, misapplication of forensic science, false confessions, unreliable informants, and official misconduct as leading causes of wrongful convictions).

of wrongfully convicted individuals, as we are aware only of cases where DNA testing was pursued and successfully obtained. Even when DNA technology became available, legal and procedural hurdles were put in place, making it difficult to access testing, with courts often refusing to grant relief even when the results proved innocence. These cases illustrate the continued reluctance of the criminal justice system to rectify wrongful convictions.

A. DNA Exonerations as Empirical Evidence

First, DNA evidence is simply not available or useful in the majority of criminal cases. For DNA testing to demonstrate identity, there must be biological material left at the crime scene by the perpetrator, and in most cases, no such evidence exists.[14] Further, DNA testing can only be performed if such evidence was properly preserved after trial. Despite its potential to exonerate, DNA evidence is frequently not maintained.[15] Law enforcement typically only collects biological evidence in cases involving murder or rape, where it is deemed particularly relevant.[16] Furthermore, police and prosecutors have little incentive to ensure proper evidence preservation. One example: in 1989, the Supreme Court ruled in Larry Youngblood's case that he could not obtain relief because he could not show that the police had acted in bad faith when they mishandled and improperly stored biological evidence, resulting in its degradation.[17] By 2000, DNA technology had advanced enough to test this degraded evidence, which not only exonerated Youngblood but also matched another individual through a "hit."[18] Seventeen exonerees raised claims concerning the destruction of exculpatory evidence during their appeals, but none succeeded.[19] However, like Youngblood, they were later able to test degraded evidence or find other material suitable for DNA testing.

Second, even when relevant DNA evidence exists, prisoners may not always gain access to testing. The criminal justice system has long been

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[14] *See* Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of 'Accuracy' in Criminal Justice*, 60 N.Y.U. Ann. Surv. Am. L. 655, 658–59 (2005); Kayleigh E. McGlynn, *Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants' Access to DNA Database Searches to Prove Innocence*, 60 B.C. L. Rev. 709, 718 n.58 (2019) (citing Garrett, Convicting the Innocent, *supra* note 9); Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations 1989–2014: Review of Data and Findings from the First 25 Years*, 79 Alb. L. Rev. 717, 722 (2016).

[15] Richard A. Rosen, *Innocence and Death*, 82 N.C.L. Rev. 61, 73 (2003) ("[F]or every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands" without any such physical evidence.). In some cases, DNA evidence has not only been used to exonerate, but also to identify the true perpetrators. *See* Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1267, n.133 (2005).

[16] *See* McGlynn, *supra* note 14 at 718, n.58 (citing Garrett, Convicting the Innocent, *supra* note 9, at 12) (explaining that DNA is rarely present at most crime scenes but commonly present in rape cases); *id.* at 263 (observing that DNA testing is typically performed in rape cases); *id.* at 271 (explaining why DNA testing is generally unavailable in robbery cases).

[17] Arizona v. Youngblood, 488 U.S. 51, 57–59 (1988).

[18] *See Larry Youngblood*, The Innocence Project, https://innocenceproject.org/cases/larry-youngblood/ [https://perma.cc/8E86-5EEG] (last visited Aug. 4, 2024).

[19] Garrett, *Judging Innocence*, *supra* note 9, at 117.

resistant to postconviction claims of innocence, particularly requests for DNA testing.[20] Sixteen exonerees, for example, were initially denied motions for DNA testing (some multiple times), with courts often citing evidence of guilt as justification.[21] In one such case, involving Bruce Godschalk, the court rejected DNA testing because his conviction rested largely on his own confession, which contained details of crimes that were not publicly known.[22] While this practice is slowly changing, it is not due to a widespread reevaluation of when postconviction discovery should be granted.[23] Instead, legislative action has driven change, as forty-four jurisdictions have now passed laws granting a right to postconviction DNA testing.[24] Most of these laws were passed within the past five years, though many still impose significant obstacles to obtaining DNA testing and subsequent relief.[25] Without a specific statute or court order, securing DNA testing can often depend solely on the willingness of law enforcement to consent to it.[26]

Despite the barriers they faced, these 200 exonerees eventually secured DNA testing and had their convictions vacated.[27] To understand how DNA testing allowed these exonerees to prove their innocence, data was compiled on how they requested testing.[28] 158 exonerees (seventy-nine percent) sought DNA testing by contacting innocence projects or other postconviction attorneys.[29] While innocence projects do not pursue testing for every prisoner who reaches out, organizations like the Innocence Project pursue testing in any case where DNA evidence exists and could prove relevant.[30] Twenty-three exonerees (twelve percent) initiated the process pro se, by filing petitions in states where statutes or court decisions allowed for postconviction DNA testing, or by independently seeking legal assistance.[31]

Law enforcement also played a role in some exonerations. In twenty-two cases (twelve percent), DNA testing was initiated by police, prosecutors, or

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[20] *Compare* Herrera v. Collins, 506 U.S. 390 (1993) (holding that a claim of actual innocence based on newly discovered evidence alone is not a ground for federal *habeas corpus* relief in a non-capital case, absent an independent constitutional violation); Schlup v. Delo, 513 U.S. 298 (1995) (stating that allowing an actual innocence claim should not be used as a "gateway" to constitutional errors at trial) *with* McQuiggin v. Perkins, 569 U.S. 383 (2013) (proven claims of actual innocence can serve as an exception to the one-year statute of limitations for federal habeas petitions under the Antiterrorism and Effective Death Penalty Act).

[21] Garrett, *Judging Innocence*, *supra* note 9, at 117.

[22] Commonwealth v. Godschalk, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996).

[23] Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1652–60 (2008).

[24] *Id.* at 1655.

[25] *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355 (2002).

[26] Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 554 (2002).

[27] *See* Barry Scheck & Peter Neufeld, *200 Exonerated: Too Many Wrongfully Convicted* 1, The Innocence Project (Jul. 7, 2007), http://www.innocenceproject.org/wp-content/uploads/2016/10/ip_200.pdf [https://perma.cc/RK9V-WZ8A] (last visited Apr. 8, 2026) (citing calculations of various wrongful conviction experts).

[28] Garrett, *Judging Innocence*, *supra* note 9, at 78.

[29] *Id.*

[30] *See About*, The Innocence Project, https://innocenceproject.org/about [https://perma.cc/YCL6-37PG] (last visited Aug. 20, 2024).

[31] Garrett, *Judging Innocence*, *supra* note 9, at 118.

the FBI.[32] This occurred either through projects aimed at testing backlogged evidence, programs to retest cases involving misconduct by forensic scientists, during unrelated criminal investigations, or, in one instance, based on an anonymous tip. In these cases, the state informed the exoneree that DNA testing had exonerated them.

A significant benefit of these DNA exonerations is that seventy-four of them (thirty-seven percent) also led to the identification of the true perpetrator, demonstrating a substantial public safety benefit.[33] This aspect of DNA exonerations is often underappreciated, but it should weigh heavily in cost-benefit analyses regarding resources for preventing wrongful convictions.[34] In forty-nine cases, the real perpetrator was identified through a "cold hit" in a DNA database.[35] In two other cases, the true perpetrator was found through other means, such as the actual perpetrator coming forward and being tested. Still, in the remaining 126 cases, the true culprit remains unidentified.[36]

Contrary to what some may believe, not all of these exonerees aggressively pursued their innocence from the start. Many exonerees waited years before seeking DNA testing, serving an average of twelve years before being exonerated, with a combined total of 2,475 years served.[37] Most of the 200 exonerees were freed long after DNA testing was available.[38]

The reason for the delays varies. Many exonerees struggled to obtain access to DNA testing without the cooperation of law enforcement. In seventy-one of the 200 exonerations (thirty-six percent), the exoneree had to apply for a court order to access testing.[39] In twenty-four of these instances, testing was granted pursuant to a state statute providing for postconviction DNA testing, as states have increasingly enacted such laws.[40] Most notably, in 119 of the cases (sixty percent), the exoneree obtained DNA testing through the consent of law enforcement or prosecutors. This highlights the important role law enforcement has played in helping to correct wrongful convictions. However, in some instances, access to testing came only after a court reversed the conviction or was planning to order testing. In around half of the cases, law enforcement initially refused to cooperate, and the exonerees had to rely on other avenues to secure DNA testing. These findings underscore the need for more expansive access to postconviction DNA testing.

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[32] *Id.*

[33] *Id.* at 119.

[34] *See* Jones, *supra* note 15, at 1267.

[35] Law enforcement can use the Combined DNA Index System (CODIS) to search for a DNA match, often referred to as a "cold hit." This system combines DNA databases from all 50 states with a federal database established by the FBI in 1990. CODIS allows for the comparison of DNA samples across a vast pool of data to help identify suspects. For more details about the program, see the FBI's CODIS Mission Statement and background, as well as information about participating states.

[36] *See* Scheck & Neufeld, *supra* note 27, at 40–41.

[37] *See id.* at 2–41.

[38] *See id.*

[39] *Id.* At a minimum, the figure is seventy-one exonerees. This is because information on how DNA testing was acquired was unavailable in the media for all of the 200 documented exonerees.

[40] Garrett, *Judging Innocence*, *supra* note 9, at 119.

Once DNA test results were obtained, the incarcerated exonerees were finally released. Nevertheless, for reasons unknown, some exonerees experienced further delays before their release. Twelve exonerees were convicted at trial despite the existence of DNA evidence at the time of trial that excluded them; they were later exonerated after further DNA testing identified another person.[41] Others obtained DNA testing during their appeals but lacked a judicial forum to argue that actual innocence should be grounds for vacating their convictions. In one example, at least twelve exonerees were denied relief by courts even though preliminary DNA test results excluded them; each was eventually exonerated through an executive or higher court granting relief.[42] Forty-one exonerees (twenty-one percent) received a pardon from their state's executive, often due to the lack of available judicial relief.[43] Only two exonerees received DNA testing and vacatur through federal habeas corpus. The majority received vacatur in state courts, typically based on newly discovered evidence of innocence. For some, even when DNA evidence proved their innocence, the judicial system was either unwilling or unable to provide an immediate remedy.[44]

B. Case Studies

A ruling of harmless error may involve a conclusion that the error had no effect on the jury due to the strength of other evidence, though the Court has explicitly warned against applying harmless error analysis in this incorrect manner.[45] Among exonerees with written decisions, thirty-two percent had courts rule an error harmless, and sixteen percent had claims acknowledged as valid, yet relief still denied based on harmless error.[46] This applied to about one-third of the sixty cases where the court found merit in the claim.

For the 200 exonerees documented by the Innocence Project, fewer saw such rulings on appeal: twenty-six percent had courts deem errors harmless,

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[41] An illustrative case is that of Leonard McSherry, who presented DNA test results in 1988 prior to sentencing, which excluded him as a match, but the trial court denied his motion for a new trial. In 1991, more advanced PCR testing—which was unavailable in 1988—also excluded McSherry, but the California appellate court still deemed the evidence of guilt to be "overwhelming." People v. McSherry, 14 Cal. Rptr. 2d 630, 633–36 (Ct. App. 1992). The court stressed the victim's identification and detailed descriptions of the perpetrator's house, which matched McSherry's. It concluded that the scientific test showing he was not the source of the semen on the victim's panties did not entirely discredit the prosecution's case or definitively prove innocence. *Id.* at 636. McSherry was eventually released in 2001 after another round of DNA testing excluded him and matched a convict from the DNA database through a "cold hit." *See also* Daniel Hernandez & Monte Morin, *Man is Cleared in 1 Case, but Jailed in another*, L.A. Times, (May 1, 2003).

[42] These include J. Watkins, J. Restivo, L. McSherry, J. Kogut, D. Hunt, L. Holdren, A. Hicks, D. Halstead, C. Elkins, W. Dedge, R. Criner, and S. Avery. Garrett, *Judging Innocence*, *supra* note 9, at 120 n.51.

[43] Garrett, *Judging Innocence*, *supra* note 9, at 120.

[44] Garrett, *supra* note 23, at 1674.

[45] The predominant application of harmless error doctrine requires the state to demonstrate that the trial error did not affect the outcome. *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. Rev. 1053, 1085–98 (2005).

[46] Garrett, *Judging Innocence*, *supra* note 9, at 108.

eleven percent had courts agree the claim had merit but still find the error harmless, and nine percent saw courts conclude both that the claim lacked merit and that any error was harmless.[47] Moreover, eight percent had courts describe the evidence against them as "overwhelming."[48] A close look at these cases reveals the damage caused by harmless error review in dismissing defendants' claims.

1. Ron Williamson

Ron Williamson was convicted in 1988 for the murder of Debra Sue Carter, which occurred in 1982.[49] The prosecution's case against Williamson relied on forensic evidence, informant testimony, and statements made by Williamson, including an account that prosecutors characterized as a confession in the form of a dream.[50] Williamson was sentenced to death and spent eleven years on death row.[51] His conviction was vacated in 1999 after DNA testing conclusively proved that neither Williamson nor his co-defendant, Dennis Fritz, had been involved in the crime. The DNA results instead identified Glenn Gore, a key prosecution witness at the original trial, as the actual perpetrator.[52]

In *Williamson v. State*, the Court of Criminal Appeals of Oklahoma addressed multiple legal issues raised on appeal, including the admission of hair comparison evidence and the application of the harmless error doctrine.[53] The court found that while certain errors occurred at trial—most notably, the reliance on forensic techniques later deemed unreliable—these errors did not rise to the level of prejudicial error under the law as it stood at the time.[54] Specifically, the court reasoned that the errors were outweighed by what it viewed as corroborative evidence, such as Williamson's purported confession and other circumstantial evidence presented by the State.[55] As a result, the court concluded that the errors were harmless and did not undermine the validity of the conviction.[56]

The later exoneration of Williamson through DNA evidence ultimately demonstrated that the harmless error analysis employed by the court failed to account for critical flaws in the State's case. Even more significant, the subsequent identification of the actual perpetrator underscores the importance of continually revisiting the reliability of convictions in light of advancements in forensic science and the evolving understanding of evidentiary standards.

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[47] *Id.* at 109.
[48] *Id.*
[49] *Ron Williamson*, The Innocence Project https://innocenceproject.org/cases/ron-williamson/ [https://perma.cc/7B9V-XURE] (last visited Aug. 3, 2024).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Williamson v. State, 812 P.2d 384, 391 (Okla. Crim. App. 1991).
[54] *Id.* at 391–92.
[55] *Id.* at 397.
[56] *Id.*

2. James Tillman

James Tillman was convicted in 1989 for the January 1988 kidnapping, robbery, sexual assault, and assault of a woman in Hartford, Connecticut.[57] The conviction was based largely on the victim's eyewitness identification and on flawed forensic serological evidence.[58] The victim, who was white, identified Tillman, an African-American man, as her assailant.[59] Serological testing at trial suggested that Tillman could have been a contributor to the biological material found on the victim's clothing, but the analyst did not account for the possibility of degradation, which could have affected the results.[60] DNA testing was not available at the time to conclusively exclude or confirm Tillman's involvement.[61]

In 2006, with the assistance of the Connecticut Innocence Project, advanced DNA testing conclusively excluded Tillman as the source of the semen found on the victim's clothing.[62] This testing, conducted on biological evidence that had been preserved for nearly two decades, led to the vacatur of Tillman's conviction in June 2006.[63] Further testing confirmed that the semen on the victim's clothing came from a single source, but not from Tillman. On July 11, 2006, all charges against Tillman were dropped, and he was fully exonerated after serving sixteen years in prison.[64]

In *State v. Tillman*, the Connecticut Supreme Court addressed several issues on appeal, including jury selection and jury instructions.[65] Tillman contended that the *venire* from which his jurors were selected was unconstitutionally discriminatory, claiming that the selection process underrepresented black males and Hartford residents.[66] The trial court rejected these claims, and the appellate court affirmed, holding that Tillman had not presented sufficient evidence to demonstrate systematic exclusion.[67]

Tillman also challenged the trial court's jury instructions regarding the victim's identification of him as the perpetrator.[68] While acknowledging that the victim had been under significant stress during the assault, the court concluded that the trial court's instructions were adequate and did not prejudice the defendant.[69] The court applied the harmless error doctrine, determining

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[57] *James Tillman*, The Innocence Project, https://innocenceproject.org/cases/james-tillman/ [https://perma.cc/JY6B-W2H2] (last visited Aug. 3, 2024).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* The use of DNA evidence in criminal trials first emerged in the late 1980s but did not become prevalent in criminal cases until the early 1990s. *See* Richard A. Nakashima, *DNA Evidence in Criminal Trials: A Defense Attorney's Primer*, 74 Neb. L. Rev. 444, 444 (1995).

[62] *Connecticut Innocence Project*, Conn.'s Off. State Website, https://portal.ct.gov/ocpd/innocence-project/connecticut-innocence-project [https://perma.cc/RW9P-AXUW] (last visited Aug. 4, 2024).

[63] *Id.*

[64] *Id.*

[65] State v. Tillman, 600 A.2d 738, 740–41 (Conn. 1991).

[66] *Id.*

[67] *Id.* at 742.

[68] *Id.* at 749.

[69] *Id.* at 744–45.

that even if there had been an error in the jury instructions, it would not have changed the outcome of the trial.[70]

However, the subsequent DNA testing, which conclusively excluded Tillman as the source of the biological evidence, belied the court's harmless error analysis. The DNA evidence demonstrated that the errors made during the trial—errors that had once been deemed harmless—had in fact contributed to the conviction of an innocent man.[71]

3. Christopher Tapp

Christopher Tapp was convicted in 1998 for the 1996 murder and rape of Angie Dodge in Idaho Falls, Idaho.[72] Tapp's conviction was based largely on a confession obtained after several lengthy interrogations, during which he was subjected to a series of polygraph tests and provided with details of the crime by police.[73] Despite DNA evidence excluding Tapp and another suspect, Benjamin Hobbs, as the source of semen found at the crime scene, Tapp's confession led to his conviction.[74]

Tapp entered multiple immunity agreements with the prosecution, but these agreements were voided after his statements were deemed inconsistent with the evidence.[75] Over time, Tapp changed his account of the events several times, eventually implicating himself, Hobbs, and another unidentified person.[76] Later DNA testing excluded both Tapp and Hobbs as contributors to the biological evidence.[77] In 2017, Tapp's rape conviction was vacated as part of a deal that reduced his sentence to time served.[78] In 2019, after advances in genetic genealogy led to the identification and confession of the actual perpetrator, Brian Dripps, Tapp was fully exonerated.[79]

In *State v. Tapp*, the Idaho Court of Appeals addressed several issues raised on appeal, including challenges to the admissibility of Tapp's confession and the voiding of his immunity agreement.[80] Tapp argued that his confession was coerced and that his rights under *Miranda* had been violated, and the court agreed.[81] The court acknowledged that some aspects of Tapp's interrogation may have been problematic, citing "doubt that the system under which

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[70] *Id.* at 745. Connecticut's harmless error rule shifts the burden onto defendants and required Tillman to show "that it was reasonably probable" that the error impacted the outcome. State v. Shifflett, 508 A.2d 748, 766–67 (Conn. 1986).

[71] *See* The Innocence Project, *supra* note 57.

[72] *Christopher Tapp*, The Innocence Project, https://innocenceproject.org/cases/christopher-tapp [https://perma.cc/PKB5-4NX4] (last accessed Aug. 5, 2024).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] State v. Tapp, 33 P.3d 828, 831 (Idaho Ct. App. 2001).

[77] The Innocence Project, *supra* note 72.

[78] *Id.*

[79] *Id.*

[80] *Tapp*, 33 P.3d at 832.

[81] *Id.* at 835.

Tapp was interviewed afforded the cushion from 'inherently compelling pressures' that *Miranda* and its progeny require."[82]

However, the court held that any error in admitting Tapp's confession was harmless in light of other evidence, including his repeated admissions during later interviews and the details of his involvement in the crime.[83] The court also found that the State was justified in voiding the immunity agreement due to inconsistencies between Tapp's statements and the DNA evidence.[84] Despite these rulings, the DNA evidence that eventually exonerated Tapp demonstrated that the harmless error analysis had failed to account for the coercive nature of the interrogations and the unreliability of the confession.[85]

C. Errors in Cross-Racial Eyewitness Misidentifications

Seventy-nine percent of wrongful convictions involve eyewitness misidentifications—specifically, 158 out of 200 cases.[86] Although less than one third of rape cases involve assaults committed by strangers, nearly all wrongful conviction cases based on eyewitness identifications involved strangers, with only eight cases involving misidentification by acquaintances.[87] In sixty-eight percent of cases, the identification was provided by the victim, while in seventeen percent, a non-victim eyewitness provided testimony, sometimes alongside the victim's identification.[88] In twenty-eight percent, the victim's testimony was the key evidence leading to the conviction.[89]

It is not surprising that many of these cases involve eyewitness identification errors, as the prosecution of stranger rape cases typically hinges on the victim's identification of a perpetrator they had never encountered before. Without such identification, it would be difficult to proceed, particularly in the absence of DNA evidence. In fact, of the 141 rape cases known by the Innocence Project to have resulted in wrongful convictions, eighty-nine percent involved victim identifications. Notably, 126 out of the 158 total erroneous eyewitness identifications compiled by the Innocence Project occurred in rape cases.[90]

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[82] *Id.*
[83] *Id.* at 839-40 ("Having concluded that Tapp's statements to police given on January 15, 17, 30, and 31 were taken in violation of his Fifth Amendment right to counsel, we must determine whether the erroneous admission of these statements necessitates a new trial or constitutes harmless error . . .").
[84] *Id.* at 834.
[85] *See* The Innocence Project, *supra* note 72.
[86] Garrett, *Judging Innocence*, *supra* note 9, at 78–79.
[87] Cathy Maston & Patsy Klaus, *Criminal Victimization in the United Sates, 2005 Statistical Tables*, U.S. Dep't of Just., Bureau of Just. Stat. 34(b) (2006), https://bjs.ojp.gov/content/pub/pdf/cvus05.pdf [https://perma.cc/4XGG-PXWJ].
[88] Garrett, *Judging Innocence*, *supra* note 9, at 79.
[89] *Id.*
[90] *See* Scheck & Neufeld, *supra* note 27, at 14.

II. The Evolution of Harmless Error

A. English Common Law Origins

The harmless-error doctrine has its roots in English common law, where early appellate practice wrestled with whether procedural defects should always mandate reversal or whether some errors could be excused.[91] In English appellate courts of the early nineteenth century, a prevalent rule was that any deviation from form or procedure required reversal, regardless of the substantive result.[92] Historical examinations of its evolution often begin with the 1835 decision in *Crease v. Barrett*, where the Court of the Exchequer sought to curtail the then-common practice of English appellate courts affirming judgments merely because they believed the right result had been reached.[93] Over time, *Crease* became symbolically associated an era in which English courts reversed almost any judgment tainted by error, even trivial ones.[94] Appellate review was a technical application of harmless error doctrine in both criminal and civil cases.[95]

In 1873, Parliament enacted the Judicature Act with the goal of restraining appellate courts from this technical application.[96] Reversal or vacatur would then be appropriate only when the losing party was truly wronged.[97] The Act did not change judicial behavior, and appellate courts continued to vacate judgments even for minor irregularities. [98]

In 1907, Parliament tried again, this time with the Criminal Appeal Act.[99] This law went further by instructing that criminal appeals should be dismissed if "no substantial miscarriage of justice has actually occurred."[100] English judges largely disregarded the statute too, continuing their frequent

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[91] Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433, 436–38 (2009).

[92] Roger J. Traynor, The Riddle of Harmless Error 4 (1970). Justice Traynor critiques the judiciary's use of the harmless error doctrine, cautioning against an approach that diminishes the rights of litigants under the guise of judicial efficiency. Traynor underscores the importance of substantive fairness, advocating for a judicious scrutiny of errors that may seem innocuous but could corrode public trust in the justice system. *Id.*; *see also* Amanda M. Chaves, *The Doctrine of Harmless Error in Criminal Cases in Massachusetts*, 18 Suffolk J. Trial & App. Advoc. 282, 286 (2013).

[93] Crease v. Barrett, 149 Eng. Rep. 1353, 1359 (Ex. 1835).

[94] Fairfax, *supra* note 91, at 435.

[95] *See* Traynor, *supra* note 92, at 4–8 (citing 1 J. Wigmore, Evidence § 21, at 368 (3d ed. 1940)). Justice Traynor took issue with the portrayal of *Crease* as establishing a rule of near automatic reversal. He attributed this misrepresentation not to the decision itself, but to later English rulings that failed to accurately convey what *Crease* actually held. Compounding the error, John Henry Wigmore, in his seminal treatise on evidence, accepted these flawed interpretations without question, further entrenching the misunderstanding within the legal canon. *Id.*

[96] *Id.* at 8–9 (citing Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66, § 48 (Eng.)); *see also* Fairfax, *supra* note 91, at 435.

[97] Traynor, *supra* note 92, at 8–9.

[98] Fairfax, *supra* note 91, at 435–37; Traynor, *supra* note 92, at 9–10.

[99] Fairfax, *supra* note 91, at 435.

[100] Criminal Appeal Act 1907, 7 Edw. 7, c. 23, § 4 (Eng.) ("Provided that the court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.").

reversals for technicalities.[101] This had widespread effects, given that English double jeopardy principles precluded retrial after a criminal conviction had been reversed.[102]

Across the Atlantic, in the late nineteenth and early twentieth centuries, American appellate courts mirrored their English counterparts.[103] Reversals were routine, and retrials frequent.[104] Courts were criticized for their excessive focus on technical errors, towering over criminal trials with a fixation on procedural missteps.[105] The U.S. Supreme Court, in its 1946 decision *Kotteakos v. United States*, captured the essence of the era: "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."[106]

B. Early American Practice and Legislative Reform

This hyper-technical approach to criminal trials spurred legislative reform at both the federal and state levels, led by prominent figures within the legal profession and academic circles.[107] In 1919, following extensive debate and reflection, Congress passed a federal statute concerning harmless error, found in § 269 of the Judicial Code.[108] The statute set forth the following:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.[109]

By 1926, eighteen states had passed laws instructing their appellate courts to disregard errors deemed harmless, with another ten states adopting similar guidelines through judicial rulings.[110] Despite these initiatives, the reforms failed to produce the desired effect, as appellate courts in the U.S. continued to reverse and vacate judgments at a significant rate over the next twenty years.[111]

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[101] John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev. 59, 67 (2016).
[102] *Id.*
[103] *See* John M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819, 823 (1994).
[104] Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925) (quoting Kotteakos v. United States, 328 U.S. 750, 759 (1946)).
[105] *Id.* at 222.
[106] Kotteakos, 328 U.S. at 759.
[107] Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2038–40 (2008); *see Kotteakos*, 328 U.S. at 758–60 & nn. 10–14 (listing examples of the extent to which there were legislative efforts to reform).
[108] 28 U.S.C. § 391 (1940) (repealed 1948).
[109] *Id.*; Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, *repealed by* Act of Jun. 25, 1948, ch. 646, § 39, 62 Stat. 892, 998.
[110] *See* Greabe, *supra* note 103, at 823 n.23 (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984)).
[111] *See* Fairfax, *supra* note 107, at 2034.

In the 1940s, however, both Congress and the Supreme Court took further action to tighten the application of harmless-error review.[112] Congress facilitated this shift by approving the Federal Rules of Criminal Procedure, which included a harmless-error clause echoing the language of the 1919 federal statute, but which notably left out the term "technical" before "errors."[113] The Supreme Court, in *Kotteakos*, offered the first substantial explanation of how courts should handle harmless-error assessments under the 1919 law.[114]

C. Kotteakos *and the "Substantial and Injurious Effect Test"*

In *Kotteakos*, the petitioners had been convicted of a single conspiracy under the National Housing Act, although, as the government conceded on appeal, the evidence revealed multiple conspiracies—eight or more—centered around a common figure.[115] The issue at hand was whether this discrepancy between the single conspiracy charged in the indictment and the many conspiracies proven at trial was a mere technical error or an issue that affected substantial rights of the parties, as outlined in the harmless-error statute.[116] The Supreme Court ruled that this error did affect substantial rights of the parties, so a new trial was required.[117] The Court further clarified that the key question in such cases was whether the error had a "substantial and injurious effect or influence" on the jury's decision.[118]

For the next two decades, the Court interpreted 28 U.S.C. § 2111—the harmless-error statute passed in 1949 to replace the earlier version—as mandating a new trial whenever a constitutional error occurred during the proceedings.[119] But in 1963, in *Fahy v. Connecticut*, the Court reconsidered its stance and raised the issue of whether the wrongful admission of evidence obtained through an unconstitutional search and seizure could be subject to the same harmless-error rules that applied under federal standards.[120] The Court

[112] *Id.* (quoting Fed. R. Crim. P. 52(a)).

[113] Fed. R. Crim. P. 52(a). A separate statutory provision, 28 U.S.C. § 2111 applies the harmless error rule to the federal appellate courts, stating, "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994). This statutory provision is unnecessary, however, because Rule 1 makes it clear that all of the Federal Rules "apply to all criminal proceedings . . . in the United States Courts of Appeals." Fed. R. Crim. P. 1; *see* Charles A. Wright, Federal Practice and Procedures § 852, at 296 (2d ed. 1982) (stating that § 2111 was enacted "apparently on the mistaken belief that [the criminal harmless-error rules and its civil counterpart] apply only to the district courts").

[114] *Kotteakos*, 328 U.S. at 751.

[115] *Id.* at 751–52.

[116] *See id.* at 757–58.

[117] *See id.* at 776.

[118] *Id.* at 776.

[119] *See* Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152, 154 (1991) (criticizing the concern of accuracy of convictions inherent in criminal trials); *see also*, *e.g.*, Michael Coenen, *Spillover Across Remedies*, 98 Minn. L. Rev. 1211, 1235–39 (2014).

[120] Fahy v. Connecticut, 375 U.S. 85 (1963).

ultimately did not resolve this question, ruling instead that the evidence's admission had been "prejudicial," explaining that there was a "reasonable possibility" that the evidence influenced the conviction.[121]

D. Chapman *and the Rise of Constitutional Harmless Error*

During this period, the Warren Court was expanding federal constitutional protections for criminal defendants, fundamentally reshaping the landscape of criminal procedure.[122] By the time *Chapman v. California* reached the Supreme Court in 1967, the area of constitutional criminal procedure was ready for refinement.[123] As Justice Cardozo described, this "taming" process took sweeping legal principles and distilled them into clearer, more objective rules that posed less of a threat to established legal structures.[124] *Chapman* and its subsequent cases have played a significant role in this process.[125]

Chapman came to the Supreme Court from California, where a prosecutor had commented on the defendant's silence during the trial—a practice deemed unconstitutional by the Court in *Griffin v. California* two years earlier.[126] The California Supreme Court applied its harmless-error rule, instructing courts to disregard errors that did not result in a miscarriage of justice, and upheld the convictions.[127] The U.S. Supreme Court, however, reversed this decision, finding that the error was not harmless.[128] Crucially, *Chapman*, in an opinion authored by Justice Black, marked the first time the Court explicitly recognized that some constitutional errors might, in certain circumstances, be so trivial that they could be considered harmless.[129]

The Court began by noting that "[w]hether a conviction for [a] crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal

[121] *Id.* at 86.

[122] Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 Ohio St. J. Crim. L. 105, 105–06 (2005) ("Under Chief Justice Earl Warren's leadership the Supreme Court rewrote the corpus of constitutional law-especially in the criminal procedure arena.").

[123] Sanjay K. Chablani, *Chapman v. California: Harmless Error and the Warren Court's Progressive Legacy*, 49 Stetson L. Rev. 375, 375–76 (2020); Chapman v. California, 386 U.S. 18 (1967).

[124] Benjamin N. Cardozo, The Nature of the Judicial Process 51 (1921); Craig Goldblatt, Comment, *Disentangling* Webb*: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis*, 59 U. Chi. L. Rev. 1239, 1243 n.25 (1992).

[125] Ogletree, *supra* note 119, at 158 (explaining that the harmless error, as outlined in *Chapman*, has diluted many of the protections outlined by the Warren Court).

[126] *Chapman*, 386 U.S. at 19; Griffin v. California, 380 U.S. 609, 613 (1965) (holding that comment on a defendant's decision not to testify violates the Fifth Amendment).

[127] *Chapman*, 386 U.S at 19–20; *see also* Cal. Const. art. VI, § 13 ("No judgment shall be set aside, or a new trial granted . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.").

[128] *Chapman*, 386 U.S at 24–26.

[129] *Id.* at 22 (observing "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless.").

constitutional provisions themselves mean, what they guarantee, and whether they have been denied."[130] From there, the Court went on to state:

> With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.[131]

Justice Stewart concurred in the judgment but opted to sidestep the question of harmless error.[132] His view was that a prosecutor's violation of the rule established in *Griffin should* automatically result in reversal.[133] Justice Harlan, on the other hand, dissented, asserting that "a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment."[134]

In moving toward crafting a harmless-error rule for federal constitutional violations, Justice Black, speaking for the majority, expressed a preference for the approach set out in *Fahy*—whether there is a reasonable possibility that the problematic evidence contributed to the outcome—over California's miscarriage-of-justice standard.[135] Justice Black equated *Fahy* with the principle for which *Chapman* is now known and stated the Court's holding: "We, therefore, do no more than adhere to the meaning of [*Fahy*] when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[136]

While formulating this new standard for reviewing constitutional errors, the *Chapman* majority did not reference 28 U.S.C. § 2111, nor did it refer to the harmless-error analysis used in *Kotteakos*, which, as previously discussed, was an interpretation of the statute's predecessor. However, in later rulings, the Court clarified that the *Kotteakos* standard—whether the error had a "substantial and injurious effect or influence" on the jury's verdict—should be applied to nonconstitutional errors, while the *Chapman* rule is reserved for

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[130] *Id.* at 21.
[131] *Id.*
[132] *See id.* at 45 (Stewart, J., concurring).
[133] *Id.*
[134] *Id.* at 46 (Harlan, J., dissenting).
[135] *Id.* at 23–24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)).
[136] *Chapman*, 386 U.S. at 24.

constitutional errors.[137] The Court also emphasized that the *Kotteakos* analysis is considered more lenient than the *Chapman* standard.[138]

In the years following *Chapman*, the Supreme Court considered several methods for determining whether an error is harmless beyond a reasonable doubt.[139] The first, suggested by *Chapman* itself, focused solely on the extent to which the improperly admitted evidence was incriminating, without considering the untainted evidence.[140] The second method evaluated whether the error was "cumulative," meaning it duplicated untainted evidence that supported the same facts established by the disputed evidence.[141] The third approach examined whether, given the entire record, the jury likely gave significant weight to the erroneously admitted material.[142] The Court seems to have ultimately settled on this third approach for reviewing courts to follow.[143]

In holding that constitutional errors should be disregarded if proven to be harmless beyond a reasonable doubt, the *Chapman* majority acknowledged, but did not retreat from, earlier decisions indicating that there are certain constitutional rights so fundamental to a fair trial that their violation can never be treated as harmless error.[144] The Court highlighted three such rights—the right against the admission of a coerced confession, the right to counsel, and the right to an impartial judge—implying that the list may not be exhaustive.[145]

E. Different Buckets of Standards of Error

Over the following twenty-five years, the Court expanded this list on a case-by-case basis, but it did not clarify how to determine whether a specific constitutional error could be subject to harmless-error review until its decision

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[137] Kotteakos v. United States, 328 U.S. 750, 776 (1946); *see also* United States v. Lane, 474 U.S. 438, 445–49 (1986).

[138] *See*, *e.g.*, Fry v. Pliler, 551 U.S. 112, 116 (2007); Brecht v. Abrahamson, 507 U.S. 619, 621 (1993) (noting that harmless error on collateral attacks raising constitutional errors should be assessed using *Kotteakos*, which the Court described as "less onerous" than that of *Chapman*).

[139] *See* Sullivan v. Louisiana, 508 U.S. 275, 279–80 (1993); *Brecht*, 507 U.S. at 620–21; Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15, 16 (1976).

[140] *Chapman*, 386 U.S. at 24–26; LaFave & Israel, *supra* note 110, at 257.

[141] *See, e.g.*, Harrington v. California, 395 U.S. 250, 254 (1969); Field, *supra* note 139, at 21–22.

[142] Field, *supra* note 139, at 21–22; *see* Yates v. United States, 500 U.S. 391, 403–04 (1991).

[143] Greabe, *supra* note 103, at 829 (citing *Yates*, 500 U.S. at 403–04; LaFave & Israel, *supra* note 110, at 279, 281 n.5); *see* Sullivan v. Louisiana, 508 U.S. 275, 279–80 (1993) (reaffirming and applying the *Yates* analysis). However, the Court has occasionally implied, in other settings, that overwhelming evidence of guilt can render an error harmless. *See* Greabe, *supra* note 103, at 829 n.67 (citing United States v. Hasting, 461 U.S. 499, 510–11 (1983) ("The question a reviewing court must ask is this: absent [the improperly admitted material], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"); Milton v. Wainwright, 407 U.S. 371, 372–73 (1972); Schneble v. Florida, 405 U.S. 427, 431–32 (1972). Still, such statements bear resemblance to a "correct result" test—the very standard rejected in *Chapman*—and thus should not be seen as a proper statement of the harmless-error doctrine. Greabe, *supra* note 110, at 829 n.67; Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. Pa. J. Const. L. 991, 992–93 (2015) (noting the lack of clear Supreme Court guidance on a uniform harmless-error review approach).

[144] *Chapman*, 386 U.S. at 24.

[145] *Id.* at 23 n.8.

in *Fulminante* in 1991.[146] In *Fulminante*, the Court, which was deeply divided, revisited the question of whether admitting a coerced confession should be assessed under *Chapman*'s harmless-error standard.[147] In concluding that it should, the Court established a framework for analyzing whether other constitutional errors should undergo *Chapman* review.[148] It divided constitutional errors into two categories. Most errors fell under the category of "trial" errors, which occur during the presentation of the case to the jury and can be weighed against the other evidence to determine if the error was harmless.[149] The second category encompassed "structural defects"—fundamental flaws in the trial mechanism that cannot be analyzed using the harmless-error framework.[150]

In 2006, in *United States v. Gonzalez-Lopez*, the Court elaborated that structural defects "bear directly on the framework within which the trial proceeds."[151] The Court then listed several examples of errors that cause such structural defects: denial of the right to counsel, denial of the right to self-representation, denial of a public trial, and failure to provide a proper reasonable-doubt instruction.[152] Additionally, the Court included any procedural errors that result in the denial of the right to counsel of one's choice.[153]

From 1967 to 1993, the Court maintained the *Chapman* standard when reviewing constitutional errors that could be analyzed under harmless error, regardless of whether the case came from a state court judgment,[154] a federal court decision,[155] or collateral review of a state court conviction.[156] However, in 1993, *Brecht v. Abrahamson* redefined the approach for federal courts reviewing state convictions marred by constitutional errors during habeas proceedings.[157] In doing so, the Court pivoted away from the stringent *Chapman* standard, opting instead for the *Kotteakos* rule, originally applied to non-constitutional errors in federal criminal trials.[158] Under this new framework, federal courts were directed to leave convictions intact unless it was clear that the error had a "substantial and injurious effect or influence" on the jury's verdict, a threshold requiring a showing beyond a mere "reasonable possibility" of the error

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[146] Arizona v. Fulminante, 499 U.S. 279 (1991); *see, e.g.,* McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (right to represent self); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (right to public trial).

[147] *Fulminante*, 499 U.S. at 306–12 (Rehnquist, J., dissenting).

[148] *See id.* at 288, 309 (rejecting a proposal alternative in *Chapman* and *Payne v. Arkansas*); *Chapman*, 386 U.S. at 23; Payne v. Arkansas, 356 U.S. 560, 567–68 (1958).

[149] *Fulminante*, 499 U.S. at 307–09.

[150] *Id.* at 309–310.

[151] United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 150 (2006).

[152] *See id.* at 149–50 (citing Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); McKaskle v. Wiggins, 465 U.S. 168, 177–78, n.8 (1984); Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984); Sullivan v. Louisiana, 508 U.S. 275 (1993)).

[153] *Id.* at 150 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.").

[154] *See* Chapman v. California, 386 U.S. 18, 24–26 (1967).

[155] *See* United States v. Hasting, 461 U.S. 499, 510–11 (1983).

[156] *See* Yates v. Evatt, 500 U.S. 391, 402 (1991); Rose v. Clark, 478 U.S. 570, 579–80 (1986); Milton v. Wainwright, 407 U.S. 371, 372–73 (1972); Anderson v. Nelson, 390 U.S. 523, 523–24 (1968).

[157] Brecht v. Abrahamson, 507 U.S. 619, 631–33 (1993).

[158] *See id.*

contributing to the outcome, and resulting in what the Court deemed "actual prejudice." [159]

The issue in *Brecht* arose from a prosecutor improperly using the defendant's post-*Miranda*[160] silence against him during the defendant's trial testimony.[161] Categorizing this as a "trial error," the Court deliberated over whether to apply the "stringent" *Chapman* test[162] or the more lenient *Kotteakos* standard.[163] Ultimately, it settled on the latter, invoking several policy reasons: respect for state convictions that had endured direct review, the principles of comity and federalism, the importance of finality in judgments, and the significant challenges of retrying cases after the passage of time.[164] Applying the *Kotteakos* test, the Court concluded that the error in *Brecht* did not materially affect the jury's decision since the prosecutor's improper comments were limited and the evidence of the defendant's guilt was compelling, if not overwhelming.[165]

This evolution continued when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[166] which imposed further restrictions on federal courts' ability to grant habeas petitions unless the state court's decision was found to be "contrary to, or involved an unreasonable application of, clearly established Federal law."[167] In *Mitchell v. Esparza*, the Court ruled that the AEDPA standard applied even to state appellate decisions finding constitutional violations harmless under Chapman, barring relief unless the state court's application of Chapman was unreasonable.[168] This interplay between Brecht and AEDPA was affirmed in *Fry v. Pliler*, where the Court rejected the notion that AEDPA eliminated the need for petitioners to meet the *Brecht/Kotteakos* threshold, instead holding that *Brecht* remained a necessary precondition for habeas relief.[169] The Court reasoned that Congress, in enacting AEDPA, intended to restrict habeas relief, not broaden it.[170] Requiring formal application of both tests was deemed unnecessary because *Brecht* effectively encompassed the AEDPA/*Chapman* standard.[171]

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[159] *Id.* at 637–38 (quoting *Chapman*, 386 U.S. at 24; Kotteakos v. United States, 328 U.S 750, 776 (1946)) (rejecting *Chapman*'s approach and adopting *Kotteakos*'s requirement that an error have a substantial and injurious effect on the verdict; also explaining that habeas relief requires a showing of "actual prejudice").

[160] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[161] *See Brecht*, 507 U.S. at 629–30, 632.

[162] *Id.* at 632; *see also*, Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[163] *Brecht*, 507 U.S. at 637.

[164] *See id.* at 635–37.

[165] *See id.* at 638–39.

[166] 28 U.S.C. § 2254(d) (2012). The relevant portion provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

[167] *See id.*

[168] Mitchell v. Esparza, 540 U.S. 12, 17–18 (2003) (per curiam).

[169] Fry v. Pliler, 551 U.S. 112, 119–20 (2007).

[170] *Id.*

[171] *Id.* at 120.

Yet, the Court complicated this framework in *Davis v. Ayala* by criticizing the Ninth Circuit's interpretation of *Fry*.[172] While *Fry* did not require formal application of both tests, *Davis* clarified that the state court's harmlessness determination still held relevance under *Brecht*.[173] The Ninth Circuit had misinterpreted Fry to suggest that *Brecht* could subsume AEDPA/*Chapman*, but *Davis* emphasized that a state appellate court's Chapman analysis could not be dismissed without evaluating its reasonableness under AEDPA.[174] Therefore, for a habeas court to find that a state court's harmless-error determination was unreasonable, it would need to show that no fair-minded jurist could support the state court's conclusion, a high bar under federal law.[175]

This multi-layered approach to harmless error now delineates four distinct categories: (1) constitutional "structural" errors that elude harmless-error review; (2) constitutional "trial" errors, scrutinized on direct review using the *Chapman* standard; (3) nonconstitutional trial errors, which are reviewed for harmlessness under the *Kotteakos* test; and (4) constitutional trial errors reviewed on collateral appeal, subject to the *Brecht/Kotteakos* framework. Additionally, federal law has incorporated a separate "plain error" rule, applicable when appellate rights have not been preserved.[176] In such cases, even structural errors must meet the plain-error criteria, which demands that the error be evident at the time of its occurrence, that it affects the claiming party's substantial rights, and that it significantly undermines the integrity, fairness, or reputation of the judicial proceedings.[177] Beyond this, when federal courts review harmless errors found by state appellate courts, the complexity of the analysis multiplies.[178] As a result, the contours of harmless-error review within the federal system have become exceedingly intricate.[179]

The *Chapman* decision was framed as addressing a federal question,[180] yet its nature—alongside *Fulminante* and *Brecht*—has puzzled scholars. Three years after *Chapman*, Justice Traynor, in his work *The Riddle of Harmless Error*,[181] defended *Chapman*'s handling of federal questions while challenging Justice Harlan's dissent.[182] Harlan had argued that when a state court reasonably applied its own harmless-error rule, that should constitute an independent and adequate state ground, shielding the judgment from federal review.[183] Traynor, however, expressed confusion over why the *Chapman* Court had failed to acknowledge that federal statutes—28 U.S.C. § 2111 and Federal Rule of Criminal Procedure 52(a)—already governed harmless-error analysis.[184]

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172 Davis v. Ayala, 576 U.S. 257, 268 (2015).
173 *See id.*
174 *See id.*
175 *Id.* at 269–70.
176 *See* United States v. Olano, 507 U.S. 725, 732 (1993); *see also* Fed. R. Crim. P. 52(b).
177 *See* Johnson v. United States, 520 U.S. 461, 466 (1997) (evidentiary errors are not automatically reversible).
178 *See* Greabe, *supra* note 101, at 828–29; Kavanagh, *supra* note 104 at 222.
179 *See* Poulin, *supra* note 143, at 1007–13.
180 Chapman v. California, 386 U.S. 18, 21 (1967).
181 *See* Traynor, *supra* note 92, at 37–41.
182 *Chapman*, 386 U.S. at 46 (Harlan, J., dissenting).
183 *Id.*
184 *See* Traynor, *supra* note 92, at 41.

He contended that the Court should recalibrate harmless-error doctrine within the confines of § 2111.[185] Other commentators have suggested that *Chapman*'s reasoning is inherently constitutional in nature.[186]

One such commentator, Professor Daniel J. Meltzer, offers perhaps the most comprehensive examination of *Chapman*'s doctrinal foundation.[187] Disagreeing with Traynor's statutory approach, Meltzer points out that Rule 52(a) has no bearing on state court cases,[188] and that § 2111 directs courts to disregard any errors that do not affect "substantial rights."[189] He further emphasizes that *Chapman* arose from a state court, and Rule 52(a) has no jurisdiction over state court proceedings or the U.S. Supreme Court's review of them.[190] Hence, *Chapman*'s harmless-error standard must rest on constitutional grounds, separate from procedural statutes.

With respect to § 2111, Meltzer notes that the statute enjoins courts to disregard errors that do not affect the parties' substantial rights.[191] He argues that harmless-error analysis in cases such as *Chapman*, which arise from state courts, cannot be grounded in this federal statute.[192] Meltzer further contends that while the Court has applied harmless error in different contexts, *Chapman*'s federal nature demands a constitutional interpretation of harmless error, rather than a statutory one rooted in § 2111.[193]

Moreover, Meltzer observes that *Chapman* stands as a procedural doctrine grounded in the federal Constitution, rather than one derived from federal statutory law.[194] This distinction is critical because it ensures that state courts are subject to federal constitutional standards when evaluating whether an error was harmless beyond a reasonable doubt.[195] Accordingly, Meltzer's analysis reinforces the idea that the *Chapman* rule, and those cases following it,

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[185] *See id.* ("Once the *Chapman* case is viewed anew, the crucial question is one of statutory interpretation, the meaning of the words in § 2111, 'errors or defects which do not affect substantial rights."). Justice Traynor ultimately urged courts to abandon *Chapman*'s beyond-a-reasonable-doubt standard in favor of an analysis, rooting § 2111, that would focus on whether it was "highly probable" that the error had not affected the jury. *See id.* at 43–51.

[186] *See* Greabe, *supra* note 101, at 115 (arguing that "there is no reason to privilege constitutional errors by subjecting them to a different harmless-error test"); Richard M. Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885, 1912–18 (2014) (arguing that the harmless error standard should be constitutionalized); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 424 n.31 (1980) (asserting *Chapman* as a "constitutional judgment").

[187] Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 19–21, 26 (1994).

[188] *See id.* at 19–20.

[189] *See id.* at 1–26.

[190] *See id.* at 26.

[191] *Id.* at 21.

[192] *See id.* at 21. Meltzer also considered—and rejected—another potentially statutory argument that *Chapman* could be necessary to preserve the Court's appellate jurisdiction to review federal constitutional claims arising from state trial courts. *See id.* at 22.

[193] *See* Meltzer, *supra* note 187, at 26.

[194] *See id.* at 22–26.

[195] *See id.* The Supreme Court has continued to state that the federal Constitution provides no right of appeal. *See* Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 160 (2000); M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996); Goeke v. Branch, 514 U.S. 115, 119 (1995) (per curiam).

should be understood as exercises of constitutional authority rather than mere statutory interpretations.[196]

The *Chapman* opinion primarily focused on addressing the argument that the harmless-error rule should never apply to constitutional errors.[197] The Court found no basis, either in legal theory or precedent, for giving constitutional errors a broad exemption from this appellate review rule.[198] The Court noted that harmless-error statutes, including the federal provision, did not explicitly differentiate between federal constitutional errors and nonconstitutional ones.[199] These statutes, the Court observed, served "a very useful purpose" in preventing convictions from being overturned due to minor errors that had little chance of affecting the trial's outcome.[200] The Court declined to adopt the position that no constitutional error could ever be so insignificant as to be considered harmless under the Federal Constitution.[201]

The *Chapman* decision acknowledged that previous cases had recognized certain constitutional rights as so fundamental to a fair trial that their violation could never be treated as harmless error.[202] In a footnote, the Court referred to three illustrative examples: *Payne v. Arkansas* (reversing a conviction based on coerced confessions);[203] *Gideon v. Wainwright* (recognizing the Sixth Amendment right to counsel);[204] and *Tumey v. Ohio* (holding that due process is violated when a presiding judge is financially interested).[205] However, the Court made no attempt to explain what differentiated these constitutional violations from the *Griffin* violation it was addressing. An improper comment on the defendant's silence was viewed as a "trial error" typically subject to harmless-error analysis, and once the Court decided that some constitutional errors could be harmless, it concluded that the *Griffin* violation fell within that category.[206] Justice Stewart concurred, arguing that the recognition of harmless constitutional errors should be confined to specific constitutional requirements, like the exclusionary rule, which involves balancing deterrence against the exclusion of relevant evidence.[207]

The *Chapman* opinion faced criticism for offering "little guidance" on how to determine which errors required automatic reversal and which did not.[208] It was clear that the Court's citation of three constitutional errors necessitating automatic reversal was merely illustrative and did not exhaust the possible list of such violations.[209] As Justice Stewart pointed out, prior rulings had indicated that other constitutional violations could also belong in the

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[196] *See* Meltzer, *supra* note 187, at 22–26.
[197] *See* Chapman v. California, 386 U.S. 18, 18 (1967).
[198] *Id.*
[199] *Id.*
[200] *Id.* at 22.
[201] *Id.* at 24.
[202] *Id.* at 23 n.8.
[203] Payne v. Arkansas, 356 U.S. 560 (1958).
[204] Gideon v. Wainwright, 372 U.S. 335 (1963).
[205] Tumey v. Ohio, 273 U.S. 510 (1927).
[206] *Chapman*, 386 U.S. at 23.
[207] *Id.* at 42–43 (Stewart, J., concurring).
[208] Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 816 (1970).
[209] *Id.*

automatic-reversal category.[210] The *Chapman* opinion, however, only stated that "some constitutional errors," including a *Griffin* violation, could be harmless.[211] It provided no clarity on whether "some" meant "most," "many," or just a "few." This issue would be clarified through later cases, but *Chapman*, from the start, excluded two distinct types of constitutional violations.[212]

One category of constitutional violations made harmless-error analysis irrelevant due to their very nature. When the violation necessitates barring re-prosecution, reversal is automatic once the violation is confirmed.[213] For instance, a defendant who successfully proves a violation of the right to a speedy trial or the protection against double jeopardy is entitled to automatic reversal.[214]

In *Smith v. United States*, the Court explained that it recognized a violation of the Speedy Trial Clause as the "one exception" to the general rule that retrial is the appropriate remedy for prejudicial trial error.[215] The Court refused to expand this exception to include violations of the Vicinage and Venue Clauses.[216] After reviewing the text, purpose, and history of these clauses, the Court found no grounds for barring reprosecution.[217] The Court also held that double jeopardy does not preclude a retrial in the correct venue, with a jury selected from the proper geographic area.[218] The Court affirmed the lower court's decision, which found that "the remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice," and concluded that the Double Jeopardy Clause was not implicated by retrial in the appropriate venue.[219]

There is another category of violations that, by their very nature, cannot be subject to *Chapman*'s harmless-error test because they inherently involve harmful consequences.[220] The *Chapman* standard requires a judicial finding that the error did not have a prejudicial impact "beyond a reasonable doubt."[221] For certain violations, however, such an inquiry would be unnecessary because the violation itself implies likely prejudice.[222] Typically, these violations require a finding that the challenged behavior had a "reasonable possibility"

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[210] *Chapman*, 386 U.S. at 43 (Stewart, J., concurring).

[211] *Id.* at 23.

[212] *Id.* at 24–26. Structural errors are fundamental errors that affect the entire framework of the trial, and thus, are not subject to harmless error analysis. *Id.* at 23 ("[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."). Similarly, are errors that result in a denial of constitutional rights that inherently defy quantitative assessment. *Id.* at 26 (applying the "reasonable doubt" to constitutional errors).

[213] *See, e.g.*, Strunk v. United States, 412 U.S. 434 (1973); Morris v. Mathews, 475 U.S. 237 (1986); Price v. Georgia, 398 U.S. 323 (1970); *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 672–73 (1996) (criticism of the Court's decisions that require automatic dismissal in Sixth Amendment constitutional speedy trial violations).

[214] *Strunk*, 412 U.S. at 436.

[215] Smith v. United States, 599 U.S. 236, 242 (2023).

[216] *Id.* at 248–50.

[217] *Id.* at 253–54.

[218] *Id.*

[219] *Id.* at 241, 254.

[220] *See infra* note 227.

[221] Chapman v. California, 386 U.S. 18, 26 (1967).

[222] *Id.* at 23.

or a "reasonable probability" of affecting the outcome.[223] For example, a finding of ineffective counsel under the *Strickland* standard[224] or nondisclosure of exculpatory evidence under the *Bagley* standard[225] already involves a determination that the error likely influenced the outcome. As the Court explained in *Kyles v. Whitley*, once a court identifies a constitutional error under *Bagley*, further harmless-error analysis is unnecessary.[226] A recurring debate, dividing the Court since *Chapman*, has centered on whether certain conduct should be viewed as a constitutional violation subject to *Chapman*'s harmless-error analysis or whether the conduct should only be considered an error if it is first shown to have likely affected the trial's outcome.[227]

Excluding violations that bar recurring prosecution and those that already require a finding of prejudicial impact, the *Chapman* harmless-error analysis had the potential to apply to a wide range of constitutional violations. This potential has been fully realized over time. The Court has stated that only a "very limited class of errors" is considered structural, which requires automatic reversal.[228] Under *Chapman*, the Supreme Court has applied the harmless-error rule to a wide variety of constitutional violations, including improper comments on a defendant's failure to testify;[229] admission of evidence obtained in violation of the Fourth Amendment;[230] statements obtained in violation of the right to counsel;[231] and admission of statements violating the Confrontation Clause; [232] denial of the defendant's right to be present during trial;[233] ordering that the defendant appeared shackled in front of the

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[223] *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); *Chapman*, 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1963)).

[224] Strickland v. Washington, 466 U.S. 668, 694 (1984).

[225] United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* Brady v. Maryland, 373 U.S. 83 (1963).

[226] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[227] *Bagley*, 473 U.S. at 668–69. The Court held that a key element of a due process violation is the requirement of "materiality," which is established by showing a reasonable probability that the disclosure of exculpatory evidence would have led to a different result. *Id.* at 674–83. In his dissent, however, Justice Marshall contended that one the prosecutor's failure to disclose favorable evidence has been demonstrated, a constitutional violation was already present. Then, Marshall argued, the burden should shift to the prosecution to prove that the error was harmless, applying the *Chapman* standard. *Id.* at 704 (Marshall, J., dissenting). *See also* Fry v. Pliler, 551 U.S. 112 (2007) (The majority avoided the question of whether such errors could ever be considered harmless and the Court assumed that if the error were reviewed for harmless, the appropriate standard would be the more deferential one used for habeas review, but dissenters maintained that this type of error is inherently prejudicial by its very nature, making it impossible to be deemed "harmless" under any standard.).

[228] United States v. Davila, 569 U.S. 597, 611 (2013) ("[T]he highly exceptional category of structural errors"); *id.* at 599.

[229] *See, e.g.*, United States v. Robinson, 485 U.S. 25 (1988); Anderson v. Nelson, 390 U.S. 523 (1968).

[230] Chambers v. Maroney, 399 U.S. 42 (1970); Bumper v. North Carolina, 391 U.S. 543 (1968).

[231] Milton v. Wainwright, 407 U.S. 371 (1972) (statements); United States v. Wade, 388 U.S. 218 (1967) (lineups); *see also* Moore v. Illinois, 434 U.S. 220 (1977) (remanded for the application of harmless error based on introduction of evidence of a pretrial identification procedure made in violation of the right to counsel).

[232] *See, e.g.*, Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969).

[233] Rushen v. Spain, 464 U.S. 114 (1983); *see* Yarborough v. Keane, 101 F.3d 894 (2d Cir. 1996) (finding that witness's testimony was of no significance, so defendant's absence from sequestration hearing was harmless).

jury;[234] submitting incorrect aggravating factors as a jury instruction;[235] and omitting necessary elements in final jury instructions, when charged to the jury.[236]

As courts have continued to refine and apply the *Chapman* standard, it has been used to review a broad array of constitutional errors in both trial and appellate proceedings. Lower courts have extended the *Chapman* standard to additional errors, such as the unjustified use of anonymous juries or the admission of perjured testimony to a grand jury.[237] Other examples include the admission of evidence in violation of *Miranda*, or a defendant's denial of the right to testify.[238] This analysis has also been applied to various instances of jury misconduct and improper dismissal of jurors during deliberations.[239]

In *Fulminante*, the majority elaborated on the "structural defects" that impact the framework of the trial, rather than simply errors within the trial process itself.[240] These structural errors, the Court explained, were fundamentally different from those subject to the *Chapman* harmless-error standard.[241] Errors in the latter category, the Court noted, shared the common trait of being "trial errors," meaning they occurred during the presentation of the case to the jury and could therefore be assessed quantitatively against the other evidence to determine whether they were harmless beyond a reasonable doubt.[242] Although the Court later moved away from a rigid division between structural and trial errors, preferring to refer to them as part of a "spectrum of constitutional errors," it continued to cite *Fulminante*'s classification as authoritative.[243] For instance, in *Greer v. United States*, the Court clarified that unlike structural defects, which affect the entire proceeding from start to finish, isolated errors

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[234] Deck v. Missouri, 544 U.S. 622, 635 (2005) ("[W]here a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained.'" (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

[235] Brown v. Sanders, 546 U.S. 212 (2006); Stringer v. Black, 503 U.S. 222 (1992).

[236] Neder v. United States, 527 U.S. 1 (1999); *see* California v. Roy, 519 U.S. 2 (1996) (holding that failure to instruct on requisite mental state was error, albeit not structural).

[237] Major v. State, 873 N.E.2d 1120 (Ind. Ct. App. 2007); United States v. Harmon, 833 F.3d 1199 (9th Cir. 2016).

[238] *See, e.g.*, Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980); Gorham v. Franzen, 760 F.2d 786 (7th Cir. 1985); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984); Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995); Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978); Ortega v. O'Leary, 843 F.2d 258 (7th Cir. 1988); State v. Nelson, 849 N.W.2d 317 (2014).

[239] *See, e.g.*, United States v. Tejeda, 481 F.3d 44 (1st Cir. 2007) (unlike judicial misconduct and bias, neither juror misconduct nor bias are structural errors); United States v. Mackey, 114 F.3d 470 (4th Cir. 1997); Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998); In re Carpenter, 889 P.2d 985 (Cal. 1995); Stokes v. Maryland, 843 A.2d 64 (Md. App. Ct. 2004) (alternate jurors impairs the integrity of jury trial); Michigan v. Miller, 759 N.W.2d 850 (Mich. 2008) (convicted felon sitting on a convicting jury was not structural and harmless error, absent evidence of felon's partiality).

[240] Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (such error is a "structural defect affecting the framework within which the trial proceeds.").

[241] *See id.* at 296.

[242] *See id.* at 289.

[243] Brecht v. Abrahamson, 507 U.S. 619, 629 (1993); *see also*, Johnson v. United States, 520 U.S. 461 (1997); United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). The distinction resembles that which has divided nonconstitutional violations into errors that might require reversal and those that are harmless. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 27(6)(b) (4th ed., 2004).

in the trial process—such as the omission of a single element in jury instructions or a missed warning during a plea colloquy—are not structural, because they do not necessarily render a trial fundamentally unfair or unreliable for determining guilt.[244] The question of what types of errors impact the trial framework has been a persistent source of disagreement among the justices.

F. The Modern Multi-Layered Framework

Clarification was found in 2017 in the case of *Weaver v. Massachusetts*.[245] There, the Court identified three broad justifications for exempting an error from harmless-error review: (1) when the error's impact is too difficult to measure; (2) when the error affects a right meant to protect an interest other than the defendant's interest in a reliable outcome; or (3) when the error always results in fundamental unfairness.[246] The Court noted that more than one of these rationales might explain why a particular error is deemed structural.[247]

Many structural errors fall into the first category identified by the *Weaver* Court—those whose impact is simply too hard to quantify.[248] Some justices have referred to this as the "inherently indeterminate" nature of the error's impact on the trial's outcome.[249] Unlike most trial errors, these types of violations do not involve the introduction or evaluation of particular pieces of evidence. For example, while some errors subject to the *Chapman* standard—such as the failure to instruct on the presumption of innocence—may have a broad effect on the trial, their impact can be measured by considering other jury instructions and the final verdict.[250] In *Gonzalez-Lopez*, the Court reasoned that its conclusion that the denial of the right to counsel of choice constituted structural error was due to the difficulty of measuring the error's effect.[251] The Court in *Weaver* added that because the government would find it nearly impossible to prove such an error was harmless beyond a reasonable doubt, the costs of allowing the government to attempt such proof were unjustified.[252]

Another example of a defect not subject to harmless-error review, the Court held, is the failure of a judge to recuse when required.[253] In *Williams v. Pennsylvania*, the Court ruled that recusal was mandatory, even if the judge's

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[244] Greer v. United States, 593 U.S. 503, 510–11 (2021) (reasoning that since the omission of a single element in jury instructions is not considered structural, the exclusion of a *mens rea* element during a plea colloquy does not undermine the entire framework of the proceeding and therefore does not qualify as a structural error).

[245] Weaver v. Massachusetts, 582 U.S. 286 (2017).

[246] *Id.* at 290.

[247] *Id.*

[248] *See, e.g.*, United States v. Davila, 569 U.S. 597, 599 (2013) (observing that structural errors "undermine the fairness of a criminal proceeding as a whole").

[249] Chapman v. California, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting); *Weaver*, 582 U.S. at 311 (Breyer, J., dissenting).

[250] *Chapman*, 386 U.S. at 24.

[251] United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

[252] *Weaver*, 582 U.S. at 290.

[253] Williams v. Pennsylvania, 579 U.S. 1, 4 (2016).

vote was not the deciding one.[254] The fact that the judge did not cast the decisive vote only meant that the judge may have successfully persuaded the majority of the court to adopt their view, which does not lessen the unfairness to the party affected.[255] The Court explained that a multimember court's neutrality must not be compromised, as the appearance of bias damages not only the integrity of one judge, but also that of the entire institution.[256] Both the appearance and reality of impartial justice are essential to the public's trust in the courts and to the rule of law itself.[257] When a judge's bias rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

In *Sullivan v. Louisiana*, the Court ruled that a jury instruction on the reasonable doubt standard that was constitutionally flawed constituted structural error, automatically requiring reversal.[258] The Court reasoned that the violation extended beyond the due process requirement for the state to prove guilt beyond a reasonable doubt, also implicating the Sixth Amendment's guarantee of a jury verdict finding guilt beyond a reasonable doubt.[259] Since there had been no valid jury verdict in the case, applying *Chapman* would be inconsistent with its logic.[260] *Chapman* directs appellate courts to assess the basis for the jury's verdict and determine whether the verdict was clearly unaffected by the error.[261] But where no such verdict exists, the most an appellate court could conclude is that a jury likely would have found the defendant guilty beyond a reasonable doubt, an analysis *Chapman* prohibits.[262]

The Court distinguished cases involving unconstitutional jury instructions on presumptions, explaining that such errors can be reviewed by assessing how the presumption influenced the jury's verdict in light of the findings it did make.[263] However, when the error involves a misdescription of the burden of proof, it undermines all the jury's findings, making it impossible to establish the necessary link to a "beyond a reasonable doubt" finding.[264]

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[254] *Id.*
[255] *Id.* at 5.
[256] *Id.* at 5–6.
[257] *Id.*
[258] Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).
[259] *Id.* at 279.
[260] *Id.* at 278–79.
[261] *Id.* (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)).
[262] *Sullivan*, 508 U.S. at 280; *see also* Chapman v. California, 386 U.S. 18, 24 (1967).
[263] *Sullivan*, 508 U.S. at 279. In their concurring opinion in *California v. Roy* Justices Scalia and Ginsburg urged that the reasoning in *Sullivan* should prevent a reviewing court from deeming harmless the omission of an element in jury instructions merely because it believes that "no reasonable jury would have found otherwise" based on the evidence. California v. Roy, 519 U.S. 2, 7 (1996). Instead, the jury must make an actual finding, which can be demonstrated in one of two ways: either the jury's existing finding effectively encompasses the missing element, or it would have been impossible for the jury to reach its verdict without also finding the missing element. *See also* United States v. Edmonds, 80 F.3d 810, 825–26 (3d Cir. 1996) (en banc) (failure to instruct the jury to make unanimous findings on certain issues was still subject to harmless error review because the jury reached unanimous findings on other facts that were "functionally equivalent").
[264] Victor v. Nebraska, 511 U.S. 1, 5 (1994) (citations omitted) ("[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

Appellate courts in the U.S. initially approached harmless error legislation differently depending on the right in question.[265] When evaluating errors such as those in jury selection, courts focused on whether the mistake resulted in a "miscarriage of justice," assessing whether the error was merely technical or whether it deprived the defendant of the substance the right was intended to protect.[266] However, when the error involved the admission or evaluation of evidence, the courts shifted their inquiry.[267] They did not simply assess whether the defendant lost the benefit of an evidentiary rule, but instead evaluated whether the error created a miscarriage of justice based on its probable effect on the outcome of the case.[268] For instance, if a judge wrongly allowed hearsay, the court would not merely consider if the violation was technical—such as where a hearsay statement would have qualified under an exception but for a minor issue—but would also need to decide if the inadmissible evidence affected the overall evidentiary landscape enough to justify a reversal.[269]

Building on these early distinctions, modern American courts often apply two separate analytical methods when reviewing nonconstitutional errors under harmless error statutes.[270] The first, which considers the error's probable influence on the outcome, is used for trial errors that affect the evidence presented to the jury, including admissibility rulings and issues of joinder.[271] This method also applies to faulty pretrial decisions that impact the evidence's presentation, such as discovery rulings, and to actions by judges or prosecutors that may shape how the jury evaluates evidence, such as flawed jury instructions or prosecutorial misconduct.[272] Similarly, this outcome-focused review applies to errors in plea bargaining and plea agreements, as well as mistakes made during sentencing.[273]

For rights related more closely to the procedural structure of the trial, courts employ a different analysis. In such cases, courts determine whether the error was merely technical or whether it violated the defendant's substantive rights.[274] A breach of the core substance of these rights mandates a new trial, regardless of the strength of the evidence supporting the conviction.[275] Exam-

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[265] *See, e.g.*, People v. Moore, 221 P. 665 (Cal. Dist. Ct. App. 1923); Long v. State, 141 N.E. 691 (Ohio 1923); Reynolds v. Commonwealth, 112 S.E. 707 (Va. 1922).

[266] *See, e.g.*, Hoyt v. United States, 273 F. 792 (2d Cir. 1921) (discussed that if an unqualified juror was seated, yet the defendant could have remedied the issue by using an available peremptory challenge but chose not to, the error was considered harmless).

[267] *See, e.g.*, Williams v. United States, 265 F. 625 (8th Cir. 1920); People v. Pickens, 214 P. 1027 (1923); Walls v. State, 102 S.E. 43 (Ga. 1920).

[268] *Williams*, 265 F. at 626.

[269] *See, e.g.*, People v. Kello, 746 N.E.2d 166 (N.Y. 2001); Commonwealth v. Swann, 776 S.E.2d 265 (Va. 2015).

[270] United States v. Ince, 21 F.3d 576 (4th Cir. 1994).

[271] *Id.* at 577–78; *see* United States v. Bauer, 132 F.3d 504 (9th Cir. 1997) (infringement on the attorney-client privilege).

[272] *See, e.g.*, United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (prosecution's discovery obligations); United States v. Ogbuehi, 18 F.3d 807 (9th Cir. 1994); United States v. Simon, 995 F.2d 1236 (3d Cir. 1993) (jury instructions on alibi defense); United States v. Zehrbach, 47 F.3d 1252 (3d Cir. 1995); United States v. Thompson, 76 F.3d 442 (2d Cir. 1996).

[273] *See* Fed. R. Crim. P. 11(h); *see also* Little v. Nev. State Prison, 34 P.3d 540 (Nev. 2001).

[274] *See, e.g.*, People v. Miller, 759 N.W.2d 850 (Mich. 2008); Prieto v. Sussex I State Prison, 748 S.E.2d 94 (Va. 2013).

[275] Lowrey v. State, 705 So.2d 1367 (Fla. 1998).

ples of this automatic reversal approach include errors in jury selection, such as seating an unqualified juror, or improperly denying a peremptory challenge.[276] Other examples include denial of the right to have each juror polled individually after the verdict and prosecution by someone unauthorized to act as a prosecutor.[277]

In federal court, all nonconstitutional errors are reviewed under the harmless error framework set out in Federal Rule of Criminal Procedure 52(a).[278] For example, in *United States v. Lane*, the Court observed that "Rule 52(a) admits of no broad exceptions to its applicability," rejecting rigid per se rules for deciding when to apply harmless error analysis.[279] The *Lane* Court applied the harmless error standard to a case involving the misjoinder of parties in violation of Federal Rule 8(b).[280] In his concurring opinion, Justice Stevens contended that this type of error should not be subject to harmless-error analysis for two reasons.[281] First, because it is intended to guard against "guilt by association," Rule 8(b) was not intended to be subject to harmless error and instead serves an independent value beyond ensuring the reliability of the verdict,.[282] Second, Justice Stevens argued that the effect of such an error on the outcome of the case is too difficult to measure with any precision.[283] Nonetheless, the majority adhered to the traditional harmless-error standard, viewing Rule 8(b) as a mechanism for ensuring reliable verdicts by controlling the relevancy of evidence and finding that its violation was no harder to assess than other evidentiary errors.[284]

Many courts approach harmless-error analysis by comparing the potential impact of the error against the weight of the evidence presented at trial.[285] The core question they seek to answer is whether the properly admitted evidence of guilt is so convincing and the effect of the error so negligible that the court can confidently assert that the error did not play a role in influencing the jury's decision.[286] This type of comparative review often applies when the error concerns the admission or exclusion of evidence.[287] In such cases, if the prosecution's evidence overwhelmingly establishes the defendant's guilt, the court is likely to conclude that the error was harmless.[288] To overturn a

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[276] *See e.g.*, State v. Mootz, 808 N.W.2d 207 (Iowa 2012); Paulley v. Commonwealth, 323 S.W.3d 715 (Ky. 2010) (citing Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2008)); People v. Hecker, 942 N.E.2d 248 (N.Y. 2010); State v. Yai Bol, 29 A.3d 1249 (Vt. 2011).

[277] State v. Wright, 852 S.E.2d 468 (S.C. Ct. App. 2020); *see* State v. Lewis, 134 Conn. App. (2012).

[278] United States v. Lane, 474 U.S. 438, 449 n.11 (1986). Rule 52(a) was enacted as a departure from the old Exchequer rule of automatic reversal followed by English courts in the nineteenth century. Fairfax, *supra* note 91, at 436; Meltzer, *supra* note 187, at 3.

[279] *Lane*, 474 U.S. at 447 n.11.

[280] *Id.* at 446.

[281] *Id.* at 466–67.

[282] *Id.* at 474–75.

[283] *Id.* at 474.

[284] *Id.* at 446.

[285] *See, e.g.*, Commonwealth v. Story, 383 A.2d 155 (Pa. 1978); *see also* United States v. Ibisevic, 675 F.3d 342, 350 (4th Cir. 2012).

[286] *Lane*, 474 U.S. at 444.

[287] Derden v. McNeel, 978 F.2d 1453, 1456 (5th Cir. 1992).

[288] *Id.*

verdict in these situations, the excluded or wrongly admitted evidence would need to possess such extraordinary significance that it could be seen as altering the jury's perception, despite the otherwise conclusive proof of guilt already presented by the government.[289]

However, courts are also mindful of the possibility that, in certain cases, a series of seemingly minor procedural errors might collectively influence the outcome.[290] While each individual error may not have caused prejudice on its own, their cumulative effect can still result in an unfair trial.[291] This legal principle is referred to as the doctrine of "cumulative error."[292] When courts apply this doctrine, they do not view each error in isolation but rather consider whether, taken together, the errors undermined the integrity of the trial process and contributed to the final judgment.[293] In these instances, even if the overwhelming evidence points toward guilt, the overall fairness of the proceedings is brought into question, prompting the court to conclude that the cumulative errors may have unfairly prejudiced the defendant and impacted the outcome.[294]

For instance, when multiple procedural mistakes occur during a trial, such as improper jury instructions, prosecutorial misconduct, or exclusion of relevant testimony, courts may determine that the combined weight of these errors compromised the defendant's ability to receive a fair trial.[295] This approach is critical in ensuring that the justice system does not rely solely on the strength of the prosecution's evidence but also upholds the integrity of trial procedures.[296] It underscores that, even in cases where the evidence seems overwhelming, defendants are entitled to a trial free from errors that, when viewed together, might have distorted the fact-finding process.[297]

III. Moving Forward and Away from Harmlessness

A. The Misalignment Between Harmless Error Standards and Wrongful Convictions

The Innocence Project highlights that forty-eight percent of individuals exonerated after being convicted based on eyewitness testimony had been identified by someone of a different race.[298] Research in social science has consistently

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[289] *Id.*

[290] Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1313–15 (2017).

[291] *Id.*

[292] United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990).

[293] McGill v. State, 357 P.3d 1140 (Wyo. 2015).

[294] *Id.* at 1148.

[295] Linney v. State, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring).

[296] *See* People v. Krueger, 643 N.W.2d 223 (Mich. 2002).

[297] *See Derden*, 978 F.2d at 1456; United States v. Starks, 34 F.4th 1142 (10th Cir. 2022).

[298] Scheck & Neufeld, *supra* note 27, at 20. Of written decisions that followed direct appeals from exonerees' convictions, none identify the race of the eyewitness.

shown that cross-racial identifications are prone to higher error rates.[299] Cross-racial identifications may also contribute to the disproportionately high number of minorities among those exonerated through postconviction DNA testing.[300]

The Supreme Court has long recognized the inherent challenges of eyewitness identification, acknowledging that "the annals of criminal law are rife with instances of mistaken identification."[301] As a result, the Due Process Clause protects individuals from unduly suggestive identification procedures, such as when police encourage a witness to select a specific individual from a lineup.[302] With modern DNA testing, it is now clear that many eyewitnesses in these cases of wrongful convictions misidentified the defendants.

A total of forty-seven exonerees, or forty-five percent of those with written decisions based on eyewitness testimony, challenged the identification process.[303] Few of their claims, however, invoked constitutional grounds to challenge the reliability of the eyewitness testimony.[304] Twenty-nine exonerees argued that the police used suggestive procedures to encourage the eyewitness to identify their suspect, representing twenty-eight percent of the 104 exonerees who were convicted on the basis of eyewitness testimony, and whose cases had written decisions.[305] None of the claims regarding suggestive identifications were successful.[306] Four exonerees argued their right to have counsel present at a post-arrest lineup, as established in *United States v. Wade*, but none of these claims were successful either.[307] Overall, thirty-one of these exonerees, or thirty-percent, raised constitutional claims challenging the identification.[308] Another sixteen exonerees used state law or other constitutional claims to indirectly challenge the identification, including claims of ineffective assistance of counsel (five), newly discovered evidence of innocence (four), and faulty jury instructions (two).[309]

The accuracy of eyewitness identifications undoubtedly matters, but problematic procedures do not always render evidence inadmissible. For example, in *Manson v. Brathwaite*, the Court held that even if police engage in procedures that are so suggestive as to violate due process, the identification may still be allowed at trial if it is otherwise deemed "reliable."[310]

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[299] *See* Nat'l Rsch. Council of the Nat'l Acad., Identifying the Culprit: Assessing Eyewitness Identification 96–97 (Nat'l Acad. Press 2014); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 3–5 (2001).

[300] *See* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psych. Pub. Policy. & L. 230, 230 (2001) ("Eyewitnesses are less likely to misidentify someone of their own race than they are to misidentify someone of another race.").

[301] Manson v. Brathwaite, 432 U.S. 98, 119 (1977) (Marshall, J., dissenting) (internal quotations omitted).

[302] *See id.* at 113.

[303] Garrett, *Judging Innocence*, *supra* note 9, at 76 tbl. 3.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *See* United States v. Wade, 388 U.S. 218, 236–37 (1967).

[308] Garrett, *Judging Innocence*, *supra* note 9, at 80.

[309] *Id.*

[310] *See* Manson v. Brathwaite, 432 U.S. 98, 106 (1977).

This reliability could be based on factors like the witness's certainty or the opportunity they had to observe the perpetrator.[311] Social scientists, however, argue that the *Manson* ruling exacerbates the problem because it allows identifications from suggestive procedures to be admitted, so long as the witness appears confident—despite the fact that such confidence may be artificially inflated by the very suggestive tactics used by the police.[312]

B. *Toward Reliability-Focused Harmless Error Review*

The outcomes in these cases of wrongful convictions show that most exonerees had little success challenging the erroneous identifications made against them. Courts denied all claims related to suggestive eyewitness procedures, even in cases where, with the benefit of hindsight, we now know that the identifications were not reliable, but rather mistaken. Additionally, only four exonerees were successful in indirectly challenging the faulty eyewitness identification process.

The primary causes of wrongful convictions include eyewitness misidentification, followed by the use of unvalidated or improper forensic science, false confessions, and informants. It is particularly challenging to contest these types of errors as constitutional violations.[313] The rigor applied to harmless error analysis in such cases depends on whether the claim is constitutional or simply a state evidentiary issue. However, confusion over the applicable standards persists, not only within the Supreme Court, but also in state and federal appellate courts.[314] Scholars have noted little difference in how these standards are applied in practice.[315]

Eyewitness Misidentification: Defendants may challenge an eyewitness identification on constitutional grounds by arguing that law enforcement employed unduly suggestive methods to obtain the identification. This claim is based on the Due Process Clause.[316] However, it is notoriously difficult to prevail on such claims. Courts often do not require the state to prove beyond a reasonable doubt that an unduly suggestive identification was harmless because the Supreme Court has ruled that no violation exists if the identification is otherwise "reliable."[317] This reliability assessment, in a way, serves as a built-in harmless error analysis for such claims. The Court has provided several criteria to determine reliability, including the witness's opportunity

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[311] *Id.*

[312] *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 Calif. L. Rev. 383, 449–50 (2007).

[313] *See* Garrett, *Judging Innocence*, *supra* note 9, at 60–61.

[314] *See* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; a New Paradigm for Criminal Cases*, 43 Crim. L. Bull. 955 (2007).

[315] Harry T. Edwards, *To Err is Human But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1179 (1995); Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The "Guilty as Hell" Rule in State Courts*, 36 Am. J. Trial Advoc. 233, 252 (2012).

[316] *See Manson*, 432 U.S. at 119 (Marshall, J., dissenting).

[317] *Id.* at 106.

to observe the suspect, the level of certainty displayed, and the time elapsed between the event and the identification procedure.[318]

However, scientific research has cast doubt on the reliability of these factors—especially the "level of certainty"—and DNA exonerations have shown that these criteria often fail to align with actual reliability, or are applied too loosely to uphold convictions.[319] As a result, the current reliability standard for evaluating misidentifications is itself unreliable and unlikely to prevent wrongful convictions. Numerous scholars have examined this issue in depth.[320] In Garrett's study of wrongfully convicted individuals who challenged eyewitness identifications, none succeeded on appeal with this claim.[321]

Even in cases where appellate courts find the identification unduly suggestive and unreliable, they often proceed to assess the remaining evidence for harmlessness. At this stage, courts frequently fail to account for how a suggestive identification can contaminate other evidence, such as subsequent identifications or even confessions. The identification, especially if it was made early in the investigation, can become so entangled with the rest of the evidence that it is difficult to separate. Yet the harmless error standard does not encourage courts to examine how the investigation developed, step by step, before the trial.

False Confessions: False confessions occur more often than is generally assumed.[322] When a confession is obtained through unconstitutional coercion or a violation of *Miranda* rights, the defendant can bring a constitutional challenge, which would be reviewed under the harmless error standard requiring proof beyond a reasonable doubt.[323] However, if the confession was false for reasons unrelated to improper police conduct, it becomes much harder to challenge, as the claim would need to rely on other evidentiary grounds—if it can be challenged at all.

Courts frequently overlook the profound impact a confession has on the jury and how that confession can shape the development of other evidence. In *Fulminante*, for example, one coerced confession led to repeated claims, including one from a jailhouse informant. Although the Supreme Court in *Fulminante* ruled that admitting the coerced confession was not harmless, the state court had maintained that the other evidence was "overwhelming."[324] Before the rise of DNA exonerations, it was likely as hard for judges as it was for juries to disregard the weight of a confession.[325] Moreover, studies have

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[318] *See* Nancy K. Steblay, *Maintaining the Reliability of Eyewitness Evidence: After the Lineup*, 42 Creighton L. Rev. 643, 647 (2009).

[319] *Id.*

[320] Garrett, *supra* note 9, at 79.

[321] *Id.* at 61.

[322] Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 Berkley J. Crim. L. 1, 4 (2007).

[323] *See* Arizona v. Fulminante, 499 U.S. 279, 295–302 (1991).

[324] *See id.* at 297.

[325] *See id.* at 313 (Kennedy, J., concurring).

shown how confessions can bias identification procedures, influencing witnesses asked to make identifications.[326]

Over time, courts have lost the skepticism toward confessions that once led to the creation of the *corpus delicti* rule, a principle that may need to be revived. Since *Fulminante*, courts have increasingly found the admission of coerced confessions to be harmless, often with little analysis and, in some cases, on the grounds that the confession was repeated elsewhere.

Regardless of the issue, if a court determines that there was non-structural error, it will proceed to review the remaining evidence as part of a harmless error analysis. Courts may rely heavily on confessions, even when those confessions were challenged at trial, or they may turn to cross-racial identifications or questionable forensic evidence. The cumulative impact of such evidence may be deemed "overwhelming," while courts overlook how these pieces of evidence are interconnected and potentially tainted by the error. Courts may also conflate the sufficiency of the evidence standard from *Jackson v. Virginia*—which asks whether any rational fact-finder could have convicted based on the evidence—with the harmless error standard, which does not require the same level of deference to the state's case.[327]

Conclusion

One of the appeals of the harmless error doctrine is that it allows for the avoidance of costly retrials, especially in cases where the defendant is likely guilty. It may be worth exploring compromise alternatives, such as remand hearings, to evaluate the impact of an error and the strength of the remaining evidence. These hearings could be appropriate where the evidence appears solid but involves elements known to contribute to wrongful convictions, or where the erroneous admission of such evidence is in question. In such hearings, defense counsel should be permitted to challenge the reliability of the evidence and argue that it was unlikely to have supported the verdict. Additionally, they should be allowed to claim that the wrongly admitted evidence had a decisive influence on the outcome.

One intriguing suggestion for improving harmless error review is to have jurors complete post-verdict forms that assess the significance of particular pieces of evidence or instructions that were contested during the trial. Although this proposal has potential drawbacks and limitations, it could help reduce the speculative nature of harmless error analysis, which often takes place months or years after the trial.

While harmless error is only one element of post-conviction review, reforming it alone won't prevent wrongful convictions from being upheld. Other barriers exist, such as rules around issue preservation and waiver, as well as the challenges of presenting factual claims on appeal. Furthermore, there is

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[326] *See* Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications*, 20 Psych. Sci. 122 (2009).

[327] Jackson v. Virginia, 443 U.S. 307 (1979).

an inherent relationship between the standard required to prove an error and the ease with which courts find such errors harmless—if it becomes harder to deem an error harmless, courts may become less willing to identify errors in the first place. After all, the development of harmless error has occurred in tandem with the rise of criminal procedural rights.

The Plea Colloquy as Scientific Inquiry: Safeguarding Criminal Defendants Amid Objective Advancements

*Marcia M. Ziegler**

Abstract

Across the United States, police officers testify as experts on a wide variety of subjects like blood pattern analysis, fingerprints, and bite marks. Most of these officers qualify as experts by taking a forty-hour training course on a particular subject, usually taught by other officers. These officers then regularly opine on crucial issues at trial; their inclusion as expert witnesses is widely accepted and has led to thousands of wrongful convictions. This relative lack of experience coupled with an ever-changing landscape of actual scientific inquiry renders police testimony on quasi-scientific subjects a dangerous proposition. The system's current safeguards against such unreliable evidence are insufficient to protect criminal defendants, especially the vast majority of whom accept plea agreements to avoid the risk of a trial. Adding a section on scientific reliability to the plea colloquy is a straightforward way to ensure the reliability of evidence over time and accommodate changes to scientific testimony. Trial courts are in the best position to make sure defendants understand the consequences of scientific testimony in their cases, and to protect their rights on appeal. In most jurisdictions, judges are responsible for the drafting of a plea colloquy narrative that occurs on the record in open court; that plea colloquy or a brief proffer should establish a record of scientific accuracy for the evidence presented in that colloquy. The plea colloquy must evolve in this way to safeguard defendants against wrongful convictions rooted in junk science.

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* Marcia Ziegler is an Associate Professor at Salmon P. Chase College of Law at Northern Kentucky University. After nearly a decade as a trial court prosecutor, her research agenda focuses on criminal procedure and police accountability. She wishes to thank her research assistants, Dayana Perez and Zeinab Elkhansa, her family for their continued support, and the Chase faculty for their continued collegial guidance.

I. The Three Trials of Angela Garcia

> The fire at 9618 Harvard Ave. began around dinnertime on November 20, 1999. It was the Saturday before Thanksgiving. Next door, Shirley Brandon was on the phone when she heard someone banging on her door. It was her neighbor Angela Garcia, "hollering, help me, help, me[.]"[1]

Angela Garcia lived next door to Shirley's East Cleveland, Ohio, home with her two young daughters, two-year-old Nijah and three-year-old Nyeemah.[2] While one neighbor called 911, another raced with Angela back to her home as flames ripped through the two story house.[3] Firefighters arrived within minutes, but it was too late—both girls died in the master bedroom from smoke inhalation.[4]

The day after the fire, police investigators reviewed the scene and found no evidence of accelerants through the use of a trained dog; they concluded that a burning candle in dining room likely started the fire.[5] Later, Angela filed an insurance claim for the loss of her home; investigators reviewing that claim believed that she overvalued the home's contents.[6] About a month after the fire, the cause was changed from "accidental" to "incendiary," and Angela was arrested for aggravated murder, manslaughter, and insurance fraud.[7]

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[1] Liliana Segura, *The Fire on Harvard Avenue*, The Intercept (Mar. 5, 2017), https://theintercept.com/2017/03/05/did-angela-garcia-kill-her-own-daughters-arson-cover-up/ [https://perma.cc/77SA-ZJ3B].

[2] *Guilty Plea Series: The Case of Angela Garcia*, The Innocence Project (Oct. 23, 2018), https://innocenceproject.org/news/guilty-plea-series-the-case-of-angela-garcia/ [https://perma.cc/GL7Z-XLH9].

[3] *Id.*

[4] Segura, *supra* note 1.

[5] *Id.*

[6] *Guilty Plea*, *supra* note 2.

[7] *Id. See also* State v. Garcia, 2002-Ohio-4179, 2002 WL 1874535, at *1 (Ohio Ct. App. Aug. 15, 2002).

Almost like magic, the evidence against Angela changed drastically between the initial investigation and her first trial. The conclusion that no accelerants were used was discarded in favor of one involving "alligatoring," a char pattern which the investigators now claimed showed evidence of a liquid accelerant.[8] Even with this "new" evidence, the jury hung, with several jurors believing that Angela loved her children and could not have wanted them harmed.[9] Angela's subsequent second trial also resulted in a hung jury when testimony from a jailhouse informant was undermined by the deal the informant got on her own fraud charges.[10]

But at Angela's third trial the game changed yet again. New prosecutors took over and introduced a fresh theory of the crime—the fire had two points of origin, one in the dining room and one on the stairs leading to the second floor.[11]

> The evidence: a never before noticed "burn pattern" visible in a picture taken at the scene. This, prosecutors said, was proof that Garcia had poured a flammable liquid on the staircase, trapping her daughters upstairs before running out of the house.[12]

Where did this new theory come from? Not from forensic analysis of the crime scene, as it had long been destroyed. Not from a chemical analysis of the flooring or from a reenactment of a candle combusting—no, this new theory came straight from the informant jailed alongside Angela—Tonya—who had testified at Angela's second trial. After the woman insisted to police that Angela had confessed, investigators reviewed photographs of the scene that had been in evidence by that point for years.

> They discovered a photograph that "revealed unusual burn patterns" on the staircase of the house. One side of the carpet had been totally consumed, showing "heavy charring," while the other side remained undamaged. There was a marked division between the two areas, [an investigator] wrote—"a clear indication of an ignitable liquid pour pattern."[13]

In support of this theory, the state had to overcome some significant obstacles, including evidence of already well-established scientific standards. Back in 1992, the National Fire Protection Agency released NFPA 921, or the

[8] Segura, *supra* note 1. The only real evidence of the point of origin was a candle in the living room, which was alleged to have come in contact with "combustible materials." *Id.*

[9] *Id.*

[10] *Id.* The witness, named Tonya, had been recently married to a man named Timothy Lanum. Lanum was known as a "notorious jailhouse snitch," who had testified against cellmates multiple times. In Angela's case, both husband and wife had allegedly witnessed confessions from other inmates within three weeks of being incarcerated. Not for nothing, Lanum wrote Angela a letter in 2014 suggesting that she was not in fact guilty of the crime in which his wife testified. Lanum claimed that a detective set the whole thing up, explaining "[y]ou know where [Tonya] got her testimony from? From me, telling her on the phone, 'This is exactly what you say.' Whether or not Angela did it or not, it was a fucking travesty. Because it was all made-up bullshit that they wanted on the record." *Id.*

[11] *Id.*

[12] *Id. See also* Garcia, 2002 WL 1874535, at *3.

[13] Segura*, supra* note 1.

Guide for Fire and Explosion Investigations, the "single most important treatise ever published" in the field.[14] The guide "revolutionized arson analysis," and required the use of the scientific method in order to establish causation.[15] "Among the tools eliminated by the guide were go-to visual signs like the alligatoring [the state] pointed out to Garcia's jury. Today, alligatoring is a long-discarded myth; NFPA 921 warns sternly against using it as proof that an accelerant has been used to start a fire."[16]

Not only did the new testimony disregard this standard, the state also called a new expert who "insisted that he could tell through visual analysis alone that the fire had been caused by a liquid accelerant" and overtly rejected the use of the NFPA's standards.[17] "'You are asking me if I can look at this pattern and say to myself that's a liquid pour pattern,' he said on cross-examination. 'Yes, I can say that. I don't care what the NFPA says.'"[18] Despite her own expert, who had not testified in her other trials and who disputed the state's evidence, Angela was convicted in May of 2001 and sentenced to life in prison.[19]

"As with many arson cases that have come under scrutiny in recent years, the evidence against Garcia was flawed—based on circumstantial evidence, a flimsy fire investigation, and junk science."[20] Much of the flawed evidence in her case and in others centers on those "burn patterns," or visual imagery at the scene of a fire that officers believe is proof of a flammable liquid poured over a floor or furniture.[21] The issue with burn pattern analysis is that it has long been specifically discredited in the scientific community—and at a crucial juncture in Angela's case, both the prosecutors who tried Angela and the investigators who testified against her knew it.[22] After a decade in prison, Angela moved the court for a new evidentiary hearing arguing that advances in fire science should be ruled "new evidence" to allow her a new trial.[23] This motion was based on a report that "exposed the lack of scientific validity behind Garcia's conviction, pointing to accidental scenarios that were never explored, along with recent scientific studies that [had] further undermined the state's case."[24]

Just before the hearing on Angela's motion, both of the prosecutors attended a course on the proper investigation of fires.[25] This training focused on minimum qualifications for investigators, the scientific method, and

[14] *Id. See generally* Nat'l Fire Prot. Ass'n, NFPA 921: Guide for Fire and Explosion Investigations (1992).
[15] Segura, *supra* note 1.
[16] *Id.*; Nat'l Fire Prot. Ass'n, NFPA 921: Guide for Fire and Explosion Investigations (2024).
[17] Segura, *supra* note 1.
[18] *Id.*
[19] *Id.*
[20] *Id.* With no laboratory testing to back up the images, [an investigator] argued that the state's conclusions were "the equivalent of walking into a drug case and having the officer looking at a picture of a white substance and saying, geez, that looks like crack cocaine, it must be." *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

instructions on how to properly determine origin and cause.[26] The presentations at this course would have, by definition, contradicted the theories that the state had relied on to convict Angela at her third trial.[27] Nevertheless, a month and a half after the course concluded, the state filed to continue Angela's evidentiary hearing to have an independent consultant write a report that would contradict virtually every aspect of what the prosecutors had just learned.[28]

After two hung juries, vacillating theories of guilt, and more than a decade in prison, Angela's case was poised to finally overcome the shoddy investigative work that condemned her—until she was made a proposal; instead of going through with the hearing that might have exposed the complete lack of scientific certainty in her conviction, Angela was offered a plea that would allow her to trade in her life sentence for one that would let her out within six years.[29] She took it, even as two distinguished fire scientists, one of whom flew in on his own dime, stood ready to testify that she was factually innocent of setting the fire that killed her babies.[30] But who could blame her; even as she sobbed through the plea colloquy, it gave her hope that one day she would walk free and be able to visit the graves of her beloved children.

Offers like the one Angela received are the backbone of the criminal justice system; the vast majority of all criminal cases end in a guilty plea, with some studies showing that close to ninety-seven percent of cases do not see a trial.[31] With such a significant number of criminal charges ending in pleas, certainly some end up being influenced by scientific evidence later proven inaccurate, especially with the number of police officers who testify as experts in quasi-scientific fields. And because so many cases plead, very little of this police-established evidence ever becomes subject to an evidentiary hearing. Few criminal defendants who plead guilty ever get to relitigate their guilt—once they have pled, the strength of the evidence against them is no longer legally relevant. Of course, there are a few relevant mechanisms like actual innocence statutes and clemency,[32] but these options are nearly toothless. The strength of evidence against a defendant should always matter—even years after they plead guilty to the charges. When defendants cannot question the scientific accuracy of things like arson investigations, injustice results when it is later discovered that their plea was based on junk science established by police witnesses with little to no actual scientific training.

A plea must be both knowingly and voluntarily made,[33] and as such, is necessarily based on and influenced by the scientific evidence reviewed by defense counsel. Requiring a scientific proffer at a plea colloquy would

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Dan Canon, Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class 7 (2022).
[32] *See* Section V, *infra*, for a discussion of some current options for scientific review, including actual innocence statutes.
[33] *See, e.g.*, Fed. R. Crim. P. 11.

protect both the rights of a criminal defendant and the needs of the system by allowing a safety valve for review when the strength of the evidence changes. Should evidence later be viewed as inaccurate, a thorough plea colloquy including the scientific basis for the state's evidence strengthens both the case against the defendant and his plea—and it does so without having to appropriate funds, make its way through a state legislature, or be signed into law by an executive. All the solution needs is an amenable judge and a pre-written form for potentially wide-ranging benefits.

II. The Systemic Problem with Police Experts

Cases like Angela's are not rarities; "[i]n the time since Garcia went to prison, more than 50 people have been exonerated in arson cases across the country, with many more convictions overturned."[34] Many of these exonerations are based on quasi-scientific evidence admitted through the testimony of poorly trained officers. While arson is a particularly fruitful source of this such wrongful convictions, examples of the insufficient education of police abound in many contexts, starting with the basic legal training for officers—the police academy. Yuri Linetsky describes the exact training that most police academies provide, and opines that it is insufficient, even in terms of how much officers know when they try to enforce the law.[35] Linetsky, a professor and a police officer himself, describes what he calls an inadequate amount of training, even for a police officer who is *not* acting as an expert witness:

> An empirical analysis of training requirements in state police academies shows that the number of hours devoted to legal topics is, on average, surprisingly low: about 12% of total academy hours. Most academies devote many of those hours to the state's statutory and traffic laws, rather than to teaching legal theory, application, and limitations of the law.[36]

Linetsky details the problem with officers, who have significant power over Americans, as one that derives from a lack of real education and training. While criminal justice programs across the country dispense even doctoral degrees, none is required for officers, who instead take a training program at a state-sponsored academy.[37] Most academies take less than six months to complete—some are as short as three.[38] The academies devote little time

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[34] Segura, *supra* note 1.

[35] *See generally* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. Rev. 1 (2018).

[36] *Id.* at 3.

[37] *Id.* at 16–19.

[38] *Id.* For example, in Indiana, the Indiana Law Enforcement Agency (ILEA) runs the statewide police academy, which takes 600 hours, or fifteen weeks, to complete. *Basic Training - Tier I,* Ind. L. Enf't Acad. https://www.in.gov/ilea/about-the-academy/basic-training-tier-i/ [https://perma.cc/C6Z9-638H] (last accessed Sep. 22, 2025). Police academy is roughly 800 hours in Kentucky. *Law Enforcement Basic Training*, Dept. of Crim. Just. Training, https://www.docjt.ky.gov/basic [https://perma.cc/E5VM-ZSQJ] (last accessed Sep. 22, 2025), and as much as six months in New York, *Training & Physical Requirements,* NYPD Recruitment,

to learning the law yet expect officers to enforce it fairly. As such, Linetsky describes multiple cases in which civilians were arrested on disorderly conduct or domestic violence charges for clearly constitutional speech.[39] In each case, the officer reviewed and attempted to enforce the text of a state statute but was unaware that courts had already determined that the speech in question was constitutionally protected.[40]

These kinds of cases, while unfortunate, are easily remedied by dismissing charges or by increasing the kinds of police training that already exist. But the inexperience and inaccuracies of police training are not limited to applications of the law. Linetsky's argument is even stronger when made in reference to police officers who testify as experts in quasi-scientific areas. For instance:

> David Camm lost 13 years of his life to eight drops of blood. In 2000, the Indiana state trooper was charged with murder after finding his wife and two children shot to death in their home. During the three trials that followed, the prosecution brought in bloodstain experts who argued that the flecks of blood on the t-shirt Camm had worn the night of the murder were "high-velocity impact spatter"—proof, they said, that he was the shooter.[41]

Camm was convicted twice; courts overturned both convictions.[42] At his third trial, a forensic scientist testified that there was "too little information [relative to the bloodstains] from which to draw any meaningful conclusion."[43] He was acquitted in his third trial, after another man had been convicted of the crime in a separate proceeding.[44] Unlike Camm's, that man's DNA was found at the crime scene years prior under one of the victim's fingernails.[45]

Typically, an officer who testifies to crucial evidence like the bloodstain analysis in Camm's case has completed no more than a forty-hour training course in his discipline,[46] and he rarely has even an associate's degree in the field as the only required education is the academy. By contrast, the expert scientists who discredit their testimony are typically highly educated in

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https://nypdrecruit.com/pages/police-officer-training-physical-requirements [https://perma.cc/7KA3-AS2D] (last accessed Sep. 22, 2025).

[39] Linetsky, *supra* note 36, at 2–15.

[40] *Id.*

[41] Katherine J. Wu, *There will Be Blood, and Physics, Too: The Messy Science of Bloodstain Pattern Analysis*, NOVA (Aug. 6, 2019), https://www.pbs.org/wgbh/nova/article/forensics-bloodstain-pattern-analysis/ [https://perma.cc/R9HP-Q3DN]. *See also David Camm*, The Nat'l Registry of Exonerations, https://exonerationregistry.org/cases/11440 [https://perma.cc/HG3S-93Y8] (last updated Aug. 24, 2023).

[42] D.R.C. v. State, 908 N.E.2d 215, 219–21 (Ind. 2009).

[43] Pamela Coloff, *Bloodstain Analysis Convinced a Jury She Stabbed Her 10-Year-Old Son. Now, Even Freedom Can't Give Her Back Her Life*, ProPublica (Dec. 20, 2018), https://www.propublica.org/article/bloodstain-pattern-analysis-jury-wrongful-conviction-acquitted-exonerated [https://perma.cc/3J2J-9NZH].

[44] Wu, *supra* note 41.

[45] *Id.*

[46] Linetsky, *supra* note 35. *See also* A.C. Thompson, Rohan Naik & Ken Schewencke, *Hate Crime Training for Police Is Often Inadequate, Sometimes Nonexistent*, ProPublica (Nov. 29, 2017), https://www.propublica.org/article/hate-crime-training-for-police-is-often-inadequate-sometimes-nonexistent [https://perma.cc/E45E-BGRT].

analytical sciences with experience in empirical research.[47] These cases underscore a troubling trend in American jurisprudence: that police officers testify routinely as experts on all kinds of high profile trial matters, like blood pattern analysis and the origin of building fires, with little relevant scientific training. And defendants like Angela Garcia end up spending the rest of their lives in jail based on their opinion testimony.

Up until now, there has been little to no judicial pushback on officers who testify to specious science. Some jurisdictions have reviewed the issue of scientific testimony in criminal cases; they now differentiate between scientific and other training, both in their case law and in their rules of evidence, but to little avail. New Mexico, for instance, has set forth separate standards for "scientific" and "specialized" fields of testimony.[48] For example, *State v. Torrez* examined a murder trial in which the defense objected to a police officer offered as an expert in "gang-related law enforcement and gang culture."[49] New Mexico Evidence Rule 11-702, on the testimony of expert witnesses, requires that the testimony assist the trier of fact and be based on "scientific, technical or other specialized knowledge."[50] In *Torrez*, the defendant argued that the officer's testimony "amounted to 'junk science' and an unscientific attempt to predict the behavior of gang members."[51] Further, the methodology could not be tested, as "gang culture" is not a recognized field of study.[52] In allowing the officer's testimony under Rule 11-702, the court drew a distinction between two words in the rule and opined that the defendant confused "the standards applicable to determining the admissibility of expert *scientific* testimony with those for admitting expert testimony based on the *specialized knowledge* of the expert witness."[53] For the New Mexico Supreme Court, the officer was an expert in the *specialized* field of gang culture, not the *scientific* field, thus, the officer's limited training was still enough to qualify him as an expert.[54]

But evidence rules like these, even when they attempt to refine how we admit evidence, rarely discourage judges from accepting the pseudo-scientific expert testimony of a police officer. While the evidentiary distinction might be helpful in cases involving obvious scientific testimony, like when a medical examiner determines a cause of death or when a doctor opines on how permanent a disability might be, it is less clearly applicable to those fields that are science-adjacent.[55] In addition to the scientific/specialized analysis

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[47] *See, e.g.*, Pierre Margot, *Commentary on The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 795 (2011).

[48] State v. Torrez, 210 P.3d 228, 234–36 (2009).

[49] *Id.* at 231.

[50] Rule 11-702 N.M.R.A.

[51] Torrez, 210 P.3d at 234.

[52] *Id.* at 233.

[53] *Id.* at 234.

[54] *Id.*

[55] Police officers testify to all manner of evidence, such as identifications, confessions, and the investigative steps they take. It is in the more highly technical fields, such as fingerprinting and ballistics, where scientific experts can be more accurate than police officers in their opinions. This article focuses on these "science adjacent" fields to the exclusion of other realms of erroneous evidence.

in *Torrez*, New Mexico courts have reviewed police expert credentialing in a blood pattern analysis case under Rule 11-702. *State v. Fry* involved a homicide where the defense objected to the state's blood spatter analyst on the grounds that the officer was not an expert.[56] The court upheld the admission of his testimony on the grounds that blood spatter evidence was subject to peer review, was testable, and that the theory had been generally accepted in the field.[57] The main witness: the blood spatter expert officer himself, who was essentially self-proving his own expertise.[58]

In *Fry*, as in a large body of cases,[59] courts uphold the testimony of police officers as experts in these scientific-adjacent fields. While the *Fry* court held that the blood spatter evidence was scientific instead of specialized under the statute, it did not require the testimony of a scientist, or even someone with more than forty hours of training, to admit it. By far, the most common expert witness at any criminal trial is a police officer, and they are tasked with providing evidence against thousands of criminal defendants every year. It is in these "scientific cases presented by non-scientists" where we see many wrongful convictions, and where the court should be proactive in protecting future defendants.

A. The History of Scrutinizing the Police as Quasi-Scientific Experts

The use of police officers as expert witnesses in American criminal trials has been commonplace for decades. As early as the 1950s, trial judges "welcomed police officers as expert witnesses on crime, including on topics previously deemed either commonsensical or the province of scientific professionals."[60] The commonality of such testimony evolved into a significant amount of deference, both from juries and from judges.[61]

Over time, this expert testimony has come under some scrutiny—leading in part to the creation of a landmark report commissioned by Congress in 2009. This report,[62] released by the National Academy of Science (NAS), has served as the foundation for much of the creation and admission of forensic testimony in courts nationwide. Written nearly half a century after the advent of police as experts, it was created in response to the "notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of

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[56] State v. Fry, 126 P.3d 516, 540 (2005). In *Fry*, the court discussed that the expert in question had testified over 300 times and had qualified as an expert in twenty-five jurisdictions, but there was no mention of their formal scientific training beyond a police-based course; thus, the court's opinion did not require formal scientific training, like a degree, as a requirement to admission.

[57] *Id.* at 540–42.

[58] *Id.*

[59] *See* Paul C. Giannelli, *Scientific Evidence in Civil and Criminal Cases*, 33 Ariz. St. L. J. 103, 112–17 (2001).

[60] Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995, 2000 (2017).

[61] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 27 (1968) (urging courts to give weight to inferences drawn by officers "in light of [their] experience").

[62] Nat'l Acad. of Scis., Strengthening Forensic Science in the United States: A Path Forward (2009).

many forensic methods."[63] Notably, the report's drafters heard consistent testimony that the entire system has "serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country."[64] The NAS's ultimate recommendations "included the establishment of a wholly independent federal agency to oversee the forensic science community," the need for certification and accreditation of forensic science professionals, and "the need for institutional independence of public forensic laboratories, which the NAS found often hold a prosecutorial bias."[65]

The 2009 NAS report, among others, defined the problem as one so fundamental to the system as to render it broken and in need of structural reform.[66] Nevertheless, the study barely moved the needle in terms of improving the accuracy of such testimony in criminal trials. While the National Association of Criminal Defense Lawyers notes that the issue was so significant as to be the "second leading cause of wrongful convictions [in America] . . . much of the promise of the 2009 NAS report and its associated recommendations remain unfulfilled[.]"[67] In 2017, the Department of Justice disbanded the National Commission on Forensic Science, and "ended plans for an expanded review of FBI testimony in several forensic disciplines . . . leaving open the possibility that similar errors and resulting wrongful conviction will go unremedied."[68]

In light of such scrutiny, jurisdictions have reviewed several different police techniques that are scientific or quasi-scientific in nature; many techniques that were once regularly utilized in court are no longer viewed by the justice system as valid since the empirical basis for them has disintegrated over time. Journalists call these outdated techniques "junk science," and argue that they have "wormed their way into every corner of our real-life criminal justice system" as they have been instrumental in thousands of convictions.[69] Thankfully, some techniques have gone the way of the dinosaurs,[70] even if they are responsible for convicting some of our country's arguably most dangerous men. Bite mark analysis, for example, was once used to convict infamous serial killer Ted Bundy and became widely used in a variety of subsequent criminal prosecutions. In *Forensic Odontology and Bite Mark Analysis: Understanding the Debate*, Anthony Cardoza explains that Bundy's case "put bite marks as evidence on

[63] *Id.* at 8. *See also Ten Years Later: The Lasting Impact of the 2009 NAS Report*, The Innocence Project, (Feb. 19, 2019), https://innocenceproject.org/news/lasting-impact-of-2009-nas-report/ [https://perma.cc/PGY2-AFP3].

[64] Nat'l Acad. of Scis., *supra* note 62, at xx.

[65] *News Release*: *The NAS Report on Strengthening Forensic Science, Ten Years On; Much Work Still to be Done*, Nat'l Ass'n of Crim. Def. Laws. (Feb. 18, 2019), https://www.nacdl.org/newsrelease/News-Release-~-02-18-2019 [https://perma.cc/MAN6-PCK3].

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Sophia Kovatch, Pamela Colloff & Brett Murphy, *Is it Forensics, or Is It Junk Science?*, ProPublica, (January 31, 2023), https://www.propublica.org/article/understanding-junk-science-forensics-criminal-justice [https://perma.cc/FM4X-6TVL].

[70] At the time of writing, it was widely reported in the media that scientists had recently cloned a previously extinct animal called a dire wolf. While the potential for resurrecting the T-Rex might at some time exist, it is not yet a viable technique supported by empirical studies.

the map," and that such analysis "went 'viral'" after his conviction through the next twenty-five years."[71] However, starting in the 2000s, "it started to become evident to some odontologists that the opinions of bite mark patterns and bite mark analysis were not consistent between 'experts.'"[72] Because Bundy later confessed to killing 30 women between 1974 and 1978, his case was not one where most would argue his actual innocence based on bad scientific testimony–nevertheless, it was influenced significantly by science that is no longer widely accepted. The forensic odontologist who testified at Bundy's trial, Richard Souviron, even "recently said his bitemark testimony would have been different after 30 additional years working in that field."[73]

Cardoza's take on how the intersection between science and policing can obscure the truth could not be clearer. He, a dentist and not a police officer, describes what many lawyers never seem to fight: the wholesale acceptance of scientific or quasi-scientific testimony established in court by police officers alone when there is no real basis for the opinions. He describes the massive proliferation of bite mark testimony in hundreds of cases, but "[e]ven though reliability and validity of bite mark analysis had not been established, bite mark testimony continued to be accepted by the courts."[74] The passage of time has been rough on other police-established fields like hypnosis and 911 call analysis, and these two equally problematic fields illustrate that this problem is one exacerbated if not created by law enforcement.

From the 1950s through the 1980s, hypnosis became a popular tool for law enforcement use.[75] Considered a reliable "way to exhume information thought to be buried in the mind," hypnosis is defined as a "highly suggestible state into which a willing subject is induced by a skilled therapist" to recall memories of a crime they had been a victim of or a witness to.[76] "Prior to 1979, virtually all jurisdictions which addressed the subject of hypnosis held that it was a permissible means of refreshing the recollection of a witness."[77] Since then, however, jurisdictions across the country have struggled with whether or not the technique is scientifically sound, and it has largely fallen out of favor.

The use of hypnosis in criminal cases illustrates that a significant part of the problem with changing evidence lies in law enforcement motivations to utilize it. Much like other police-driven pseudoscience, the appeal of the technique lies in its ease of use and inexpensiveness, thus becoming an attractive evidentiary option for offices that chronically operate on small budgets.

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[71] Anthony Cardoza, *Forensic Odontology and Bite Mark Analysis: Understanding the Debate*, 51 J. Cal. Dental Ass'n 1 (2023) [https://doi.org/10.1080/19424396.2023.2210332].

[72] *Id.*

[73] Laurie Kaiser, *Bitemark Evidence Can Send Wrong Person to Prison, Death Row, UB Professors Say,* UBNow (July 26, 2023), https://www.buffalo.edu/ubnow/stories/2023/07/bush-bitemark-evidence.html [https://perma.cc/QWD2-2JCW].

[74] Cardoza, *Forensic Odontology*, *supra* note 71, at 1.

[75] Alison Winter, *The Rise and Fall of Forensic Hypnosis*, 44 Stud. in Hist. & Phil. Biological & Biomedical Sci. 26, 27.

[76] State v. Mack, 292 N.W.2d 764, 765 (Minn. 1980) (citing J. Coleman, Abnormal Psychology and Modern Life 579 (2d ed. 1960)).

[77] 3A Cipes, Bernstein & Hall, Criminal Defense Techniques § 68A.03 (Matthew Bender, Rev. Ed.) (2025).

This is largely due to the training requirements which—as in many other police "expert" fields—is minimal at best. Ira Mickenberg explains that:

> The use of hypnotism is a somewhat common prosecution tactic in cases where a government witness is unable to remember key details of a crime. Moreover, these cases are no longer limited to large cities in which the prosecutor's office has the resources to engage in hypnosis. A small but thriving industry has grown up in which weekend seminars have been conducted to train police officers as instant "experts" on hypnosis. These officers then return home and begin hypnotizing crime victims and witnesses. Consequently, hypnosis is used in both large cities and smaller communities.[78]

For example, for the low price of $70.50 (on sale from $150.00), one can obtain a certificate in forensic hypnosis from the Mottin & Johnson Institute of Hypnosis.[79] The program's founder, Don Mottin, joined the police force after a stint in the Marines.[80] Within four years, he quit police work and opened his own Institute of Hypnosis, teaching other officers to use the techniques he learned during a year spent studying them in Japan.[81] This was not before he "used hypnosis to help the police with cases involving murder, rape, kidnapping, robberies, burglaries, and other major crimes."[82] Mottin describes himself as "one of the foremost experts in hypnosis today."[83]

In terms of value to potential clients, Mottin bills his day-long course as a chance to "take your hypnosis practice into the exciting field of Forensic hypnosis," advertising that "[h]ypnosis has been used to help solve crimes as far back as 1845. Police Departments have found that even in States [sic] not allowing hypnosis to be used in court, it is a very valuable adjunct to their investigations. This exciting program will also prove to be extremely valuable in helping you establish regression techniques that are both beneficial and accurate for your clients."[84]

If Mr. Mottin's course isn't appealing, perhaps one from the Texas Commission on Law Enforcement might fit the bill.[85] In Basic Investigative

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[78] *Id.*

[79] *Forensic Hypnosis*, Mottin & Johnson Inst. of Hypnosis, https://donmottin.com/home/shop/programs-with-certificates/forensic-hypnosis-digital-view-download/ [https://perma.cc/NZZ4-NL2V]. The full package includes four DVDs, a workbook, and a certificate of completion and takes "one full day" to complete. *Id.*

[80] *Meet Don Mottin*, Mottin & Johnson Inst. of Hypnosis, https://donmottin.com/ [https://perma.cc/5NCT-XFC3].

[81] *Id.*

[82] *Id.*

[83] *Id.* Mottin's website brags: "every major hypnosis organization has presented Don with awards for his unique teaching abilities. Don is the only hypnosis instructor in the country that has been named Instructor of the Year by NGH three times. Other awards include: the Rexford L. North Trophy, the President's Award, Educator of the Year, the prestigious Ormond McGill Award, the Iron Man Of Hypnosis Award, and the Charles Tebbett's Award just to name a few. Don has also been featured on the cover of the Journal of Hypnotism. Mottin loves teaching hypnosis and he does it very well. Going to Google and typing in Don Mottin will generate hundreds of responses from those who have trained with Don." *Id.*

[84] *Forensic Hypnosis*, *supra* note 79.

[85] The state of Texas has not cornered the market on police pseudoscience. Mottin and other trainers operate across the country, using web-based videos that can be accessed with just

Hypnosis, "[s]tudents will learn about the role of the police investigative hypnotist, the ethical and professional aspects of hypnosis, and proper interviewing techniques" as well as "hypnosis techniques such as induction techniques, deepening techniques, and the use of the Chevreul pendulum."[86] The course takes a minimum of forty hours to complete, and includes classroom, practical and field exercise hours.[87] It may be taught by a fellow police officer who has themselves taken the course.[88]

Neither Mottin nor the officers at the Texas Commission on Law Enforcement have a background in science; nevertheless, not only do they advocate for and testify to the efficacy of this technique, but they create and run the programs that train police officer experts nationwide. Yet, the current state of the law largely does not support the use of the technique in court, and much of the precedent surrounding its exclusion is based on a lack of scientific rigor. Mickenberg discusses four separate approaches states have used to restrict or abolish the use of hypnotized witness testimony.[89] A limited number of jurisdictions do apply *Daubert* and some have consequently excluded testimony.[90] In *Borawick v. Shay* the Second Circuit reviewed the appropriate standard for the introduction of hypnotized testimony.[91] There, an alleged victim of sexual abuse sued her aunt and uncle in tort.[92] The victim had no memory of any abuse for twenty years until she began experiencing panic attacks in her late twenties.[93] After a significant amount of treatment,

an internet connection and an iPhone. Further, the federal government has also used hypnosis in law enforcement, despite also publishing articles on the unreliable nature of the practice as long ago as 1979. In the journal *Detective*, one author opines that hypnosis should only be used as a last resort in criminal investigations due to legal and mental health considerations. G.L. Griffiths, *Investigative and Forensic Hypnosis*, Detective, Summer 1979, at 14, 19, https://www.ojp.gov/ncjrs/virtual-library/abstracts/investigative-and-forensic-hypnosis [https://perma.cc/7X9E-UBY8].

[86] Tex. Comm'n on L. Enf't, *Basic Investigative Hypnosis: Instructor Resource Guide* (2025), https://www.tcole.texas.gov/document/basic-investigative-hypnosis.pdf [https://perma.cc/JDE5-DYVT].

[87] *Id.*

[88] *See id.*

[89] 3A Cipes, Bernstein & Hall, *supra* note 77, § 68A.03. Mickenberg also goes on to discuss the evidentiary rules states have enacted to deal with the technique. *Id.*

[90] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). *Daubert* sets the standard for the introduction of scientific evidence, holding that a technique upon which an expert opinion was based did not have to be generally accepted as reliable as a precondition to the opinion's admission as long as the standards of reliability and relevance under the federal evidence rules were met. *Id.* at 597–98. This was a relaxation of previous standards for the admissibility of scientific evidence based on *Frye v. United States*, which had previously held that expert opinion based on a scientific technique is inadmissible unless the technique is generally accepted as reliable in the relevant scientific community. *See* 293 F. 1013 (D.C. Cir. 1923). As *Daubert* relaxed the *Frye* requirement of general acceptance, Mickenberg opined that "[i]t is likely that as states choose to adopt the *Daubert* standard, they will decide that hypnosis meets the standards for the introduction of scientific evidence." 3A Cipes, Bernstein & Hall, *supra* note 77, § 68A.03. However, this has not panned out, and several cases applying the *Daubert* standard have ruled hypnotized testimony inadmissible. *See* United States v. D.W.B., 74 M.J. 630, 638 (N-M. Ct. Crim App. 2015) ("Many jurisdictions hold that hypnosis as a general matter fails a *Daubert* (or, in older cases, *Frye*) reliability analysis, and accordingly, witnesses are per se barred from testifying to memories recovered during or after hypnosis.").

[91] Borawick v. Shay, 68 F.3d 597 (2d Cir. 1995).

[92] *Id.* at 598.

[93] *Id.*

the victim underwent hypnosis that "uncovered" memories of abuse.[94] There, the Second Circuit applied a seven-factor case-by-case analysis, focusing on the purpose of the hypnosis, the suggestibility of the subject, and the presence of a video or audio recording of the hypnosis session.[95] The court further suggested that a pretrial hearing on the reliability of hypnotized evidence would be "highly desirable."[96]

The court also specifically referenced *Daubert* in choosing this more strenuous test to apply, even though the fundamental question was not the admissibility of an expert witness, but of a lay one; Borawick was the complaining witness, not the hypnotist. Nevertheless, the court detailed that "[e]ven though *Daubert* does not provide direct guidance, our decision today is informed by the principles underlying the Supreme Court's holding."[97] After applying the extensive and *Daubert*-adjacent test, the Second Circuit excluded Borawick's testimony, largely based on her hypnotist's lack of scientific qualifications and his lax use of techniques, such as not keeping notes of sessions.[98] Combined with the "inherent incredibility" of her "far-fetched, uncorroborated" allegations, the court held that the entirety of the witness's testimony

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[94] *Id.* at 598–600. The opinion goes into extensive detail relative to the "uncovering" of these memories. Her panic attacks started in 1984, and she underwent hypnosis starting in 1987. *Id.* at 598. She revealed sadistic if not inconceivable abuse during the sessions, but did not independently remember any abuse until 1989. *Id.* at 598–99.

[95] *Id.* at 608.

[96] *Id.* ("First, it should evaluate the purpose of the hypnosis: whether it was to refresh a witness's memory of an accident or crime or whether it was conducted as part of therapy . . . a second important consideration is whether the witness received any suggestions from the hypnotist or others prior to or during hypnosis such as a theory of the cause of the subject's ailments or key information relevant to the investigation for which she underwent hypnosis. A third and related factor is the presence or absence of a permanent record, which can help the court ascertain whether suggestive procedures were used. Ideally, the session should be videotaped or audiotaped. Fourth, a court should consider whether the hypnotist was appropriately qualified by training in psychology or psychiatry. A fifth factor is whether corroborating evidence exists to support the reliability of the hypnotically-refreshed memories. Sixth, evidence of the subject's hypnotizability may also be relevant. A highly hypnotizable subject may be more prone to confabulate and more susceptible to suggestion. Seventh, the court should consider any expert evidence offered by the parties as to the reliability of the procedures used in the case. Finally, a pretrial evidentiary hearing is highly desirable to enable the parties to present expert evidence and to test credibility through cross-examination.").

[97] *Id.* at 610 ("Even though *Daubert* does not provide direct guidance, our decision today is informed by the principles underlying the Supreme Court's holding. First, by loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence. Second, it emphasizes the need for flexibility in assessing whether evidence is admissible. Rather than using rigid "safeguards" for determining whether testimony should be admitted, the Court's approach is to permit the trial judge to weigh the various considerations pertinent to the issue in question. Third, *Daubert* allows for the admissibility of scientific evidence, even if not generally accepted in the relevant scientific community, provided its reliability has independent support. Finally, the Court expressed its faith in the power of the adversary system to test 'shaky but admissible' evidence, and advanced a bias in favor of admitting evidence short of that solidly and indisputably proven to be reliable. Finally, we note that, even if *Daubert* were of direct application, nothing in *Daubert* is inconsistent with our outlined approach.") (citations omitted).

[98] *See id.* at 609 ("The district court's finding that St. Regis was not properly qualified finds ample support in the record: his formal education ended with a high school diploma; he had no formal training in psychiatry or psychotherapy; his hypnotic technique used an experimental cranial electronic stimulator; he did not read the professional literature; and his work experience prior to being a hypnotist at Pacific Medical Center was intermittent.").

was inadmissible.[99] They felt so strongly in their opinion that they refused to remand the case to the lower court for further review, choosing instead to dismiss it outright.[100]

In some states, like California, courts have held that hypnotizing a witness *per se* renders their testimony inadmissible. In *People v. Shirley*,[101] the California Supreme Court discussed just how unreliable the courts in that jurisdiction view hypnosis. There, in a rape case in which the complaining witness had been hypnotized to enhance her testimony,[102] the trial court had ruled that hypnosis goes only to the weight of the evidence, and not the admissibility.[103] On appeal, the court examined cases from across the country where the testimony of witnesses who had been hypnotized was "unanimously" excluded, and stated they joined "a growing number of courts that have abandoned any pretense of devising workable 'safeguards' and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the *Frye* test."[104] Thus, "[i]n accord with recent and persuasive case law and the overwhelming consensus of expert opinion, [the court concluded] that the testimony of such a witness should not be admitted in the courts of California."[105]

But in most jurisdictions, hypnotically enhanced testimony is not excluded *per se*; rather, a witness who has been hypnotized may only testify to memories that existed before the hypnosis. Those that appeared only because of the hypnosis are inadmissible and excluded.[106] Twenty-two jurisdictions use this majority rule, and many others either highly scrutinize the exercise of hypnosis or bar all hypnotized testimony on a *per se* basis.[107] As such, the use of hypnosis in modern trial work is virtually non-existent, and it remains a remnant of discredited pseudoscience.

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[99] *Id.* at 609.

[100] *See id.* ("Since in our view the factors before the district court weighed decisively against the admissibility of Borawick's testimony, we are convinced that if the district court had followed our test, it would have necessarily reached the same conclusion. We see no point in remanding the case so that the district court can reach the same finding."); *see also* 3A Cipes, Bernstein & Hall, *supra* note 77, § 68A.03.

[101] 723 P.2d 1354 (1982).

[102] *See id.* In *Shirley*, there was an indication that the testimony elicited at trial did not exist before the hypnosis. *Id.* at 1359–61. The complaining witness "was allowed to testify to a number of matters that she assertedly had been unable to recall on two occasions prior to hypnosis, i.e., when she gave statements to the police on the night of the events in question, and when she testified at the preliminary hearing." *Id.* This evidence included details of the removal of her clothing, the use of a knife, as well as an incident of oral copulation. *Id.*

[103] This argument has been advanced in a few other jurisdictions. Based on pre-*Daubert* cases, it is a minority position. *See, e.g.*, Harker v. State, 463 A.2d 288 (Md. App 1983) ("A number of jurisdictions similarly ruled that pretrial hypnotism raises questions as to the weight and credibility, rather than the admissibility, of the evidence.) (citing United States v. Adams, 581 F.2d 193, 198 (9th Cir. 1978); United States v. Narciso, 446 F.Supp. 252, 284 (E.D. Mich. 1977); Creamer v. State, 205 S.E.2d 240, 242 (1974); People v. Smrekar 385 N.E.2d 848, 853 (1979); State v. Jorgensen, 492 P.2d 312, 315 (1971)).

[104] *Shirley*, 723 P.2d at 1366–67.

[105] *Id.* at 1355. Following *Shirley*, the California legislature passed Cal. Evid. Code § 795 (2024), which significantly limits the introduction of testimony from a witness who was hypnotized about the events they would testify to. *See* People v. Alexander, 235 P.3d 873, 879–83 (Cal. 2010) (discussing the evidentiary rule and *Shirley*).

[106] 3A Cipes, Bernstein & Hall, *supra* note 77, § 68A.03.

[107] *Id.*

Changes in how courts view the efficacy and admissibility of hypnosis and bite marks show just how ineffective this evidence can be; but while courts have responded to some forms of ineffective evidence, there are other technologies that are created outside of the scientific community that also deserve scrutiny.

911 call interpretation is such a field. In 2019, a young mother named Jessica Logan called 911 when her child stopped breathing.[108] Jayden was a 19-month-old baby with a history of respiratory issues for several weeks, including four admissions to the hospital.[109] On one of these admissions, he had been prescribed breathing treatments, which his mother tried to administer that night—instead, she found him already in the throes of rigor mortis by the time she realized something was wrong.[110]

But Jessica's situation became even worse, if that could be possible, once she called for help. In her subsequent trial for killing Jayden, the jury heard evidence from a police officer who interpreted her 911 call as an act staged to cover up the baby's murder.[111] That officer had taken a two-day law enforcement training course called "911 homicide: Is the caller the killer?" at a nearby community college.[112] The crux of the training is that attendees will leave with the "power to solve murders by listening to a 911 call."[113] Because Jessica "did not explain precisely what had happened until almost a minute into the 911 call, and . . . never explicitly asked for an ambulance for Jayden," the detective testified that her call itself indicated her guilt.[114] During her trial, he testified that:

> She gave information in an inappropriate order. Some answers were too short. She equivocated. She repeated herself several times with "attempts to convince" the dispatcher of Jayden's breathing problems. She was more focused on herself than her son: I need my baby instead of I need help for my baby. And when asked if Jayden was beyond any help, Logan said, "I think he's gone." She had "already accepted that Jayden was deceased," Matthews noted in his report. According to the detective, almost everything Logan said—and didn't say—was evidence of her guilt.[115]

Jessica, a young victim of domestic violence, was so learning disabled that she qualified for government benefits after graduating high school, where she needed the questions on her exams read to her as an accommodation for her ability.[116] She was poor but did her best to keep a roof over her family's head

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108 Brett Murphy, *How Jessica Logan's Call for Help Became Evidence Against Her*, ProPublica (Nov. 20, 2022), https://www.propublica.org/article/911-call-analysis-jessica-logan-evidence [https://perma.cc/Y5TE-2QF8].

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

with the help of Section 8 and her family.[117] Instead of using this information to explain why she, in a moment of sheer panic, might not have known what to say to a dispatcher, the prosecution twisted it into a motive—financial stress.[118] And although the investigators never tested the baby's bedding for lung fluid, nor had any other direct evidence of murder, the jury convicted Jessica.[119] Her case is currently on appeal.[120]

While the field of hypnosis includes at least some empirical study,[121] 911 call analysis is largely presented, if not wholly created, by law enforcement and as such is not subject to peer review, statistical analysis, or any other empirical process. The theory that a 911 call itself can be evidence of guilt through tone of voice, language choice, or a lack of emotion was created by a retired deputy police chief named Tracy Harpster.[122] Harpster possesses no scientific training—he created his program as an offshoot of his master's thesis in criminal justice, where he listened to one hundred recordings to claim that certain indicators correlate with guilt and others with innocence. [123] These "indicators of guilt" include responses to dispatch questions like "Huh?" and an isolated "please."[124] Did the caller give extraneous information? Was there little urgency in her voice? Was there a "lack of sensory details?" Each of these can show that a call is "dirty," and a caller therefore guilty of, well, something.[125]

Unfortunately for many criminal defendants, 911 call analysis is, in short, junk.[126]

> Twenty researchers from seven federal government agencies, universities and advocacy groups have tested Harpster's model against other samples of 911 calls to see if the guilty indicators he had identified did, in fact, correlate with guilt. They've consistently found no such relationship for most of the indicators. In two separate studies, experts at the FBI's Behavioral Analysis Unit warned law enforcement officials to exercise caution when using 911 call analysis because their results contradicted so many of Harpster's claims.[127]

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[117] *Id.*

[118] *See id.* The prosecutor even "warned the jury not to infantilize Logan or excuse what she'd done because she's 'not very bright.'" *Id.*

[119] *Id.*

[120] *Id.*

[121] *See generally* Jenny Rosendahl, Cameron T. Alldredge & Antonia Haddenhorst, *Meta-Analytic Evidence on the Efficacy of Hypnosis for Mental and Somatic Health Issues: A 20-Year Perspective*, 14 Frontiers in Psych. 1 (2024) [doi: 10.3389/fpsyg.2023.1330238].

[122] *Tracy Harpster*, L. & Jus. Comm'n, https://mtu8.com/instructor/tracy-harpster/ [https://perma.cc/364A-YA6M].

[123] *See Brett Murphy, They Called 911 for Help. Police and Prosecutors Used a New Junk Science to Decide They Were Liars*, ProPublica (Dec. 28, 2022), https://www.propublica.org/article/911-call-analysis-fbi-police-courts [https://perma.cc/Q7NW-38V3].

[124] *Id.*

[125] *Id.*

[126] *Id.* It might be called "junk science," but there is really no scientific basis for it whatsoever.

[127] Murphy, *supra* note 108 (citing Daniel E. O'Donnell et al., *"My Child is Missing": 911 Calls in Mysterious Disappearances of Children*, Aggression & Violent Behav., Nov.–Dec. 2022 [https://doi.org/10.1016/j.avb.2022.101795]; Michelle L. Miller et. al., "*911 What's Your Emergency?": Deception in 911 Homicide and Suicide Staged as Homicide Calls*, 25 Homicide Stud. 256 (2021) [https://doi.org/10.1177/1088767920948242]).

Further, Harpster's specious methods have met with pushback in legal circles even while other fields accept it. Investigators from ProPublica have reported on 911 call analysis and found more than 100 cases in twenty-six states where the technique has been used to convict defendants.[128] Following ProPublica's analysis, judges and prosecutors nationwide have become more skeptical of the techniques. Agencies in Ohio, North Carolina, Texas, and Colorado have either warned lawyers about the potential injustices, stated concern that the technique undermines the integrity of convictions, or distanced themselves from it altogether.[129] However, Miriam Krinsky and Isabelle Cohn nevertheless write that "[t]his concerning approach continues to spread across the country, despite the risk it poses to innocent people who were simply calling 911 to seek help."[130] They argue that "prosecutors would be well advised to review any investigation and prosecution that relied on this questionable technique" and "policymakers and law enforcement leaders should consider banning this technique nationwide."[131]

Like 911 call analysis, voice stress tests use speech indicators to "determine" whether the speaker is being truthful—and, yet again, oversight of the technique is squarely in the hands of the law enforcement officers who created it. Voice Stress Analysis (VSA) is often conducted through the use of computerized equipment and is largely overseen by a company called the National Institute for Truth Verification Federal Services (NITV).[132] With an official-looking website, save the conspicuous misspelling of the word "excellence,"[133] one could be easily convinced that the company is an offshoot of the federal government. The company touts that their Computer Voice Stress Analyzer product is only sold to government and law enforcement agencies, over 3,000 of which currently use it to determine whether subjects are lying when giving statements.[134] Training to use this system involves a five-day proprietary course run by the company, which also hosts seminars and "continuing education" on their products at their headquarters in "balmy West Palm Beach, Florida."[135] The headquarters even boasts a helipad should attendees wish to travel by helicopter to learn about the technology.[136]

Voice stress analysis is perhaps the clearest example of how these police-created fields that enjoy law enforcement indicia of credibility have, in reality, no real scientific proof of validity. The company touts their product as being

[128] Brett Murphy, *Prosecutors and Judges Push for Ban on 911 Call Analysis*, Governing (Mar. 19, 2023) https://www.governing.com/now/prosecutors-and-judges-push-for-ban-on-911-call-analysis [https://perma.cc/T9P3-4B5B].

[129] *Id.*

[130] Miriam Krinsky & Isabelle Cohn, *911 Call Scrutiny Should Not Be Used To Identify Suspects*, Law 360 (Feb. 2, 2024), https://www.law360.com/articles/1793107/911-call-scrutiny-should-not-be-used-to-identify-suspects [https://perma.cc/R2Q7-GTAP].

[131] *Id.*

[132] *NITV Federal Services,* NITV Fed. Servs., https://www.cvsa1.com/about [https://perma.cc/Q536-PP84].

[133] NITV Fed. Servs, https://www.cvsa1.com/ [https://perma.cc/AEP3-2BY6].

[134] *Id.*

[135] *CVSA Certified Examiner's Course*, NITV Fed. Servs, https://www.cvsa1.com/training/cvsa-certified-examiners-course/ [https://perma.cc/CDV2-72QW]; *NITV Federal Services*, *supra* note 132.

[136] *NITV Federal Services*, *supra* note 132.

scientifically sound—yet produces precious little information to support that claim. Their homepage calls the product "the most accurate truth verification technology" and intimates that any backlash the product receives is just pushback from a competing technology—the polygraph.[137] Polygraphs, once heavily used in law enforcement, are nearly universally excluded from evidence in most states, based on their limited reliability.[138] Thus, the NITV's website attempts to set up the two technologies as competing factions in the war against lies—going so far as to accuse the polygraphy community of "hijacking" the Wikipedia page on voice stress testing.[139] The website goes on to provide "evidence" of scientific proof that their proprietary VSA is accurate—but the studies listed either are not peer reviewed, are outdated, or do not address the issue of scientific reliability.[140]

The federal government, however, studied the accuracy of VSA back in 2003, and concluded that it was virtually useless in detecting lies. In a report titled *Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field Test*, the National Institute of Justice (NIJ) discussed their statistical analyses of voice VSA.[141] The institute funded field evaluations of two programs used within the Oklahoma Department of Mental Health, where more than 300 arrestees were questioned about recent drug use.[142] The answers to the questions were then compared to the subjects' drug test results to determine whether they had been truthful.[143] In determining that VSA was ineffective in uncovering lies, the institute found:

> Fifteen percent [of respondents] who said they had not used drugs—but who, according to their urine tests, had—were correctly identified by the VSA programs as being deceptive [while] eight and a half percent who were telling the truth—that is, their urine tests were consistent with their statements that they had or had not used drugs—were incorrectly classified by the VSA programs as being deceptive.[144]

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[137] Nitv Fed. Servs., *supra* note 133.

[138] *See* Am. Psych. Ass'n, *Do "Lie Detectors" Work? What Psychological Science Says About Polygraphs* (Oct. 14, 2025), https://www.apa.org/topics/cognitive-neuroscience/polygraph [https://perma.cc/A6V4-BS3B]; *see also* 29A Am. Jur. 2d Evidence § 999 ("The results of a polygraph examination and an accused's offer to take a polygraph examination are generally inadmissible in a criminal trial.").

[139] *Wikipedia Alert—VSA Article Hijacked*, NITV Fed. Servs., www.cvsa1.com/wikipedia-alert-vsa-article-hijacked/ [https://perma.cc/B52G-8KY2] (last accessed Sep. 22, 2025).

[140] *Research and Recent Studies on the Science of Voice Stress Analysis*, NITV Fed. Servs., https://www.cvsa1.com/research-and-recent-studies-on-the-science-of-voice-stress-analysis/ [https://perma.cc/2E64-YNC3] (last accessed Sep. 22, 2025).

[141] Kelly R. Damphouse, *Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field Test,* Nat'l Inst. of Just., (Mar. 16, 2008), https://nij.ojp.gov/topics/articles/voice-stress-analysis-only-15-percent-lies-about-drug-use-detected-field-test [https://perma.cc/TTJ5-9EK3].

[142] *Id.*

[143] *Id.*

[144] *Id.*

Using those findings, the NIJ determined that the programs' ability to accurately detect deception was about fifty percent—no greater than a coin flip.[145]

The NIJ did discuss that speech patterns can differ under stress, but "it is unclear whether VSA can detect *deception-related* stress." Was this an issue in Jessica Logan's 911 call, the one that helped convict her of murdering her child? It is difficult to conceive of a more stressful situation than waking up to find your infant dead and his body already stiff in his bed. VSA, unfortunately, seems ill suited to determine whether Jessica's speech in the 911 call she made was deceptive or simply showing indicia of stress—but the officer who testified was clear that almost everything she said in the call was evidence of her guilt.

Ultimately, the NIJ closed their analysis by concluding that there may be no evidentiary use for this technology,[146] and courts across the country have followed suit. For example, in *State v. Arnold*, the Louisiana Court of Appeals reviewed a murder trial in which the defendant had not been allowed to introduce VSA results.[147] In that case, the defendant gave a statement to the police that supported his innocence in the shootings of his wife and another man.[148] He subsequently took a VSA test on the same statement and was told he passed—meaning his statement had been truthful.[149] He moved to admit the results of that test at his trial and was denied such on the basis that VSA tests are legally inadmissible.[150] In reviewing his appeal, the court relied on *United States v. Traficant*, which compared the "long line of cases which reject the admissibility of polygraph test results at trial" to VSA.[151] The *Traficant* court, under a *Frye*[152] analysis, noted that "several studies revealed that [voice stress] testing results yielded an accuracy rate only slightly higher than, and in some cases lower than, chance expectancy rates."[153] The court in *Arnold* followed suit.[154]

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[145] *Id.*

[146] *Id.*

[147] State v. Arnold, 533 So. 2d 1311 (La. Ct. App. 1988).

[148] *Id.* at 1312 ("Defendant gave a tape-recorded oral statement to a Deputy Sheriff at the scene. Defendant stated that he had brought St. Julien to his home that afternoon to perform yard work and that he intended to assist St. Julien. Defendant then allegedly went into the bathroom to change his clothes. From his position in the bathroom, he recalled hearing gunshots in the den, just minutes after St. Julien was brought into the house. Defendant stated that he ran into the den and observed St. Julien holding his .22 caliber rifle and Mrs. Arnold's body lying on the floor. At this point, St. Julien saw him and attempted to flee. A struggle ensued in a hallway, in which defendant successfully wrestled the rifle from St. Julien and shot him several times. After examining his wife's body and discovering she was dead, defendant returned to St. Julien's body and, in a fit of anger, emptied the rifle into him.")

[149] *Id* at 1313.

[150] *Id.*

[151] *Id.* at 1314 (citing United States v. Traficant, 566 F. Supp. 1046, 1047 (N.D. Ohio 1983)).

[152] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) set the standard for admission of scientific testimony at that which "has general acceptance" in the field. It has since been superseded by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), which uses a stricter standard of scientific reliability based on scientifically valid reasoning and methodology. *See supra* note 90. Presumably, if VSA fails under *Frye*, it would have virtually no chance of admission under *Daubert*.

[153] *Traficant*, 566 F. Supp. at 1047.

[154] *Arnold*, 533 So. 2d at 1313–16.

Academic analysis also suggests this technology may be ineffective. In *Voice Stress Analysis: Is "Some Evidence" Sufficient Grounds for Making Legal Determinations*, Brad McCall reviews the recent science relative to VSA technology by examining the popular NITV product.[155] After discussing the company's history and alleged superiority to polygraphy, with its "greater than 98% accuracy rate," McCall compares the NITV's "scientific" evidence with peer reviewed studies on its efficacy. "In one study, in which 911 emergency call recordings were analyzed, researchers were able to predict stress in the voice with about 80% accuracy by evaluating components of the speech, primarily pitch."[156] Since "stress" is not synonymous with guilt, evidence with only eighty percent accuracy runs the risk of unfairly prejudicing any jury that hears it. Further, there is evidence to show that the initial study the NITV relied on to prove the accuracy of its product may not even actually exist. McCall indicates that professors of linguistics have been unable to confirm that the journal cited by the NITV is real, and they argue that the publication could be a fraud created to provide justification for the company's technology.[157]

McCall concluded that "[a]lmost without exception, courts faced with a request to admit VSA test results during a criminal trial have rejected the offer."[158] Rationales for this exclusion vary, with most courts finding the testimony unreliable, prejudicial, or lacking any meaningful scientific analysis. This is little comfort for Jessica Logan, as her conviction relied on this testimony—not unlike a similar defendant in *State v. Schiefelbein*.[159] In both cases, the appellate bench has so far declined to overturn their convictions; in *Schiefelbein*, while the court held that the VSA testimony was improper and the state's cross-examination on it "misleading, factually incorrect, and irrelevant," the court concluded that the error did not justify a reversal.[160]

"Expert" police evidence is still accepted in many modern courtrooms. In the past decade or so, journalists have reported in depth on some specious techniques that are still popular among the bar today. For instance, bloodstain pattern analysis is relatively popular, but its reliability:

> has never been definitively proven or quantified. . . . While there is no index that lists cases in which bloodstain-pattern analysis played a role, state appellate court rulings show that the technique has played a factor in felony cases across the country. Additionally, it has helped send innocent people to prison. From Oregon to Texas to New York, convictions that hinged on the testimony of bloodstain-pattern analysts, arson investigators, and other police witnesses have been overturned and the defendants acquitted or the charges dropped.[161]

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[155] Brad McCall, *Voice Stress Analysis: Is "Some Evidence" Sufficient Grounds for Making Legal Determinations?*, 1 Barry L. Rev. 29, 30 (2024).

[156] *Id.* (citing Grazyna Demenko & Magdalena Jastrzebska, *Analysis of Voice Stress in Call Centers Conversations*, in Proceedings of the International Conference on Speech Prosody 183, 185 (2012).

[157] *Id.* at 40.

[158] *Id.* at 48.

[159] State v. Schiefelbein, 230 S.W.3d 88 (Tenn. Crim. App. 2007).

[160] *Id.* at 134.

[161] Kovatch, Colloff & Murphy, *supra* note 69.

A wide variety of this "junk science" is still judicially popular, and has seen little judicial scrutiny even amid growing concerns.

1. Arson

Angela Garcia is not the only person convicted of arson based on the pseudoscience of burn patterns—and at least one man has been executed based on similar testimony. Two days before Christmas 1991, Stacy Kuykendall left her home in Corsicana, Texas to go Christmas shopping for her three children, two-year-old Amber Louise Willingham, and one-year-old twins, Karmon Diane Willingham and Kameron Marie Willingham.[162] The children were at home sleeping with their father, Cameron "Todd" Willingham, when a fire broke out in the family's house.[163] Neighbors, responding to the Willinghams' yard when they smelled smoke, saw Todd "standing on the front porch, wearing only a pair of jeans, his chest blackened with soot, his hair and eyelids singed. He was screaming, "My babies are burning up!"[164]

Witnesses reported feeling intense heat radiating off the home and within moments windows started exploding and flames "blew out" of them.[165] First responders wrestled Todd to the ground and handcuffed him to keep him out of the burning home where his children were still inside.[166] For his part, Todd could do little but watch as a firefighter gave Amber CPR that would prove fruitless; none of the three children survived the fire.[167]

Corsicana Fire Department (CFD) Investigators responded to the fire and immediately reviewed the scene as soon as the fire was out.[168] They subsequently requested more assistance from the State Fire Marshal's Office (SFMO), and were joined by deputy fire marshal Manuel Vasquez.[169] The responding officer from CFD, Douglas Fogg, says he had "battled the beast" of fire for twenty years and was later quoted at trial as saying things like "[y]ou learn that fire talks to you."[170] Vasquez was also a seasoned fire investigator with his own catchphrases like "[f]ire does not destroy evidence–it creates it" and "[t]he fire tells the story. I am just the interpreter."[171]

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[162] David Grann, *Trial By Fire*, New Yorker (Aug. 31, 2009), https://www.newyorker.com/magazine/2009/09/07/trial-by-fire [https://perma.cc/37W7-PFGB].
[163] *Id.* Many reports refer to Todd with his full name, Cameron Todd Willingham. Willingham typically used his middle name, Todd, as will this article.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id. See also* Tex. Forensic Sci. Comm'n, Final Report on Complaint No. 09.01, The Innocence Project for Cameron Todd Willingham & Ernest Ray Willis 8 (2011), https://www.txcourts.gov/media/1454542/fr-willingham-mka-new-version-03162022.pdf [https://perma.cc/BS9Z-7M5V].
[169] Grann, *supra* note 162.
[170] *Id.*
[171] *Id.*

Ultimately, Willingham was charged with capital murder and arson, and Vasquez was the chief expert witness at his trial.[172] During the guilt phase, "Vasquez . . . testified that, based on the burn patterns and pour patterns and the stains on the concrete front porch, the fire was set intentionally with the use of an accelerant."[173] He said that Willingham had told him "that his daughter had awakened him while he was sleeping, the bedroom was full of smoke, he kicked open the door with his bare foot, and he ran down the hallway and out the door."[174] In his opinion, Willingham's version of the incident was a lie; he could not have exited the house after it was on fire without sustaining injury to his feet or substantial smoke inhalation damage.[175] He did not believe Willingham's two-year-old daughter could have started the fire.[176] Finally, Vasquez testified that it was his opinion that Willingham purposefully started the fire.[177] Following Vasquez's expert testimony, Willingham was convicted of capital murder in 1992 and was put to death by the state of Texas in 2004.[178]

Both before and after Willingham's execution, there has been significant scrutiny towards the expert testimony used to convict him. Neither Fogg nor Vasquez was a fire scientist—each was a trained member of law enforcement, but that training didn't include a degree in any forensic or scientific field. The training Fogg and Vasquez had focused chiefly on fire prevention and suppression, not the investigation of fires and not forensic science. For example, Vasquez was a deputy fire marshal at the time of the trial. In Texas, the Commission on Fire Protection (TCFP) recommends that a basic Fire Marshal have 112 hours total of training.[179] These 112 hours include courses on administrative duties, community relations, and regulations; only mere twenty hours is dedicated towards fire investigations.[180] Douglas Fogg on the other hand, was not a fire marshal but an assistant fire chief in Corsicana, Texas. Texas requires a chief to have five years' experience appointed in a fire suppression position in Texas while holding active TCFP certification or have ten years of experience as an active volunteer fire fighter.[181] These standards are not unlike those of a police officer, who might attend an academy led by other officers over three to six months to qualify for the post.

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[172] Willingham v. Cockrell, 61 Fed. App'x. 918, 2003 U.S. App. LEXIS 28134, *23 (5th Cir. 2003).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at *2. *See also* Tex. Forensic Sci. Comm'n, *supra* note 168, at 7–9.

[179] Tex. Comm'n on Fire Protection, Certification Curriculum Manual 15-5 (2023) https://www.tcfp.texas.gov/Services/GetPdf?filename=%2FManual%2FCurriculum%2Fcurriculum_Chapter_15%5B2023.8.1%5D.pdf [https://perma.cc/N2YN-FL9Z].

[180] *Id.*

[181] *Head of Department*, Tex. Comm'n on Fire Protection, https://www.tcfp.texas.gov/services/certificate?CertificateSlug=Head-of-department [https://perma.cc/NT6G-7RRX] (last accessed Sep. 22, 2025).

Shortly before Willingham was executed, Dr. Gerald Hurst was retained to review the evidence from Willingham's trial. [182] Hurst has a doctorate in chemistry, spent most of three decades working in the private sector as a fire and explosives expert, and worked as an expert for hire in civil cases relative to the cause of a fire.[183] His experience also includes testifying, pro bono, in dozens of arson cases around the country as an expert witness for the defense.[184] He has reviewed the forensic evidence in multiple criminal arson cases and found it lacking in several, including Willingham's.[185]

When reviewing the evidence in Willingham's case in anticipation of further litigation, he "saw immediately that investigators had used outdated assumptions to convict Willingham." Working against the clock, he wrote a report that debunked much of the physical evidence.[186] Hurst's report stands in harsh contrast to the evidence that Vasquez and Fogg testified to, and it relied on new technology that had become standard in the field of arson science.[187] It listed six key references, including one prepared by FEMA and the United States Fire Administration.[188] It examined evidence like trailers, pour patterns, and puddle configurations, it looked for evidence of accelerants, and opined on the importance of crazed glass—all of this standard in modern fire investigations.[189] Hurst concluded in his report that "most of the conclusions reached by [Fogg and Vasquez] would be considered invalid in light of current knowledge."[190]

None of this was examined at all in Vasquez's cross-examination, who testified "[t]he fire does not lie. It tells me the truth."[191] And "in the two decades since Willingham was sentenced to death for murder by arson, scientific progress has disproved or cast doubt on the specific 'arson indicators' Vasquez so confidently listed in court" like burn patterns.[192] After Willingham was executed, the Texas Forensic Science Commission reviewed his case in light of the changing science on arson investigations; Vasquez "was wrong about several key points."[193] In an investigation of his testimony, the *Austin American-Statesman* detailed:

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[182] Dave Mann, *Fire and Innocence,* Tex. Observer (Dec. 3, 2009), https://www.texasobserver.org/fire-and-innocence/ [https://perma.cc/RG5L-Q38T].

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *See* Report of Dr. Gerald Hurst, at 2–3, Cameron Todd Willingham, No. 24,4670 (B) (366th Jud. D.), https://www.texasobserver.org/wp-content/legacy/uploads/files/hurstreport.pdf [https://perma.cc/M3RF-46QR]. The report was entered into Willingham's case before he was executed.

[188] *Id.*

[189] *Id.* at 3–4.

[190] *Id.*

[191] Chuck Lindell, *Fire Investigator in Spotlight as Willingham Review Nears End*, Austin American-Statesman (Mar. 12, 2011) https://www.statesman.com/story/news/2011/03/13/fire-investigator-in-spotlight-as/6701725007/ [https://perma.cc/7A8G-668E].

[192] *Id.*

[193] *Id.*

> Contrary to his testimony, blown-out windows, melted aluminum thresholds and discolored bedsprings are not sure signs that an ignitable liquid was present, nor do accelerant-fueled fires burn far hotter than "normal" ones. Other indicators that Vasquez attributed to a liquid accelerant—including burn patterns on the floor, brown stains on concrete and peeled vinyl tiles—also are found in accidental or natural fires, and modern investigators are cautioned against basing arson findings solely on such clues. In fact, at least eight nationally known fire experts have said Vasquez—like many fire investigators of his day—had a poor knowledge of fire dynamics and misinterpreted or misunderstood every indicator that he presented to jurors as emphatic proof of arson and Willingham's guilt.[194]

Ultimately, in 2011, the Texas Forensic Science Commission completed a more-than-900 page report on Willingham's case.[195] The Commission determined Vasquez's testimony to be completely inaccurate and referenced it, saying "[t]he statement that 'a fire does not lie' is true, but we have all seen numerous instances where a fire was grossly misinterpreted. This, sadly, is such an instance."[196]

2. Bloodstain Pattern Analysis

On October 13, 1997, ten-year-old Joel Kirkpatrick was asleep in his Lawrenceville, Illinois home.[197] His mother, Julie Rea, heard a scream in the middle of the night and found an intruder in a ski mask—she struggled with him and then ran to a neighbor's home for help.[198] Julie, a single mom working on her PhD, was unable to save her son who had been murdered on his bedroom floor.[199] Joel had been stabbed twelve times, twice through his aorta.[200] Julie "was taken to the hospital with a black eye, rug burns on her knees, a wound on her right arm that required stitches, and scratches and abrasions on her head, both shoulders and the tops of her feet."[201]

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[194] *Id.*

[195] Tex. Forensic Sci. Comm'n, *supra* note 168.

[196] *Id.* at 19. The report "gathered and reviewed thousands of pages of documents and received extensive input from fire scientists and investigators. Commissioners have also heard public comment at numerous meetings." *Id.* at 7. It "convened an expert panel during which Ed Salazar, Assistant State Fire Marshal of the SFMO, Dr. John DeHaan, Dr. Craig Beyler and Houston fire investigator Buddy Wood provided extensive comments and responded to questions from Commissioners. The FSC also heard brief comments from Paul Maldonado, the Texas State Fire Marshal, and Ed Cheever, fire investigator for the SFMO." *Id.* It contained hundreds of supplementary exhibits and was thoroughly investigated. *See generally id.*

[197] Pamela Colloff, *Bloodstain Analysis Convinced a Jury She Stabbed Her 10-Year-Old Son. Now, Even Freedom Can't Give Her Back Her Life.*, ProPublica (Dec. 20, 2018), https://www.propublica.org/article/bloodstain-pattern-analysis-jury-wrongful-conviction-acquitted-exonerated [https://perma.cc/APX8-FVDK].

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

Notwithstanding the injuries Julie received in the fight with her assailant, her lack of a criminal record, and an absence of any mental health issues, she was convicted of killing her son three years later after "a deeply flawed investigation."[202] Prosecutors used a forensic discipline called bloodstain-pattern analysis (sometimes referred to as blood spatter analysis) to argue that an intruder never entered her home on the night of the crime and that Rea was, in fact, her son's killer. [203]She was convicted, largely on the strength of the testimony of two bloodstain-pattern analysts.[204]

The investigation in Julie's case focused on her from the outset. "Investigators dug up her septic tank, inspected her sink and shower drains, and examined the clothes in her washing machine. They sprayed luminol, a chemical that detects the presence of blood, around her house. They found nothing."[205] There was no evidence of motive, and no fingerprints were found on the alleged murder weapon—a steak knife pulled from her own butcher block.[206] So, with "no eyewitnesses, little forensic evidence and no motive,"[207] experts for the prosecution relied on bloodstain-pattern analysis to convict her.

> Bloodstain-pattern analysis is rooted in the belief that the drops, spatters and trails of blood at a crime scene are rich repositories of information that can be used to reverse engineer and even reconstruct crimes. Many practitioners are law enforcement officers, not scientists. But their expert testimony often lends a sense of scientific certainty to circumstantial cases, and it can be a powerful tool in the hands of prosecutors.[208]

The "experts" who testified in Julie's case were police officers, not scientists. The first was Rod Englert, a retired police detective and past president of the International Association of Bloodstain Pattern Analysts (IABPA).[209] The IABPA includes an education committee that has recommended guidelines for basic bloodstain pattern analysis training courses. The guidelines require content like lectures on the characteristics of liquid blood droplets and exercises on transfer stains for a total of forty hours of training.[210]

Englert testified at Julie's trial that the crime scene had been staged, that there was no evidence of a struggle, and that there was no intruder, based on his "experience of having gone to many, many scenes, many like [that], hundreds of scenes."[211] His testimony was primarily based on the stain patterns in the home while Dexter Bartlett, a crime scene investigator with

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[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] Int'l Ass'n of Bloodstain Pattern Analysts, Bloodstain Pattern Analysis Basic Course 1, https://www.iabpa.org/bpa_training_standards.php [https://perma.cc/NR29-SCCN] (last accessed Sep. 22, 2025).
[211] Colloff, *supra* note 197.

the Illinois State Police testified about the bloodstains on her t-shirt.[212] DNA analysis indicated that some small stains on her shirt were her own blood, but at least one small stain belonged to her son.[213] Bartlett testified that "Joel's blood could not have transferred onto her shirt and was more consistent with her wielding a weapon."[214] However, "Bartlett offered no proof of this—no experiments he had conducted, no data and no explanation of the methodology he used to come to his conclusions."[215]

Both officer expert witnesses who testified for the state to the bloodstain pattern evidence in Julie's case had similar and all too common backgrounds. Bartlett's LinkedIn profile shows the standard level of training that police experts have when they become trainers for other officers—decades of police work, but no advanced degrees.[216] Bartlett teaches a "Bloodstained Pattern Analysis and Identification Course" at the Chicago Police Academy and runs his own Forensic Consultant "operation."[217] Bartlett holds an associate of arts degree in Criminal Justice; otherwise, he has years of experience working crime scenes as an officer.[218] Englert's bio, meanwhile, is prominently displayed on his website; he has a bachelor's degree in Police Administration and "has done post-graduate work in psychology."[219] He has "consulted in over 500 criminal and civil death cases in the United States. He has testified and is a qualified court expert in homicide in 26 states."[220]

Julie had her own expert at trial, Paul Kish, who testified that her son's blood had "transferred onto" her shirt because it "rested on top of the fibers" and "had not penetrated the weave of the fabric, as blood cast off of a weapon would be expected to do."[221] Kish is a forensic consultant and holds a B.S. in Criminal Justice and an M.S. in Education.[222] Like Englert and Bartlett, Kish marks himself as an "internationally known lecturer on the subject of bloodstain pattern analysis lecturing throughout the United States, as well as in Canada, England, the Netherlands, and Sweden" who has "educated over 1000 students from 18 countries during week-long courses on bloodstain pattern analysis."[223]

None of the three forensic experts at Julie's trial possessed an advanced degree or even any significant undergraduate or graduate training in biology, chemistry, physics, or any other scientific field. Yet, between them, these three witnesses have testified many, many times to the physical properties of

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212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 Dexter Bartlett, LinkedIn, https://www.linkedin.com/in/dexter-bartlett-3a533147/ [https://perma.cc/L4XA-SU7U] (last accessed Sep. 22, 2025).
217 *Id.*
218 *See id.*
219 *Bio*, Englert Forensics, https://englertforensics.com/bio/ [https://perma.cc/W7SJ-H7MK] (last accessed Sep. 22, 2025).
220 *Id.*
221 Colloff, *supra* note 197.
222 *About*, Paul Kish, http://www.paulkish.com/about-paul-kish [https://perma.cc/XNT9-R2CL] (last accessed Sep. 22, 2025).
223 *Id.*

blood–how it congeals, how it flows over time, and how it can be used to convict someone like Julie Rea of a crime she did not commit. In her case, the jury was tasked with determining which experts to believe. Julie's public defender argued:

> none of the claims made by the state's bloodstain-pattern analysts could be verified; they had not conducted any experiments to test their conclusions. "That's not scientific . . . [s]cience is about establishing: 'This is scientific and true because I can recreate it. I can duplicate it. I know within a range that this can be done this way.' There was no attempt to do that."[224]

Even after her lawyer's argument that the evidence against her was not scientific in nature, the jury convicted Julie Rea.[225]

It was not until 2004 that a serial killer named Tommy Lynn Sells confessed to Joel's murder.[226] After her conviction was overturned on other grounds, Julie's 2006 retrial focused again on the bloodstain pattern analysis, and the prosecution again called Englert.[227] But this time, he had a new theory—he testified that the source of the blood on her shirt was from Joel's bloody hand pushed up against it.[228] This theory came with no scientific testing,[229] and no measurements of Joel's hands for comparison, but the jury was left with the argument that Joel was pushing his mother away as she stabbed him with a knife from their own kitchen.[230]

At the second trial, Julie testified in her own defense, which combined with her experts and the taped confession of a serial killer was enough to win an acquittal.[231] However, the impact of four years behind bars and a struggle to get a job because of her conviction changed her life. She was ultimately formally exonerated in 2010, after the Downstate Illinois Innocence Project uncovered evidence that Sells, the serial murderer, was Joel's actual killer.[232] Not only did he confess, but the physical evidence at the crime scene matched the details of his confession.[233]

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[224] Colloff, *supra* note 197.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] The defense expert at her second trial challenged Englert on how he reached his conclusions: "'I have seen nothing to indicate that this area was studied for that purpose, and data collected, comparisons made, and some sort of a conclusion or hypothesis drawn,' [he] said, referring to the T-shirt. 'There is no scientific basis for making such a claim.'" *Id.*
[230] *Id.*
[231] *Id.*
[232] *Julie Rea*, The Ill. Innocence Project, https://www.uis.edu/illinoisinnocenceproject/julie-rea [https://perma.cc/25P9-4DQZ] (last accessed Sep. 22, 2025).
[233] A nurse who treated Julie documented rug burns on her leg. *Id.* Sells described to investigators how she clung to his leg as he dragged her inside the house. *Id.* There were fifty-three total points of corroboration of Sells's confession. *Id.* There was also evidence that a deputy provided false testimony that he searched the back yard for footprints. *Id.*

Bloodstain pattern analysis is used in thousands of cases across the country, yet many experts question the scientific efficacy of its theories.[234] The NAS's 2009 report questioned the evidence at work in bloodstain pattern analysis along with several other science-based disciplines that police officers often opine on.[235] That report has since been used to fight the admission of such evidence in court. The Innocence Project describes it as serving "as the foundation for much of [their] science-driven, policy-based reform and strategic litigation efforts" since it "established a blueprint for forensic science research, engaged the scientific research community and spurred various meaningful science-based criminal justice reforms."[236]

In 2022, the National Institute of Justice updated the findings from the 2009 report relative to bloodstain patterns—here, the NIJ reported that analysts' methods are "largely based on subjective expert opinion."[237] The NIJ report reviewed a large-scale study of the accuracy and reproducibility of these analysts' conclusions.[238] The study investigated conclusions made by seventy-five practicing analysts on 192 patterns.[239] Patterns were created by known actions, and the analysts were tasked with making conclusions about those patterns.[240] Of the samples with known causes, 11.2 percent of the analysts' responses were incorrect and nearly eight percent of the conclusions could not be correctly reproduced.[241] The researchers noted that "[b]oth semantic differences and contradictory interpretations contributed to errors and disagreements, which could have serious implications if they occurred in casework."[242] Today, the science of bloodstain pattern analysis remains specious, at best, and a complete fabrication at worst.

Clearly, the bloodstain pattern analysis used in Julie Rea's case was inaccurate. In cases where defense attorneys fight junk science, the ultimate win is an acquittal by a jury, but in Julie's case, her full exoneration by the state combined with the corroborating evidence of Sells's confession leads to the reasonable conclusion that the expert police officers who testified against her were simply wrong. Their testimony: that the blood stains at the crime scene

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[234] For a discussion of the history of the field as well as details on several illustrative cases, see Leora Smith, *How a Dubious Forensic Science Spread Like a Virus*, ProPublica (Dec. 13, 2018), https://features.propublica.org/blood-spatter-analysis/herbert-macdonell-forensic-evidence-judges-and-courts/ [https://perma.cc/5WYS-XKNM]. As recently as July 2024, state appeals courts are still reviewing bloodstain pattern analysis cases because courts across the country routinely allow it in as evidence at trial. *See, e.g.*, People v. Rhee, No. 21CA1483, 2024 Colo. App. LEXIS 2516 (Colo. App. July 18, 2024); People v. Dixon, 224 N.E.3d 831 (Ill. App. Ct. 2022).

[235] *Study Reports Error Rates for Bloodstain Pattern Analysis*, Nat'l Inst. of Just. (Feb. 28, 2022), https://nij.ojp.gov/topics/articles/study-reports-error-rates-bloodstain-pattern-analysis [https://perma.cc/PTF2-LTDK]; *see also* Nat'l Acad. of Scis., *supra* note 62, at 177–79.

[236] Innocence Staff, *Ten Years Later: The Lasting Impact of the 2009 NAS Report*, innocence project (Feb. 19, 2019) https://innocenceproject.org/news/lasting-impact-of-2009-nas-report/ [https://perma.cc/2YDC-UVGX].

[237] *Study Reports Error Rates for Bloodstain Pattern Analysis*, *supra* note 235.

[238] R. Austin Hicklin et al., *Accuracy and Reproducibility of Conclusions by Forensic Bloodstain Pattern Analysts,* Forensic Sci. Int'l Aug. 2021, at 1 [http://doi.org/10.1016/j.forsciint.2021.110856].

[239] *Id.* at 1–2.

[240] *Id.*

[241] *Id.* at 2–5.

[242] *Id.* at 7.

proved there was no intruder, that there was no struggle, and that Joel was killed by the only person in his home who loved him, sent his innocent, grieving mother to jail for years.

And in at least one similar case, the blood spatter expert who sent an innocent man to jail later admitted that his conclusions were wrong. Joe Bryan, a former high school principal, was convicted of the 1985 murder of his wife Mickey.[243] Police detective Robert Thorman testified at Bryan's trial that tiny flecks of blood found on a flashlight were evidence of back spatter, a pattern that indicated a close range shooting.[244] His testimony tied the flashlight, found in Bryan's trunk four days after the murder, to the crime scene, and he opined that the "killer had likely held the flashlight in one hand while firing a pistol with the other."[245]

But years later, Thorman, who had the standard forty hours of bloodstain pattern training, testified that his "techniques and methodology were incorrect," and that his testimony was thus incorrect.[246] This recantation came at a hearing brought about by the Innocence Project of Texas, which had filed a complaint asking for the Texas Forensic Science Commission to review Bryan's case.[247] Thorman had testified at Bryan's trial that blood evaporated after traveling forty-six inches through the air, and that human blood had its own "characteristic geometric patterns;" neither contention is scientifically sound.[248] In addition, another analyst told the Commission that the pattern Thorman relied on to determine that the flashlight was hit with blood "back spatter" didn't exist—it was not consistent with a close-range shooting.[249] The Commission ultimately concluded that the blood pattern analysis was "absolutely unreliable."[250] Unfortunately for Joe Bryan, the Texas Forensic Science Commission's report calling the evidence against him "egregiously wrong" did not convince a court to release him and he was not granted a new trial.[251] He was paroled in 2020 and died three years later.[252]

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[243] State v. Bryan, No. 11-17-00236-CR, 2019 Tex. App. LEXIS 10330, at *1 (Tex. App. Nov. 27, 2019); *see also* Pamela Colloff, *Blood-Spatter Expert in Joe Bryan Case Says "My Conclusions Were Wrong,"* ProPublica (Sep. 17, 2018), https://www.propublica.org/article/blood-spatter-expert-robert-thorman-joe-bryan-case [https://perma.cc/5ZH4-RUET].

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] Joe Bryan, The Innocence Project, (last accessed Sep. 22, 2025), https://innocencetexas.org/cases/joe-bryan/ [https://perma.cc/J9XK-Z8RW].

[248] Pamela Colloff, *He Has Spent Three Decades in Prison. Now Experts Dispute the Evidence.*, N.Y. Times (July 24, 2018), https://www.nytimes.com/2018/07/24/us/joe-bryan-blood-spatter.html [https://perma.cc/8ZQT-6RSR].

[249] Colloff, *supra* note 243.

[250] *Joe Bryan*, *supra* note 247.

[251] State v. Bryan, No. 11-17-00236-CR, 2019 Tex. App. LEXIS 10330 (Tex. App. Nov. 27, 2019); Pamela Colloff, *Influential Texas Commission Says Blood-Spatter Testimony in Joe Bryan's Murder Case Was "Not Accurate or Scientifically Supported*, ProPublica (July 24, 2018), https://www.propublica.org/article/texas-forensic-science-commission-blood-spatter-evidence-testimony-murder-case-joe-bryan [https://perma.cc/4473-FH3F].

[252] Trip Gabriel, *Joe D. Bryan, 84, Dies; His Murder Conviction Raised Troubling Questions*, N.Y. Times (Oct. 4, 2024), https://www.nytimes.com/2024/10/04/us/joe-d-bryan-dead.html [https://perma.cc/NCN2-F79S].

3. Firearms Identification Techniques

Firearms identification is "the practice of investigating whether a bullet, cartridge case or other ammunition component or fragment can be traced to a particular suspect weapon."[253] The basic idea is that (1) features unique to the interior of any particular firearm leave unique, microscopic patterns and marks on bullets and cartridge cases that are fired from that firearm, so (2) by comparing patterns and marks left on bullets and cartridge cases found at a crime scene ("unknown samples") to marks left on bullets and cartridge cases fired from a known firearm ("known samples"), firearms examiners can determine whether the unknown samples were or were not fired from the known firearm.[254]

> Firearms identification has existed as a field for more than a century. Throughout most of that time, it has been accepted by law enforcement organizations and courts without significant challenge. However, the advent of *Daubert*, work exposing the unreliability of other previously accepted forensic techniques, and recent reports questioning the foundations underlying firearms identification have led to greater skepticism.[255]

This technology has recently been questioned by state appellate courts. In *Abruquah v. State*, the Supreme Court of Maryland reviewed the current state of scientific evaluation in firearms identification. The court noted that the leading methodology in the field comes from the Association of Firearm and Tool Mark Examiners (AFTE) and their Theory of Identification.[256] This theory involves matching patterns between cartridge cases and firearms under magnification.[257] A given examiner then decides that there either is or is not a match between two or more "contour patterns" in the samples.[258] This determination is necessarily subjective in nature, which has resulted in challenges.

The *Abruquah* court reviewed reports critical of the field issued since 2008.[259] The NAS's foundational 2009 report criticized the AFTE theory, indicating that it lacked specificity, and produced results that were not in line with the scientific method.[260] After an exhaustive review of other reports, numerous empirical studies, recent caselaw, and the evidence presented at trial, the Supreme Court of Maryland reviewed the trial court's decision, and granted the defendant a new trial. The court held that the state

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[253] Fleming v. State, 1 A.3d 572, 586 (Md. Ct. Spec. App. 2010).
[254] Abruquah v. State, 296 A.3d 961, 968 (Md. 2023).
[255] *Id.* at 976.
[256] *Id.* at 974–75.
[257] *Id.* 973–74.
[258] *Id.* at 975.
[259] *See id.* at 976–83.
[260] Nat'l Acad. of Scis., *supra* note 62, at 6, 63–64, 155. The field was found to be "producing results that are not shown to be accurate, repeatable, and reproducible; lacking databases and imaging that could improve the method; having deficiencies in proficiency training; and requiring examiners to offer opinions based on their own experiences without articulated standards." Abruquah, 296 A.3d at 977.

> examiner should not have been permitted to offer an unqualified opinion that the crime scene bullets were fired from Mr. Abruquah's gun. The reports, studies, and testimony presented to the circuit court demonstrate that the firearms identification methodology employed in this case can support reliable conclusions that patterns and markings on bullets are consistent or inconsistent with those on bullets fired from a particular firearm. Those reports, studies, and testimony do not, however, demonstrate that that methodology can reliably support an unqualified conclusion that such bullets were fired from a particular firearm.[261]

4. *Dog Sniffs*

K9 Units are often dispatched in law enforcement; they have been used to track suspects, find missing people, and to determine whether someone might be carrying drugs. But their use has come into question due to studies that have questioned the field's efficacy. In 2011, the Australian government launched a study of over 14,000 searches where a dog indicated that a person was carrying drugs.[262] In over 11,000 of those cases, no drugs were found, resulting in a false positive rate of over seventy percent.[263] In another study, the Chicago Tribune looked at three years' worth of cases in which law enforcement used dogs to sniff out drugs and cars in suburban Chicago.[264] The researchers found that in only forty-four percent of cases in which dogs alerted them to the presence of drugs were drugs or paraphernalia found on suspects.[265] In this study, there also seemed to be a correlation with the race of the defendant; when the driver was Latino, the dogs were right only twenty-seven percent of the time.[266]

The Chicago study, however, went one step farther, and spoke to canine experts who almost universally blamed the handlers:

> Dog handlers can accidentally cue alerts from their dogs by leading them too slowly or too many times around a vehicle, said Lawrence Myers, an Auburn University professor who studies detector dogs . . . . Training is the key to eliminating accidental cues and false alerts, said Paul Waggoner of Auburn's detector-dog research program.[267]

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[261] Abruquah, 296 A.3d at 968.

[262] Anna Patty, *Sniffer dogs get it wrong four out of five times*, The Sydney Morning Herald (Dec. 12, 2011), https://www.smh.com.au/environment/conservation/sniffer-dogs-get-it-wrong-four-out-of-five-times-20111211-1oprv.html [https://perma.cc/JV2L-6GVL].

[263] *Id.*

[264] Eyder Peralta, *Report: Drug-Sniffing Dogs Are Wrong More Often Than Right*, NPR (Jan. 7, 2011), https://www.npr.org/sections/thetwo-way/2011/01/07/132738250/report-drug-sniffing-dogs-are-wrong-more-often-than-right [https://perma.cc/PNJ2-R7FX].

[265] *Id.*

[266] *Id.*

[267] *Id.*

Whether due to poor handling or garden variety inaccuracy, the practice seems to have limited efficacy in law enforcement use.

5. Hair and Fiber Evidence

In rural Stoughton, Wisconsin, in 1987, a twenty-eight-year-old mother of two was raped by a stranger in her home.[268] Nearly two years later, Richard Beranek, who was living 130 miles away and had no known ties to the community, surfaced as a suspect based on his resemblance to a composite sketch of the perpetrator.[269] At his trial, an FBI analyst testified that a hair found in the victim's underwear matched the defendant to a high degree of probability.[270] Even though multiple witnesses testified he was hundreds of miles away at the time of the rape, he was found guilty on nine felony counts after a jury trial and sentenced to 243 years in prison.[271]

Unfortunately for Beranek, and for many other defendants, he sat in prison for twenty-seven years until later DNA analysis excluded him as the source of the hair left at the scene.[272] His case is among an estimated 3,000 cases slated for reexamination due to FBI hair or fiber analysis used before DNA testing was widely available. [273] This review, conducted in 2015, was a joint project between the FBI, the Innocence Project, the Department of Justice, and the National Association of Criminal Defense Lawyers.[274] The project determined that in at least ninety percent of trial transcripts, examiners testifying to hair and fiber evidence made erroneous statements or submitted erroneous laboratory reports.[275] In many cases "FBI microscopic hair analysts committed widespread, systematic error, grossly exaggerating the significance of their data under oath with the consequence of unfairly bolstering the prosecutions' case."[276] Of the 3,000 reviewed cases, the majority were taken to trial, and at least thirty-five defendants received the death penalty.[277] In light of the review's findings, the FBI committed to an independent investigation of FBI laboratory protocols, additional review of cases, and to encouraging independent state review.[278]

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[268] Dee J. Hall, *Innocent People Convicted from Flawed Hair Evidence*, Post Crescent (Apr. 30, 2017), https://www.postcrescent.com/story/news/investigations/2017/04/30/innocent-people-convicted-flawed-evidence/100974186/ [https://perma.cc/NL2H-XZNS].

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FBI News (Apr. 20, 2015), https://www.fbi.gov/news/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review [https://perma.cc/W92C-5ZEX].

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id. See also* United States v. Nelson, 217 A.3d 717 (D.C. 2019) (vacating convictions where a government hair expert provided false and misleading testimony; the court emphasized that the evidence was central to the prosecution's theory and not harmless beyond a reasonable doubt); Jones v. United States, 202 A.3d 1154 (D.C. 2019) (vacating convictions because the

B. The Effects of Junk Science on Convictions

In all these cases, police officers provided evidence, either through a trial or before a plea, that appears scientific in nature but was ultimately less than scientific in methodology. And in most of these cases, the police officer witness had no more training than a short course in the discipline taught by another police officer. There was no requirement for credentialing[279] by degree or other standard, and the courses were typically one week or shorter. There is significant evidence that invalid forensic science like that discussed here leads to erroneous convictions, whether in a trial or before a guilty plea. In *Invalid Forensic Science Testimony and Wrongful Convictions*,[280] Brandon Garrett and Peter Neufeld present the first study exploring how often forensic science testimony by state experts factors into the trials and ultimate convictions of the innocent. In their study, the authors reviewed transcripts for the trials of 137 people who had been convicted but ultimately exonerated by DNA evidence.[281] The evidence in these trials commonly included testimony concerning hair comparison and blood analysis, but some included bite mark testimony and fingerprint and shoe print comparisons.[282] The study found that in most of the trials of these innocent defendants, upwards of sixty percent of the forensic analysts who were called by the state at trial provided invalid testimony.[283] In many cases, officers testified to conclusions that misstated empirical data, or those that were wholly unsupported by data.[284] In most of these cases, there was virtually no oversight of the "science," in that defense counsel rarely cross-examined the state witnesses or presented experts of their own.[285] Even in those cases where the forensic science was challenged, judges rarely provided relief in terms of excluding the evidence.[286] Thus, while the option to review scientific evidence remains a valid one at trial, it rarely results in the exclusion of evidence.

Further, John Morgan examined 1,391 forensic examinations and concluded that most errors related to forensic science are frequently associated with miscommunicating results, not conforming to established standards, or

prosecution presented false or misleading expert testimony on microscopic hair comparisons, violating due process; the court emphasized that the expert's testimony had been powerful and improperly linked the defendant to the crime); Martin v. State, 2018 Ark. 344 (Ark. 2018) (allowing reinvestment of jurisdiction for coram nobis review, noting errors in the expert's testimony that paralleled flaws identified in national FBI reviews, including statistical exaggerations).

[279] There is some evidence that even credentials might not be enough to ensure scientific reliability. *See generally* Brandon Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. Pa. L. Rev. 901 (2018) (reviewing credentialling in finger print analysis and finding an incredibly high rate of false positive identification, even when the officers had an established credential).

[280] Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

[281] *Id.* at 9.

[282] *Id.*

[283] *Id.* at 14.

[284] *See id.* at 74.

[285] *Id.* at 6, 10.

[286] *Id.* at 33.

failing to provide appropriate limiting information.[287] Morgan notes that "the misapplication of forensic science has been associated with a significant fraction of wrongful convictions in the United States,"[288] and indicates that his work is designed to determine what specific kinds of errors are at fault. In approximately half of the wrongful convictions he studied, "improved technology, testimony standards, or practice standards may have prevented a wrongful conviction at the time of trial."[289] Thus, his work shows that a significant number of errors in forensic testimony that convict innocent people are not then due to unscrupulous examiners or corruption in the system but are directly attributable to the lack of scientific or technical ability of the people that testify.

If trials have little chance of addressing the issue of scientific reliability, guilty plea hearings have almost no chance of doing so. In each of the cases discussed herein, defendants had legitimate arguments that the science convicting them was inaccurate at best and fabricated at worst. For those defendants who went to trial, they at least had a mechanism for appeal in which higher courts could review issues of scientific reliability. But for those defendants who took a plea, like Angela Garcia after her third trial, there was absolutely no mechanism by which they could have review of any of the hard sciences that were used to provide evidence against them. This is what needs to change.

Because the American criminal justice system literally requires such an incredibly high percentage of guilty pleas, and because the consequences of evolving science are particularly great for pleas, the plea system itself can and should change. Not only are trial court judges well suited to respond to this pressing issue, but they can also accomplish true progress without substantially involving any other aspect of the justice system. They need no legislative support, no extralegal support, and, not insignificantly, no funding, to safeguard the system against the reach of pseudoscience.

III. The Plea Colloquy Scope and Process

While (and perhaps because) guilty pleas remain crucial to the criminal justice system, several constitutional and procedural protections exist to protect defendants both in the federal and in all state systems. These protections create a scaffolding for the introduction of scientific reliability at the colloquy, and the procedure allows for easy and efficacious inclusion of language that might benefit thousands of defendants.

Guilty pleas are the most common way cases are disposed of in both state and federal courts. "Plea bargaining has been a constitutionally recognized

[287] John Morgan, *Wrongful Convictions and Claims of False or Misleading Forensic Evidence*, 68 J. Forensic Sci. 908 (2023).

[288] *Id.* at 909. Morgan gleaned this data from the Innocence Project's review of wrongful convictions. *See also* Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 years*, 79 Alb. L. Rev. 717 (2016).

[289] Morgan, *supra* note 287, at 908.

part of the American criminal legal system for over 50 years. Upwards of 95% of criminal cases at the federal and state levels terminate in guilty pleas, many of which are secured through negotiations between the prosecution and the defense."[290] Professor Dan Canon discusses the magnitude of the plea system in America in his book, *Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class*:

> Today, with the full blessing of the courts, plea bargaining is the primary way—indeed, almost the *only* way—in which criminal cases are resolved in the United States. . . . We like to think of our justice system as revolving around the jury trial. In fact, trials in America are practically extinct. Somewhere around 97% of US criminal convictions are by guilty plea, and the vast majority of those are result of a plea bargain. Most judges now believe that plea bargaining is, "not only an essential part of the process, but a highly desirable part. . . ." As one Supreme Court justice wrote, "To a large extent . . . horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."[291]

Canon goes on to describe the "breakneck speeds" at which the bargaining process occurs, calling plea negotiations "rocket dockets" and "plea blitzes," at which high numbers of convictions can be ensured in an hour or two, with "files . . . barely cracked and allegations barely read."[292] He details the standard process: "prosecutors offer a deal, defense attorneys counter offer, the lawyers go back and forth until the price is right and defendants plead guilty. All without anyone knowing much of anything about the case at all."[293]

When a defendant wants to plead guilty to a crime in the United States, the court must be certain that he understands the consequences of his guilty plea, both to protect his rights and so that the plea cannot be later attacked on appeal. The Supreme Court has held that guilty pleas must be voluntarily and knowingly made and has determined that defendants may only plead guilty if they know the direct consequences of the plea, like the potential sentence and appealability. Specifically, a guilty plea that can withstand constitutional scrutiny must be (1) "knowing[,] that is, the defendant understands the rights being waived and the consequences of their waiver; (2) the plea is voluntary[,] that is, the plea 'did not result from force, threats, or promises (other than promises in a plea agreement)'; and (3) that the plea has a factual basis."[294]

Once the parties agree on the details of the plea, it is reduced to writing and entered on the record in court. "This tends to be a standardized process,

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[290] Dylan R. McDonough, *In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements*, 57 Colum. J.L. & Soc. Probs. 633, 635 (2024).
[291] Canon, *supra* note 31, at 16.
[292] *Id.* at 7.
[293] *Id.*
[294] McDonough, *supra* note 290 at 641. This specific requirement is found in Fed. R. Crim. P. 11.

with procedural rules providing a checklist of factors to move through."[295] Federal Rule of Criminal Procedure 11 and most state rules require the court to engage in what is typically called a "plea colloquy"[296] with the defendant. This colloquy typically involves the trial court judge asking a pre-prepared series of questions to the defendant and seeking his answers on the record. Rule 11 requires the plea colloquy to include at minimum the following inquiries:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
> (C) the right to a jury trial;
> (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
> (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
> (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
> (G) the nature of each charge to which the defendant is pleading;
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
> (I) any mandatory minimum penalty;
> (J) any applicable forfeiture;
> (K) the court's authority to order restitution;
> (L) the court's obligation to impose a special assessment;
> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

[295] *Id.* at 641–42.
[296] This may also be called an "allocution." *See, e.g.*, United States v. Kim, 71 F.4th 155, 168 (4th Cir. 2023).

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.[297]

This process is designed to ensure that the constitutional imperative of a voluntary and knowing plea is upheld—but much like a *Miranda* warning, no specific language is required.[298] The Fourth Circuit has described the process thusly: "When determining whether a plea hearing complies with the requirements of Rule 11, we are obligated to accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant."[299] In this colloquy, the trial court is tasked with providing notice of a defendant's constitutional rights with some level of clarity, but not with extreme precision. Any errors rarely result in the withdrawal of a plea. The Supreme Court has determined that only a select few errors belong to the "highly exceptional category of structural errors" that can justify withdrawing a guilty plea.[300] The "very limited" class of errors that can justify overturning a conviction based on a guilty plea "include the denial of counsel, denial of self-representation, denial of a public trial, and a defective reasonable-doubt instruction—errors so intractably disruptive to the defendant's constitutional trial rights that they affect the entire conduct of the [proceeding] from beginning to end."[301]

The rest of the details, however, are left to the court—the language of the required advisements, whether to have a conversation back and forth with the defendant or to let him confer with counsel, whether there are any additional warnings the court decides to give.[302] Only once this colloquy is complete, and the court is satisfied that it shows the voluntariness of the knowing plea, may the court accept it. Of course, the acceptance of a guilty plea must follow these constitutional and procedural standards, but the process in which it is bargained for primes the system to accept evidence at face value without a significant inquiry into the adequacy of any scientific or quasi-scientific claims. This is not sustainable, ethical, or logical in a system based on proof and on convictions beyond a "reasonable" doubt.

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[297] Fed. R. Crim. P. 11(b)(1).

[298] *See* Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("[T]he Constitution does not require any specific code . . . .).

[299] *Kim*, 71 F.4th at 165.

[300] United States v. Davila, 569 U.S. 597, 599 (2013).

[301] United States v. Umeh, 132 F.4th 573, 580 (2025) (citing Greer v. United States, 593 U.S. 503, 513 (2021)) (internal citations omitted).

[302] One warning that judges may ask defendants in the colloquy process is whether they are satisfied with the representation of counsel. This warning attempts to protect the defendant against substandard representation, but it might protect practitioners from subsequent malpractice cases even more. *See, e.g.*, Ramos v. United States, No. 23-14247-CIV-CAN, 2024 U.S. Dist. LEXIS 77697, at 19 (S.D. Fla. Apr. 26, 2024) ("Movant made sworn statements at the plea colloquy that he understood the charges against him; that counsel had reviewed defenses with him and the case in general; and that he was fully satisfied with the representation of counsel.").

Both defense counsel and the court are charged with ensuring that these constitutional protections are enforced to protect the defendant; as far back as 1938, the Supreme Court in *Johnson v. Zerbst* held that it is not only the duty of defense counsel to protect the rights of the accused but that the constitutional right of representation "[i]nvokes, of itself, the protection of a trial court . . . [t]his protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver [of a jury trial] by the accused." [303] In addition, it is the trial court and the trial court alone that can decide whether to even take a plea agreement at all. Even in cases where both the state and the defendant want a case to plead, a trial court can reject their agreement and force the parties to renegotiate or for the matter to go to trial. As the Supreme Court has noted, "[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . although the States may by statute or otherwise confer such a right."[304] Typically, criminal procedure rules specifically give trial courts discretion over when and whether to accept a defendant's guilty plea as there is no constitutional right to plead guilty.[305] However, even in states that do confer such a right, it only extends to the defendant's right to plead guilty, not to enter a plea agreement.[306]

In federal court, Rule 11 also governs the acceptance or rejection of a plea agreement; it provides "[t]o the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C),[307] the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report."[308] Under Rule 11, "[a] district court enjoys broad discretion . . . to reject a plea agreement . . . [and] does not abuse its discretion when it rejects a plea agreement because the agreement does not adequately reflect the seriousness of the defendant's offense conduct."[309] "Nor does a district court abuse its discretion when it rejects a plea agreement because the agreement will result in a sentence that is too lenient under the circumstances."[310]

These pleas can take many different forms. Prosecutors often use colloquialisms for all the different types; a plea of guilty without an agreement might be called a "straight up," an "open," or a "chips" plea. Open pleas allow the court to sentence a defendant to a variety of potential terms, as opposed to

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[303] Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

[304] North Carolina v. Alford, 400 U.S. 25, 38 (1970).

[305] *See, e.g.*, H. Mitchell Caldwell and Anthony X. McDermott, *A Life in the Balance: Is There a Right to Plead Guilty Even If It Is to Avoid the Death Penalty?,* 104 Dick. L. Rev. 409 (2000).

[306] *See id* for an example of how California statutes discuss this right in the context of a capital murder case.

[307] Section A describes charge or count bargaining, where the government agrees to dismiss or not bring other charges. Section C describes a sentencing cap or an agreed-upon sentence. Section B describes sentencing that does not bind the court–thus, one that is not fundamentally different from an open plea. It may contain a sentencing recommendation, but not a formal agreement. Fed. R. Crim. P. 11.

[308] *Id.*

[309] United States v. Darnelle Young, No. 23-12921, 2024 U.S. App. LEXIS 28184, at *3 (11th Cir. Nov. 6, 2024).

[310] *Id.* (citing United States v. Bean, 564 F.2d 700, 704 (5th Cir. 1977)). This precedent relies heavily on *Santobello v. New York*, which held that "a court may reject a plea in exercise of sound judicial discretion." 404 U.S. 257, 262 (1971).

a plea bargain, which often included dropped charges, agreed-upon sentences, or sentence caps.[311] While it is not often that a court rejects an open plea,[312] courts have "wide latitude" to accept or reject plea agreements and do reject them more often based on the potential sentence.[313] In *Michael Flynn and Motions to Dismiss in Tennessee Agreed Dismissal—Who Can Complain?*, Wade Davies summarizes the landscape:

> What happens . . . often is for a trial court to reject a plea agreement that the state has offered. This does not implicate separation of powers nearly as much as the decision about whether to prosecute or dismiss a case because sentencing is traditionally a judicial function. Still, there are limits on when a trial court can reject a plea agreement. A trial judge must evaluate the facts of the particular case and exercise discretion using sound legal principles. In exercising discretion on a plea agreement, however, the trial court has the authority to take into account what the judge thinks the fair result should be. There is no requirement that the state is operating in bad faith. The trial court, for example, can reject a plea agreement because the punishment is too lenient.[314]

In *In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements*, Dylan McDonough argues that the judicial discretion to reject a plea is perhaps the only power courts have in the process: in federal courts and in at least 14 states, judges are barred from participating in plea negotiations by statute, procedural rule, court rule, or case law.[315] In those jurisdictions, judges have one tool for oversight: judicial discretion to reject plea agreements.[316] McDonough goes on to argue that judges should utilize this power more often, contending that Rule 11 fails to provide guidelines for the court in considering whether to accept or reject the agreement: "Instead, the federal rules have left it to the courts to develop their own criteria for determining whether to accept or reject a proposed plea agreement."[317] Because appellate "[c]ourts have failed to clarify the nature of the discretion granted to them in these procedural rules," trial judges reject plea agreements for a wide variety of reasons

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[311] This is short for "let the chips fall where they may." *See* Randall v. State, No. 20A03-0711-CR-538, 2008 Ind. App. Unpub. LEXIS 685 (Ct. App. Feb. 29, 2008). ("[P]ublic defender responded affirmatively when the court asked, 'This is a chips plea?' The court was also informed that the State did not offer a plea agreement…") (citation modified). *See also* United States v. Perdue, 110 F.4th 662, 671 (4th Cir. 2024) ("Perdue made a voluntary decision to plead straight up to the indictment. Perdue rejected his counsel's advice to consider accepting a plea agreement…"); People v. Henderson, 282 Cal. Rptr. 3d 538 (2021) (discussing an "open plea").

[312] Under Fed. R. Crim. P 11(c)(1)(B), the court must accept pleas that are mere sentence recommendations, and not agreements.

[313] *See, e.g.*, United States v. Jimenez-Hernandez, No. 24-5060, 2024 LEXIS 32910 (10th Cir. Dec. 31, 2024); *see also* McDonough, *supra* note 290, at 660 ("The most common consideration trial courts cite when rejecting an agreement is the sentence contemplated by the agreement. Trial courts frequently reject plea agreements as too lenient.").

[314] Wade Davies, *Crime & Punishment: Michael Flynn and Motions to Dismiss in Tennessee Agreed Dismissal–Who can complain?*, 56 Tenn. B.J. 34, 35 (2020).

[315] McDonough, *supra* note 290 at 649–50.

[316] *Id.*

[317] *Id.* at 643.

"without any unifying theory;" these decisions generally hold up on appeal.[318] For example, judges have rejected certain pleas out of hand, stating they just "don't waive firearms enhancements . . . you plead them, they're stuck,"[319] some reject ordinary stipulated sentences,[320] others are flatly rejected in the "public interest,"[321] and some judges simply reject a sentence as too lenient—the most common consideration, and one with a specific legal basis in the rules.[322]

Because courts have the responsibility to advise defendants in open court of their charges, to ensure that any plea they give is voluntary and knowing, and possess wide latitude to accept or reject any plea agreement, they also have the ability to reject a plea agreement that is not based on solid scientific evidence. In *Daubert*, the Supreme Court was clear that the rules of evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." [323] This happens with some regularity at trial—before scientific evidence is presented, many courts conduct *Daubert* hearings to determine whether an expert's testimony is admissible.[324] But during most plea negotiations, the court and defense counsel and her client are often most concerned with the clear and direct consequences of the plea: how long will he be incarcerated, and how will the conviction affect his future? In many cases, however, the biggest issue in a defendant's case and what drives the plea negotiations is the strength of the evidence against him.

Such wide latitude to accept or reject a plea coupled with the court's responsibility to protect a criminal defendant's rights, including the scientific efficacy of the evidence, creates the perfect storm—one in which updates to the process are within the control of one member of the system. Should a trial court wish to update standards for a plea, they need ask no permission of the legislature and need not wait for reform to take place outside of their courtroom. Thus, they can effect change efficiently, effectively, and at no expense to the jurisdiction, financial or otherwise.

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[318] *Id.* at 659.

[319] State v. Montiel, 122 P.3d 571, 574 (Utah 2005). In *Monteil*, the trial court rejected a plea agreement, stating that they would not allow any pleas on firearm enhancements unless there was a mistake in pleading. *Id.* at 574. After being convicted by a jury, the defendant appealed the rejection of the guilty plea. *Id.* The decision was upheld on appeal, as the court acted "well within the bounds of reason" in rejecting the plea. *Id.* at 581.

[320] *E.g.*, In re Morgan, 506 F.3d 705, 708 (9th Cir. 2007). While the District Court did overturn this rejection based on a lack of individualized consideration, it did not wholly reject the rationale that judges could reject a stipulated sentence on a case-by-case basis. *See id.* at 709 ("Rule 11 clearly vests district courts with the discretion to accept or reject plea agreements. . . .").

[321] *See* United States v. Walker, 922 F.3d 239, 245 (4th Cir. 2019), *vacated by,* Walker v. United States, 589 U.S. 1042 (2019). In *Walker*, the court rejected a fentanyl distribution agreement due to the cultural context of the opioid crisis, among other things. *Id.* The decision was upheld by the Fourth Circuit. *Id.* at 248–52.

[322] *See* McDonough, *supra* note 316. Other reasons to reject a plea agreement include public interest, victims' rights, legislative intent, views of law enforcement, and other rarer reasons. *Id.*

[323] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 598 (1993).

[324] *See* Robert E. Larsen, Navigating the Federal Trial § 11:26 (2025).

IV. Adjusting the Plea Colloquy: Proffers and Linguistic Updates

Adjusting the plea colloquy to establish scientific reliability could take shape in one of two ways; first, via a proffer by the state. Should the state offer such an evidentiary proffer in the plea process, the proof might protect defendants when that evidence later turns out to be "junk science." Establishing a record as to what the defendant and his counsel were advised about the science at the time of the plea could help protect him should the basis for the scientific evidence change; in pleading guilty, the defendant relied on this proffer and on the strength of the scientific evidence the state had against him, even if he was not fully equipped to understand it. At minimum, the rules of criminal procedure can allow a hearing based on the voluntariness of the plea, not just on the actual innocence of the defendant. These hearings, based on the evolution of scientific inquiry, have the potential to right system wrongs, and the plea colloquy preserves the argument for appeal or for post-conviction relief. Without it, the defendant simply takes the state's evidence at face value and acknowledges that it is sufficient without further inquiry.

But what would such a scientific proffer look like in open court? Because the question of the language in a plea colloquy is up to the trial court, the judge has wide deference to accept a variety of different proffers. Requiring a proffer to have some indicia of scientific reliability would not be difficult; of course, a prosecutor could call an expert witness to lay the basis for scientific reliability at a plea hearing. But as a prosecutor typically simply types up a summary of the evidence or orally states it on record in open court to establish the factual basis for the plea, it could also be as simple as the prosecutor stating the scientific basis for the evidence in the colloquy, or by providing a scientific journal or an article discussing the basis of the scientific methodology. This would, at minimum, establish some sort of reasonable basis that the court and a defendant might later rely on to ensure that his conviction is sound.

The second option to protect the scientific integrity of the plea is through changes to the language of the colloquy itself and could include a dialogue between the court and the defendant on the scientific evidence at hand. A potential change to the plea colloquy should include questions that directly address the changing nature of science and the potential for erroneous pleas based on evidence that might change in relevance over time. For courts that want to include such inquiry in colloquies, questions should appropriately address disclosure, advice, and the preservation of evidence without forestalling a defendant's ability for further address should the science change. In short, questions should aim to protect a defendant and ensure the integrity of scientific inquiry, not just memorialize the pseudo-science available at the date of the plea. Courts can and should adjust their plea colloquies using language that accomplishes this goal.

A. Disclosure of Scientific Evidence

A defendant has the right to know what the evidence is against him. As such, if that evidence is scientific in nature, they have the right to understand not only what the evidence proves in the trial, but how reliable and effective it may be. The plea colloquy should reflect that with the following questions:

1. Has the prosecution informed you and your attorney that this case involves evidence or testimony that relies on scientific, technical, or specialized knowledge?
2. Have you reviewed all of the evidence against you, including any that relates to scientific, technical, or specialized knowledge?

B. Counsel's Advice on Reliability

In order to preserve the finality of a guilty plea, questions might also center around the explanation of scientific evidence. By inquiring as to this evidence on the record, defense counsel now has a specific duty to advise their client on any scientific or technical evidence and may also review the collateral consequences of a plea based on it. The colloquy should include questions such as:

1. Has your attorney explained to you whether the scientific or expert evidence against you has been tested for reliability, and whether there are known challenges to that type of evidence?
2. Do you understand whether the expert in your case is trained as a scientist or as a law enforcement officer with specialized training?
3. Do you understand that the reliability of scientific evidence may change over time, and that could result in changes in the strength of the evidence against you?

C. Preserving the Record on Appeal

Perhaps the most important questions that a court should ask a criminal defendant in a plea colloquy involve those that preserve his rights on appeal. There is currently no specific safeguard against the changing of scientific evidence, but if a defendant can show through answers to the questions in his plea colloquy that his plea was either not voluntary or not knowing, he could potentially later attack that plea on appeal should the reliability of the scientific evidence against him change. Because guilty pleas do not currently contain a *Daubert* or *Frye* inquiry requirement, the questions evinced at a plea colloquy can and should use the language from those cases to establish scientific reliability for purposes of appeal through the following questions:

1. Does your plea today rely on an understanding that the scientific, technical, or specialized evidence against you is reliable and generally accepted in its field?
2. Does your plea today rely on an understanding that the scientific, technical, or specialized evidence against you is a product of the scientific method, and is testable, peer reviewed, and able to be replicated?
3. Are you pleading guilty in light of the validity of scientific evidence that exists to prove the state's case?
4. Have any promises been made to you in terms of the strength of the scientific evidence against you?

This colloquy not only protects the defendant, but the state. In cases where the scientific evidence is sound, like in a case involving DNA evidence, a defendant's guilty plea is that much more certain once he has been advised of the evidence and decides to plead guilty even in light of it.

V. The Need to Ensure Scientific Inquiry in Criminal Pleas

Certainly, courts across the country are free to either include scientific proffers at a plea colloquy or to reject plea agreements that are not accompanied by significant proof that the scientific allegations contained in the colloquy are accurate. They can do so unilaterally and need no permission nor buy-in from any governing body as the matter is within their sole discretion. As it is a matter within a court's purview, such a scientific proffer is unlikely to be a source of appeal, even if a conviction might later be. This proposal is not without some scholarly support; in *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, Nancy King discusses that on many occasions, the relative leniency of a plea agreement is simply an outcropping of how skilled the defense attorney is at negotiation—and not whether it reflects an appropriate sentence in light of the evidence.[325] Also, Congress itself, through the Sentencing Reform Act of 1984, recognized how sentencing regulations were threatened by shrewd bargaining based on considerations irrelevant to sentencing and opined that "judicial oversight [is] the most potent remedy for this threat."[326]

Other scholars have discussed how the relationship between prosecutors and judges can unbalance the scales in the plea process and lead to a lack of scrutiny for police officers who testify for the state. In *Uneven Scales: How the Symbiotic Relationship Between Prosecutors and Judges Results in Unfair Criminal Proceedings*, Edward Adams describes the phenomenon that many judges are former

[325] *See generally* Nancy King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 Stan. L. Rev. 293 (2005).
[326] *Id.* at 294.

prosecutors—far more than those who are prior defense attorneys—and argues that "prosecutors and judges routinely work hand-in-hand to best serve their respective functions such that defendants can rarely receive a fair trial."[327] This "symbiotic relationship" results in judges who "make decisions that confirm or support prior beliefs, attitudes, or values."[328] As such, it follows that judges will typically trust a prosecutor's assertion that the science in a given police-based field, like blood spatter or 911 call analysis, is accurate.

An overworked system in which the vast majority of cases get resolved via a guilty plea, and in which many judges have ties to prosecutors, is setting innocent defendants up for wrongful convictions. When there is not enough time on a docket to make a lengthy inquiry, and not enough time in a court schedule to conduct more than a trial a month, the system keeps hurtling defendants forward into this conveyor belt of criminal justice, where few, if any cases actually end up examining the science that puts thousands of people away. A process that allows for quick, resilient, and efficient inquiry into the science behind a conviction benefits everyone, and that process could either be accomplished by way of a brief proffer or through a few questions in a standard plea colloquy.

A. Safeguarding the Finality of the Guilty Plea

"Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."[329] Guilty pleas allow defendants to avoid extended incarceration pretrial; they allow both defendants and victims of crimes some level of certainty as opposed to the risks that a jury trial normally is accompanied by. They save the state time, effort, and expense in litigating a case before a jury. But "these advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality."[330] Thus, collateral attacks on guilty pleas are rare, but are not "uniformly invulnerable to subsequent challenge."[331]

Because of the potential for serious harm, including wrongful executions, the system must ensure not only that the scientific evidence is good, but that it stays good over time. Otherwise, this evidence serves not to establish the truth, but a police officer's mere perception of truth at the time of an investigation. This is especially important at a plea where the strength of the science may be reviewed later if only in limited situations. At a trial, the defendant preserves the right to appeal, at which time another court can review the admissibility of scientific evidence. But at a plea, the defendant waives that right to appeal.

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[327] Edward Adams, *Uneven Scales: How the Symbiotic Relationship Between Prosecutors and Judges Results in Unfair Criminal Proceedings,* 43 L. & Ineq. 105, 139 (2025) ("As of 2021, 263 federal judges used to be prosecutors. However, only 66 federal judges were criminal defense attorneys.").

[328] *Id.* at 140.

[329] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[330] *Id.*

[331] Fontaine v. United States, 411 U.S. 213, 215 (1973).

What happens to a defendant when the science changes after his plea, and functionally renders his conviction erroneous?

A defendant may collaterally attack his guilty plea if he can show that it was not given voluntarily with knowledge of the consequences.[332] In addition, unless the court record conclusively shows that a prisoner is not entitled to this kind of relief, he is entitled to a hearing on his motion.[333] While this is the specific standard under the Federal Rules of Criminal Procedure, most states follow a similar process. For example, in New York, a prisoner may allege ineffective assistance of counsel, fraud or duress, constitutional violations, or that new evidence was discovered favorable to the defendant that would have made a difference at his trial.[334] In Ohio, defendants may move to withdraw guilty pleas after sentencing with a showing of "manifest injustice."[335] Manifest injustice includes ineffective assistance of counsel, a lack of voluntariness, and the defendant not receiving the concessions agreed to in the plea. As under the federal rules, most states like Ohio require a hearing to be held once a defendant makes such allegations.[336]

Hearings to overturn pleas, while somewhat rare, would certainly be affected by scientific inquiry at the colloquy, both strengthening some pleas and weakening others in a profoundly just way. When a trial court inquires into the science behind a guilty plea, it necessarily makes the subsequent conviction more secure. Through a specific colloquy, the court can establish that a given defendant knew that his guilty plea is based on his understanding of the scientific evidence—this allows for less surprise later should the conviction actually be based on solid scientific proof. The only pleas that are "less secure" are those that should not have been guilty pleas in the first place—those based on shoddy or inadequate evidence. Inquiry into the science at a guilty plea, then, only weakens the power of the pleas that should have been dismissals, yet strengthens those based on good science.

B. Educating the Court about the Importance of a Scientific Basis for Guilty Pleas

The legal system has concerned itself with scientific reliability for decades—in *Daubert*, the Supreme Court:

> set forth several factors for judicial consideration in evaluating admissibility of scientific evidence. Under *Daubert* factors, expert

[332] 28 U.S.C. § 2255(a). The statute provides that federal prisoners claiming a constitutional or other violation, including the voluntariness requirement of Rule 11, may move the court to vacate, set aside, or correct a sentence. Fed. R. Crim. P. 11.

[333] 28 U.S.C. § 2255(b).

[334] N.Y. Crim. Proc. Law § 440.10.

[335] Ohio Crim. R. 32.1.

[336] *Id. See also* State v. Dajuan L. Banks, 2022-Ohio-1463 (Ct. App. 2022). "This term (manifest injustice) has been variously defined, but it is clear that under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court."

> opinion is admissible when supported by particular grounds for the expert's scientific conclusion. . . . The United States Supreme Court further clarified that an expert must "employ in the courtroom *the same level of intellectual rigor that characterizes the practice of an expert in the relevant field*."[337]

Many states have also codified *Daubert* factors in their evidence rules, which reflect similar relevant factors.[338]

Daubert hearings are an important tool to protect the integrity of evidence, and the stakes for them are high: failure to meet *Daubert* standards can result in dismissal or severe limitations on evidence submitted to the jury.[339] But these hearings are largely a function of trial—in most guilty pleas, there is no inquiry into the reliability of the scientific evidence of a given case. As ninety-seven percent of cases never see a trial, judges who rarely make inquiries into scientific fields may be apt to accept the testimony of *some* expert, in whatever form, as *the* expert in a particular field. For example, general police training does not cover scientific topics such as fluid viscosity—the resistance of a fluid against flow.[340] But how can a forty-hour training course educate them in this, plus fluid viscoelasticity, which is specific to blood products and has a direct impact on how blood functions—a concept central to the field of blood pattern analysis? This level of depth is appropriate for study by physicians and biochemical engineers; is it part of a police expert's forty hours?

Or should it be? What are the proper parameters to judge whether a smear of red on a victim's neck is the result of blowback from a gunshot or castoff from the knife in their own hand? Or whether it is blood at all? Only a court is charged with determining what is allowable in trial to prove any of this—and this scientific evidence can be the literal difference between life and death for the accused. Judges should have some familiarity with scientific methodology in order to make these legal determinations. Of course, they can educate themselves through study and continuing judicial education. But having more opportunities to review scientific evidence during the course of a plea makes sense, and it sets the court up well to review it at *Daubert* hearings, too. Through the process of scientific plea review, both in the colloquy and at hearings when science is later exposed as inaccurate, judges will become more comfortable with issues of scientific reliability as they start examining

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337 Jennifer Engelhardt & Chad Engelhardt, *Daubert Challenges to Expert Testimony: Legal Overview and Best Practices*, 101 Mich. B.J. 34, 34 (2022) (emphasis added). It is important that *Daubert* requires "intellectual rigor" relative to an expert in the field in question. Certainly, training to become a police officer doesn't have the same intellectual rigor as the scientists in the fields in which they routinely testify.

338 *See, e.g.*, M.C.L. § 600.2955.

339 *See* Engelhardt, *supra* note 337, at 34.337.

340 This is different from fluid viscoelasticity, which is the elastic property that red blood cells possess as they interact with one another. This article does not argue that viscoelasticity is important to pattern analysis, it merely acknowledges that blood is unique; physicians and biochemical engineers study it. Do the police? *See* Marko Oydanich et al., *Clarification on viscosity vs. viscoelasticity*, 55 Anaesthesiology Intensive Ther. 313–14 (2023) [doi: 10.5114/ait.2023.132522].

such data more often, leading to stronger evidentiary reliability throughout the system.

C. Protecting Defendants Beyond the Often-Unavailable *Alford* Plea

There is a mechanism for defendants who wish to challenge the admissibility of scientific or other evidence and still get the benefit of plea negotiations—the *Alford*[341] plea. An *Alford* plea allows a defendant to take the benefit of a guilty plea without admitting guilt—instead, he must acknowledge that there is evidence against him to prove the charges, but that he does not wish to go to trial.[342] This allows the defendant to get the bargain of a set sentence or a dropped charge but still allows him to contest evidentiary rulings with a higher court.

Unfortunately, while *Alford* is a valuable tool to resolve even high-profile cases[343] and when used in a conditional plea allows for some appeal of *Daubert* rulings,[344] it is not sufficient to address the problem of junk science in criminal justice. *Alford* is disallowed in three states (Indiana, Michigan, and New Jersey), and in U.S. military courts.[345] Beyond this, the decision to allow a defendant to plead guilty via *Alford* is up to the prosecutor to offer and the court to accept. Of course, the court has wide discretion to accept or reject any guilty plea, and an *Alford* plea is no exception. But before that plea agreement is even signed by the defendant, the prosecutor must agree to it as well. This means that even in states where *Alford* pleas are routine, any prosecutor at any time may simply refuse to negotiate with a defendant who will not admit his guilt. Thus, *Alford* is not a true right held by criminal defendants, but a tool wielded by prosecutors—who can put it back into their arsenal without deploying it whenever they so choose. As such, it is not a substitute for the prosecutor's duty to offer significant evidence at trial or to proffer it at a guilty plea.

In addition, *Alford* pleas are arguably a lesser evil of the overall plea-bargaining system; one that ensures more cases get resolved efficaciously but undermines the key values of admitting guilt in open court. Stephanos Bibas argues that the *Alford* plea undercuts the "norm of punishing only those known to be blameworthy," and allows for victims to be continuously harmed by defendants who plead guilty but publicly maintain innocence.[346] A move

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[341] North Carolina v. Alford, 400 U.S. 25 (1970).

[342] Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1363–64 (2003).

[343] An *Alford* plea was used to resolve the high-profile cases of the West Memphis Three and Michael Peterson. The three were likely wrongly convicted of murdering three young boys in the era of "satanic panic." Echols v. State, 686 S.W.3d 790 (Ark. 2024). Journalist Michael Peterson may have fatally pushed his wife down a staircase, or she might have been killed by an owl. *Mike Peterson Walks Free as 15-year Murder Case Ends with Plea Deal*, WRAL News (Feb. 24, 2017), https://www.wral.com/mike-peterson-walks-free-after-15-year-murder-case-ends-with-plea-deal/16546848/ [https://perma.cc/7TDB-H5AH].

[344] A conditional plea allows a defendant to take advantage of a favorable agreement, while also seeking appeal on the admissibility of evidence. *See* 1 Karen A. Newirth & Adnan Sultan, Pleas, Plea Bargaining, and Sentencing § 6.05 (2025).

[345] Bibas, *supra* note 342, at 1373, 1377, 1381 (2003).

[346] *Id.* at 1366.

away from *Alford* pleas and toward wholesale inspection of scientific inquiry, then, serves both sides of the criminal justice system: the victims, who are less at risk of further pain from a defendant's protestation of guilt, and the defendants, who are less at risk of admitting to a crime that later turns out to be erroneous when the science changes.

D. Ensuring an Attack in Addition to Actual Innocence

Actual innocence statutes can be another tool to assess scientific reliability, but they are incredibly narrow and are not often successfully implemented.[347] A typical actual innocence statute allows a defendant to petition for post-conviction relief based on his actual innocence—the first such statutes only applied to cases where DNA evidence was tested or discovered post-conviction, but some states have expanded their statues to include evidence other than DNA.[348] In a perfect world, all states and the federal government would allow convicted defendants to petition for a new trial or to set aside a guilty plea in light of any changing science; an actual innocence statute does allow for some such relief, but most do not fully address the issue by failing to cover guilty pleas or restricting their application solely to DNA cases. Also, post-conviction statutes across the country do not specifically or sufficiently address issues involving the changing scientific landscape.

For instance, Kentucky's post-conviction DNA testing statute only applies to *Alford* pleas and in capital cases.[349] Other states attempt to address the issue of changing science by adding additional language to their actual innocence statute; the Innocence Project has been chronicling these changes.[350] However, most of these statutes specifically address trials, and not guilty pleas. For example, Tex. Code Crim. Proc. Art. 11.073 "applies to relevant scientific evidence that: . . . (2) contradicts scientific evidence relied on by the state *at trial*."[351] Cal. Pen. Code § 1473(b) allows for a writ of habeas corpus when "a significant dispute has emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic testimony that was introduced at trial and contributed to the conviction, such that it would have more

[347] *See* McQuiggin v. Perkins, 569 U.S. 383 (2013) (". . . tenable actual-innocence gateway pleas are rare").

[348] Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. Irvine L. Rev. 671, 689 (2020). Such post-conviction relief statutes vary greatly in the details; some have statutes of limitation, some require showing that trial counsel could not have discovered the exculpatory evidence, and others are still limited to biological evidence. Some limit relief to a two-year period following conviction, others only allow such testing after a verdict in a capital case. *See generally id.*

[349] See Ky. Rev. Stat. § 422.285(5)(d), (6)(d) (West 2019); *see also* Owens v. Commonwealth, 512 S.W.3d 1, 8 (Ky. App. 2017) ("[T]he right to DNA testing is not available to someone who pleaded guilty to the offense, unless the death penalty was imposed.").

[350] *See* The Innocence Project, https://innocenceproject.org/tags/revealing-wrongful-conviction/ [https://perma.cc/8XQS-96DW] (last visited Dec. 15, 2025); The Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Forensics.aspx [https://perma.cc/SRH6-RXEJ] (last visited Dec. 15, 2025).

[351] Tex. Code Crim. Proc. Ann. art. 11.073 (West 2025) (emphasis added).

likely than not changed the outcome *at trial*."[352] And Michigan's statute allows for relief based on:

> new scientific evidence. This includes, but is not limited to, shifts in science entailing changes: (a) in a field scientific knowledge, including shifts in scientific consensus; (b) in a testifying expert's own scientific knowledge and opinions; or (c) in a scientific method on which the relevant evidence *at trial* was based.[353]

Likewise, Nevada's actual innocence statute does not clearly apply to a guilty plea:

> "Newly discovered evidence" means evidence that was not available to a petitioner at trial or during the resolution by the trial court of any motion to withdraw a guilty plea or motion for new trial and which is material to the determination of the issue of factual innocence, including, without limitation: . . . (3) relevant forensic scientific evidence . . . that undermines materially forensic scientific evidence presented *at trial*.[354]

Without clear application to guilty pleas, actual innocence statutes are virtually useless in combating scientific reliability in over ninety-five percent of all criminal cases, reinforcing the need for changes to the plea colloquy.

E. Acknowledging That There are No Other Viable Options

Researchers have studied the growth rate of science over time, and it is nothing short of astounding compared with an overview of how the law changes over time.

> Growth of science is an ongoing topic in empirical and theoretical studies on science of science. In a recent overview of science of science studies, Fortunato *et al.* stated that "early studies discovered an exponential growth in the volume of scientific literature . . . a trend that continues with an average doubling period of 15 years."[355]

Scientists thus characterize this doubling rate as evidence of the size and gravity of modern scientific inquiry: "[i]f the literature doubles every 15 years, science would be characterized by immediacy: 'the bulk of knowledge remains

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[352] Cal. Pen. Code § 1473(b)(D) (West 2025) (emphasis added); *see also* W. Va. Code § 53-4A-1(b)(1) (2025) ("[A] contention or contentions shall not be deemed to be previously and finally adjudicated when either relevant forensic scientific evidence exists that was not available to be offered by a petitioner at the time of the petitioner's conviction or which undermines forensic scientific evidence relied on by the state at trial; and there is a reasonable probability there would be a different outcome at trial.").

[353] Mich. Ct. R. 6.502 (emphasis added).

[354] Nev. Rev. Stat. Ann. § 34.930 (West 2025) (emphasis added).

[355] Lutz Bornmann, Robin Haunschild & Rüdiger Mut, *Growth Rates of Modern Science: A Latent Piecewise Growth Curve Approach to Model Publication Numbers from Established and New Literature Databases*, 8 Human. & Soc. Sci. Commc'n., 2021, at 2 [https://doi.org/10.1057/s41599-021-00903-w].

always at the cutting edge.'"[356] Further, this growth is compounded over time: "the development of science follows the law of exponential growth: "at any time the rate of growth is proportional to the . . . total magnitude already achieved—the bigger a thing is, the faster it grows."[357]

In stark contrast, while a singular law may change in a moment, large-scale changes in the law take time. It takes months, if not years, for Congress to pass a law once a bill goes through committee in both chambers. Then, only after an executive signs it or the legislature overrides their veto does it go into effect. Not only does this process take procedural time, but it also takes time for members of Congress to substantively agree to introduce bills. Only once an approved bill is signed into law can a court review the constitutionality of it, and although that can happen with one singular opinion, no final word on constitutionality ever occurs until the Supreme Court rules after the case progresses through lower courts.

All of this is to say that it takes quite a bit of time to enact a new law or to review one already enacted. Scientific discovery, on the other hand, is evolving at an astronomically fast rate all across the world. What is scientifically true today may not be scientifically true tomorrow and may be painfully and obviously false in six months' time. Meanwhile, criminal defendants serving lengthy sentences do not benefit from any of these scientific discoveries unless the court allows it to be so. The same should be true relative to scientific inquiry; rapid changes in scientific discovery should lead to rapid changes in how the legal system reacts to using that science in convicting criminal defendants. Because the legal system does not evolve at the same rate as scientific discovery, we see defendants linger in custody from convictions that were once scientifically based but are no longer logically sustainable. A plea colloquy that memorializes the scientific standards relied upon at the time of the plea provides at least some mechanism for justice in light of changing technology.

Conclusion

Professor Canon describes the American plea system, with all its wide acceptance, as "fast justice."[358] But justice requires evidence, transparence, and certainty, and there are consequences to the speed at which the system churns through those convicted of a crime to the point that justice is elusive. In the plea system:

> [b]argaining over basic liberties plays out day after day, life after life, in near total darkness. Unlike trials, which are a matter of public record, plea negotiations happen in secret, often without the defendant knowing they are happening until the last minute. We don't see the facts of criminal cases (such as whether the prosecution

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[356] *Id.*
[357] *Id.*
[358] Canon, *supra* note 31, at 8.

> has enough proof or whether the cops followed the rules) because those facts don't matter if a defendant is just going to plead anyway. There are no juries, no appeals, and no time for questions. The lawyers who make the deals are not held accountable for the evidence they did or did not present, or for the case they did or did not make on behalf of their clients, or for much of anything.[359]

The plea system is in desperate need of overhaul, and while one article cannot possibly atone for all its faults, it can offer a solution to the looming problem of scientific evolution—by including it in plea evaluation. Judges have wide latitude in reviewing pleas—and they should exercise that by ensuring, on the record, that each plea is supported by scientific methodology. Whether that comes in the form of an enhanced or specified plea colloquy or through a more involved proffer of evidence to support the plea is up to an individual judge. But the solution's efficacy is in expediency—one need not convince a legislature or an executive that this is worthy of implementation. Such a rare opportunity should be taken, for the benefit of science, for the benefit of the criminal defendant, and for the benefit of the system as a whole.

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[359] *Id.*

Building Social Equity Through Value Capture

Brian J. Connolly[*] and Arthur C. Nelson[**]

Abstract

Public infrastructure, including transit, roads, utilities, recreation facilities, and healthcare, is central to modern society and urban growth. Yet the United States faces a $9 trillion infrastructure-maintenance backlog, and further investments are needed to support economic growth, technological advancement, and climate resilience. Financing and completing these projects present a formidable puzzle. However, such projects often generate private wealth by increasing land values; consequently, they enhance tax and fee revenues beyond their direct funding streams. When accounted for, spillover revenues can be reinvested in ways that advance social equity, such as providing free transit fares, building affordable housing, furthering public health, or supporting education.

Although economists and urban planning scholars have studied infrastructure's multiplier effect, legal scholarship has yet to examine whether and how the law facilitates or hinders it. This Article identifies three key state and federal legal barriers—tax and revenue limits, restrictions on development exactions, and prohibitions on legislative entrenchment—that prevent cities from fully realizing and allocating projects' secondary financial gains for social equity. Some value-capture tools currently exist and offer immediate, practical solutions, such as utilizing annual budgeting to allocate unpledged revenues. However, more transformative reforms, including relaxing tax limits or implementing special land-value taxing districts, could further improve outcomes. This Article offers a roadmap for growing unrestricted local revenues, building popular support for essential infrastructure, and ensuring fairness in returns on public investments.

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[*] Assistant Professor of Business Law, Stephen M. Ross School of Business, University of Michigan. Connolly was previously a partner in the land use practice group at Otten Johnson Robinson Neff + Ragonetti, P.C., in Denver, Colorado.

[**] Professor Emeritus of Urban Planning and Real Estate Development, College of Architecture, Planning & Landscape Architecture, University of Arizona. For helpful conversations and feedback on this Article, the authors wish to thank Jonathan Levine, the Business Law Area of the Ross School of Business, attendees at the 2026 Rocky Mountain Land Use Institute conference, attendees at the 2024 Rocky Mountain Land Use Institute Cheever Academic Workshop, transportation and planning staff of the City of Tucson, participants at the downtown Tucson redevelopment workshop sponsored by the Arizona chapter of the American Planning Association at its 2024 fall conference, and legal counsel of the City of Tucson for its legal opinion on the discretionary use of unpledged value added revenues in the budgeting process. The authors also wish to thank Brittany Frysinger for her editing assistance and the editors of the Harvard Law and Policy Review for their work on this Article.suggestions and for all their hard work on the article. This research was supported in part by a grant from the Bentley University Research Council.

Introduction

Tucson's Sun Link streetcar is hardly a world-famous transit system.[1] Running for 3.9 miles between the University of Arizona and the city's downtown, the streetcar serves a mere handful of neighborhoods in a city of nearly 550,000 people.[2] Yet despite its relative anonymity, Sun Link, which opened to the public in 2014 and boasted a 2024 annual ridership of 1.6 million, is an economic boon: it has drawn consequential new employment, population, and real estate investment to the neighborhoods along its route.[3] The value of real property in the area within one kilometer of its route has increased by an inflation-adjusted $2.6 billion.[4] The corresponding net increase in city property-tax revenues totals over $750,000 and, when combined with sales,

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[1] *See Sun Link Streetcar*, Sun Tran, https://www.suntran.com/routes-services/sunlink/ [https://perma.cc/FVW7-7UPK] (last visited June 11, 2025); Ben Jones, *The World's Best Subways: How These Metro Networks Keep Cities on the Move,* CNN (Mar. 1, 2024), https://www.cnn.com/travel/worlds-best-subways-metros [https://perma.cc/7Z4S-KARW] (identifying more widely known transit systems).

[2] *See Sun Tran*, Sun Tran, https://www.suntran.com/routes-services/find-my-bus/ [https://perma.cc/6PQE-AFUD] (last visited June 11, 2025) (mapping the Tucson streetcar system); *U.S. Census Bureau QuickFacts: Tucson City, Arizona*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/tucsoncityarizona/PST045224 [https://perma.cc/U85Q-AXDA] (last visited June 11, 2025) (providing population data on Tucson).

[3] *See* RATP DEV et al., FY24 Annual Report 8 (Aug. 12, 2025), https://www.suntran.com/wp-content/uploads/2023/05/Annual-Report-FY24-REV-8-12-25.pdf [https://perma.cc/P7VT-M82M]; Arthur C. Nelson & Daniel Lawlor, Transit Value-Added Monitoring System: Estimating Value-Added Outcomes of Tucson's Streetcar i (2024), https://ppms.trec.pdx.edu/media/project_files/new_one.pdf [https://perma.cc/2MK4-7YER].

[4] Nelson & Lawlor, *supra* note 3, at 103.

use, income, and other tax and fee revenues along the route, Sun Link has boosted city revenues by over $13 million.[5]

Owing in part to these revenues, Tucson has waived fares on Sun Link since the beginning of the COVID-19 pandemic.[6] Waiving transit fares disproportionately benefits lower-income people, who are likelier than others to rely on transit to get to work, medical appointments, shopping, and elsewhere.[7] Whereas Sun Link's pre-pandemic farebox collections totaled around $800,000 in 2023 dollars, the city has realized $1.5 million in new sales and property-tax receipts along the line since eliminating fares.[8] Sun Link's benefits, quantified in a first-ever monitoring system for policymakers, public administrators, and the general public, illustrate how value is added as a result of public transit investments.[9]

Modern society and economies are built on infrastructure, from roads to transit, utilities, energy, and healthcare facilities.[10] Cities in particular rely on infrastructure projects to foster urban growth, agglomeration economies, and efficient and sustainable living patterns.[11] Nevertheless, due to past disinvestment, the United States must spend an estimated $9.1 trillion—much of which is presently unfunded—to bring its existing infrastructure into good repair.[12] This estimate does not include expansion and modernization needed to facilitate economic growth, advance technology, improve sustainability, and build climate resilience.[13] There are now widespread calls to rapidly expand and improve public infrastructure to address the housing and climate crises.[14]

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[5] *Id.* at iii.

[6] *See* Natalie Robbins, *Tucson City Council Votes to Rethink Free Sun Tran Bus Fares*, Tucson Sentinel (Apr. 8, 2025), http://www.tucsonsentinel.com/local/report//040825_free_bus_fares/ [https://perma.cc/7PWS-HBPN].

[7] *See generally* Rebecca Brough et al., *Eliminating Fares to Expand Opportunities: Experimental Evidence on the Impacts of Free Public Transportation on Economic and Social Disparities*, 17 Am. Econ. J.: Econ. Pol'y 1 (2025) (discussing the benefits of transit fare waivers).

[8] Nelson & Lawlor, *supra* note 3, at iii.

[9] *See id.* at 3.

[10] *See, e.g.*, Mary Bridges, *Infrastructure Is Remaking Geopolitics*, Foreign Affs. (May 10, 2024), https://www.foreignaffairs.com/united-states/infrastructure-remaking-geopolitics [https://perma.cc/ZA99-AZQ3]; Robert Puentes, *Why Infrastructure Matters: Rotten Roads, Bum Economy*, Brookings (Jan. 20, 2015), https://www.brookings.edu/articles/why-infrastructure-matters-rotten-roads-bum-economy/ [https://perma.cc/C6AS-HPJN]; *see also generally* Massoud Amin, *Toward Secure and Resilient Interdependent Infrastructures*, 8 J. Infrastructure Sys. 67 (2002). A wide array of public goods can be considered infrastructure. *See* Cotten Seiler, White Care: The Impact of Race on American Infrastructure 13–14 (2026).

[11] *See generally* Morris A. Davis et al., *Macroeconomic Implications of Agglomeration*, 82 Econometrica 731 (2014) (discussing the importance of infrastructure to urban growth and development).

[12] This backlog is unfunded because money has not been allocated to needed projects, and because it is unavailable under current revenue projections. *See* American Society of Civil Engineers, 2025 Report Card for America's Infrastructure 7 (2024), https://infrastructurereportcard.org/wp-content/uploads/2025/03/Full-Report-2025-Natl-IRC-WEB.pdf [https://perma.cc/CV56-YWDF] [hereinafter ASCE].

[13] *Id.* at 5; *see also* Zachary Liscow, *Getting Infrastructure Built: The Law and Economics of Permitting*, 39 J. Econ. Persps. 151, 152 (2025).

[14] *See, e.g.*, Ezra Klein & Derek Thompson, Abundance 71–78 (2025) (discussing needed transportation improvements); *Massive Investment Is Needed in Sustainable Infrastructure to Build Climate Change Resilience*, Org. for Econ. Coop. & Dev. (Apr. 9, 2024), https://www.oecd.org/en/about/news/press-releases/2024/04/massive-investment-is-needed-in-sustainable-infrastructure-to-build-climate-change-resilience.html [https://perma.cc/XJ8B-3AXL]

Although building public support for these investments will be a daunting task, Tucson's experience offers an important, quantifiable story about such projects' positive cascades.[15]

Quantifying these benefits demonstrates that infrastructure projects can generate knock-on returns beyond simply providing a necessary public service. It also raises important questions about who is entitled to these returns and how the law directs them. To date, however, legal scholarship has not surveyed the law's treatment of these questions. This Article does just that. It identifies the legal roadblocks that cities face in realizing secondary benefits of their infrastructure projects, and describes how cities can overcome these roadblocks. It then suggests legal reforms that would enable communities to earn greater returns on their infrastructure investments, which could be directed to a host of socially, economically, or environmentally important policy priorities.[16] Although this Article uses transit as a primary example, its analysis applies equally to other projects, including parks, utilities, telecommunications, healthcare facilities, and sports stadiums.[17]

Whether and how infrastructure should be paid for, and who should benefit from it, is an evergreen subject of political debate.[18] Take transit, for example. Riding transit costs less than owning and operating a car, and it offers transportation for people who cannot drive or afford to drive, reduces

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(describing needed infrastructure investments to address the risks of climate change); Christian O. Deseglise & Louis Downing, *Why Investment in Sustainable Infrastructure Is Key to Financial Resilience in a Changing Climate*, World Econ. F. (Apr. 24, 2025), https://www.weforum.org/stories/2025/04/why-investment-in-sustainable-infrastructure-is-key-to-financial-resilience-in-a-changing-climate/ [https://perma.cc/JQC5-3FFJ]. *See also generally* Joseph W. Kane, *Seizing the U.S. Infrastructure Opportunity: Investing in Current and Future Workers*, Brookings (Dec. 2022), https://www.brookings.edu/articles/infrastructure-workforce/ [https://perma.cc/UDT2-K4JL]; Gregory H. Shill & Jonathan Levine, *Transportation for the Abundant Society*, 112 Iowa L. Rev. (forthcoming 2026) (observing the Abundance Movement's focus on transportation and recommending a reorientation of transportation policy around accessibility).

[15] *See* ASCE, *supra* note 12, at 12–19; James McBride et al., *The State of U.S. Infrastructure,* Council on Foreign Rels. (Sept. 20, 2023), https://www.cfr.org/backgrounder/state-us-infrastructure [https://perma.cc/S34L-YUR3]; Municipal Securities Rulemaking Board, Municipal Securities: Financing the Nation's Infrastructure 2 (2021), https://www.msrb.org/sites/default/files/MSRB-Infrastructure-Primer.pdf [https://perma.cc/RE5K-Z8YD] [hereinafter MSRB].

[16] *See infra* Parts II–IV.

[17] For example, several studies indicate that parks improve surrounding property values. *See, e.g.*, Nick Manes, *Joe Louis Greenway Could Bring a Big Boon for Nearby Homeowners*, Crain's Detroit Business (Mar. 25, 2026), https://www.crainsdetroit.com/real-estate/residential/cdb-joe-louis-greenway-home-prices-20260326/ [https://perma.cc/B9A2-K874].

[18] *See, e.g.*, Kevin DeGood, *Infrastructure Investment Decisions Are Political, Not Technical*, Ctr. for Am. Progress (Apr. 14, 2020), https://www.americanprogress.org/article/infrastructure-investment-decisions-political-not-technical/ [https://perma.cc/PT4D-8SB4]; Judge Glock, *We Don't Need This Much Infrastructure: Diminishing Returns & Increasing Political Demands on Infrastructure*, Manhattan Inst. (Sept. 24, 2024), https://manhattan.institute/article/diminishing-returns-and-increasing-political-demands-on-infrastructure [https://perma.cc/UB87-UZ5H]; Stephen Collinson, *The Fight to Define Infrastructure Could Change America*, CNN (Apr. 6, 2021), https://www.cnn.com/2021/04/06/politics/joe-biden-infrastructure-us-debate [https://perma.cc/8GAB-NDS3]; Joshua Zeitz, *What the "Infrastructure" Fight Is Really About,* Politico (May 1, 2021), https://www.politico.com/news/magazine/2021/05/01/what-the-infrastructure-fight-is-really-about-485107 [https://perma.cc/2G8B-GKML]; Martin Neil Baily, *Wanted: A More Reasonable Debate on Infrastructure*, Brookings (Oct. 6, 2016), https://www.brookings.edu/articles/wanted-a-more-reasonable-debate-on-infrastructure/ [https://perma.cc/4VXR-2KHE].

vehicle traffic, and produces fewer greenhouse gas emissions on a per-rider basis than automobiles. Advocates thus tout transit's benefits for social equity, mobility, and environmental sustainability.[19] In contrast, detractors emphasize the cost of building and operating transit, and argue it is unsafe, vulnerable to criminal activity, and reduces choice and freedom compared with automobile travel.[20]

Like many other major infrastructure investments, transit projects are usually built with a combination of federal or state grants and debt obligations—mostly tax-advantaged bonds—issued by state or local agencies.[21] These bonds are repaid pursuant to a revenue pledge, often from a special sales or use tax or, in some cases, project operating revenues.[22] Project operations are typically funded through user fees, *i.e.*, rider fares, combined with general or special tax revenue, and some federal grant support.[23] Other revenues may support operations; for instance, transit systems' operations are also partly funded by proceeds from advertising, vehicle registrations or tolls, facility leases, parking charges, and other sources to make up the difference.[24]

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[19] *See, e.g.*, Irvin Dawid, *Phoenix Sales Tax Measure Key to County's Transit Future*, Planetizen (July 29, 2015), https://www.planetizen.com/node/79871/phoenix-sales-tax-measure-key-countys-transit-future [https://perma.cc/53YD-8KF8]; Derek P. Jensen, *Roads or Rails? It's Both, and Soon*, The Salt Lake Trib. (Dec. 20, 2006), https://archive.sltrib.com/article.php?id=4870939&itype=NGPSID [https://perma.cc/6PWP-SFBW]; Nicole Warburton, *UTA Kicks off Campaign for Transit Tax Hike*, Deseret News (Oct. 7, 2006), https://www.deseret.com/2006/10/7/19978176/uta-kicks-off-campaign-for-transit-tax-hike/ [https://perma.cc/QQ3C-EX58]; FasTracks RTD, *FasTracks Plan* ES-4–ES-8 (2004), https://wp-cpr.s3.amazonaws.com/uploads/2024/09/2004-FasTracks_Plan.pdf [https://perma.cc/C3J5-2QXX].

[20] Commentators often push the narrative that "transit does not pay for itself" on the premise that transit systems' operating costs usually exceed farebox revenue. *See, e.g.*, Garry Pierre-Pierre, *Benefits From Transit Spending Said to Outweigh Costs by 5 to 1*, N.Y. Times (Apr. 16, 1996), https://www.nytimes.com/1996/04/16/nyregion/benefits-from-transit-spending-said-to-outweigh-costs-by-5-to-1.html [https://perma.cc/U5CU-WRQK]; Randal O'Toole, *Transit: The Urban Parasite*, Cato Inst. (Apr. 20, 2020), https://www.cato.org/policy-analysis/transit-urban-parasite [https://perma.cc/3H25-HM5J].

[21] *See* McBride et al., *supra* note 15; MSRB, *supra* note 15, at 4. However, federal and state grants often come with restrictions on their use. One example is the Federal Airport Improvement Program, managed by the Federal Aviation Administration. This program restricts the expenditure of federal money to airports' ground transportation infrastructure that is intended for exclusive use by passengers and airport employees, which effectively mandates the separation of airport transit systems from surrounding regions' transit systems. *See* Geoffrey D. Gosling et al., Collaborative Funding to Facilitate Airport Ground Access 24–25 (June 2012), https://transweb.sjsu.edu/sites/default/files/2503-collaborative-funding-airport-ground-access.pdf [https://perma.cc/5HZK-DBBB] (identifying the AirTrain at John F. Kennedy International Airport in New York as one example of an on-airport transit system that is not integrated into the Metropolitan Transit Authority's surrounding subway and train systems).

[22] *See* MSRB, *supra* note 15, at 6; Ctr. for Innovative Fin. Support, *Local Revenue*, U.S. Fed. Highway Admin., Dep't of Transp., https://www.fhwa.dot.gov/ipd/value_capture/traditional_transportation_revenue/local.aspx [https://perma.cc/F2RY-MR5Z] (last visited July 11, 2025).

[23] *See generally* William J. Mallett, Cong. Rsch. Serv., R47900, Federal Support of Public Transportation Operating Expenses (2024), https://www.congress.gov/crs-product/R47900 [https://perma.cc/M5G6-KLFC]; Ctr. for Innovative Fin. Support, *supra* note 22.

[24] *See generally* Anna Kustar et al., A Fare Look: Funding Urban Public Transport Operations (World Res. Inst., Working Paper, Dec. 11, 2024), https://www.wri.org/research/fare-look-funding-urban-public-transport-operations [https://perma.cc/Q5LF-RTE4].

Whereas these revenues fund the construction and operation of transit projects, infrastructure investments can generate secondary, *unpledged* public benefits.[25] Such projects boost nearby land values and economic activity, leading to job creation and more retail transactions.[26] As a result, infrastructure projects can generate derivative local property, income, and sales tax revenues that support local general funds and, unlike pledged revenues, are unrestricted.[27] While some scholars urge capturing the wealth generated from public projects to finance their construction,[28] a city could also direct such derivative revenues to other programs and activities that improve social equity; that is, it could distribute the resources and privileges attributable to infrastructure projects to the broadest possible segment of society.[29] Examples could include building parks or affordable housing to supporting social services.

Redistributing wealth attributed to public actions back to the public, often termed *land value-capture*, is not a new idea.[30] Henry George famously recommended taxing land value to recapture some of the economic rent created by the public's labor and investments.[31] Others have argued that land-value increases caused by public actions like regulatory relief or infrastructure projects should be taxed—sometimes called betterment taxes—given that public

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[25] *See* Nelson & Lawlor, *supra* note 3, at i–iii.

[26] *See, e.g.*, Gerald Korngold, *Land Value Capture in the United States*, Lincoln Inst. of Land Pol'y 5 (2022), https://www.lincolninst.edu/publications/policy-focus-reports/land-value-capture-in-united-states/ [https://perma.cc/EX6X-7VGK]; *see also generally* J. Anthony Coughlan, *Land Value Taxation and Constitutional Uniformity*, 7 Geo. Mason L. Rev. 261 (1999); Shishir Mathur, Innovation in Public Transport Finance: Property Value Capture 22–24 (2014); Arthur C. Nelson & Robert Hibberd, Economic Development and Demographic Outcomes of Streetcar Station Proximity with Post-Pandemic Implications (Jan. 1, 2025) (unpublished manuscript) (available at SSRN), https://papers.ssrn.com/abstract=5113417 [https://perma.cc/R85V-DHC4]; Blake Acton et al., *Impacts of Bus Rapid Transit (BRT) on Residential Property Values: A Comparative Analysis of 11 US BRT Systems*, 100 J. Transp. Geography 103324 (2022). Of course, some public infrastructure projects might reduce property values, say, where a property is located too close to the project such that the project's externalities—such as a highway's noise, a waste transfer facility's odor, or a transit station's nighttime lighting—negatively affect the property.

[27] *See* Mathur, *supra* note 26, at 66.

[28] *See id.* at 195–202; Zhirong Jerry Zhao & Kerstin Larson, *Special Assessments as a Value Capture Strategy for Public Transit Finance*, 16 Pub. Works Mgmt. & Pol'y 320, 335–36 (2011).

[29] Definitions of "social equity" are wide-ranging, yet in the urban planning field, they tend to coalesce around improving opportunity for all—particularly historically disadvantaged—population groups by ensuring the availability of public resources from quality education to housing, transportation, and environmental quality. *See, e.g.*, *Social Equity*, Am. Plan. Ass'n, https://www.planning.org/knowledgebase/equity/ [https://perma.cc/8AYG-BKZU] (last visited Nov. 7, 2025).

[30] *See* Donald G. Hagman, *Windfalls and Their Recapture*, *in* Windfalls for Wipeouts: Land Value Capture and Compensation 16–18 (Donald G. Hagman & Dean J. Misczynski eds., 1978); Korngold, *supra* note 26, at 5; Michael Manville, *Value Capture Reconsidered: What If L.A. Was Actually Building Too Little?*, UCLA Lewis Ctr. for Pol'y Stud. 8 (2021), https://www.lewis.ucla.edu/research/value-capture-reconsidered/ [https://perma.cc/RP28-Y94J]; Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 Case W. Res. L. Rev. 513, 525–27 (2020).

[31] Henry George, Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth; the Remedy 411–12 (Doubleday 1905).

decisions cause these windfalls.[32] American localities[33] have, by and large, not implemented pure land-value or betterment taxes, yet they can and do capture some of the wealth generated from their infrastructure projects through *ad valorem* property taxes, special assessments, and real estate transfer taxes.[34] And their sales and income taxes enable them to earn spin-off revenues from increased economic activity near their infrastructure investments. Moreover, U.S. cities sometimes capture incremental value from these investments through development charges, including fees or public improvements obligations, on new real estate projects built nearby.[35]

Although localities have some value-capture tools at their disposal, this Article identifies three state and federal constitutional limits that directly handicap their returns from their infrastructure investments. First, most states limit localities' ability to levy taxes, generate revenue, or expend public dollars.[36] Second, courts apply the judicially created unconstitutional conditions doctrine to limit exactions—that is, conditions imposed on government

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[32] *See generally, e.g.*, Coughlan, *supra* note 26; Zhao & Larson, *supra* note 28; Korngold, *supra* note 26; Nathaniel Lichfield & Owen Connellan, *Land Value and Community Betterment Taxation in Britain*, Lincoln Inst. of Land Pol'y (2020), https://www.lincolninst.edu/publications/working-papers/land-value-community-betterment-taxation-britain/ [https://perma.cc/G92G-SM8V]; Rachelle Alterman, *Land-Use Regulations and Property Values: The "Windfalls Capture" Idea Revisited*, *in* The Oxford Handbook of Urban Economics and Planning 755, 759–62 (Nancy Brooks et al. eds., 2011). Michael Manville observes that "land value is publicly created." Manville, *supra* note 30, at 20. Arguments against betterment levies tend to focus on issues of economic competitiveness, potential negative effects on developers, the difficulty of calculating betterment, and concerns about liquidity-challenged landowners' ability to pay. *See, e.g.*, Frances Plimmer & Greg McGill, Land Value Taxation: Betterment Taxation in England and the Potential for Change 13 (Int'l Fed'n of Surveyors (FIG), Working Paper No. TS9, 2003), https://www.fig.net/resources/proceedings/fig_proceedings/fig_2003/TS_9/TS9_4_Plimmer_McGill.pdf [https://perma.cc/6DUY-MK4H].

[33] Throughout this Article, the terms "locality," "local government," "municipality," "city," and "community" are used interchangeably. Unless otherwise noted, these terms are intended to reference general-purpose local governments.

[34] *See* Ctr. for Innovative Fin. Support, *Land Value Tax*, Fed. Highway Admin., https://www.fhwa.dot.gov/ipd/value_capture/defined/land_value_tax.aspx [https://perma.cc/ZE4N-S3EM] (last visited June 13, 2025); Elizabeth Kepner & Rick Mattoon, *Land Value Taxes—What They Are and Where They Come From,* Fed. Rsrv. Bank of Chi. (Nov. 2023), https://www.chicagofed.org/publications/chicago-fed-letter/2023/489 [https://perma.cc/29AH-VPQP]; Harrison Clanton, *Detroit, MI: A Case Study on Taxing Land Instead of Property,* Bipartisan Pol'y Ctr. (Dec. 6, 2023), https://bipartisanpolicy.org/blog/detroit-mi-a-case-study-on-taxing-land-instead-of-property/ [https://perma.cc/4WNS-QWKM] (reviewing Detroit's efforts to impose a land-value tax in 2023, which failed in the Michigan legislature); William A. Fischel, Zoning Rules! The Economics of Land Use Regulation 132 (2015); Steven C. Bourassa, *The U.S. Experience*, in Land Value Taxation: Theory, Evidence, and Practice 11 (Richard F. Dye & Richard W. England, eds., 2009); Alterman, *supra* note 32, at 768, 775; Dean J. Misczynski, *Special Assessments*, *in* Windfalls for Wipeouts: Land Value Capture and Compensation 334–35 (1978); Dean J. Misczynski, *Transfer Taxes*, *in* Windfalls for Wipeouts: Land Value Capture and Compensation 427–30 (1978) (noting that some cities, mainly in Pennsylvania, have utilized split-rate property tax systems where a land value component is included in the tax). Instead of relying on land-value taxes, most American cities rely on some combination of *ad valorem* property taxes (which tax the value of land plus improvements on it), sales taxes, and income taxes, along with fees, charges and intergovernmental transfers. *See* Jaebeum Cho et al., *Land Value Capture Across the Globe*, 24 Cityscape 231, 250–52 (2022); Alan A. Altshuler et al., Regulation for Revenue: The Political Economy of Land Use Exactions 3–4 (1993).

[35] *See* Elmendorf & Shanske, *supra* note 30, at 525–27 (identifying value capture as one potential aim of exactions).

[36] *See infra* Section II.A.

real estate development permits.[37] This doctrine technically prevents cities from imposing fees or in-kind development charges as a pure value-capture tool, instead allowing them only when they offset identifiable impacts of a project.[38] And third, federal and state constitutional limits on entrenching legislation—such as making it difficult or impossible for future legislatures to repeal or modify a law—mean that cities cannot guarantee that unpledged revenue from an infrastructure investment will be directed to a particular purpose.[39] As we discuss below, relaxing these limitations could aid communities in improving returns on their infrastructure investments and might lead to greater public acceptance of transit and other major infrastructure projects.

Given the significant backlog of U.S. infrastructure needs and the inadequacy of current infrastructure to facilitate future growth, advance sustainability, and build climate resilience,[40] addressing legal roadblocks to the public's return on its infrastructure projects is of great importance. Tucson's and other cities' stories also challenge the proposition that infrastructure projects do not pay for themselves.[41] If Tucson's transit investment can deliver robust, unpledged revenue and public benefits under current law, then legal reforms aimed at maximizing the public's return on such projects would provide an even greater impetus to make these necessary investments.

Moreover, addressing the legal roadblocks identified in this Article carries important distributive and fairness consequences. Infrastructure projects produce windfalls for small groups of landowners with nearby properties, yet these windfalls are generated at the public's expense.[42] Numerous scholars agree that fairness demands that the government should be allowed to share in these windfalls, to reinvest them into public goods, or to compensate the public for the projects themselves.[43] Yet current law often precludes this outcome, protecting landowners' windfalls while depriving the public of returns on taxpayer investments. Although this Article describes existing tools that cities can use to capture returns from their projects, it also suggests reforms that would get the public more bang for its buck.

At the outset, there are two important caveats. This Article generally assumes the policy wisdom of public infrastructure investments and that such investments will produce the sorts of positive fiscal outcomes presented here.[44]

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[37] *See infra* Section II.B.

[38] *See infra* Section II.B.

[39] *See infra* Section II.C.

[40] *See* ASCE, *supra* note 12, at 7.

[41] For emblematic arguments about transit not paying for itself, *see generally* O'Toole, *supra* note 20, and Randal O'Toole, *Fixing Transit: The Case for Privatization*, Cato Institute (Nov. 10, 2010), https://www.cato.org/policy-analysis/fixing-transit-case-privatization [https://perma.cc/7BSJ-HG72].

[42] *See generally* Jeffery J. Smith & Thomas A. Gihring, *Financing Transit Systems Through Value Capture: An Annotated Bibliography*, 65 Am. J. Econ. & Socio. 751 (2006).

[43] *See, e.g.*, Manville, *supra* note 30; Korngold, *supra* note 26, at 5; Mathur, *supra* note 26, at 12–13; Smith & Gihring, *supra* note 42, at 784; Rachelle Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Recapture Genie Out of the Exactions Bottle*, 34 Wash. U. J. Urb. & Contemp. L. 3, 44 (1988); Hagman & Misczynski, *supra* note 30, at 17–18.

[44] We also acknowledge that choices around infrastructure provision, design, and construction in the United States have long had social—especially racial—dimensions. *See* Seiler, *supra* note 10, at 23 (discussing historical and present-day inequity in infrastructure provision and repair in white and non-white communities).

Nevertheless, popular media and political advocates routinely challenge infrastructure investments as wasteful, and there are myriad examples of infrastructure projects that were either ill-conceived or failed to deliver promised benefits.[45] However, the policy, planning, economic, engineering, and other rationales that drive public decision-making around these investments are outside the scope of this analysis. This Article's purpose is instead to evaluate whether and how the law facilitates the public's returns on these projects, and how it could maximize such returns irrespective of any particular project's rationale.

Second, although this Article relies on transit as a primary example of how infrastructure projects could produce value-captured revenues, it does not advocate any particular types of infrastructure investments. Choices around how to spend public infrastructure dollars abound, and legislators and other policymakers are routinely faced with questions of whether to, say, fund transit or highways. Moreover, several commentators have observed that some infrastructure investments—namely, highways—produce negative externalities that reduce property values and produce other negative environmental and social outcomes. This Article avoids these debates by generally focusing on infrastructure projects with positive land-value spillovers. By definition, where projects negatively impact property values, there is no value to be captured. Thus, this Article simply analyzes how the law presently treats, and should treat, value capture; it is otherwise up to policymakers to decide whether to make value-adding, rather than value-reducing, infrastructure investments.

This Article is organized in four Parts. Part I presents an overview of the value-added concept and value-capture, with a particular focus on Tucson's transit experiment. Part II analyzes three important constitutional barriers to value-capture associated with infrastructure projects in the United States: state limits on tax and revenue increases, the application of the unconstitutional conditions doctrine to exactions, and constitutional prohibitions on legislative entrenchment limit the effectiveness and efficacy of value-capture efforts. Part III discusses how, even in spite of the limits discussed in Part II, localities can obtain incremental unpledged revenue from their infrastructure investments.

Finally, Part IV offers normative suggestions for how the law might better facilitate returns on these investments, to ensure fairness to the public.

[45] *See, e.g.*, Jawad Mahmud Hoque et al., *Are Public Transit Investments Based on Accurate Forecasts? An Analysis of the Improving Trend of Transit Ridership Forecasts in the United States*, 186 Transp. Res. Part A: Pol'y and Practice 104142, 1–2 (2024); James Horrox & Andre Delattre, *Highway Boondoggles*, U.S. PIRG (Oct. 9, 2025), https://pirg.org/edfund/resources/highway-boondoggles/ [https://perma.cc/6MLC-WF2E]; Steve Quinn, *Alaska's 'Bridge to Nowhere' Plan Finally Scrapped*, Reuters (Oct. 23, 2015), https://www.reuters.com/article/world/us/alaskas-bridge-to-nowhere-plan-finally-scrapped-idUSKCN0SI000/ [https://perma.cc/D4SW-W5UB].

I. The Value-Added Concept and Value Capture, Explained

This Part reviews the value-added concept and outlines the rationale for value-capture. It then describes value-capture techniques, noting that many of them require pledging revenue for specific purposes, and discusses how unpledged value-added revenue can be quantified and allocated through the standard budget process to meet local policy objectives, such as advancing social equity.

A. Creating Value Through Public Decision-Making

Basic real estate economics holds that the market accounts for factors that influence land values by internalizing externalities.[46] Externalities can be positive or negative. A property with publicly provided sewer access is more valuable for urban development than one without, because it internalizes the positive externality of public sewer access.[47] On the other hand, a property near a landfill is less valuable for residential development than one farther away, because it internalizes the negative externality of landfill proximity.[48] Externality value can change through public actions, leading to "windfalls" and "wipeouts."[49] Rezoning land from an agricultural to residential designation can generate windfalls to landowners, yet this windfall is not necessarily attributable to their efforts.[50] Likewise, the reverse zoning decision might generate wipeouts to landowners over their objections.[51] Although negative externalities from government actions are important problems, this Article focuses on positive externalities and their role in adding value to the community, bolstering government revenues, and achieving certain public purposes.

Representing an interplay of private and public actions, real estate value-added can be separated into four components.[52] First, land has some intrinsic value.[53] Second, value is created by private investment such as adding roads, installing on-site utilities, and so forth, but without much government involvement.[54] Third, value is created by increasing demand for location

[46] *See generally* Michael A. Goldberg & Peter Chinloy, Urban Land Economics (1984); *see generally* Arthur C. Nelson et al., *Price Effects of Road and Other Impact Fees on Urban Land*, 1350 Transp. Rsch. Rec. 36 (1992).

[47] *See* Arthur C. Nelson & Gerrit J. Knaap, *A Theoretical and Empirical Argument for Centralized Regional Sewer Planning*, 53 J. Am. Plan. Ass'n 479, 480–81 (1987).

[48] *See* Arthur C. Nelson et al., *Price Effects of Landfills on House Values*, 68 Land Econ. 359, 364 (1992).

[49] Donald G. Hagman & Dean J. Misczynski, *Introduction*, *in* Windfalls for Wipeouts: Land Value Capture and Compensation 1 (1978).

[50] *See* Hagman & Misczynski, *supra* note 30, at 16.

[51] *See* Brad Kuhn & Jillian Friess Leivas, *The Legal Consequences of Downzoning*, NAIOP (2023), https://www.naiop.org/research-and-publications/magazine/2023/Spring-2023/development-ownership/the-legal-consequences-of-downzoning/ [https://perma.cc/C6AH-CGVQ]. Whether such an action comports with regulatory takings law is, of course, another question.

[52] Arthur C. Nelson et al., Proportionate Share Impact Fees and Development Mitigation 238–39 (2022).

[53] *Id.*

[54] *Id.*

through regional population and economic growth that elevates the site's attractiveness to development.[55] Fourth, value is added through public-sector decisions such as changes in land use regulations, infrastructure investments, and the provision of services, whether or not such value enhancements are captured by public agencies.[56]

Tucson's streetcar, discussed in the Introduction, exemplifies the fourth component. From the early 2010s into the early 2020s, the streetcar corridor accounted for about half of the city's population and a third of its household growth, attracted about half of all new housing units in the city, and gained a third of a billion dollars in household income after inflation.[57] The corridor also added hundreds of jobs with a quarter of a billion dollars in new wages; saw more than forty percent of corridor residents commute to work via something other than a car (compared to twenty percent city-wide); increased real estate investment by $2.5 billion; and boosted the city's annual fiscal revenues by $13 million, or thirty percent, which, if capitalized, would finance debt of about $400 million.[58] Although this analysis does not isolate Tucson's streetcar from other factors that may have contributed to the corridor's economic boom—such as its proximity to the University of Arizona and other regional economic drivers, broader market conditions, or other planning decisions—it stands to reason that this growth would not have happened without this significant infrastructure investment.

During the COVID-19 pandemic, streetcar ridership fell from nearly 900,000 in 2019 to just under 440,000 in 2021. In 2020, the city council waived transit fares.[59] Streetcar ridership gradually increased, reaching a record 1.7 million riders in fiscal year 2023.[60] How much did the city lose in foregone streetcar fares? In 2019, fare revenue was about $800,000, adjusted for inflation.[61] Because transit costs tend to be fixed, they are mostly unchanged whether ridership halves or doubles.[62] Yet research shows that free fares increase ridership, and more riders means more consumer spending along transit corridors.[63] In Tucson, overall streetcar corridor *tax* revenues—excluding all other city revenues—increased by $2.3 million in 2023 compared to 2019, adjusted for inflation.[64] Even if this change is likely not entirely attributable to free fares, the tradeoff seems good.

In effect, by waiving $800,000 in streetcar fares, the city gained up to $2.3 million in new tax revenue, a net gain of $1.5 million. Put differently,

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[55] *Id.*

[56] *Id.*

[57] Nelson & Lawlor, *supra* note 3, at i–iii.

[58] *Id.*

[59] Robbins, *supra* note 6.

[60] RATP DEV et al., *supra* note 3.

[61] *Id.*

[62] *See generally* Jean-Paul Rodrigue, The Geography of Transport Systems (6th ed. 2024); *Public Transit Operating Expenses - 2022*, U.S. Dept. of Transp. (2023), https://data.transportation.gov/stories/s/2022-NTD-Data-Summary-Operating-Expenses/py8m-wb7u/ [https://perma.cc/P5XQ-C5FP].

[63] Brough et al., *supra* note 7, at 20; Roanne Neuwirth, *Economic Impacts of Transit on Cities*, 1274 Transp. Rsch. Rec. 142, 149 (1990).

[64] Nelson & Lawlor, *supra* note 3, at 142.

each dollar of waived fares is associated with up to $2.88 in new tax revenue. This "quiet money" slides into the general fund mostly unnoticed.[65] While Tucson officials have debated reinstating transit fares, these findings suggest that doing so might reduce ridership, which would also reduce collateral unpledged revenues accordingly.[66] Measuring value added from infrastructure and making decisions based on such measurements confounds cities and other public agencies nationwide.

The last phase of the real estate value-added process is value-capture. Logic and fairness suggest that, if a public investment improves property values, the public may legitimately seek reimbursement by capturing a share of the incremental value sufficient to cover the public's costs.[67] Otherwise, perverse land use outcomes, like urban sprawl, could ensue.[68] Where public actions add value, the public's recovery of its costs occurs through *value-capture*, a concept that dates to David Ricardo and Henry George.[69] The United Nations recommends that countries impose value-capture as a matter of human rights.[70]

Practically, value-capture is limited by whether or not it prevents development. In the extreme, capturing all economic rent from a land-use change or public infrastructure investment would likely discourage the private investment that such decisions are supposed to encourage.[71] More practically, in the context of value-capture offsetting infrastructure costs, if one development project cannot afford to pay a value-capture assessment but another can, the result will be a Pareto-efficient outcome.[72]

B. How Value is Captured

There are three broad ways in which value attributable to public investments can be captured: betterment taxes and assessments grounded in planning gain theory, enhanced local tax revenues associated with new growth and development, and development charges. Each is discussed in turn below.

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[65] Arthur Nelson, *Local Opinion: Streetcar Benefits Offset Free Fares,* Tucson Op. (Nov. 19, 2024), https://tucson.com/opinion/column/local-opinion-streetcar-benefits-offset-free-fares/article_267a4da6-a5d9-11ef-8a86-0361b8d030a2.html [https://perma.cc/AH3T-3CTY].

[66] *See* Brough et al., *supra* note 7, at 20.

[67] *See* Korngold, *supra* note 26, at 5; Manville, *supra* note 30, at 20.

[68] *See* Pamela Blais, Perverse Cities: Hidden Subsidies, Wonky Policy, and Urban Sprawl 221–23 (2010). Of course, if new infrastructure causes property values in its vicinity to rise, that alone could have a compacting, rather than sprawling effect.

[69] *See generally* David Ricardo, On the Principles of Political Economy, and Taxation (1817); George et al., *supra* note 31. The term "value-capture" is sometimes used interchangeably with "value-recapture."

[70] United Nations Conf. on Hum. Settlements, Vancouver, Can., The Vancouver Action Plan Recommendation D.3, at 30–31 (1976), https://sdgs.un.org/sites/default/files/documents/7252The_Vancouver_Declaration_1976.pdf [https://perma.cc/85Z5-MMZS].

[71] William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 L. & Contemp. Probs. 101, 110 (1987).

[72] Pareto efficiency references a state of resource allocation such that no person can be made better off without making someone else worse off. Black's Law Dictionary (8th ed., 2012). This insight is based on an international study of value-capture transfer between mature and early national development. *See generally* Klaas Kresse et al., *Value Capture Ideals and Practice – Development Stages and the Evolution of Value Capture Policies*, 106 Cities 102861 (2020).

The first method, betterment taxes and assessments, is well developed among Commonwealth countries.[73] Betterment is defined as:

> [T]he increase in value of land which results from actions other than those of the land owner, i.e., the increase in land which is created by the community and which can be positive, e.g., in the grant of planning permission or the provision of infrastructure and other environmental benefits, or negative, e.g., in the imposition of development restrictions on adjoining land.[74]

A betterment tax recoups costs incurred by the government to create value.[75] It derives from the concept of "planning gain," which, in its logical extreme, posits that the government should receive all net profits of a development project, because public allocations of property rights and infrastructure construction create such private gains.[76] Betterment taxation is not practiced officially in the United States.[77]

The second method of value-capture is enhanced tax revenue. Subject to the legal limits discussed in Section II.A, *infra*, new developments increase local property taxes, sales and excise taxes, various fees and assessments, and, in some cases, intergovernmental transfer revenues.[78] These can be measured directly based on new infrastructure projects and indirectly based on collateral development or enhanced local economic exchange that follows.[79]

Nevertheless, growth does not *per se* generate more local revenues than service costs.[80] Instead, more compact and integrated land-use patterns are less costly to serve and tend to generate more net revenues compared with sprawl.[81] By itself, incremental fiscal revenue generated from new development

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[73] *See* Lichfield & Connellan, *supra* note 32, at 27–31.

[74] Plimmer & McGill, *supra* note 32, at 2–3.

[75] *Id.* at 3.

[76] For details of the evolution of the planning gain concept, and its evolution into an American style impact fee system, *see* Christine Whitehead, *The Economics of Development Value and Planning Gain*, *in* Planning Gain: Providing Infrastructure & Affordable Housing 20, 20 (Tony Crook et al. eds., 2015). The United Kingdom's Town and Country Planning Act of 1947 acquired development rights to most rural and agricultural land through a compensation scheme, thereby enabling national and local authorities to negotiate the sale of development rights, which, in theory, could be equivalent to the entire real estate market gain realized by the development, net of costs.

[77] *See* Nelson et al., *supra* note 52, at 239–40 (observing, however, that U.S. jurisdictions rely heavily on the special assessment as a means of financing public improvements).

[78] *See* Robert Burchell et al., Sprawl Costs: Economic Impacts of Unchecked Development 74–77 (2005) (ebook) (discussing tax, non-tax, and intergovernmental transfer revenues).

[79] *See generally* L. Carson Bise & Colin McAweeney, *The Evolution of Fiscal Impact Analysis and Where It Needs to Go*, 5 J. Compar. Urb. L. & Pol'y 425 (2022).

[80] For an extensive literature review showing the mismatch between new development revenues and costs incurred by local government, *see generally* Robert W. Burchell et al., Transportation Costs of New Development: Procedural Guide, User Guide, and Model (2011), https://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP08-59_FR.pdf [https://perma.cc/7TES-NB86].

[81] For a recent study, *see generally* Urban3, Economics of Community Development: Annapolis Maryland (2024), https://www.annapolis.gov/DocumentCenter/View/32692/Urban3—Annapolis-Report [https://perma.cc/QUL8-WA52].

facilitated by public investment will not always offset public costs, including social ones.[82]

One subset of value-capture through enhanced taxation are special taxing or assessment districts. Special districts involve assessments or taxes on property within a designated area whose properties are the principal beneficiaries of infrastructure improvements or other services.[83] Every state enables them, though there are differences in purposes, formation, governance, and financing options.[84]

Special districts usually entail compulsory levies against property owners to finance specified public improvements. They are typically used only to fund local improvements which provide benefits within the designated assessment zone, and assessments are only charged to those properties that receive a "special benefit" from the improvement. Although legal requirements vary between states, assessments must usually bear a reasonable relationship to the value of the benefits the property receives. As discussed below in Section II.A, special assessments are usually exempt from caps on tax levels and aid localities that otherwise need supplemental revenue. In most cases, special districts require a vote of the local governing body or sometimes the electorate to be created.[85]

A variation of the special district is the tax-increment financing (TIF) district. A local government creates a district, adopts a redevelopment plan, and implements it in part by improving infrastructure, acquiring property, clearing title, and facilitating real estate development. The local government uses the incremental property taxes generated above a base year to finance the improvements in a TIF district. Where those improvements are financed from debt, the tax increment revenues are pledged to debt service.[86] In practice, state laws largely limit the use of TIF to urban redevelopment projects. Localities identify areas of the community that are blighted and include them within urban renewal districts that allow TIF. The law may also limit the use of TIF to improvements that are of a public or quasi-public nature; for instance, a housing developer might be able to use TIF to aid in the construction of a

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[82] *See generally* Adam Found, *Development Charges in Ontario: Is Growth Paying for Growth?*, 41 IMFG Papers on Mun. Fin. & Governance 1 (2019); Siba Sankar Mohanty & Annie Rath, *Capturing Social Cost in Construction Sector: A Review of Literature through Meta-Analysis*, 8 J. Stud. Dynamics & Change 17 (2021). For instance, if highway-building encourages urban sprawl, the property tax revenues from new development on the urban fringe may be insufficient to account for the environmental and social costs of that type of growth.

[83] *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum. L. Rev. 365, 414–15 (1999).

[84] *See About Special Districts*, Nat'l Special Dists. Ass'n, https://www.nationalspecialdistricts.org/about-special-districts [https://perma.cc/3Q25-BDWF] (last visited July 11, 2025).

[85] *See generally* Jennifer Ahlin et al., Value Capture: Capitalizing on the Value Created by Transportation (2019), https://www.fhwa.dot.gov/ipd/value_capture/resources/value_capture_resources/value_capture_implementation_manual/ [https://perma.cc/AQZ5-CHGB].

[86] *See generally* David Merriman, Lincoln Inst. of Land Pol'y, Improving Tax Increment Financing (TIF) for Economic Development (2018), https://www.lincolninst.edu/publications/policy-focus-reports/improving-tax-increment-financing-tif-economic-development/ [https://perma.cc/C46N-76PE].

parking structure or sidewalk improvements, but may not be able to use it to construct internal building improvements.

The third method of capturing value is by charging fees or requiring landowners and developers to build infrastructure or support public services in-kind to capture value, mostly in connection with new development.[87] These methods of value capture are usually called *exactions*, *development charges*, or *development mitigation*.[88] For example, a locality could capture some of the value generated by the construction of a new transit line by requiring developers along the line to provide affordable housing or by entering into agreements with developers requiring them to provide various other public improvements.[89] These requirements could be imposed on a negotiated, project-by-project basis or based upon a legislated schedule of fees or other requirements.[90]

The use of exactions, now standard in many states and localities, has expanded in response to anti-growth attitudes, declining intergovernmental transfers to local governments, and funding shortages stemming from the limits on taxation described in the preceding subpart.[91] Compared to the mid-twentieth century, localities now have a much greater reliance on exactions as a share of their revenue, as their reliance on tax revenue has decreased, and they increasingly rely on developers to build their infrastructure.[92]

Individual development projects are often held accountable for their impact through land dedications, negotiated development agreements, and impact fees.[93] Mandatory dedications commonly include land for parks, public access or utility easements, or open space.[94] They also include the installation and dedication of onsite infrastructure and occasional offsite improvements such as traffic signals on roads entering projects.[95]

Development agreements are contracts between developers and local governments to reduce uncertainty surrounding proposed developments and

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[87] Elmendorf & Shanske, *supra* note 30, at 521.

[88] Another version of an exaction is a "linkage fee," where commercial projects pay for things like affordable housing on the premise that they create demand for it. Alterman, *supra* note 43.

[89] Elizabeth Elia, *Perpetual Affordability Covenants: Can These Land Use Tools Solve the Affordable Housing Crisis?*, 124 Penn State L. Rev. 57, 103 (2019); Elmendorf & Shanske, *supra* note 30, at 522.

[90] Elmendorf & Shanske, *supra* note 30, at 523; Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 190 (2006).

[91] Rosenberg, *supra* note 90, at 179–80, 186; Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 Fla. L. Rev. 373, 377–78, 416 (2004); Altshuler & Gomez-Ibanez, *supra* note 34, at 8–10.

[92] Rosenberg, *supra* note 90, at 188.

[93] Reynolds, *supra* note 91, at 416–17; Altshuler & Gomez-Ibanez, *supra* note 34, at 3–5.

[94] *See generally* Agustin Leon-Moreta, *Land Dedications as Local Government Requirement for Open Space: Results from US Surveys of Cities*, 157 Cities 105625 (2025); David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42 Urb. Law. 307 (2010).

[95] For a review of the law and applications, *see generally* J. Craig Smith & Scott M. Ellsworth, The Utah Land Use Inst., Land Development Dedications/Exactions (2023), https://utahlanduse.org/wp-content/uploads/2023/11/Dedications-Exactions-v.-6-2023-11-01-v.-2.pdf [https://perma.cc/6PFD-WP25].

ensure the provision of public benefits.[96] They set out the responsibilities, rights, and obligations of the parties and other stakeholders who are affected by the development, including remedies in case of agreement violations.[97] These agreements can address social equity concerns, but usually do so only on a case-by-case basis.

Impact fees are one-time charges on new development to mitigate its proportionate share impact on public facilities.[98] Variations of impact fees, called linkage fees, can address such social equity issues as housing affordability and social services.[99]

Exactions serve several purposes. They shift the cost of developing infrastructure from the incumbent public to developers and new residents, increase the efficiency of infrastructure usage, mitigate negative externalities of new development, improve political acceptance of new development (or discourage growth in some or all areas, if exactions appropriate too much value from projects).[100] Despite their occasional use for value-capture, as discussed in Section II.B, *infra*, development charges are subject to important legal limitations. And as described in Section III.A.4, *infra*, development project mitigation does not systemically address social equity, as this purpose is usually not enabled by legislation.

The foregoing U.S. value-capture techniques share several common characteristics. They are (1) usually designed to serve specific geographic areas, such as impact-fee service areas or special districts with prescribed boundaries; (2) typically enabled by state statute;[101] and (3) required to be created by local government acts that sometimes require voter approval.[102] Value-capture is accomplished through assessments that are compulsory against property owners, as a condition of development approval, to finance specified public improvements. Value-capture assessments can only be used to fund local improvements that provide benefits to property within the assessment area, and as such the assessment, in the form of a fee or tax, is charged only to those

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[96] *See generally* Julie A. Tappendorf et al., Development by Agreement: A Tool Kit for Land Developers and Local Governments (2nd ed. 2024).

[97] *See generally* David L. Callies et al., Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights and the Provision of Public Facilities (2003).

[98] *See generally* Arthur C. Nelson et al., Impact Fees: Principles and Practice of Proportionate-Share Development Fees (2009).

[99] Lillian Murphy et al., Ctr. for Soc. Dev., Brown School at Wash. Univ., Linkage Fees: A Vehicle for Financing Affordable Housing 1 (2023), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1944&context=csd_research [https://perma.cc/ZS45-FPJY].

[100] Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 482–83 (1991).

[101] In the case of impact fees, in the absence of express state enablement they are nonetheless allowed under home rule and police power authority. See Nelson et al., *supra* note 98. Indeed, the role of impact fee enabling legislation is usually to restrict impact fee scope. *See generally* Clancy Mullen, Duncan Associates, State Impact Fee Enabling Acts (2025), https://www.impactfees.com/wp-content/uploads/1stateacts2025.pdf [https://perma.cc/SHU9-PHEB].

[102] Ctr. for Accelerating Innovation, Fed. Highway Admin., Introduction to Special Assessments, https://www.fhwa.dot.gov/ipd/pdfs/value_capture/intro_special_assessments.pdf [https://perma.cc/Z3QG-CW63] (last visited July 30, 2025).

properties that benefit from the improvement. The amount of the assessment is reasonably related to the value of the benefits received.[103]

Given these limitations, local governments such as Tucson would not be able to pledge value-added tax revenue associated with transit to, say, waive transit fares, without forming an entity to do so, perhaps with a public vote. But there is another way, discussed next.

C. Quantifying Unpledged Value-Added Revenues

In all cases where taxes are assessed, the value-added increment associated with public action can be measured and, in turn, factored into local policymaking. Measuring value-added fee increment is more challenging, however, where assessments are not linked to property value or transactions but rather to the apportionment of costs through some proportionate-share formula.[104]

In Tucson's case, eliminating transit fares cost $800,000 per year yet may have generated up to $2.3 million per year in value-added revenues.[105] Because the transit system is not run by or within a special district, the city's budget process recognizes the lost revenue but does not account for increased revenue associated with its secondary effects.[106] Owing to a lack of data on the benefits of fare waivers, some city officials might have been inclined to cut losses by reinstating fares after COVID-19 subsided. But, as discussed above, this move could have reduced ridership and economic transactions along the streetcar corridor, perhaps eliminating all the fiscal gains.[107]

Public investments such as transit systems are costly to build and maintain. In the case of transit, fares are needed to offset operating costs. Literature shows that transit fares impose higher economic burdens on lower-income riders than those with higher-income.[108] A perverse outcome occurs when fares are raised, as lower-income riders have no choice but to pay them, while higher-income riders often choose alternatives such as automobiles. A vicious cycle emerges where reduced ridership leads to ever-higher fares to cover costs.

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[103] Nelson et al., *supra* note 98, at 97.

[104] For an example, *see generally* Am. Water Works Ass'n, M1 Principles of Water Rates, Fees and Charges (7th ed. 2012).

[105] Nelson & Lawlor, *supra* note 3, at 142.

[106] *Id.* at 144. Using value-added property tax revenues to support the transit fare waiver was easy in Tucson's case, because Sun Link is operated by the city. In a scenario where a separate agency operates the transit system, this type of value capture would likely necessitate an intergovernmental agreement, which could prove more politically challenging. Moreover, Tucson's Sun Link system is not subject to farebox recovery requirements, which in some states would require the transit system to collect a minimum percentage of its operating costs from fares. *See* Regional Transp. Auth., *Illinois Transit Farebox Recovery Ratio Requirement is Uniquely High and Harms Riders* (Oct. 9, 2025), https://www.rtachicago.org/blog/2025/10/09/illinois-transit-farebox-recovery-ratio-requirement-is-uniquely-high-and-harms-riders [https://perma.cc/D7TP-B2LZ].

[107] *See* Brough et al., *supra* note 7, at 20.

[108] *See generally id.*

In Tucson's case, however, eliminating fares—and monitoring the results of the program—led to multiple public policy wins.

The next Parts describe the nature of the legal limits on cities like Tucson, and then discuss how, despite these limits, such cities can realize the benefits of their infrastructure investments.

II. The Law of Value Capture

This Part discusses three significant legal limitations on the value-capture mechanisms described in Part I. First, most U.S. states limit cities' ability to realize additional revenue, whether via caps on property-tax increases or restrictions on revenue. Second, federal constitutional law restricts localities' ability to capture incremental value through fees or in-kind provision of public amenities. And third, state and federal constitutional and statutory restrictions on entrenching legislation mean that cities may not usually allocate unpledged revenue toward particular programs in perpetuity. Each of these limitations is discussed below.

A. Taxation, Revenue, and Expenditure Limitations

Localities derive their taxing and spending powers from their respective states.[109] In a handful of states, home rule cities have some fiscal autonomy, but in most states, local authority to tax or otherwise raise revenue is circumscribed.[110] Because property taxes are often cities' largest revenue source and most effective value-capture vehicle, the most consequential limits on cities' revenues are restrictions on their imposition of property taxes.[111] Forty-six states limit property taxes, local revenues from them or other sources, or both.[112] Most of these restrictions are found in state constitutions.[113]

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[109] *See* Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. Rev. 292, 295–96, 301 (2016); Ctr. for City Sols. & Applied Rsch., Nat'l League of Cities, Cities and State Fiscal Structure 11–12 (2015), https://www.nlc.org/wp-content/uploads/2015/01/NLC_CSFS_Report_WEB.pdf [https://perma.cc/ZTE6-SVU4] [hereinafter NLC Report].

[110] *See* Scharff, *supra* note 109, at 302; Clayton P. Gillette, *Fiscal Home Rule*, 86 Denv. U. L. Rev. 1241, 1245–46 (2009); Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 908–09 (2003).

[111] *What Are the Sources of Revenue for State and Local Governments?*, Tax Pol'y Ctr., Urb. Inst. & Brookings Inst. (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-and-local-governments [https://perma.cc/K22C-VNNY]; Scharff, *supra* note 109, at 303–04; Briffault, *supra* note 110, at 928.

[112] Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 Harv. L. Rev. 1884, 1887 (2020); Advisory Comm'n on Intergovernmental Rels., Ctr. for Urb. Pol'y & the Env't, Tax and Expenditure Limits on Local Governments 1 (1995), https://www.lincolninst.edu/app/uploads/legacy-files/gwipp/upload/sources/Alabama/2006/ACIR_Tax_and_Expenditure_Limits_on_Local_Governments_M-194_1995.pdf [https://perma.cc/6TEW-UUB3] [hereinafter Advisory Comm'n].

[113] *See* Briffault, *supra* note 110, at 928.

Such restrictions come in five general varieties.[114] First, property tax-rate limits cap the total tax levy on parcels based on their fair market value.[115] Examples of such limits include Arizona's and California's limits on overall property taxes to one percent of a property's fair market value.[116] These limits may apply to all property, but some, like Arizona's, apply only to residential property.[117] Debt service is regularly excluded from these limits.[118]

Second, a majority of states impose limits on the rates of specific types of property taxes, such as county or school taxes.[119] These are usually expressed as a specific mill levy limit, such as, for example, Florida's limit of ten mills on county or municipal taxes.[120] These first two types of limits are usually imposed irrespective of a taxpayer's income; however, some states have "circuit-breaker" laws that limit a property taxpayer's burden based on their income.[121]

Third, some states restrict cities' overall property-tax revenue, capping annual increases.[122] In these systems, tax rates are often adjusted—"rolled back"—to prevent localities from exceeding the increase limit.[123] Fourth, a handful of states cap increases in general government revenue or expenditures, including property and other tax revenues, for some or all governmental entities.[124]

Fifth, over a quarter of states limit assessed-value increases.[125] These systems establish a base-year value for a parcel and tie assessed-value increases to inflation or a fixed percentage until the parcel is sold.[126] Then, the base-year value is reset to market value, which restarts the cycle of limits on assessed valuation increases.[127] For example, California allows assessments to increase at the same rate as the consumer price index, up to two percent, while other states impose fixed limits on the rate of increase.[128] Some states, including Arizona and California, limit assessment increases on a parcel-by-parcel basis,

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[114] A sixth category requires local governments to provide public notice or disclosure of proposed tax increases, but this category is less relevant to this Article's discussion of value-capture. *See* Advisory Comm'n, *supra* note 112, at 49. Not included in this list are balanced budget laws, which typically apply at the state level and also sometimes apply to local governments. *See* Harold W. Elder, *Exploring the Tax Revolt: An Analysis of the Effects of State Tax and Expenditure Limitation Laws*, 20 Pub. Fin. Q. 47, 51 (1992) (noting that forty-nine states maintain balanced-budget laws).

[115] Advisory Comm'n, *supra* note 112, at 11.

[116] Cal. Const. art. XIII A, § 1; Ariz. Const. art. IX, § 18.

[117] *See* Advisory Comm'n, *supra* note 112, at 13; Ariz. Const. art. IX, § 18.

[118] Advisory Comm'n, *supra* note 112, at 13.

[119] *Id.*

[120] *Id.* at 17.

[121] *See* Kleiman, *supra* note 112, at 1895–96; Clarence Y.H. Lo, Small Property Versus Big Government: Social Origins of the Property Tax Revolt 18–20 (1990). One example of a circuit-breaker law is in Michigan, where elderly taxpayers earning less than a certain amount are exempt from paying property taxes. *See* Mich. Comp. Laws § 206.520 (2025).

[122] *See* Advisory Comm'n, *supra* note 112, at 27.

[123] *Id.*

[124] *Id.* at 43.

[125] *See* Joan Youngman, A Good Tax: Legal and Policy Issues for the Property Tax in the United States 196 (2016); Advisory Comm'n, *supra* note 112, at 2.

[126] Youngman, *supra* note 125, at 196.

[127] *Id.*

[128] *See* Cal. Const. art. XIII A, § 2(b); Advisory Comm'n, *supra* note 112, at 39.

while others, such as Iowa, impose a limit on the increase in overall assessed valuation on a statewide basis.[129]

In addition to the foregoing limits, some states cap cities' ability to impose other types of taxes or fees, including sales, income, and real estate transfer taxes.[130] Although sales and income taxes are not technically forms of value-capture (i.e., they don't raise revenues from growth in land wealth), they are a means by which cities collect revenue that stems from their infrastructure investments.[131] Real estate transfer taxes, while not usually considered property taxes, capture some value from growth in land values, but impose a percentage tax on the entire market value of the transacted property.[132]

States that impose overall revenue limits on local governments indirectly control their ability to impose non-property taxes.[133] For instance, in 1996, California voters approved Proposition 218, which requires voter approval for any new tax, including those such as sales or income taxes.[134] Missouri maintains a similar rule.[135] Other states maintain constitutional caps on sales taxes, or have limited their localities' authority to impose other revenue measures like fees, as a belt-and-suspenders means of ensuring that localities do not circumvent taxation limits.[136] And several states prohibit local governments from collecting real estate transfer taxes.[137]

Most of the foregoing tax limits were enacted in the late 1970s,[138] originating as part of an anti-tax social movement focused specifically on property taxes.[139] This "tax revolt" followed a period when home values rose faster than inflation, thus increasing property taxes; moreover, states had recently attempted to rein in the practice of "fractional assessment," whereby local assessors valued real property lower than its fair market value, subsidizing homeowners.[140] The result of these limits has been to effectively remove property taxes (and some other taxes) from the normal political process,

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[129] *Id.*

[130] *See* Briffault, *supra* note 110, at 931–32.

[131] *See* Lawrence C. Walters, *Are Property-Related Taxes Effective Value Capture Instruments?*, *in* Value Capture and Land Policies 189 (Gregory K. Ingram & Yu-Hung Hong eds., 2012).

[132] *See id.*

[133] *See* Briffault, *supra* note 110, at 931.

[134] Cal. Const. art. XIII C, §§ 1–3; *see also* Lauren Shores Pelikan, *State Constitutional Limitations to Cities Taxing the Digital Economy*, 43 Va. Tax Rev. 469, 500 (2024).

[135] Mo. Const. art. X, § 18; Pelikan, *supra* note 134, at 497.

[136] *See* Gillette, *supra* note 110, at 1246; Briffault, *supra* note 110, at 936–37.

[137] *See generally* Charles Allen Szypszak, *The Legal History, Incongruous Variations, and Outer Reaches of the Real Estate Transfer Tax*, 57 Real Prop., Tr. & Est. L.J. 275 (2022).

[138] *See* Kleiman, *supra* note 112, at 1893; Youngman, *supra* note 125, at 194; Kirk J. Stark, *The Right to Vote on Taxes*, 96 Nw. U. L. Rev. 191, 192 (2001); Isaac William Martin, The Permanent Tax Revolt: How the Property Tax Transformed American Politics 2 (2008); Elder, *supra* note 114, at 48.

[139] *See* Martin, *supra* note 138, at 2; Advisory Comm'n, *supra* note 112, at 1.

[140] *See* Elmendorf & Shanske, *supra* note 30, at 521; Martin, *supra* note 138, at 6–9 (describing the practice of fractional assessment as "the largest single government housing subsidy in the postwar era and . . . among the largest categories of social expenditure of any kind, direct or indirect"). The economist William Fischel has also pointed to California's Proposition 13 as a response to earlier California court decisions that effectively withdrew local decision-making related to school finance. *See* William A. Fischel, The Homevoter Hypothesis 108–18 (2001) (citing Serrano v. Priest, 5 Cal. 3d 584 (1971)).

imposing hard caps and requiring voter approval for new or increased taxes or revenues.[141]

Tax and revenue limits have several social, economic, and fiscal consequences. First, they benefit homeowners and long-term landowners by restricting tax-bill increases from the time of purchase.[142] This benefit accrues especially to businesses and wealthy residents, as more valuable properties—and properties that rapidly increase in value—typically receive larger tax breaks over long periods.[143] Second, these laws can diminish public services and amenities.[144] Third, tax and revenue limits require cities to identify alternative revenue sources that, in some instances, are more regressive or elastic than property taxation.[145] For instance, some places may become more reliant on sales tax or fee revenue, both of which tend to be regressive, if property-tax revenues are reduced.[146] Consumption taxes and fee-for-service revenues also tend to benefit and attract wealthy residents.[147]

Fourth, these laws often result in pushing local government functions to special districts, which are usually formed to finance and operate specific government functions or manage local government amenities and services across smaller geographies than general-purpose municipal governments.[148] Indeed, the number of special districts in the United States has grown sharply since the enactment of property-tax limits.[149] Despite tax-limit advocates'

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[141] *See* Martin, *supra* note 138, at 3.

[142] *See id.* at 13–14.

[143] *See id.* at 14; Kleiman, *supra* note 112, at 1896.

[144] *See* Iris J. Lav & Michael Leachman, *State Limits on Property Taxes Hamstring Local Services and Should Be Relaxed or Repealed,* Ctr. on Budget & Pol'y Priorities (July 18, 2018), https://www.cbpp.org/research/state-budget-and-tax/state-limits-on-property-taxes-hamstring-local-services-and-should-be [https://perma.cc/4MMS-S9V3]; Martin, *supra* note 138, at 14; Iris J. Lav & Erica Williams, *A Formula for Decline: Lessons from Colorado for States Considering TABOR,* Ctr. on Budget & Pol'y Priorities (Mar. 15, 2010), https://www.cbpp.org/research/a-formula-for-decline-lessons-from-colorado-for-states-considering-tabor [https://perma.cc/Y2MU-69KL].

[145] *See* Farhad Kaab Omeyr et al., City Fiscal Conditions 2022 12 (2022), https://www.nlc.org/wp-content/uploads/2022/10/2022-City-Fiscal-Conditions-Report.pdf [https://perma.cc/G7RL-Z3MC]; NLC Report, *supra* note 109, at 7; Elmendorf & Shanske, *supra* note 30, at 521; Kleiman, *supra* note 112, at 1887–88; Scharff, *supra* note 109, at 300, 314–16; Lav & Leachman, *supra* note 144, at 12; Gillette, *supra* note 110, at 1242; Reynolds, *supra* note 91, at 376–77; Briffault, *supra* note 110, at 932. Regressive taxes place greater burdens on poorer taxpayers; in comparison, a progressive tax takes higher percentages of income and wealth as they increase. *See* Youngman, *supra* note 125, at 19. The shift to other revenue sources, such as sales taxes, also drives development decision-making: cities reliant on sales taxes tend to prioritize commercial retail development over housing or other construction. *See* Scharff, *supra* note 109, at 312–13.

[146] *See* Youngman, *supra* note 125, at 32 (describing sales taxes as "the most politically palatable replacement" for property taxes); Lav & Leachman, *supra* note 144 at 1; Advisory Comm'n, *supra* note 112, at 1.

[147] *See* Gillette, *supra* note 110, at 1248–49 (asserting that wealthier people support exactions because they deliver community benefits and sales taxes as they are less redistributive than property taxes).

[148] *See* Briffault, *supra* note 110, at 938; Advisory Comm'n, *supra* note 112, at 1 (noting that special districts are often formed to enable small geographies to receive a defined set of public services).

[149] *See* Jeremy L. Hall & Michael W. Hail, *Special Districts*, Ctr. for the Study of Federalism (2006), https://federalism.org/encyclopedia/no-topic/special-districts/ [https://perma.cc/VS86-TNL6].

goals of reducing taxes and government spending, research suggests these measures have not conclusively reduced the size of government.[150]

Finally, tax limits have implications for local control and democracy. In many instances, tax and revenue limits may be overridden—at least temporarily—with voter approval.[151] Although some scholars argue that tax limits reduce local control by shifting power to states,[152] others argue that such limits—particularly those that allow for voter overrides—empower voters, improve government responsiveness, encourage disclosure of public information, and increase voter satisfaction with government.[153] Yet voters may not always understand taxes and public financing, and tax plebiscites are susceptible to special-interest influences.[154] Moreover, placing tax or revenue increases on local ballots is a fiscal burden, as local governments must conduct more elections and distribute required information to voters.[155] And where voters are asked to approve new taxes, they may naturally favor those, like sales taxes, that tend to export tax burdens to non-resident taxpayers compared with property taxes on residents.[156]

Thus, for cities that make wealth-generating infrastructure investments, tax and revenue limits may cap their derivative benefits. Tax-rate limits allow localities to receive some benefit from their investments, subject to the cap. However, in states that cap assessed valuation or overall revenue, localities may be particularly constrained in their ability to realize a return on their investments. These laws incentivize long-term landownership and simultaneously disincentivize redevelopment that could increase transit usage, transit-oriented economic development, and produce additional tax revenue. Meanwhile, such limits secure "double" windfalls for incumbent landowners—increased land values *and* low taxes—at the public's expense. Given property-tax limits' implications for value-capture, cities could look to fees or exactions, but as the next section details, legal limits in that area compound the challenge.

B. Exactions and the Unconstitutional Conditions Doctrine

Exactions, including property dedications, in-kind public improvements, and fees charged to developers, could, as discussed in Section I.B, serve as a value-capture mechanism. However, three important and interrelated legal

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[150] Colin H. McCubbins & Mathew D. McCubbins, *Cheating on Their Taxes: When Are Tax Limitations Effective at Limiting State Taxes, Expenditures, and Budgets?*, 67 Tax L. Rev. 507, 542 (2014); Elder, *supra* note 114, at 49.

[151] Kleiman, *supra* note 112, at 1922; Briffault, *supra* note 110, at 929; Stark, *supra* note 138, at 193.

[152] *See, e.g.*, Scharff, *supra* note 109, at 300, 314–16 (observing that revenue limits preclude voters from holding their elected leaders to account, and further noting that such limits restrict innovation in municipal fiscal policy); Gillette, *supra* note 110, at 1254; Briffault, *supra* note 110, at 950–54; Advisory Comm'n, *supra* note 112, at 1.

[153] *See, e.g.*, Kleiman, *supra* note 112, at 1888, 1899–1901.

[154] *Id.* at 1901, 1934.

[155] *Id.* at 1937–38; Stark, *supra* note 138, at 202.

[156] Stark, *supra* note 138, at 220–21, 230–31.

mechanisms restrain the use of exactions for value-capture, including state enabling laws, restrictions on unlawful taxes, and the unconstitutional conditions doctrine. Each of these limits is discussed in turn below.

First, local exactions are an exercise of the police power authorized by state enabling laws and constrained by state courts.[157] State courts reviewing the legality of local exactions tend to focus on whether they are authorized under these enabling laws.[158] Whereas most state courts have held obligations to make on-site improvements in connection with new subdivisions to be lawful exercises of the police power, they have differed in their analysis of off-site requirements, cash-in-lieu alternatives, and impact fees.[159]

Today, state enabling laws may prohibit exactions' use for value-capture and social betterment purposes. In Colorado, for example, localities may collect impact fees only to defray the cost of capital facilities necessitated by new development.[160] Colorado law requires cities to determine the cost of required facilities, expressly prohibiting them from using fees to remedy pre-existing deficiencies.[161] It also provides detailed standards for collecting and accounting for fees, including that they be maintained in a separate, interest-bearing account and used only for the purpose for which they were initially collected.[162] Similarly, California's Mitigation Fee Act requires localities to make findings regarding capital improvement needs every five years, specifically obligates them to identify a nexus between required fees and their purposes, and expressly prohibits the use of impact fees for general-revenue purposes.[163]

Colorado also requires any individualized, discretionary condition on a land-use approval to bear an essential nexus between the condition and a legitimate governmental purpose, and to be roughly proportional to the anticipated impact of the proposed development.[164] Colorado authorizes localities to offer a cash-in-lieu option for developers, and further restricts localities from imposing discretionary conditions unless the condition "is based on duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner."[165] Taken together, these types of enabling-law limits preclude their use for value-capture and social-equity expenditures.

Second, the delineation between exactions and taxes affects whether exactions may be used for value-capture and public benefit.[166] Exactions are sometimes challenged as improper taxes if they are imposed without voter approval

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[157] *See* Rosenberg, *supra* note 90, at 207–08.
[158] *See id.* at 218; R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 L. & Contemp. Probs. 5, 10 (1987).
[159] *See* Smith, *supra* note 158, at 7–9, 10, 14–15.
[160] *See* Colo. Rev. Stat. § 29-20-104.5(1) (2025).
[161] *See* Colo. Rev. Stat. § 29-20-104.5(2) (2025).
[162] *See* Colo. Rev. Stat. §§ 29-1-801–803 (2025).
[163] *See* Cal. Gov't Code § 66001(d)(1) (2025).
[164] *See* Colo. Rev. Stat. § 29-20-203(1) (2025).
[165] *See* Colo. Rev. Stat. § 29-20-203(1.5)–(2) (2025).
[166] *See* Smith, *supra* note 158, at 15.

as may be required by state law for new taxes.[167] In these cases, courts consider whether exactions are imposed for general-revenue raising and deposited into general funds, or instead, intended to offset development impacts or benefits to the payor.[168] The former are usually found to be taxes, whereas the latter are not. However, this delineation between exactions and taxes means that exactions usually cannot be assessed for general public benefit, as they must bear a relationship to a particular development project's impact, effectively negating exactions' prospective use for value-capture and its attendant government expenditures.

Third, the unconstitutional conditions doctrine, which is generally concerned with whether the government may require a party to relinquish a constitutional right in exchange for a discretionary benefit, circumscribes exactions' use for anything but impact mitigation.[169] The problem of unconstitutional conditions regularly arises in land use when the government requires a landowner to dedicate land, provide public amenities, or pay money in exchange for development permission.[170] For example, cities often condition their issuance of a building permit on the landowner's uncompensated conveyance of land to expand an adjacent street.[171] In this instance, the landowner must forego her right to compensation for the government's acquisition of her property to receive the benefit of the building permit.[172] Other types of exactions that have been drawn within the ambit of the doctrine include cash-in-lieu payments,[173] public improvements requirements,[174] and even generally applicable impact fees.[175]

Courts carefully scrutinize these requirements.[176] In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court articulated a two-part test requiring the government to demonstrate, first, an essential nexus between the requested condition and the purpose of the underlying

167 *See supra* notes 144–147 and accompanying text.

168 *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. Riddell, 510 P.2d 376 (Ariz. 1977); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982); Greater Franklin Developers Ass'n v. Town of Franklin, 730 N.E.2d 900 (Mass. 2000).

169 *See* Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6–7, 10 (1988).

170 *See* Sheetz v. County of El Dorado, 601 U.S. 267, 275 (2024).

171 *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).

172 *See id.*

173 *See id.* at 612.

174 *See id.* at 614.

175 *See* Sheetz v. County of El Dorado, 601 U.S. 267, 274 (2024) (acknowledging local permitting authority); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013) ("Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."). For purposes of this Article, an "impact fee" is a fee—usually one-time—charged to offset a given real estate development project's impact on one or more public services or amenities. Examples of such fees include school impact fees, calculated based on anticipated student generation from a project, which are used to expand schools; or traffic impact fees, calculated based on the project's anticipated traffic generation, which are used to improve roads and transit systems.

176 *See, e.g.*, Sheetz v. County of El Dorado, 601 U.S. 267, 274 (2024) (generally describing localities' authorities to regulate land use).

restriction, and second, rough proportionality between the condition and the anticipated impact of the subject development.[177] Even where the landowner refuses to accept conditions, the government may be liable for an uncompensated taking.[178] Whereas other types of regulatory takings cases require the claimant to prove an uncompensated taking, in exactions cases, the government bears the burden of proving constitutional propriety.[179]

The Supreme Court has not definitively concluded that generally applicable impact fees are subject to heightened scrutiny, but the recent case of *Sheetz v. County of El Dorado* suggests as much.[180] There, the Court held that legislatively adopted exactions, such as a fee or public-improvements schedule, are subject to *Nollan* and *Dolan*, although the justices disagreed on the predicate question of whether fees can be takings in the first instance.[181] Given that *user* fees, which users pay to offset the administrative costs of a government service, are not takings, this question remains unsettled.[182] Nevertheless, state courts have conclusively found impact fees to be exactions subject to the unconstitutional conditions doctrine. For example, the North Carolina Supreme Court recently held that impact fees are exactions under the *Nollan-Dolan* framework.[183]

Scholars have probed why courts care about exactions and bargaining away of constitutional rights in the first instance. The unconstitutional conditions doctrine's application to takings is arguably awkward, given that the Constitution only outlaws *uncompensated* takings, courts have upheld in-kind compensation, and a developer's consent to land-use exactions usually means it agrees that permit approval constitutes sufficient in-kind compensation.[184]

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[177] *See* Sheetz v. County of El Dorado, 601 U.S. 267, 275-76 (2024); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605-06 (2013); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (discussing the proportionality requirement of the analysis); Nollan v. Calif. Coastal Comm'n, 483 U.S. 825, 837 (1987) (referencing the required "essential nexus").

[178] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606-07 (2013).

[179] *See* Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 177–78 (2019).

[180] *See* Sheetz v. County of El Dorado, 601 U.S. 267, 279 (2024).

[181] *Id*. Prior to *Sheetz*, there was disagreement among state and lower federal courts as to whether only adjudicative exactions, which are negotiated individually between developers and governments, should be subject to heightened scrutiny. *Compare, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (finding legislatively adopted monetary exaction exempt from *Nollan-Dolan* scrutiny) *with* Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004) (finding legislatively mandated road-improvement requirement to be subject to *Nollan-Dolan* scrutiny). In a concurring opinion in *Sheetz*, Justices Sotomayor and Jackson questioned whether impact fees would be takings if required outside of the permitting context, *see Sheetz*, 601 U.S. at 280–81 (Sotomayor, J., concurring), and Chief Justice Roberts expressed skepticism on this question at oral argument, *see* Transcript of Oral Argument at 6. On remand at the California Court of Appeals, the impact fees at issue in *Sheetz* were held to be subject to the *Nollan-Dolan* framework. Sheetz v. Cty. of El Dorado, 113 Cal. App. 5th 113, 136 (Cal. App. 2025). A petition for certiorari before the U.S. Supreme Court on the question of whether the impact fees are proper under *Nollan* and *Dolan* is pending as of this writing.

[182] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 615 (2013).

[183] *See* Anderson Creek Partners, L.P. v. Cty. of Harnett, 876 S.E.2d 476, 490 (N.C. 2022) (holding that generally applicable water and sewer capacity fees were impact, not user, fees and that they constituted exactions within the *Nollan-Dolan* framework).

[184] *See* Mulvaney, *supra* note 179, at 182–83.

Yet some courts seem concerned that exactions leave landowners susceptible to extortion and illicit governmental motives, that they surreptitiously redistribute wealth, or that they encourage rent-seeking governments to overregulate.[185] Moreover, where local governments are captured by dominant factions—such as incumbent residents or businesses—their exactions could be used to benefit such factions at the expense of weaker groups.[186] And where exactions are not comprehensively applied in a jurisdiction, they may undermine planning, compound factional rent-seeking, and result in non-uniform application of the law.[187]

Restricting exactions has drawn scholarly criticism. William Fischel asserts, for instance, that unconstrained free bargaining for land-use entitlements would improve efficiency and produce socially beneficial outcomes.[188] He argues that requiring developers to offset impacts, particularly when communities might prefer smaller, unrestricted cash payments, reduces exactions' social utility, and that developers will be less likely to pursue socially and economically beneficial real estate projects because they are deprived of economic rent.[189] He also asserts that formal rules around exactions lead communities to adopt inflexible regulations.[190] Fischel advocates for allowing developers to pay into unrestricted community funds in exchange for more favorable regulation.[191] Other scholars assert that, in addition to increasing overall efficiency, exactions better address new development's positive and negative externalities, while formalistic requirements restrict governments' and developers' ability to respond to changing market conditions.[192]

Some also question whether legal constraints on exactions are necessary. Vicki Been has asserted that markets might effectively control exactions, as developers will simply build in places where exactions are lower.[193] She argues that cities might be pressured to accept new development because of interjurisdictional competition, the possibility that developers might use the initiative system to seek approvals, state strong-arming, and competition from other, non-real estate private-sector investment vehicles.[194] Nevertheless, Stewart Sterk observed that markets may be less effective controls on exaction, as localities do not always compete for new development; they maintain monopolistic control over development due to their unique locational features, and developers' exiting does not address constitutional concerns over government rent-seeking.[195]

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185 *See* Been, *supra* note 100, at 504.

186 *See* Epstein, *supra* note 169, at 23–24, 59.

187 *See* Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731, 1742–51 (1988).

188 *See* Fischel, *supra* note 71, at 104.

189 *See id.* at 104–05.

190 *See id.* at 109–11.

191 *See id.*

192 *See, e.g.*, Rosenberg, *supra* note 90, at 239–40; Sterk, *supra* note 187, at 1734; Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Calif. L. Rev. 609, 662 (2004).

193 *See* Been, *supra* note 100, at 476, 509–10.

194 *See id.*

195 *See* Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 Vand. L. Rev. 831, 834 (1992).

Despite these legal constraints, exactions might still offer some value-capture opportunity.[196] They are more popular than taxes because they are perceived by incumbent community members as exporting the cost of public amenities to developers.[197] And whatever their drawbacks, any amount exacted transfers at least some economic rent to the public.[198]

C. Anti-Entrenchment Laws and Norms

Whereas the two preceding sections described legal restrictions on localities' authority to capture value, this section addresses the primary restriction on their authority to direct what value they capture. Generally, under federal and state constitutions, legislation may not be *entrenched*—that is, the legislature may not bind or restrict a future legislature's action on a given issue.[199] Thus, even if a city committed secondary, unpledged revenues toward a specific program—like Tucson's free transit fares—it cannot guarantee future city legislatures will continue to do so.

Entrenchment comes in several varieties, including prohibiting statutory modification—whether permanently or for a given period—or adding such conditions it as a supermajority or other voting requirement.[200] Beyond legal entrenchment, other factors may entrench legislation in practice, ranging from budgeting to physical infrastructure construction or buying or selling government property.[201] Some of these factors may have a greater entrenching effect than others.[202]

Entrenching legislation has some benefits. It avoids the roller-coaster of sudden majoritarian impulses, induces reliance from private parties and other government entities, gives predictability and confidence to markets, and makes it easier for the public to know and understand the law.[203] By offering certainty, entrenched legislation might also increase property values and reduce the government's borrowing costs by giving creditors sufficient confidence so as to reduce interest rates.[204]

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[196] Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 Colum. L. Rev. 1731, 1732–34 (1988).

[197] Rosenberg, *supra* note 90, at 208–09. As discussed in Section III.A.4, *supra*, exactions' cost is usually passed either to land sellers or the end-users of a developer's project.

[198] *See* Mulvaney, *supra* note 179, at 180; Been, *supra* note 100, at 511–12.

[199] *See, e.g.*, Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. Chi. L. Rev. 879, 881 (2011); Eric Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1665–66 (2002); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Calif. L. Rev. 1773, 1777–78 (2003); *see also* United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (approvingly citing Blackstone for the notion that one Congress may not bind a future Congress).

[200] *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 Am. Bar Found. Rsch. J. 379, 384–85 (1987); Roberts & Chemerinsky, *supra* note 199, at 1778.

[201] *See* Serkin, *supra* note 199, at 888.

[202] *See id.*; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 542 (1997).

[203] *See, e.g.*, Eule, *supra* note 200, at 391; Serkin, *supra* note 199, at 884, 890, 936–37; Posner & Vermeule, *supra* note 199, at 1671.

[204] *See* Serkin, *supra* note 199, at 890; Roberts & Chemerinsky, *supra* note 199, at 1806–07.

But entrenchment also poses problems. For one, it is antidemocratic in that it effectively removes power from future legislatures and the voters who elect them.[205] It is doubtful that one legislature's election authorizes it to withdraw voters' ability to express changed preferences through future elections.[206] Moreover, because entrenchment necessarily entails a legislature acting without knowledge of future events that might influence decision-making or public sentiment, it can hamstring the government's ability to respond to changed conditions or public preferences, and impose costs on future generations to pay for present benefits.[207] The obvious, more democratic alternative to legislative entrenchment is a legislator winning reelection.[208]

Anti-entrenchment norms come from English political theory,[209] and the Framers generally understood this concept.[210] The Supreme Court has endorsed the position that state and federal legislative acts may not constrain the power of subsequent legislatures.[211] Nevertheless, scholars debate whether the federal Constitution precludes entrenching legislation. Julian Eule argued that, although the Constitution is silent on entrenchment, its spirit dictates that legislators not extend their influence through entrenching legislation.[212] Instead, he asserted that the constitutional amendment process exists as the exclusive means to establish rules immune from future legislative interference.[213] Similarly, others argue that one of the very purposes of a constitution is to entrench norms,[214] while some scholars point to the "last in time" principle of statutory interpretation—that later-enacted statutes control

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[205] *See, e.g.*, Serkin, *supra* note 199, at 885–86; Klarman, *supra* note 202, at 502; Roberts & Chemerinsky, *supra* note 199, at 1796.

[206] *See* Eule, *supra* note 200, at 396; Klarman, *supra* note 202, at 505–06; Roberts & Chemerinsky, *supra* note 199, at 1797.

[207] *See* Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 Geo. Wash. L. Rev. 231, 240, 244 (2003); Eule, *supra* note 200, at 387–88.

[208] *See* Eule, *supra* note 200, at 388.

[209] *See, e.g.*, Francis Bacon, Bacon's History of the Reign of King Henry VII 133–34 (1901); Sir Edward Coke, The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts 41 (W. Clarke 1817); Thomas Hobbes, Hobbes's Leviathan: Reprinted from the Edition of 1651 128, 204 (photo. reprt. 1929); Henry Winthrop Ballantine et al., Blackstone's Commentaries 480 (1915).

[210] *See* John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 Notre Dame L. Rev. 735, 757 n.123 (2014).

[211] *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (approvingly citing Blackstone for the proposition that one legislature may not bind a future legislature); Manigault v. Springs, 199 U.S. 473, 487 (1905) ("As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended[,] or disregarded by the legislature which enacted it."); Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416, 431 (1853) ("The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). State supreme courts have agreed. *See, e.g.*, League of Women Voters of Utah v. Utah State Leg., 554 P.3d 872, 896 (Utah 2024); Snell v. Walz, 6 N.W.3d 458, 470 (Minn. 2024); City of Dallas v. Employees' Retirement Fund of City of Dallas, 687 S.W.3d 55, 62 (Tex. 2024); Pinckney v. Peeler, 862 S.E.2d 906, 913–14 (S.C. 2021); Dabbs v. Anne Arundel Cty., 182 A.2d 798, 817–18 (Md. 2018).

[212] Eule, *supra* note 200, at 404.

[213] *Id.* at 415.

[214] *See* Roberts & Chemerinsky, *supra* note 199, at 1786–87.

over earlier, contradictory statutes—as a recognition of anti-entrenchment principles.[215] Nevertheless, Eric Posner and Adrian Vermeule argued in an influential article that the Constitution does not expressly prohibit entrenchment and that, because of the benefits discussed above, it should be allowed.[216]

Despite questions about its legality, some examples of entrenchment exist in practice. Governments routinely enter into contracts with private parties and other governmental entities, sometimes even agreeing to maintain particular regulations.[217] Although courts tend not to order specific performance against governmental entities, damages available as remedies under contract law can have an entrenching effect.[218] In some cases, state laws sanction entrenchment through contract, as in the case of development agreements that vest, sometimes for decades, a landowner's rights in particular zoning rules.[219] Sunset provisions in temporary legislation may have some entrenching effect, as they commit future legislatures to deciding whether to reauthorize or modify a program or allow it to lapse.[220] Moreover, alienating public properties precludes future legislatures from controlling their use and disposition; legislatures must service government debts or suffer the consequences of default, and long-term tax abatements are usually enforced against the government.[221] In instances involving popular initiatives or referenda, the law specifically allows for entrenchment, as is the situation in many states for voter-approved, multiple-year, fiscal obligations.[222]

In the value-capture context, anti-entrenchment principles might preclude a local government from promising its constituents particular benefits from an infrastructure investment. For example, even if a locality seeks voter approval to build a transit system premised on the idea that any secondary, incremental, unpledged revenues will be used for affordable housing, the anti-entrenchment doctrine would ensure that a future legislature could change course and use the incremental revenues to maintain streets and sidewalks. Although there would likely be political incentives to use incremental revenue as promised, such a promise is not legally enforceable.

Having reviewed the legal limits applicable to value-capture and its use for various public purposes, the next Part discusses how cities can manage some value-capture in the current legal context.

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[215] *See* Sterk, *supra* note 207, at 233–34 (observing the problem faced by the judiciary when trying to sort out whether a prior legislature's enactment should control over a later-enacted law). This rule was acknowledged by Hamilton in Federalist No. 78. *See* The Federalist No. 78 (Alexander Hamilton).

[216] Posner & Vermeule, *supra* note 199, at 1674–85.

[217] *See id.* at 1700; Serkin, *supra* note 199, at 892; David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. Pa. L. Rev. 473, 538 (1999).

[218] *See* Dana & Koniak, *supra* note 217, at 538; Serkin, *supra* note 199, at 893.

[219] *See* Serkin, *supra* note 199, at 893–94.

[220] *See* Rebecca M. Kysar, *Lasting Legislation*, 159 U. Pa. L. Rev. 1007, 1009 (2011). Nevertheless, other scholars disagree with this position. *See* Roberts & Chemerinsky, *supra* note 199, at 1784.

[221] *See* Serkin, *supra* note 199, at 898–908.

[222] *See id.* at 926–27.

III. Capturing and Sustaining Value From Infrastructure Investments Under Current Law

For the reasons discussed in the preceding Part, cities have limited options for capturing and pledging a portion of value-added revenue to finance socially equitable activities, like transit fare waivers. To use Tucson's example, the city could create a special taxing district under Arizona's municipal improvement district law, but state law does not presently authorize it to do so.[223] It could also create an enterprise agency within local government, like a water or sewer system, and levy a transportation utility fee, but that would also require a statutory amendment.[224] What is more, the city's other means of raising new revenue to offset lost fares are impractical; for example, Tucson's existing sales taxes, hotel and motel surcharge, and public utility taxes are among the highest in Arizona.[225]

If securing special district authorization from the legislature or increasing taxes is not feasible, then the city could simply calculate the value-added tax revenues attributable to its streetcar system and budget those funds for a variety of legal purposes on an annual basis.[226] To the authors' knowledge, no U.S. city presently does this.[227] If Tucson were to employ this approach, annually updated streetcar value-added revenues would underline the city's annual general fund allocation process.[228] Transit-associated value-added revenues could be reported annually as a line item revenue entry[229] based on all sources generated from all developments along the streetcar corridor. Once identified, the city could use the funds for a variety of community reinvestment and development purposes, such as free transit, below-market loans to expand housing supply along transit corridors, and expanded transit systems elsewhere in the city, among other uses.[230] However, in Tucson's case, the city could not officially bind such revenues to underwrite transit fares, because doing so could contravene state statute.[231]

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[223] *See* Ariz. Rev. Stat. § 48-501–48-729 (2025).

[224] For an overview, see Fed. Highway Admin., U.S. Dept. of Transp., Value Capture: Capitalizing on the Value Created by Transportation – Frequently Asked Questions – Transportation Utility Fees (2020), https://www.fhwa.dot.gov/ipd/pdfs/value_capture/value_cap_faq_transportation_utility_fees.pdf [https://perma.cc/3FBJ-UH69].

[225] Ariz. Tax Rsch. Ass'n, State and Local Lodging TPT Rates by City (2025), https://www.arizonatax.org/publication/sales-tax-rates/lodging [https://perma.cc/2XE7-T8BJ]; Ariz. Tax Rsch. Ass'n, State and Local Retail TPT Rates by City (2025), https://www.arizonatax.org/publication/sales-tax-rates/retail [https://perma.cc/HG49-TGAW]; Ariz. Tax Rsch. Ass'n, State and Local Utility Service TPT Rates by City (2025), https://www.arizonatax.org/publication/sales-tax-rates/utility [https://perma.cc/C75F-3KQU].

[226] A method for creating these estimates annually has been developed by Nelson and Lawlor and can be adapted elsewhere.

[227] Nelson & Lawlor, *supra* note 3.

[228] City of Tucson, Off. of the City Att'y, Opinion Letter (Jan. 30, 2024).

[229] For the full range of direct and indirect revenues, see, *e.g.*, City of Tucson, Annual Comprehensive Financial Report (2024), https://www.tucsonaz.gov/files/sharedassets/public/v/1/bsd/documents/finance-documents/cot-2024-annual-comprehensive-financial-report.pdf [https://perma.cc/FY4Z-4E4R].

[230] Nelson & Lawlor, *supra* note 3, at 10.

[231] Increased costs associated with increased revenue along the corridor are not considered in this application for several reasons. First, unless analysis shows otherwise, it is assumed that there

Thus, cities are not powerless to obtain some fiscal—and by extension, social—benefits from their infrastructure investments. This Part details in what ways, despite legal roadblocks, cities can capture value and earn a return on their infrastructure investments, and what policy drawbacks exist under the current system. Subsection A discusses how cities can overcome limits on capturing value, while Subsection B addresses how they can continue these benefits. Subsection C offers some observations on how cities' value-capture works in concert with their regulatory approach to development in infrastructure-served areas.

A. Capturing Value Under Current Law

1. Property Taxes

Despite property-tax limits, infrastructure investments can and do generate incremental unpledged property-tax revenues, depending on the nature of the tax limit. Assume a property's value increases by fifty percent because of a nearby transit project. In states like Ohio that impose rate or levy limits, where the overall property-tax rate cannot exceed one percent of a property's fair market value, the subject property's valuation increase could still contribute a fifty percent increase in property-tax receipts from it, albeit limited to the overall rate cap.[232] Similarly, in states like Colorado that cap local revenue growth relative to inflation, the city might receive less than a fifty percent increase in property-tax revenues, but property value increases near the transit line, combined with inflation, might still allow for some incremental property-tax receipts.[233] However, in states like Michigan or California

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is sufficient excess service capacity in existing facilities to accommodate new development; thus, there is little or no marginal effect of new development on existing facilities. If existing facilities have the capacity to serve new development, because they have what is termed "excess capacity," new development imposes no new marginal costs on the city. Indeed, if new development does not absorb excess capacity, the average cost of operations, maintenance, and debt service increases for existing users; bringing excess capacity to zero also minimizes average costs paid by all development. *See generally* Robert Burchell & David Listokin, The Fiscal Impact Handbook: Estimating Local Costs and Revenues of Land Development (2017).

Second, impacts on utilities, such as water, sewer, power, gas, and so forth, are assumed to be mitigated by new revenue generated by new development dedicated for those facilities. These facilities are often financed through enterprise accounts designed to ensure that all costs are borne by users of the system through user fees and not from general taxes paid by all taxpayers even if they do not use the services. *See generally* Theodore J. Stumm & Aman Khan, *Effects of Utility Enterprise Fund Subsidization on Municipal Taxes and Expenditures*, 28 State & Loc. Gov't Rev. 103 (1996). Third, social and environmental benefits, *see generally* Paulo Anciaes & Jacob Albin Korem Alhassan, *Chapter Seven - Economic and Social Impacts of Public Transport Investments: A Scoping Literature Review*, *in* 13 Advances Transp. Pol'y & Plan. 227 (Jennifer S. Mindell & Stephen J. Watkins eds., 2024), offset much of the concern about costs even in the presence of sunk costs. Sunk costs occur when investments do not generate expected returns, but decision-makers continue to make them. There is some concern that the sunk cost literature focuses mostly on economic and not social and environmental returns. For a review of the economic bias of sunk cost literature, *see generally* Yizi Chen et al., *Toward a Deeper Understanding of Optimism Bias and Transport Project Cost Overrun*, 54 Project Mgmt. J. 561 (2023).

[232] *See* Ohio Const. art. XII, § 2(D).

[233] *See* Colo. Const. art. X, § 20(7)(c).

that cap assessed valuations, the fifty percent property-value hike would probably only negligibly impact local revenues, except in the event the property is conveyed and the property's taxable basis is adjusted to present-day fair market value.[234]

In most states with these laws, voters can waive these restrictions to allow cities to collect more taxes.[235] However, the authors are unaware of any U.S. city lifting a cap on taxes or revenues to capture unpledged revenue from infrastructure projects. Moreover, because many states require property-tax rates to be uniform among classes of property and within jurisdictions, voter approval for increasing property taxes or waiving revenue limits might apply jurisdiction-wide rather than in the area specifically benefited by an infrastructure investment, and might therefore prove politically unpopular.[236]

2. Other Real Property Levies

As described in Section I.B, two other levies on real property—special assessments and transfer taxes—can capture value, with some limitations. Special assessments may be levied on classes of properties to fund infrastructure projects; however, state laws usually require that properties subject to such assessments proportionately benefit from them.[237] Special assessments are often exempt from constitutional limits on property taxes, although they usually require approval by taxpayers who will be subject to them.[238] Their use has grown since the mid-Twentieth Century, in partial response to tax limits and the perceived efficiency and fairness of requiring a project's beneficiaries to pay for it.[239] Nevertheless, although special assessments capture landowners' economic rent to *fund* infrastructure projects, the requirement that they return a direct benefit to their payors means they are less well-suited to deliver public benefits beyond supporting such projects themselves.

Moreover, at least concerning transit, special assessments have had mixed popularity. In the 1920s, landowners near proposed subway lines—along with their business allies—defeated efforts by New York City to use special assessments to finance their construction.[240] However, more recently in Seattle,

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[234] *See* Mich. Const. art. IX, § 3; Cal. Const. art. XIIIA, § 2(b); Youngman, *supra* note 125 at 196. In these states, if a transit project generated significant redevelopment, more uncapping might occur as a result of land conveyances, although such limits disincentivize landowners from selling. *See* Les Picker, *The Lock-in Effect of California's Proposition 13*, Nat'l Bureau Econ. Rsch. (Apr. 1, 2005), https://www.nber.org/digest/apr05/lock-effect-californias-proposition-13 [https://perma.cc/NM5S-LVRT].

[235] Kleiman, *supra* note 112, at 1922; Briffault, *supra* note 110, at 929; Stark, *supra* note 138, at 193.

[236] *See The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*, 124 U. Pa. L. Rev. 1418, 1420 (1976); Wade J. Newhouse, Constitutional Uniformity and Equality in State Taxation 9–11 (1959) (discussing various state-law uniformity requirements).

[237] *See* Briffault, *supra* note 110, at 934; Reynolds, *supra* note 91, at 398.

[238] *See The Problem of Ad Valorem Special Assessments Continues to Grow*, Citizens Rsch. Council Mich. (May 11, 2021), https://crcmich.org/the-problem-of-ad-valorem-special-assessments-continues-to-grow [https://perma.cc/Q2ZU-9TLR]; Briffault, *supra* note 110, at 933.

[239] *See* Briffault, *supra* note 110, at 933; Reynolds, *supra* note 91, at 399.

[240] Misczynski, *Special Assessments*, *supra* note 34, at 315–18.

landowners near a proposed streetcar line provided just over half of the financing for the line's construction by creating a special taxing district that imposes assessments in a graduated fashion based on proximity to the line.[241] These landowners supported the imposition of the tax because they recognized the wealth-creation potential of the streetcar line.[242] Similar measures have been documented in Washington, D.C., relating to the New York Avenue station on the Metro Red Line, and the benefits assessment districts created during the construction of the Los Angeles Metrorail system.[243] Nevertheless, state special-assessment laws differ in what constitutes a benefit, how to measure benefits, and what improvements may be paid for with special assessments, contributing to special assessments' limited use in the transit context.[244]

Real estate transfer taxes are another means of capturing increases in land values for public benefit. These taxes, levied in most states whether directly or as a documentary fee at the recordation of a deed, are collected when a property is conveyed and typically expressed as a percentage of the total sale price.[245] Thus, if property near infrastructure projects transacts for higher values, transfer taxes capture such gains. Despite their widespread usage, transfer taxes have not been closely studied.[246] Some studies conducted outside the United States suggest that transfer taxes reduce sales prices and transaction volumes.[247] Whereas these levies are more obscure than property or sales taxes regularly incurred by taxpayers, they are usually politically unpopular.[248] Moreover, real estate transfer taxes raise fairness questions, as little evidence suggests that the mere conveyance of real property imposes direct costs on the public; however, some advocates suggest they offer a means for the government to capture some benefit from escalating property values.

Yet, like special assessments, transfer taxes are an imperfect value-capture tool. For one, they are levied on the *full value* of transactions, not just the wealth generated from a specific public investment.[249] Transfer taxes apply equally whether a seller profits or sells at a loss.[250] What is more, because they are incurred only when property is conveyed, transfer taxes are an inconsistent revenue source. Even if landowners experience significant land-value gains from infrastructure projects, they can avoid transfer taxes by holding their properties indefinitely, while realizing gains through leases, joint ventures, or

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[241] *See* MATHUR, *supra* note 26, at 87–90.
[242] *See id.* at 91.
[243] *See id.* at 92–104.
[244] *See* Misczynski, *Special Assessments*, *supra* note 34, at 319–24.
[245] *Real Estate Transfer Charges*, LINCOLN INST. OF LAND POL'Y, https://www.lincolninst.edu/data/significant-features-property-tax/access-database/real-estate-transfer-charges/ [https://perma.cc/8K5S-99MX] (last visited July 30, 2025); Szypszak, *supra* note 137, at 285.
[246] *See* Szypszak, *supra* note 137, at 276.
[247] *See, e.g.*, Ben Dachis et al., *The Effects of Land Transfer Taxes on Real Estate Markets: Evidence from a Natural Experiment in Toronto*, 12 J. ECON. GEOGRAPHY 327 (2012); *see generally* Carolin Fritzsche & Lars Vandrei, *The German Real Estate Transfer Tax: Evidence for Single-Family Home Transactions*, 74 REG'L SCI. & URB. ECON. 131 (2019); *see generally* Ian Davidoff & Andrew Leigh, *How Do Stamp Duties Affect the Housing Market?*, 89 ECON. REC. 396 (2013).
[248] Szypszak, *supra* note 137, at 292–94.
[249] *Id.* at 287–88.
[250] *Id.* at 288.

leveraging property to secure loans and other value.[251] Nevertheless, transfer tax receipts are usually unrestricted in their use, and cities that collect them can direct them to a variety of public purposes. Still, however, given their potential to reduce property values and transaction volumes, like special assessments, transfer taxes are likely to be of limited value in generating unpledged revenue.

3. *Sales and Income Taxes*

Because tax limits mostly relate to property taxes, cities often face fewer restrictions on generating value-added revenues from other taxes, such as sales or income taxes. In Tucson, Sun Link produced an incremental $5.8 million in sales tax revenues and significant growth in use taxes in the adjacent area.[252] Whereas Arizona law restricts property taxes, it does not cap sales or use taxes, meaning Tucson can freely generate revenue from economic activity in the transit corridor.[253] Moreover, although Arizona prohibits cities from levying income taxes, in a state that allowed them, Tucson's employment growth in the transit corridor would have resulted in even more tax receipts.[254] Of course, in states that restrict localities' imposition or collection of sales or income taxes, cities' ability to generate these unpledged revenues will be constrained.[255] For instance, in Michigan, cities cannot impose and collect most sales taxes, and state law restricts income taxes to a handful of large cities; these would bar Michigan cities from receiving such benefits.[256]

Although these alternative tax mechanisms might increase cities' returns on their infrastructure projects, they have important drawbacks. First, sales and income taxes are more elastic than property taxes because retail sales and wages suffer during economic downturns.[257] Relying on these revenue sources exposes cities to market cycles, meaning unpledged revenues and attendant public benefits might be inconsistent.[258] Second, sales taxes are regarded as more regressive than property taxes because lower-income households spend

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[251] *Id.* at 299, 301, 316–20.

[252] Nelson & Lawlor, *supra* note 3, at 114, 120. Tucson's sales taxes are made up of a business transaction privilege tax (a general sales tax), transient occupancy tax (tax on hotel guests), and hotel surcharge taxes. *See Tax Rate Table,* Ariz. Dep't of Revenue, https://azdor.gov/business/transaction-privilege-tax/tax-rate-table [https://perma.cc/2862-N7L5] (last visited June 20, 2025); Nelson & Lawlor, *supra* note 3, at 113.

[253] Nevertheless, the Arizona Constitution provides for expenditure limits on local governments that impose caps on their spending based on population change and inflation. Ariz. Const. art. IX, § 20(1). The cap can be waived via a local election or supermajority vote of the local governing body. Ariz. Const. art. IX, § 20(2).

[254] *See* Nelson & Lawlor, *supra* note 3, at 26, 121. Arizona has an income-tax sharing system in which it distributes some state income tax receipts to local governments, but these are based on a city's population. *See* Ariz. Rev. Stat. § 43-206 (2025).

[255] *See supra* notes 124–131 and accompanying text.

[256] *See* Mich. Const. art. IX, §§ 8, 10, 11 (imposing state sales tax and providing for distribution of the same to local governments); Mich. Comp. Laws §§ 141.502–03 (2025) (authorizing cities, but not villages or other localities, to levy an income tax only if they did so prior to 1995 or if authorized by a public vote).

[257] *See* Pelikan, *supra* note 134, at 479; Omeyr et al., *supra* note 145, at 7.

[258] *See* Omeyr et al., *supra* note 145, at 7.

larger shares of their income on consumer goods.[259] And because many cities levy income taxes proportionally rather than progressively, they too can be less progressive than property taxes.[260]

Third, sales and income taxes can distort regional economic development and pose problems for government accountability. Sales taxes are often popular because they push tax burdens onto non-residents, instead of internalizing community revenue needs.[261] However, high sales taxes can make a community less competitive by discouraging businesses that pay them from locating there or disproportionately driving up the cost of goods.[262] Moreover, exporting tax burdens reduces government accountability and efficiency, as non-residents cannot vote in the taxing jurisdiction, and a jurisdiction that exports tax burdens might overdeliver services to its residents.[263] The same problem arises with income taxes on non-residents who commute from other jurisdictions to work in the levying jurisdiction.[264]

Fourth and finally, sales and income taxes do not address the redistributive premise of value-capture; in fact, they are not really "value-capture" tools at all.[265] Sales and income taxes do little to capture infrastructure-generated windfalls for small classes of landowners.[266] Although these levies might have negative downstream effects on property values, such effects are attenuated and indirect compared to property taxes' effects.[267] Indeed, if sales and income taxes replaced property taxes, lower property-tax bills could provide an even greater windfall, as low property taxes tend to directly inflate land values.[268]

Therefore, although cities can and do use sales and income taxes to generate unpledged revenue from their infrastructure investments, these revenue sources have limitations and may produce unintended consequences.

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[259] *See, e.g.*, Pelikan, *supra* note 134, at 479; *See generally How Sales and Excise Taxes Work,* Inst. on Tax'n & Econ. Pol'y (2011), https://itep.org/how-sales-and-excise-taxes-work/ [https://perma.cc/RCJ8-WWJH]; Youngman, *supra* note 125, at 20. Property taxes are generally considered progressive, since they are effectively taxes on land-based wealth. *See generally* Rita Jefferson, *The (Mostly Untapped) Power of Local Income Taxes*, Inst. on Tax'n & Econ. Pol'y (2025), https://itep.org/the-mostly-untapped-power-of-local-income-taxes/ [https://perma.cc/MD7U-USPP].

[260] *See* Jefferson, *supra* note 259; Elizabeth Plummer, *Fairness and Distributional Issues*, in Land Value Taxation: Theory, Evidence, and Practice 74 (Richard F. Dye & Richard W. England, eds., 2009).

[261] *See* Stark, *supra* note 138, at 230; George R. Zodrow, State Sales and Income Taxes: An Economic Analysis 18–19 (1999) (discussing sales taxes' popularity when new taxes require a public vote). For this reason, sales taxes are often popular in tourist destinations. *See* Stark, *supra* note 138, at 231.

[262] *See* Stark, *supra* note 138, at 232.

[263] *See* Charles E. McLure, Jr., The Tax Assignment Problem: Conceptual and Administrative Considerations in Achieving Subnational Fiscal Autonomy 48 (1999), https://documents1.worldbank.org/curated/en/817561468329437517/pdf/938830WP0Box380ent0problem00PUBLIC0.pdf [https://perma.cc/J3QT-DHPH]; Zodrow, *supra* note 261, at 18.

[264] Nevertheless, where cities impose income taxes on their residents, they often push high earners to other jurisdictions. *See* Fischel, *supra* note 34, at 134–35.

[265] Hagman & Misczynski, *supra* note 30, at 16.

[266] *See* Korngold, *supra* note 26, at 5; Hagman & Misczynski, *supra* note 30, at 16–18.

[267] *See* Joyce Y. Man & Michael E. Bell, *The Impact of Local Sales Tax on the Value of Owner-Occupied Housing*, 39 J. Urb. Econ. 114, 128 (1996).

[268] *See id.* at 127.

4. *Exactions and Incentive Zoning*

Despite the legal rules around exactions, they are an important capital-improvement revenue source for many localities and may allow for some value-capture near infrastructure investments.[269] Land-value increases near these projects are sometimes used to justify requiring developers to provide additional amenities that benefit the public at large.[270] For example, a city might require developments near a transit station to improve street and sidewalk infrastructure, dedicate land or pay for park improvements, or provide affordable housing units to mitigate gentrification and displacement concerns.[271] Even if they simply mitigate a given development's impact, these requirements allow the community to capture some of the economic rent from an infrastructure investment that preceded the development project.

Relatedly, some jurisdictions use incentive zoning, deliberately maintaining restrictive zoning and inviting developers to bargain for more permissive regulations.[272] Through these bargains, developers offer benefits like parks, transportation improvements, or affordable housing in exchange for a city allowing taller or bulkier buildings or uses not permitted by prevailing zoning.[273] In some cases, cities maintain bonus systems or schedules allowing developers to exceed zoning limits in exchange for predefined public benefits.[274]

Although most exactions redistribute some value from a developer (or, more usually, new residents and businesses) to the public, their effectiveness in delivering returns on infrastructure investments is, at best, varied.[275] Competition from other jurisdictions, political pressures, or liability concerns might drive some cities to exact less than the law allows by, for example, setting impact fees lower than needed to fully offset new developments' impacts.[276] Thus, cities that presently undercharge developers could simply charge more to achieve greater value-capture.

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[269] *See, e.g.*, Elmendorf & Shanske, *supra* note 30, at 525–26; Rosenberg, *supra* note 90, at 179–80, 209; Reynolds, *supra* note 91, at 416–17; Altshuler et al., *supra* note 34, at 8–10; Nelson et al., *supra* note 52, at 66–72.

[270] *See* Been, *supra* note 100, at 483.

[271] *See* Elmendorf & Shanske, *supra* note 30, at 521.

[272] *See, e.g.*, Manville, *supra* note 30, at 5–6; Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 Wash. U. J. Urb. & Contemp. L. 3, 3–4 (1991); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 427–28 (1977).

[273] *See* Manville, *supra* note 30, at 5–6.

[274] *See* Elmendorf & Shanske, *supra* note 30, at 523. An example is Denver's adoption of incentive zoning around one of its new transit stations to encourage developers to provide affordable housing. *See generally* Kathleen McCormick, *The 38th and Blake Incentive Overlay: How Denver Used Land Value Capture to Create affordable Housing in a Redeveloping, Transit-Oriented Neighborhood*, Lincoln Inst. of Land Pol'y (2022), https://www.lincolninst.edu/publications/working-papers/38th-blake-incentive-overlay/ [https://perma.cc/PPC9-CU4B].

[275] *See* Ellickson, *supra* note 272, at 400 (describing how existing community members benefit from development charges).

[276] *See* Mulvaney, *supra* note 179, at 180; Been, *supra* note 100, at 511–12; Gregory S. Burge, *The Effects of Development Impact Fees on Local Fiscal Conditions*, *in* Municipal Revenues and Land Policies 209 (Gregory K. Ingram & Yu-Hung Hong eds., 2010); Altshuler et al., *supra* note 34, at 114–15.

Of course, some cities might use exactions more aggressively as a value-capture instrument by exacting *more* than a project's impact necessitates and the law technically allows.[277] Rational developers are loath to bear the cost, uncertainty, and political backlash of suing a city where they want to build, enabling communities to rent-seek.[278] Overcharging is even easier where exactions are negotiated on a project-by-project basis, as developers spend time and capital negotiating to an agreeable outcome and often lack information about the city's treatment of other projects.[279] In cities with rent-seeking aims, political support for value-capture might outweigh the downside risk of a successful unconstitutional-conditions claim.[280] Alternatively, some cities could reduce base zoning standards to force developers to bargain for zoning relief, entering into development agreements and providing public benefits above constitutionally permissible limits.[281]

Yet exactions also have drawbacks as a value-capture tool. First, their efficacy depends on development occurring.[282] Whereas property taxes are consistently generated and relatively inelastic, real estate development is affected by a complex web of factors like market cycles, interest rates, financing and credit availability, labor and materials supplies, regional demand, land availability, and permitting and approval procedures.[283] Although a new infrastructure investment could encourage development, exactions will likely be an inconsistent and highly elastic source of revenue and benefits.

Second, value-capturing exactions generate legal risk. Although some developers may not challenge excessive exactions, higher development charges are likelier to draw legal challenges, which often succeed.[284] For some cities, this risk is too great to bear.[285]

Third, using exactions for value-capture risks suppressing land values and pushing development elsewhere, undermining cities' policy and fiscal goals, such as encouraging transit-oriented development or more efficient infrastructure usage.[286] Thus, when employed as a value-capture mechanism, exactions could both fail to yield public benefits and result in underutilization of the infrastructure from which the community desires to capture value.[287]

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[277] *See* Fenster, *supra* note 192, at 666–67; Elmendorf & Shanske, *supra* note 30, at 525–26; Sterk, *supra* note 187, at 1749–50; Fischel, *supra* note 71, at 111; Ellickson, *supra* note 272, at 400.

[278] *See* Fenster, *supra* note 192, at 666–67; Elmendorf & Shanske, *supra* note 30, at 525–26; Fischel, *supra* note 71, at 111.

[279] *See* Altshuler et al., *supra* note 34, at 54–57.

[280] *See* Fenster, *supra* note 192, at 666–67.

[281] *See* Elmendorf & Shanske, *supra* note 30, at 526; Kayden, *supra* note 272, at 3–4.

[282] *See* Altshuler et al., *supra* note 34, at 3; Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 140 (2005).

[283] *See* Peter Hendee Brown, How Real Estate Developers Think: Design, Profits, and Community 189–210 (2015).

[284] *See* Altshuler et al., *supra* note 34, at 114–15.

[285] *See id.*

[286] *See* Been, *supra* note 282, at 146; Sterk, *supra* note 195, at 845–46; Been, *supra* note 100, at 483; Ellickson, *supra* note 272, at 395–96.

[287] *See* Smith, *supra* note 158, at 30.

Cities must therefore tailor their development charges to their risk tolerance, desired benefits, and optimal development patterns, which may in turn mean foregoing some return on investment.

Fourth, exactions, like sales taxes, tend to be regressive.[288] Exactions' cost is mostly borne by either land sellers or the end-users of the developer's project, rather than developers.[289] For instance, exactions tend to increase new-house prices, in turn increasing prices for existing homes.[290] This pattern disproportionately affects poor households because they spend more of their income on housing.[291] Moreover, because exactions tend to be levied on housing units irrespective of their sale price, exactions are likelier to suppress the development of lower-priced homes.[292] Thus, to the extent cities wish to advance social equity, pursue economic development, or spend on other public policy priorities, exactions may be a counterproductive means of doing so.

Fifth, because most exactions are assessed in-kind, they risk inefficiency.[293] In-kind exactions ensure a community gets what it bargained for, avoid the need for forecasting about uncertain future impacts, and allow land-rich but cash-poor landowners to keep their money.[294] They also obscure differential treatment between applicants and aid cities in negotiating for greater benefits.[295] However, whereas unrestricted cash payments give cities flexibility to respond to changing community needs, in-kind exactions do not offer such flexibility and may result in a developer oversupplying a public good.[296] Given in-kind exactions' prevalence, this problem may be widespread.

Sixth, the universe of possible public benefits available from exactions is comparatively narrow. The law requires that the proceeds of development charges—whether fee or in-kind—go toward mitigating specific impacts.[297] Conversely, taxes may be put to any lawful purpose for which general fund revenues may be expended.[298] Unrestricted value-capture revenues enable cities to better respond to public needs; for example, a low-income community might desperately need a children's literacy program, yet using exactions to capture incremental land value might produce only new sidewalks or small open spaces.[299]

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288 *See* Altshuler et al., *supra* note 34, at 108–09; Been, *supra* note 282, at 146–47; Reynolds, *supra* note 91, at 441.

289 *See* Altshuler et al., *supra* note 34, at 98; Fischel, *supra* note 71, at 112. Empirical evidence suggests that these costs are, in most cases, passed on to end users, whether buyers or renters of housing in a residential project, or businesses and their workers or customers. Altshuler et al., *supra* note 34, at 98–99.

290 Nelson et al., *supra* note 52, at 206.

291 Altshuler et al., *supra* note 34, at 108–09.

292 *Id.*

293 Alterman, *supra* note 32, at 775; Fischel, *supra* note 71, at 75–101; Ellickson, *supra* note 272, at 427, n. 109.

294 Elmendorf & Shanske, *supra* note 30, at 564.

295 Ellickson, *supra* note 272, at 429.

296 Fischel, *supra* note 71, at 101–06.

297 *See supra* Section II.B.

298 16 McQuillin: The Law of Municipal Corporations §§ 44:33, 44:240 (3d ed., 2025).

299 Fischel, *supra* note 71, at 101–06; Ellickson, *supra* note 272, at 427.

Taking these drawbacks together, cities could elect to limit their use of exactions as a value-capture tool in infrastructure-served areas and focus instead on encouraging desirable development. While exactions can encourage growth by making it physically possible and more politically acceptable, they risk increasing development costs, potentially rendering some projects infeasible or causing developers to exit the market.[300] Exactions are usually not needed to physically enable growth in infrastructure-served areas, but as described above, they could deter development, suppress property-value gains, overdeliver unneeded public goods, and increase housing and real estate costs for prospective residents and businesses.[301] Thus, cities might instead choose to *relax* exactions in these areas and zone them for more development density.[302] This approach might better maximize public benefits of development like vibrant streets and public spaces, more efficient infrastructure usage, more housing units and greater affordability, and growing property-, sales-, and income-tax revenue.[303]

Relaxing exactions while allowing more development might seem counterintuitive, given that it would arguably transfer even more wealth to the owners of infrastructure-adjacent properties.[304] Nevertheless, the benefits of new development in infrastructure-served areas could outstrip whatever social utility might materialize from requiring developers in infrastructure-rich neighborhoods to provide expensive, yet potentially unneeded public goods to offset their projects' impacts. In any event, cities must weigh their use of exactions for value-capture against other important policy goals, like encouraging transit-oriented and other infrastructure-served development.

B. Sustaining Value

Whereas the preceding section considered how cities can, under current law, derive secondary revenue from their infrastructure projects to support social benefits, this section considers how they can sustain those benefits. Although the anti-entrenchment doctrine generally means that governments cannot guarantee that unpledged revenues generated from infrastructure projects will be directed to particular initiatives,[305] this restriction does not

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[300] *See* Rosenberg, *supra* note 90, at 210–11; Been, *supra* note 282, at 145–46; Been, *supra* note 100, at 483.

[301] *See* Been, *supra* note 282, at 145; Fischel, *supra* note 71, at 104–05.

[302] This scenario contrasts with development on the urban fringe, where exactions are often necessary to ensure infrastructure availability, build public support for development, and where their availability could inflate undeveloped property values. *See* Been, *supra* note 282, at 145.

[303] *See, e.g.*, Shane Phillips et al., UCLA Lewis Ctr. for Reg'l Pol'y Stud., The Effect of Market-Rate Development on Neighborhood Rents (2021), https://www.lewis.ucla.edu/research/market-rate-development-impacts/ [https://perma.cc/8ZSP-ZKXP]; *see also generally* Hongwei Dong, *Higher Density Development for Lower Cost Housing? Understanding the Multifamily Housing Market and the Role of Density in Multifamily Home Prices*, 43 J. Plan. Educ. & Rsch. 617 (2020); Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, 133 J. Urb. Econ. 103383 (2023); Neuwirth, *supra* note 63.

[304] *See* Michael Manville et al., *It's Time to End Single-Family Zoning*, 86 J. Am. Plan. Ass'n 106, 109 (2020) (describing how upzoning inflates property values).

[305] *See* Section II.C, *supra*.

preclude localities from getting returns on their infrastructure investments. Instead, as described below, the anti-entrenchment doctrine might actually help them get *better* returns on these investments.

Some benefit could accrue from entrenching how secondary, unpledged revenues from infrastructure investments are spent. It might help garner support for such investments across diverse interest groups.[306] For example, if the legislature could guarantee that unpledged revenues from a transit project would be directed to a local free-school-lunch program, transit advocates might receive support from teachers' unions and other education supporters.[307] Similarly, entrenching unpledged-revenue expenditures could also induce private investment if the government uses them to provide grants to developers who build affordable housing.[308]

These benefits are overshadowed, however, by the downsides of entrenching unpledged-revenue spending. For one, it would preclude a city from responding to changing economic and fiscal conditions, technology, and preferences among its electorate.[309] Redirecting unpledged revenues from free school lunches to, say, paying snowplow drivers' wages might reflect changing community consensus. Technological change may also merit changes in how unpledged revenues are spent. Moreover, allowing unrestricted changes in the expenditure of unpledged revenues ensures communities will maximize the utility of their infrastructure investments and their reinvested revenues from them.[310] All of these are good reasons to allow unpledged revenues to be freely redirected as legislatures change over time. The anti-entrenchment doctrine can thus be viewed as a benefit for capturing value from infrastructure investments, not a limitation, rather than a detriment.

C. Zoning as an Unpledged Revenue-Generation Tool

Whereas this Article mostly focuses on cities' fiscal powers, they also have important regulatory powers—namely, zoning authority—that influence whether and how they generate public benefits from their infrastructure projects. Cities' power to regulate land use through zoning is well-documented in legal and planning scholarship.[311] Although local zoning authority is subject to some limits—for instance, zoning cannot be so confiscatory as to constitute a taking of private property—this power is relatively unconstrained compared

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306 Sterk, *supra* note 207, at 236.
307 *See id.*
308 *See* Serkin, *supra* note 199, at 936.
309 *See* Roberts & Chemerinsky, *supra* note 199, at 1810–12.
310 *See* Fischel, *supra* note 71.
311 *See, e.g.*, Brian J. Connolly, *The Black Box of Single-Family Zoning Reform*, 65 B.C. L. Rev. 2327, 2354–66 (2024); M. Nolan Gray, Arbitrary Lines: How Zoning Broke the American City and How to Fix It 11–47 (2022); Sonia A. Hirt, Zoned in the USA: The Origins and Implications of American Land-Use Regulation 31–59, 111–32 (2014); Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 Pepp. L. Rev. 719, 727–31 (2023).

with cities' taxing and spending powers.[312] As such, localities could use their zoning powers to maximize their returns on infrastructure projects.

Transit-oriented development offers a good example of how cities can and do achieve greater returns on infrastructure projects. In connection with new transit systems, some cities have zoned areas near transit stations for higher residential density and a broad mix of land uses.[313] Transit-oriented development is usually billed as a means to achieve greater efficiency; encouraging transit ridership reduces commuting costs and lessens traffic congestion by enabling people to live, work, shop, and recreate in more compact, urban places.[314] In Tucson, for example, since Sun Link opened, the city has seen over 2,000 new housing units constructed along the line and has also experienced significant employment growth attributable in part to new commercial development in the streetcar corridor.[315]

Transit-oriented development also enhances unpledged revenue.[316] Increasing zoning density boosts land values, and new development increases parcels' improvement value.[317] Subject to the limits discussed in Section II.A, these things can still result in incremental unpledged revenue. Moreover, construction activity brings use taxes and permitting fee revenues to cities.[318] And once a project is completed, new residents and businesses contribute sales and income taxes to cities. In places with strong demand for new residential or commercial development, increasing zoning density along a transit line grows local revenues.

Nevertheless, for political reasons, some cities opt not to zone for high-density development near transit. Zoning politics often suppresses, rather than facilitates, new development.[319] The immediate neighbors of property

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[312] *See* Connolly, *supra* note 311, at 2364; Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 Brook. L. Rev. 1225, 1275–76 (2023); Scharff, *supra* note 109, at 301–03.; Sheetz v. County of El Dorado, 601 U.S. 267, 274 (2024) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123, 127 (1978); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992)) ("A use restriction that is 'reasonably necessary to the effectuation of a substantial government purpose' is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations.")

[313] *See, e.g.*, Rae Zimmerman, *The Transit-Jobs Nexus: Insights for Transit-Oriented Development*, 44 Fordham Urb. L.J. 1131, 1132 (2017); David S. Silverman, *Green Transportation: Roadblocks and Avenues for Promoting Low-Impact Transportation Choices*, 43 Urb. Law. 775, 775–76 (2011); Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 Urb. Law. 547, 549–50 (1998).

[314] *See* Freilich, *supra* note 313, at 550.

[315] *See* Nelson & Lawlor, *supra* note 3, at i–iii.

[316] *See* Franklyn Salimbene & William P. Wiggins, *Transit-Oriented Development: The Quest for Sustainable Cities in the Age of the Automobile*, 45 Wm. & Mary Env't L. & Pol'y Rev. 51, 101 (2020); Dean D. Bellas, Fiscal Impacts of Transit-Oriented Development Projects 18 (Dec. 2016), https://todresources.org/wp-content/uploads/2017/02/fiscal-impacts-report.pdf [https://perma.cc/QE8F-6MK3].

[317] *See* Manville et al., *supra* note 304, at 109; Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 Urb. Affs. Rev. 758, 771 (2020).

[318] *See How Do State and Local General Sales and Gross Receipts Taxes Work?*, Tax Pol'y Ctr. (Jan. 2024), https://taxpolicycenter.org/briefing-book/how-do-state-and-local-general-sales-and-gross-receipts-taxes-work [https://perma.cc/LJD9-7MGJ].

[319] *See, e.g.*, Brian J. Connolly, *Putting The "Why" In YIMBY*, 57 Ariz. State L.J. 443, 472–73 (2025); Katherine Levine Einstein et al., Neighborhood Defenders 81 (2020);

proposed for upzoning often rally together to protest things like the prospective construction impacts, increased traffic, aesthetic incursions, and other effects of new development.[320] Despite the unproven nature of such claims, some residents protest transit improvements and related development, arguing they might serve poor people, bring in non-White people to the community, or invite crime.[321]

In some cases, anti-density attitudes prompt city officials to zone transit-adjacent properties for lower density. For example, along a light-rail line that is part of Denver's Regional Transportation District, Greenwood Village, Colorado, maintains a planning policy of not allowing new residential development.[322] Instances of low-density zoning near transit stations exist across the United States, suggesting these are not isolated policy choices.[323] Yet these decisions reduce the unpledged revenue these cities might realize from new development near the transit system and make it less likely that larger numbers of people will use the system.[324]

In some circumstances, states have stepped in to preempt local zoning that fails to encourage denser development near transit stations. In Massachusetts, the MBTA Communities Act requires localities to zone areas near Boston-area rail transit stations to allow multi-family apartment buildings.[325] In Colorado, a transit-oriented communities law similarly requires urban jurisdictions to permit up to forty dwelling units per acre in transit-station areas.[326] Although these laws were largely driven by their respective state legislatures' concerns about housing affordability, traffic congestion, and

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Roderick M. Hills, Jr. & David Schleicher, *Balancing the "Zoning Budget"*, 62 Case W. Rsrv. L. Rev. 81, 91–96 (2011); William A. Fischel, The Homevoter Hypothesis 8–12 (2001).

[320] *See* Hills, Jr. & Schleicher, *supra* note 319, at 90–93.

[321] *See, e.g.*, Robert C. Ellickson, America's Frozen Neighborhoods: The Abuse of Zoning 194–96 (2022); Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 53 (2017); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 Yale L.J. 1934, 1962 (2015); Catherine L. Ross & Nancey Green Leigh, *Planning, Urban Revitalization, and the Inner City: An Exploration of Structural Racism*, 14 J. Plan. Literature 367, 376–77 (2000); James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism 254–55 (2005).

[322] *See* Greenwood Vill., Colo., Comprehensive Plan 137 (2018), https://www.greenwoodvillage.com/DocumentCenter/View/18538/2018-Final-Comprehensive-Plan [https://perma.cc/JR8W-EPCF].

[323] *See, e.g.*, Yonah Freemark, *Spurring Housing Development Near Transit through Federally Funded Land Acquisition,* Urb. Wire (Feb. 27, 2024), https://www.urban.org/urban-wire/spurring-housing-development-near-transit-through-federally-funded-land-acquisition [https://perma.cc/LT7T-HRWX]; Wesley Jenkins, *America Has a Housing Shortage. Zoning Changes Near Transit Could Help*, Urb. Inst. (June 2023), https://apps.urban.org/features/affordable-housing-shortage-and-zoning [https://perma.cc/48G2-LLA7]; Marcel Negret et al., Reg'l Plan Ass'n, Homes on Track (2024), https://rpa.org/work/reports/homes-on-track [https://perma.cc/TB5E-KCUV] (noting that thirty-nine percent of New York-area transit station areas are zoned for low density).

[324] *See* Gray, *supra* note 311, at 101 (observing that lower-density zoning reduces transit ridership). Using a monitoring system like Tucson's can demonstrate the revenue implications of transit-oriented development.

[325] *See* Mass. Gen. Laws ch. 40A, § 3A (2025).

[326] *See* Colo. Rev. Stat. §§ 29-37-101–210 (2024).

environmental trade-offs between automobile and transit usage, they may also generate increased unpledged revenues to local governments.[327]

Outside the transit context, cities have similar opportunities to use their regulatory powers to maximize the unpledged revenue accruing from other infrastructure investments, such as utilities, healthcare facilities, and parks. Nevertheless, given the imperfections of value-capture under current law, some changes may be merited. The next Part discusses two alternatives.

IV. Expanding Value Capture: A Way Forward

This Part offers a normative take on the question of how cities can increase returns on their infrastructure projects. It recommends relaxing property-tax limits and revenue caps that make it difficult for localities to receive knock-on benefits from their projects. It also sketches out a suggested approach that, with more constrained tax-limit reforms, might more effectively enable cities to deliver benefits from their infrastructure projects to a broader class of residents.

A. Reforming Property Tax and Revenue Limits

To gain better returns on cities' and states' infrastructure limits, states should relax their property-tax and revenue caps. Scholarly debates about property-tax limits typically focus on institutional questions, such as whether such limits and their attendant procedures are normatively good for democracy or government accountability, the optimal taxes for local referenda, and the federalism implications of these limits in the realm of state versus local control.[328] Legal scholarship has additionally explored the implications of these limits for local policy experimentation and physical development.[329] Other scholars have also analyzed property-tax limits as a social movement and their implications for the provision of public services, alternative revenue sources, and whether or not such limits have led to contractions in the size and expenditures of government.[330] Although these debates are important, they cloud the serious practical implications of tax limits for cities' policy choices relating to the built environment and how those choices advance social welfare.

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[327] *See* Andrew Kenney, *Transit-Oriented Communities Bill Passes Colorado Legislature*, Colo. Pub. Radio (May 7, 2024), https://www.cpr.org/2024/05/07/transit-oriented-communities-bill-passes-colorado-legislature/ [https://perma.cc/9PHT-CQ8U]; Andrew Brinker, *An Ambitious Mass. Housing Law Is Coming to Your Town: A Handbook to the Much-Debated Housing Law That's Upending Town Meetings All over Eastern Massachusetts This Year*, Bos. Globe, Apr. 29, 2024, at D.1.

[328] *See, e.g.*, Kleiman, *supra* note 112, at 1890; Scharff, *supra* note 109, at 314–15; Stark, *supra* note 138, at 233–50; Martin, *supra* note 138.

[329] *See* Scharff, *supra* note 109, at 312–17.

[330] *See* Lav & Leachman, *supra* note 144; Lav & Williams, *supra* note 144; *see generally* Charles K. Coe, *Preventing Local Government Fiscal Crises: Emerging Best Practices*, 68 Pub. Admin. Rev. 759 (2008); Elder, *supra* note 114.

Notwithstanding voters' frustrations with them, property taxes are "the most widely used property value-capture tool in the U.S.," and they capture value particularly effectively.[331] They are progressive, as the owners of larger and more valuable properties tend to pay more.[332] Because they are levied on a large share of the incumbent population in a jurisdiction, property taxes avoid the fairness concerns associated with exporting tax burdens to non-residents.[333] Economists generally agree that property taxes are efficient because they align with benefits enjoyed by property owners, they offer fewer opportunities for circumvention, and they tend to distort behavior less than other revenue sources.[334] Moreover, property taxes are relatively easy to administer and understand, particularly compared with other taxes,[335] and they are comparatively inelastic, making them a dependable government revenue source.[336]

By effectively capping property taxes' value-capture potential, property-tax limits have unquestionably aided in concentrating wealth among landowners and reducing these taxes' progressivity.[337] In states with rate limits, all landowners benefit, while cities are restricted in their ability to recapture the wealth generated by infrastructure investments.[338] But because rate caps are proportional, landowners with more valuable properties save larger absolute amounts on their property-tax bills. Progressivity is further reduced in states that constrain assessed valuation, where long-term landowners' taxes remain exceptionally low despite potentially rapid increases in their property values, starving the government of any benefit from these increases.[339] Meanwhile, more recent purchasers, their tenants, and customers are left to supply a greater share of local revenue.[340]

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331 Mathur, *supra* note 26, at 65; Youngman, *supra* note 125, at 13–14. *But cf.* Hagman & Misczynski, *supra* note 30, at 16 (asserting that property taxes are not a windfall recapture technique because they are tailored specifically to the incremental increase in land value attributable to public investments).

332 *See* Mathur, *supra* note 26, at 65. Whereas some argue that property taxes are regressive, economists tend to disagree; they may contain some regressive elements, but the taxation of land value is nearly universally understood to be progressive. *See* Youngman, *supra* note 125, at 19, 28; Plummer, *supra* note 260, at 90 (observing that land ownership is highly concentrated among wealthy people). For a relatively recent example of a counterargument, see Arik Levinson, *America's Regressive Wealth Tax: State and Local Property Taxes*, 28 Applied Econ. Letters 1234, 1234–35 (2021) (asserting that property taxes are regressive because home values reflect a larger portion of lower-income homeowner households' wealth, other capital assets that form smaller shares of household wealth are not subject to wealth taxes, and younger homeowners who owe more on their mortgages and have higher wealth concentrations in housing are more affected by them).

333 *See* Mathur, *supra* note 26, at 65; McLure, Jr., *supra* note 263.

334 *See* Jared Walczak, *Confronting the New Property Tax Revolt*, Tax Found. (Nov. 5, 2024), https://taxfoundation.org/research/all/state/property-tax-relief-reform-options/ [https://perma.cc/X8EG-4A7G]; Youngman, *supra* note 125, at 3; Mathur, *supra* note 26, at 65; Fischel, *supra* note 34, at 160–61.

335 *See* Youngman, *supra* note 125, at 1.

336 *See* NLC Report, *supra* note 109, at 12–13.

337 *See, e.g.*, Martin, *supra* note 138, at 13–14; Walczak, *supra* note 334; Youngman, *supra* note 125, at 197–98.

338 *See* Walczak, *supra* note 334. Of course, if the rate cap only applies to, say, residential properties, commercial landowners may be penalized.

339 *See* Youngman, *supra* note 125, at 210.

340 *See id.* at 211. This problem was the subject of the Supreme Court's review in *Nordlinger v. Hahn*, in which it held that California's Proposition 13's uncapping of assessed valuation at the

Moreover, because cities ameliorate the effects of property-tax limits by adopting sales taxes and relying on exactions for revenue, they further distort the inherent progressivity and fairness of the property tax, enabling wealthier landowners to capture publicly generated wealth and exporting tax burdens to non-voters.[341] And by limiting the public's capture of more land-value increment from infrastructure projects, fares paid by transit riders and sales taxes paid by consumers to support transit systems' construction effectuate a wealth transfer from these (often poorer) system users and consumers to a narrow class of landowners.[342] What is more, absent these limits, the government could use incremental unpledged revenue to provide amenities or services that, in addition to the transit system, disproportionately benefit poor and middle-class households.[343] But such limits artificially reduce what the government can collect and spend.

Property-tax limits also distort government decisions regarding infrastructure investments and the built environment. If the public received greater returns from these projects, agencies might be better positioned to win political support for them. Given America's backlog of infrastructure needs and the necessity for infrastructure that will mitigate climate change's effects and increase economic development, encouraging support for such projects is critical.[344] Relaxing such limits would also provide incentives for cities to adopt zoning and other regulations that maximize the use of infrastructure projects. For instance, if cities did not need to pursue sales and income tax receipts, they might be more inclined to zone for more housing or other, more urgently needed uses near transit, utilities, or other infrastructure, which would help them address housing demand while improving infrastructure usage efficiencies and government service delivery.[345]

Irrespective of their benefits for other purposes, property-tax limits are particularly detrimental to efficient investment returns from public infrastructure. Although property-tax limits are rarely repealed once enacted by voters,[346] states and localities could experiment with narrow geographic exceptions to such limits around particular types of infrastructure projects, like transit. To the extent such exceptions could be characterized as ensuring

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time of a property's sale—and subsequently high tax rates for newer landowners—did not violate the Equal Protection Clause. 505 U.S. 1, 11–16 (1992).

[341] *See, e.g.*, *id.* at 20, 211; McLure, Jr., *supra* note 263, at 48; Zodrow, *supra* note 261, at 18.

[342] One possible argument for why landowners should be entitled to this value increment is that such increases are, in effect, compensation for the impacts of a nearby transit system; however, the negative externalities of transit are belied by the fact that these systems usually increase land values. *See supra* note 25 and accompanying text.

[343] Nelson & Lawlor, *supra* note 3, at 18.

[344] ASCE, *supra* note 12.

[345] Scharff, *supra* note 109, at 312–13; Fischel, *supra* note 34, at 133; *see generally* Jeremy Mattson, *Relationships between Density, Transit, and Household Expenditures in Small Urban Areas*, 8 Transp. Rsch. Interdisc. Persps. 100260 (2020).

[346] One of these rare examples was Colorado voters' repeal in 2020 of the Gallagher Amendment, which restricted residential property taxation as a share of overall, statewide property taxation. *See* Andrew Kenney, *Four Years after Its Repeal, the Gallagher Amendment Still Overshadows Colorado Politics*, Colo. Pub. Radio (Aug. 29, 2024), https://www.cpr.org/2024/08/29/gallagher-amendment-property-taxes-special-session/ [https://perma.cc/YVR7-ABHM]. The impetus for the repeal was a dearth of funding for local governments, particularly in rural areas.

that public infrastructure investments deliver maximum public benefit—with specific benefits enumerated—and avoid unfairly enriching narrow classes of landowners, they might enjoy broader public support than the complete elimination of property-tax limits.

B. A Thought Experiment: The Infrastructure-Increment Tax Zone

Given the presumptive difficulty of wholesale property-tax limit repeals, states could enable local governments to create a form of hybrid special taxing district in areas surrounding infrastructure projects. In these districts, taxes on building improvements could be wholly or partially abated, resulting in what is effectively a land-value or dual-rate tax. In exchange, such districts would be subject to no property-tax limits.[347] We call these districts *infrastructure-increment tax zones* (IITZs). This Subsection sketches out how this proposal might work and how the law might facilitate it.

In most localities, property taxes are levied equally on the value of land and improvements.[348] Taxing improvements, in addition to land, is sometimes justified because improved properties can impose greater burdens on the government, such as increasing the number of students in local schools or the amount of traffic on local streets.[349] However, several scholars, advocates, and policymakers have argued for land-value taxation—which only or mostly taxes land-value, rather than improvement-value.[350] Calls for land-value taxation have grown recently in response to the ongoing U.S. housing affordability crisis.[351] In particular, land-value taxation is advocated as a counterweight to land-banking and speculation, as it tends to penalize landowners who make less than full use of their properties.[352]

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[347] *See infra* note 354 and accompanying text. Pittsburgh, Pennsylvania, uses this abatement approach, and a version of this approach was proposed in a Strong Towns blog post by Rick Rybeck, who called for abating improvements taxes as a backdoor way of introducing land-value taxation. *See* Bourassa, *supra* note 34, at 17; Rick Rybeck, *If the Land Tax Is Such A Good Idea, Why Isn't It Being Implemented?*, Strong Towns (Mar. 8, 2019), https://www.strongtowns.org/journal/2019/3/8/if-the-land-tax-is-such-a-good-idea-why-isnt-it-being-implemented [https://perma.cc/VGK4-W5EA].

[348] Joan M. Youngman, *Defining and Valuing the Base of the Property Tax*, 58 Wash. L. Rev. 713, 715 (1983).

[349] Coughlan, *supra* note 26, at 267.

[350] *See* Jan K. Brueckner, *A Modern Analysis of the Effects of Site Value Taxation*, 39 Nat'l Tax J. 49, 49 (1986).

[351] *See, e.g.*, Josie F., *How Popular Is Land Value Tax in 2024?*, Progress & Poverty Inst., https://progressandpovertyinstitute.org/how-popular-is-land-value-tax-in-2024/ [https://perma.cc/KK46-S9EQ] (last visited Nov. 16, 2025); Girard Miller, *A 19th-Century Property Tax Idea Is Back. Can It Revive a Blighted City?*, Governing (Feb. 13, 2024), https://www.governing.com/finance/a-19th-century-property-tax-idea-is-back-can-it-revive-a-blighted-city [https://perma.cc/7SNU-R9EF]; Conor Dougherty, *The 'Georgists' Are Out There, and They Want to Tax Your Land*, N.Y. Times (Nov. 12, 2023), https://www.nytimes.com/2023/11/12/business/georgism-land-tax-housing.html [https://perma.cc/YFP9-UCUS]; Manville, *supra* note 30, at 24.

[352] *See, e.g.*, Clanton, *supra* note 34; Manville, *supra* note 30, at 21–22; George et al., *supra* note 31, at 28.

Land-value taxes are rarely used in the United States.[353] Some Pennsylvania cities have used dual-rate systems—where land is taxed at a higher rate than improvements—for many years.[354] In 2023, Detroit's mayor proposed imposing a citywide dual-rate system to combat land speculation that was blamed for driving up housing costs.[355] Objections to land-value taxes focus primarily on the difficulty of valuing land independent of its improvements and these taxes' potential to contribute to the displacement of landowners who lack the liquidity to pay them.[356] However, evidence demonstrates that, in places that have adopted dual-rate taxes, with substantially higher levies on land compared with improvements, there is more building construction and lower vacancy.[357] Furthermore, compared with customary property taxation, land-value taxes tend to increase land values.[358] Where land-value taxes are implemented in small tax zones, they will generally increase development activity and land values.[359]

With IITZs, cities could encourage efficient development around infrastructure by trading partial or full abatements on improvement taxes for uncapped land-value taxes. Because choices around how to develop land would not affect taxes, such a system, which would effectively be a land-value or dual-rate tax, would encourage full utilization of development rights and reduce vacancy and underutilization in infrastructure-served areas, and would also encourage greater utilization of the infrastructure itself.[360] If paired with permissive zoning in infrastructure-served areas, such an approach would advance value-capture while encouraging efficient development patterns. Whereas Henry George advocated land-value taxes to expropriate *all* economic rent attributable to public inputs,[361] a land-value tax in an IITZ should reflect a considered balance between recouping public investment in infrastructure and delivering on policy priorities, while returning some economic rent to infrastructure-served landowners to encourage investment and development.

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[353] *See* Fischel, *supra* note 34, at 132; Bourassa, *supra* note 34, at 11; Rybeck, *supra* note 347. Nevertheless, it is used more extensively in some other countries. Riel C.D. Franzsen, *International Experience*, in Land Value Taxation: Theory, Evidence, and Practice 28 (Richard F. Dye & Richard W. England eds., 2009).

[354] Coughlan, *supra* note 26; Wallace E. Oates & Robert M. Schwab, *The Simple Analytics of Land Value Taxation*, in Land Value Taxation: Theory, Evidence, and Practice 60 (Richard F. Dye & Richard W. England eds., 2009).

[355] Clanton, *supra* note 33.

[356] *Id.*

[357] *See, e.g.*, Florenz Plassmann & T. Nicolaus Tideman, *A Markov Chain Monte Carlo Analysis of the Effect of Two-Rate Property Taxes on Construction*, 47 J. Urb. Econ. 216, 217 (2000); Wallace E. Oates & Robert M. Schwab, *The Impact of Urban Land Taxation: The Pittsburgh Experience*, 50 Nat'l Tax J. 1, 17 (1997); Steven C. Bourassa, *Land Value Taxation and Housing Development: Effects of the Property Tax Reform in Three Types of Cities*, 49 Am. J. Econ. & Socio. 101, 109 (1990).

[358] *See* Zhou Yang, *Differential Effects of Land Value Taxation*, 39 J. Hous. Econ. 33, 38 (2018).

[359] Brueckner, *supra* note 350, at 56.

[360] *See* Coughlan, *supra* note 26; Clanton, *supra* note 34; Brueckner, *supra* note 350, at 56; Fischel, *supra* note 34, at 131–32.

[361] *See* George, *supra* note 31, at 36.

Of course, even if IITZs commenced with revenue-neutral land-value taxes, uncapping tax-rate growth might mean that IITZ tax rates might eventually exceed those outside them, pushing investors—and speculators—who hold vacant or underutilized land away from infrastructure-served properties.[362] As a normative matter, this is good public policy, as it encourages efficient development patterns. Further, assuming cities pair IITZs with permissive zoning, landowners in IITZs could offset their higher land taxes with larger, more profitable projects. While one might object that such a system would discourage investment and development in the IITZ, if investors drove up market demand outside IITZs, those properties would be subject to higher land-and-improvements property taxes, and transactions on such properties would uncap their assessed values.

To generate support from IITZ landowners, this proposal could also draw on some features of TIF, discussed in Section I.B, *supra*. As they do under TIF, cities could implement a base value for IITZ properties—established before an infrastructure project's announcement, when the market prices the proposal into land values—and then use incremental revenues for projects that advance community priorities. Like TIF, cities could return a portion of the increment to projects in the IITZ, and could even use it to support beneficial development projects such as those that create affordable housing or provide public amenities. The key difference from a TIF is that, under this proposal, the city would not be obligated to return all—or even some—of the captured tax increment to a developer; instead, the increment could be pledged to social equity-oriented policies and programs.[363]

Three legal hurdles might prevent such an approach from becoming a reality. The first is the uniformity principle in property taxation, usually embedded in state constitutions, that generally requires governments to tax similarly situated or like properties within a jurisdiction identically.[364] Rooted in equal protection and substantive due process, uniformity requirements are intended to ensure impartiality in taxation and to avoid unfairness between taxpayers.[365] Uniformity does not necessarily mean that all properties pay the same amount of taxes, but rather that they have equal tax burdens as a share of properties' value.[366]

Nevertheless, in states with uniformity laws, properties are not necessarily taxed equally as a share of their market values. Many states employ

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[362] *See generally* Philip Bess, *Henry George's Land Value Tax: An Idea Whose Time Has Come?*, 2 Am. Affs. 56 (2018) (arguing that small-area land-value taxation could create value in areas outside of the land-value tax zone).

[363] As of this writing, Colorado's legislature is considering a bill to allow a sales tax TIF, along with income tax credits for affordable housing projects, in transit-served areas to fund infrastructure and other improvements. Although this proposal is not identical to ours, it includes some similar features: namely, the use of tax increment from real estate development in transit-oriented areas to fund public amenities and return value to the community. H.B. 26-1065, 2026 Reg. Sess. (Colo. 2026).

[364] *See, e.g.*, Coughlan, *supra* note 26; U. Pa. L. Rev, *supra* note 236; Newhouse, *supra* note 236, at 9–11.

[365] Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 959 (1986).

[366] *See* C.J.S. Taxation § 28 (2024).

fractional assessment, where the taxable value of property is some proportion of, rather than its full, fair market value.[367] Among these states, several classify properties according to use or other characteristics and apply differential ratios between their taxable and market values.[368] For example, in many states, owner-occupied residential properties are assessed at lower shares of their market values than commercial properties, leading to lower overall property-tax burdens on homeowners.[369] Other legal principles operate to differentiate property-tax burdens between different classes of properties. In many states, properties used for charitable purposes are exempt from taxation, and most states also limit taxation of agricultural property.[370] Courts have generally upheld differential treatment of properties based on use, location, and other characteristics.[371]

A special taxing area around infrastructure could be attacked as violating uniformity requirements, because it would necessarily mean that properties within the IITZ wouldn't be taxed at the same rates—and under an entirely different structure—than properties outside of it.[372] Although this distinction between properties isn't the same as treating them differently according to their use, it would not violate uniformity principles. For one, assuming the establishment of small-area land-value taxes likely will require voter approval in many states, and further assuming that allowing these actions might entail constitutional amendments, such amendments could prevail over pre-existing uniformity requirements. Moreover, property near an infrastructure project is uniquely situated compared to other property.[373] Under these circumstances, differential taxation in a special taxing area hardly violates the principles of equal protection and substantive due process that animate uniformity requirements, as it is not improper discrimination.[374] Concerning the land-value tax element of the proposal, Pennsylvania courts have not directly considered the state's longstanding dual-rate and land-value taxation systems under uniformity requirements, but appear to accept that land and improvements could be different classes of property.[375] Applying a land-value tax in an IITZ would not irrationally discriminate between properties or taxpayers, but would instead be premised on a parcel's proximity to infrastructure and the government's

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[367] Youngman, *supra* note 125, at 102–03.

[368] *Id.* at 91.

[369] *Id.*

[370] *Id.* at 134–35.

[371] *See* C.J.S. Taxation § 51 (2025).

[372] Early cases suggested that differential taxation according to a property's location within a jurisdiction might violate uniformity requirements. *See, e.g.*, Phila., Balt. & Wash. R.R. Co. v. Mayor of Wilmington, 57 A.2d 759 (Del Ct. Ch. 1948) (citing Essex Cty. Park Comm. v. West Orange, 73 A. 511 (N.J. 1909); In Re State Taxation, 55 A. 827 (Me. 1903); Monaghan v. Lewis, 59 A. 948 (Del. 1905)).

[373] *See* C.J.S. Taxation § 28 (2025) (noting the requirement that taxation between equal among similarly situated properties).

[374] *See* DeKalb Cty. Bd. of Tax Assessors v. CWS SGARR Brookhaven, LLC, 836 S.E.2d 729, 856 (Ga. Ct. App. 2019) (observing that improper discrimination would violate Georgia's uniformity requirement); Roque Island Gardner Homestead Corp. v. Town of Jonesport, 167 A.3d 564, 568 (Me. 2017) (requiring unjust discrimination to find a violation of constitutional uniformity).

[375] *See* Coughlan, *supra* note 26.

legitimate interest in ensuring that value-added accruing from such projects is adequately distributed to the public.

The second hurdle is the likely need for voter support, and thus political feasibility. Many states' property-tax limits are constitutional and would require voter approval to eliminate property-tax limits in IITZs.[376] Yet, because IITZs would be geographically circumscribed, this approach may be more politically palatable than the wholesale repeal of tax limits and institution of land-value taxes. Most voters support property-tax limits for self-interested reasons, as repealing them might increase their tax bills, or because they desire greater control over local taxing decisions.[377] But, as discussed in Sections II.A and III.A.3, *supra*, voters are often willing to export tax burdens to non-residents. In infrastructure-served areas like transit corridors, a higher proportion of properties may be owned by commercial interests, meaning most voters would not bear the cost of uncapped increases in land-value taxes. Moreover, assuming IITZs represent a small share of the overall number of parcels in a city or state, most voters' tax bills would be unaffected by changes to the tax structure in these areas. Even affected landowners may accept higher land-value taxes, just as transit-adjacent owners have accepted special assessments, on the premise that improvements on their properties would go untaxed or minimally taxed.[378]

The third hurdle is that, in most cases, cities cannot control the tax levies of overlapping jurisdictions. In most cases, landowners pay property taxes to multiple taxing entities: cities, counties, school districts, water and sewer districts, fire districts, and other special taxing districts.[379] Except in the cases of TIF, where cities can usually redirect incremental tax revenue to an urban renewal authority or developer, and tax exemptions for non-profit and charitable uses of property, general-purpose local governments cannot exert control over the imposition of taxes by other taxing entities.[380]

Under an IITZ system, states would need to decide whether to allow extensions of improvements-tax abatements to overlapping jurisdictions. With TIF, this question is fraught because cities can in most cases unilaterally deny incremental revenue from development projects to school districts, counties, and other overlapping jurisdictions.[381] However, it need not be as problematic under an IITZ, because the uncapping of land-value taxes would mean that overlapping jurisdictions could share in incremental increases in land-value tax revenues. Given that an IITZ would entail uncapping those increases, overlapping jurisdictions might benefit even more than they would under a traditional property-tax system.

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[376] *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, State Ct. Rep., Brennan Ctr. for Just. at NYU (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/VF94-2EUZ]. Even if constitutional amendments were unnecessary, in some states, any tax increase requires voter approval. *See supra* notes 151–156 and accompanying text.

[377] *See* Kleiman, *supra* note 112, at 1913–16.

[378] *See supra* notes 241–243 and accompanying text.

[379] *See* Youngman, *supra* note 125, at 76 (describing overlapping jurisdictions).

[380] *Id.* at 73, 172–73.

[381] *Id.* at 73.

Although the foregoing is a simple sketch, subject to further refinement, of one possible response to the problem of capturing value from public infrastructure projects, it may address some of the fairness problems created by current law. Under current law, the construction and operation of major infrastructure projects, like transit, multiply public cost: taxation to construct and operate projects; cost to use the project, which tends to more heavily impact poorer households; and limitations on the secondary, unpledged revenues that can be derived from the project to support other community priorities. Meanwhile, a small class of infrastructure-adjacent landowners receives a windfall. Our proposal highlights states' and cities' opportunity to expand their pools of unpledged revenues and to offer greater returns to their constituents on their infrastructure investments.

Conclusion

Current law often means that constructing and operating public infrastructure projects, such as transit, results in a "triple-whammy" of public cost: direct taxes for these projects' development and operation, user fees that disproportionately affect lower-income people, and limited returns on investment that might otherwise serve broader community priorities. Meanwhile, these same laws ensure that a narrow set of landowners receive considerable windfalls. This Article has identified three important legal limits—restrictive state tax and revenue limits, the unconstitutional conditions doctrine impacting exactions, and prohibitions on legislative entrenchment—that collectively operate to lock in this system, hindering cities from fully realizing the secondary, unpledged financial gains from their infrastructure investments.

Amid a pressing national need for infrastructure upgrades and modernization to combat economic stagnation and address the housing and climate crises, states and cities have an opportunity to reconsider their approach to urban infrastructure finance. Tools for value-capture currently exist, but their effectiveness is often curtailed by the above-described limitations. This Article suggests both immediate and longer-term reforms that could expand cities' pools of unrestricted revenues, build public support for critical infrastructure and efficient development patterns, and ensure that taxpayers receive fair returns on their investments.