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SYMPOSIUM ISSUE

PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION

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* * * *

Introduction

Kyle Sutton[*]

Mass incarceration is an "epic injustice that can and must urgently end."[1] Professor Rachel E. Barkow examines this "epic injustice" in her book *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* by demonstrating how the United States fails to rely on experts or statistical and rational assessment to decrease crime.[2] Professor Barkow looks at how criminal policies instead revolve around emotions, gut reactions, and politics.[3] As a result, "many of America's criminal justice policies have little to no effect on crime."[4]

Professor Barkow's book illustrates how the criminal system needs to be revamped from the flawed institutional architecture that government actors use to make the policy choices that are implemented and affect society today.[5] Much of the reform that Professor Barkow suggests revolves around prosecutors, the courts, and the institutional changes that need to occur to make a lasting impact.[6] Professor Barkow argues that the criminal system should rely on expertise and evidence and less on emotional appeals of being "tough on crime."

The system of mass incarceration that the United States has perpetuated has severely adverse and disparate effects on members of society who are Black, Indigenous, or People of Color (BIPOC).[7] Black men are six times

[*] Editor in Chief, *New England Law Review*, Vol. 56. J.D., New England Law | Boston (2022). B.A., Political Science and Environmental Science, Northeastern University (2016).

[1] *Our Mission*, INQUEST, https://perma.cc/F69K-NDF5 (last visited Mar. 7, 2022).

[2] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1 (2019).

[3] *Id.*

[4] *Id.* at 2.

[5] *Id.* at 4.

[6] *Id.* at 14–15.

[7] THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), https://perma.cc/63LP-9NNG ("Racial minorities are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences.").

more likely to be incarcerated than white men—a result of the inherent racism and systemic injustice that created the foundation of the criminal system.[8] The U.S. criminal system is theoretically founded on the idea of color and class blindness, but "in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor."[9]

One of the many institutional issues that Professor Barkow discusses in her book is the use of felony disenfranchisement to continue the cycle of mass incarceration.[10] In 2020, The Sentencing Project estimated that 5.17 million people were disenfranchised because of a felony conviction.[11] Felon disenfranchisement laws are an excellent case study of the systemic problems that exist today. Felon disenfranchisement laws vary by state, but most people with felony convictions in the United States are barred from voting while incarcerated, and many are barred even after they are released.[12]

Lawmakers and politicians often ignore people who are incarcerated or people who have felony convictions because they cannot vote.[13] When those in power ignore the interests of the more than six million Americans who have been disenfranchised for felony convictions, a society is created where already marginalized groups remain forgotten, and their needs continue to be ignored.[14] According to Dr. Rachel Cobb, chair and associate professor of

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[8] *Id.*

[9] *Id.* at 2–3 ("Because African Americans constitute a disproportionate share of those living in poverty in the United States, they are more likely to reside in low-income communities in which socioeconomic factors contribute to higher crime rates.").

[10] BARKOW, *supra* note 2, at 116.

[11] CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4(2020), https://perma.cc/U3M2-QHWS ("One in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans. Over 6.2 percent of the adult African American population is disenfranchised compared to 1.7 percent of the non-African American population.")

[12] *Id.* at 5.

[13] Fredreka Schouten, *We Count: Untold Voter Stories: 'An Untapped Invisible Army'*, CNN, https://perma.cc/59C9-SZGD (last visited Mar. 7, 2022).

[14] *See* Spencer J. Weinreich, *Why Prisoner Abuse and Deprivation Persists in America*, WASH. POST (Mar. 7, 2019), https://perma.cc/QR5C-DD4A ("A power outage in late January left inmates without heat as a polar vortex drove temperatures well below freezing. Subsequently, officials discovered ruinous facilities, medical neglect and prisoners denied access to counsel."); *see also* Dana Liebelson, *In Prison, and Fighting to Vote*, THE ATLANTIC (Sept. 6, 2019), https://perma.cc/VYV8-PJWE.

government at Suffolk University:

> [P]olitical power actually matters. It makes a big difference in our lives, makes a big difference to the kind of economic power that we have to the distribution of government resources to communities. It makes a big difference to the kinds of policies that we're going to have in the future.[15]

Derrick Washington, who is incarcerated with a felony conviction, has described the dire effects of felon disenfranchisement by stating that he is "a 21st-century slave to a system that is not catering to [him] or to anyone from the neighborhood that [he] came from."[16] He explains, "I can't impact the people who have designed the environments I'm detained in or are designing the policies that impact me. In order to change the fabric of my situation, I would need to have a voice and reshape my environment with the vote."[17] As a result, there is "a whole pariah class that [is] excluded from the [democratic] process, yet those people are most affected by the laws that are put in place by legislators."[18] The foundation of American democracy is that the government is elected by and responsive to its citizens.[19] Yet, when a large group of citizens is systematically disenfranchised, those ideals cannot be fully realized.[20] "Our democracy is weakened when one sector of the population is blocked out of the voting process."[21]

In addition to political impacts, felon disenfranchisement laws also have lifelong and enduring social impacts.[22] Disenfranchisement is a collateral consequence of incarceration. Restoring the right to vote for a person leaving prison aids in that individual's transition back into society, and research shows that the loss of voting rights increases the isolation of the formerly

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[15] Kara Jillian Brown, *The Singular Importance of Your Vote—And the Steps You Need to Take Before Election Day*, WELL & GOOD, https://perma.cc/D6CW-D4QH (last updated Nov. 2, 2021) (quoting Dr. Rachel Cobb).

[16] Daniel Nichanian, *Massachusetts Lawmakers Consider Restoring Voting Rights, but Organizers Are Not Waiting*, THE APPEAL (Feb. 7, 2019), https://perma.cc/7W35-D4SL.

[17] *Id.*

[18] *Id.*

[19] *Your Government and You*, U.S. CUSTOMS AND IMMIGR. SERV., https://perma.cc/BET6-JTQ6 (last visited Mar. 7, 2022).

[20] *See* Uggen et al., *supra* note 11; Nichanian, *supra* note 16.

[21] JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), https://perma.cc/4V7C-6EHS (quoting former Congressman John Conyers, Jr.).

[22] *See* JEAN CHUNG, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER 6 (2021), https://perma.cc/EVD3-46MY.

incarcerated from their communities.[23] There is a clear link between civic participation and lower recidivism rates.[24] "Denying the right to vote to an entire class of citizens is deeply problematic, undemocratic, and counterproductive to effective reentry."[25]

Today, there are over 2.2 million people in U.S. prisons and jails, which is a 500% increase in incarcerated persons over the last forty years.[26] This problem is not going away on its own, and felon disenfranchisement laws are only going to perpetuate it.[27] However, mass incarceration, and subsequent felon disenfranchisement, does not touch all communities equally.[28] The U.S. prison system exists today as a result of racist sentencing policies, implicit racial bias, and socioeconomic inequity.[29] Because this system imprisons BIPOC at such a disproportionate rate, it also takes the right to vote from the BIPOC community at similar rates, allowing for the continued oppression of BIPOC through a system that is veiled as color-blind.[30] In other words, the disparities in incarceration rates by race ultimately become disparities in voting rights.[31]

Rahsaan Hall, director of the Racial Justice Program at the ACLU of Massachusetts, said that "[i]t's easy to point out the person that's obviously doing racist things. . . . It's harder to have a conversation about the people who are maintaining systems of oppression . . . and until we get to that and start teasing that apart, there's really not going to be any substantive change."[32] Keeping laws in place that disenfranchise people with felony convictions plays a huge part in maintaining a system of oppression, specifically because these laws have such an onerous effect on BIPOC.[33] "[R]ace-neutrality in disenfranchisement law masks the impact of political

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[23] *Id.*

[24] *Id.* ("In one study, among individuals who had been arrested previously, 27% of non-voters were rearrested, compared with 12% of voters.").

[25] *Id.*

[26] *See Criminal Justice Facts*, THE SENT'G PROJECT, https://perma.cc/LPL6-NE47 (last visited Mar. 7, 2022).

[27] *See* Uggen et al., *supra* note 11.

[28] *Criminal Justice Facts*, *supra* note 26.

[29] *See Criminal Justice Facts*, *supra* note 26 (indicating the disparity between incarceration rates for people of color versus white people).

[30] *See Criminal Justice Facts*, *supra* note 26.

[31] *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 364–66 (2012).

[32] *Boston's Complicated and Enduring Legacy of Systemic Racism*, ACLU MASS. (June 21, 2017, 4:45 PM), https://perma.cc/2JDE-L7NH.

[33] *See* Cammett, *supra* note 31, at 364–66.

dislocation and powerlessness in low-income communities of color."[34] This sort of "race-neutral" façade allows people to justify a system of punishment despite its stark racially disparate outcomes.[35] As the United States continues to incarcerate BIPOC at disproportionate rates and to take away their rights, BIPOC have less say in the very laws and practices that lead to incarcerating them at such astronomical rates.[36] Depriving a large population of the fundamental right to vote thus perpetuates the foundation of systemic racism upon which the United States is based.[37]

The high level of incarceration in America, at such racially disproportionate rates, "underscores why the ability to exercise one's fundamental right to vote is vital: individuals who are incarcerated are often unable to advocate for policy changes that could save their lives, because they are unable to access the ballot."[38] Yet, felon disenfranchisement is merely one example of the structural issues that the criminal system faces. *Prisoners of Politics* and the response pieces within this volume delve into the many other detrimental practices that perpetuate the cycle of mass incarceration.

Professor Barkow explains that "[w]e would achieve better public safety outcomes if punishment decisions were modified as new information becomes available."[39] Research has shown that many forms of punishment are counterproductive and do little to achieve better public safety outcomes because

> long-term sentences produce diminishing returns for public safety as individuals 'age out' of the high-crime years; such sentences are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety.[40]

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[34] Cammett, *supra* note 31, at 365 (citing legal scholar Michelle Alexander).

[35] *See generally* George Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851 (2005); Nichanian, *supra* note 16.

[36] Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1086–88 (2019).

[37] *See* Cammett, *supra* note 31, at 405; Nichanian, *supra* note 16.

[38] NAILA AWAN & SHRUTI BANERJEE, HOW TO END *DE FACTO* DISENFRANCHISEMENT IN THE CRIMINAL JUSTICE SYSTEM 1 (2020), https://perma.cc/2VVS-26ZB.

[39] BARKOW, *supra* note 2, at 73.

[40] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 121 (2018), https://perma.cc/Q9QL-EQQL.

Professor Barkow said that she had three goals in writing this book.[41] First, she wanted to show the latent fallacies present in criminal policies enacted under the cloak of being "tough on crime."[42] Second, she wanted to use concrete facts to show how we have ended up with such counterproductive policies.[43] Third, she wanted to help "craft a new agenda that sets its sights on dismantling the institutional architecture destined to continue producing excessive criminal laws and policies that do not promote public safety . . . ."[44] The *New England Law Review* is honored to be featuring Professor Barkow's work and supporting her effort to share these goals within the legal community and beyond.

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[41] BARKOW, *supra* note 2, at 202.

[42] BARKOW, *supra* note 2, at 202.

[43] BARKOW, *supra* note 2, at 202.

[44] BARKOW, *supra* note 2, at 202.

Thinking Outside the Cage: A Review of Rachel Barkow's *Prisoners of Politics*

CLARK M. NEILY III*

INTRODUCTION

The images of former Minneapolis police officer Derek Chauvin calmly murdering George Floyd in broad daylight as other officers stand guard; of Buffalo police brutally shoving septuagenarian Martin Gugino backwards onto his head and then marching past as he lies bleeding on the sidewalk; and of Rochester, NY officers pepper-spraying the eyes of a handcuffed nine-year-old girl[1] underscore a disturbing truth: Whether its agents are applying the law or violating it, the essential function of a criminal justice system is to hurt people—by using various acts of physical force, by taking property through fines and forfeitures, by locking people up in cages, and, in some cases, by executing them for capital crimes.

Of course, that's not all a criminal justice system does, and the harms it inflicts are not meant to be gratuitous. Rather, the point is to make society better off by discouraging destructive behavior, incapacitating those who threaten our well-being, and rehabilitating the redeemable. Still, we would do well to remember that when we empower police and other agents of the criminal justice system—whether it be with more equipment, more laws, more prerogatives, or more money—those resources will generally be used to hurt people in some way. So it's imperative that we understand how the system actually works and that we divest ourselves of any comforting illusions about the way it wields power in our names.

Rachel Barkow's *Prisoners of Politics* fills that prescription to perfection.

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[1] Janelle Griffith, *'You Did it to Yourself,' Officer Tells Nine-Year-Old Girl Pepper-Sprayed by Police in Newly Released Video*, NBC NEWS (Feb. 12, 2021, 3:41 PM EST), https://perma.cc/KFV6-48KF.

Indeed, I agree so completely with Prof. Barkow that the prospect of reviewing her book felt daunting at first because it seemed I would have little to do beyond summarizing her thesis, highlighting some especially choice quotes, and concluding with a resounding, "What she said!" Upon further reflection, however, I was able to identify an area of *possible* disagreement—not with anything Prof. Barkow actually says in the book, but rather with something that went unsaid. Simply put, I agree with her that our criminal justice system is profoundly pathological and desperately in need of strong medicine, and I also agree with the prescription she offers, as far as it goes. But I would augment that prescription with an extra dose of nontraditional "medicine" designed to shock the system out of its complacency and make it more receptive to the more conventional reforms that Prof. Barkow suggests.

The medical analogy seems particularly apt given the structure of the book itself. *Prisoners* is divided into three parts that would be familiar to any practicing physician. Part I represents a kind of patient history and assessment in which Barkow catalogues various pathologies of the system, including overcriminalization, excessive incarceration, insufficient accountability, centralization of power among prosecutors, implacable resistance to meaningful change, and the near-total displacement of juries by coercive plea bargaining.

Part II amounts to a diagnosis in which Barkow explains the cause of these pathologies, which she attributes to a combination of "penal populism"[2] and "institutional intransigence"[3]—that is, a populace more intent on doling out harsh punishments than reducing crime, and a class of criminal-justice professionals who exercise their considerable political influence to make the process of arresting, convicting, and incarcerating people as efficient and trouble-free for themselves as possible.

The third and final part of the book is Barkow's prescription—a list of systemic changes that she believes provide the best prospect of rescuing the system from its largely self-inflicted dysfunction. As she explains, "[t]he three key pillars of this new institutional framework" entail better oversight and control of prosecutors, "expert agencies designed to withstand political pressures" to adopt irrational policies such as excessively punitive sentencing, and "a robust role for courts in policing against government excess."[4] In essence, Barkow proposes to place the criminal justice system

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[2] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5 (2019) [hereinafter BARKOW, PRISONERS].

[3] *Id.* at 125.

[4] *Id.* at 202.

into a kind of receivership in which key policy decisions will no longer be made by police and prosecutors, but instead by a class of disinterested overseers who will ensure that the system works not for its own parochial interests but for the actual benefit of the public.

As noted, I agree with all of this. I think Barkow's dismal assessment of the system is fundamentally correct in that: (1) the system criminalizes far too much conduct that would be better addressed by the government, if at all, through other means; (2) it frequently doles out excessively harsh punishments that are more likely to cause future crime than to prevent it; and (3) much of this dysfunction may fairly be laid at the feet of a prosecutor class that has managed to "combine legislative, executive, and judicial powers under one roof—the very definition of tyranny that the separation of powers was designed to guard against."[5] Finally—and perhaps most importantly for purposes of this review—I emphatically agree with Barkow that the combination of perverse public-choice dynamics, interest-group politics, and excessively passive judges creates a situation where only incremental change is possible through conventional channels, and "reform proposals remain modest because that is, at best, all the current system is capable of producing."[6]

This brings me to the area of possible disagreement I mentioned above, which is that I think there may be something missing from Barkow's prescription. Yes, it would plainly be salubrious to (a) devolve power from prosecutors and subject their discretionary decisions to greater oversight; (b) install a cohort of experts equipped by training and disposition to blunt the self-interest of the law enforcement lobby and the mindless savagery of "penal populism"; and (c) get judges back in the business of fully enforcing constitutional limits on the government's exercise of its police power. But it is difficult to see how a system that is as broken and captured as the one Barkow describes in *Prisoners* would ever permit the sweeping reforms she suggests—precisely because those reforms are so smart, so essential, and so likely to reconstitute the entire system if successfully implemented.

So here is what I propose. In medicine, some drugs are known to have a synergistic effect and are often prescribed in tandem because of the way they work together. According to my colleague Dr. Jeff Singer, who is both a practicing physician and a policy scholar, common examples include Zofran and dexamethasone (to reduce nausea and vomiting in cancer patients receiving chemotherapy), Percocet and acetaminophen (for pain relief), and

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[5] *Id.* at 130.

[6] *Id.* at 13.

a beta blocker like propranolol along with a calcium channel blocker to control high blood pressure.

What kind of medicine to give a patient—including particularly how potent and how risky—depends in part upon how sick the patient is. We don't prescribe opioids for a paper cut, nor do we try to fix a bleeding ulcer with Tums. So what metaphorical disease best expresses the level of pathology in our criminal justice system?

I suspect most criminal justice reformers would say the level of pathology in our system is akin to high blood pressure or a moderate case of pneumonia—that is, a worrisome condition in serious need of attention, but neither a true emergency nor something that would call for any type of aggressive, unconventional treatment. I strongly disagree with that assessment, and while I would not presume to speak for Prof. Barkow, I think the level of pathology she describes in our current criminal justice system is far worse than a metaphorical case of pneumonia. It's more like metastasizing cancer that calls for an aggressive course of treatment involving public policy "prescriptions" that emphatically *have not* been approved for use by government regulators.

Thus, I would complement Prof. Barkow's prescription with one that involves imposing various changes on the system unilaterally, without the support of policymakers and even in the face of concerted opposition by police, prosecutors, and judges. Before describing this unconventional proposal in more detail, I will offer one caveat and one illustration to explain why I think the time has come to seriously consider it.

The caveat is that I am emphatically not suggesting the system's key pathologies can be cured with the kind of unconventional, unilaterally imposed changes I describe below. To the contrary, a complete and durable fix will certainly require the active support of players within the system. But going back to my point about synergistic medicines, I think the prospects of getting those actors on board with real reforms could be enhanced by delivering a major shock to the system that significantly disrupts the smooth functioning of the industrial-sized conviction machine our system has become.

Next, as a supplemental illustration of the institutional intransigence that Prof. Barkow so ably documents in *Prisoners*, I will briefly describe my own experience working on qualified-immunity reform, which has driven home to me the dismaying accuracy of her assertion that "law enforcement officials stand ready to fight any significant changes that would undermine their almost complete discretion to operate th[e] system to their own

advantage."[7]

Qualified immunity is a judge-made affirmative defense that enables government officials to avoid liability unless their misconduct involves the violation of a "clearly established" right.[8] In order for a right to be "clearly established," there must be a preexisting case in the relevant jurisdiction with nearly identical facts that would (hypothetically, since we know police do not typically read judicial opinions)[9] put a reasonable officer on notice that the particular thing he did—attacking an unarmed and unresisting suspect with a police dog, let's say[10]—was impermissible.

Lack of proper accountability is a persistent theme throughout *Prisoners*, and I have described qualified immunity as the "cornerstone of our near zero accountability policy for law enforcement."[11] Equally troubling are the astonishing injustices that qualified immunity routinely produces by enabling rights-violating police officers to avoid liability for everything from pile-driving a bikini-clad, unarmed woman onto her head at a public swimming pool,[12] to stealing more than $200,000 in cash and gold coins while executing a search warrant at a private residence,[13] to shooting a young boy in the back of the leg while blasting away at a non-threatening family dog.[14] As Justice Sotomayor explained in her dissent from a *per curiam* opinion affirming qualified immunity for an Arizona police officer who shot a woman several times through a fence because she failed to heed his command to drop a kitchen knife:

> [The majority's] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers . . . . that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just . . . about this, I respectfully dissent.[15]

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[7] *Id.* at 9.

[8] For a thorough and accessible discussion of qualified immunity doctrine and its practical implications, *see* Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://perma.cc/QQP2-R7Z2 [hereinafter Schweikert, *Moral Failure*].

[9] *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 605 (2021).

[10] *See* Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018).

[11] *See, e.g.*, *All Things Considered: 'Qualified Immunity': A Doctrine That Made It Much Harder to Sue Police* (Nat'l Pub. Radio broadcast June 8, 2020) (transcript and audio at https://perma.cc/4D9X-3BFT).

[12] Kelsay v. Ernst, 933 F.3d 975, 977–78, 986 (8th Cir. 2019) (en banc).

[13] Jessop v. City of Fresno, 936 F.3d 937, 940 (9th Cir. 2019).

[14] Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

[15] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

The timing of that case in April 2018 was serendipitous, as my Cato colleagues and I had just launched a campaign to eliminate qualified immunity earlier that year.[16] The centerpiece of that campaign was the so-called "cross-ideological amicus brief"[17] that Cato designed and recruited more than a dozen public interest organizations across the ideological spectrum to join—from the ACLU and NAACP Legal Defense and Education Fund[18] on one side to Alliance Defending Freedom and the Second Amendment Foundation on the other.[19] However, after a remarkable term in which the Supreme Court synchronized its consideration of 13 different petitions involving qualified immunity, the Court simply denied certiorari in all of those cases, allowing a number of conscience-shocking lower court decisions to stand, including the three described in the preceding paragraph.[20]

In effect, this passed the qualified-immunity hot potato over to Congress and state legislatures to clean up the mess the Supreme Court created when it invented qualified immunity out of whole cloth in a blatant act of judicial policymaking.[21] But despite relentless criticism of the doctrine by judges[22] and academics[23] and ordinary citizens,[24] the concerted effort of virtually the entire criminal justice reform community, and an extraordinary grass-roots movement that includes the founders of Ben & Jerry's ice cream along with

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[16] *Cato Leads the National Campaign to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020), https://perma.cc/6M3C-676R.

[17] *E.g.*, Clark Neily & Jay Schweikert, *Corbitt v. Vickers*, CATO INST. (Dec. 20, 2019), https://perma.cc/H6N6-U2PH (describing and linking to Cato's cross-ideological qualified immunity brief in support of cert. petition in *Corbitt v. Vickers*, No. 19-679).

[18] *LDF Joins Cross-Ideological Coalition in Submitting an Amicus Brief in Case Challenging Qualified Immunity*, NAACP LEGAL DEF. AND EDUC. FUND (Apr. 10, 2019), https://perma.cc/922D-SBSV.

[19] *See, e.g.*, Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://perma.cc/Z9GX-E866.

[20] *See* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST. (June 15, 2020, 11:27 AM), https://perma.cc/8QSA-4SQW; Jay Schweikert, *Supreme Court Will Soon Decide Whether to Reconsider Qualified Immunity*, CATO INST. (Apr. 28, 2020, 4:26 PM), https://perma.cc/SH2X-7GYH (describing cases).

[21] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47–48, 54, 80 (2018).

[22] *E.g.*, Schweikert, *Moral Failure*, *supra* note 8.

[23] *See, e.g.*, Nathaniel Sobel, *What Is Qualified Immunity and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://perma.cc/S4W7-QGG6.

[24] *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), https://perma.cc/87WK-R3LC.

more than a thousand professional athletes and celebrities like Aloe Blacc and Killer Mike,[25] Congress has done precisely nothing to address qualified immunity since the murder of George Floyd by Minneapolis police in May of 2020. Unfortunately, the reason for Congress's inaction is perfectly clear and a prime example of the intransigence that Prof. Barkow describes. Simply put, the law-enforcement lobby drew a blue line in the sand and made clear that it considers qualified-immunity reform to be a political "third rail."

The takeaway is that if Congress cannot summon the political will to repeal such a palpably illegitimate, unjust, and unpopular legal doctrine as qualified immunity, the question naturally arises—What *can* Congress accomplish in the face of implacable opposition from the criminal justice establishment? And the answer, as Prof. Barkow persuasively argues in *Prisoners*, is not very much.[26]

Turning to unconventional changes that can be imposed on the system unilaterally as a complement to Prof. Barkow's policy prescriptions, I find particularly relevant her observation that "[t]he Framers constructed a constitutional architecture to guard against pathological politics, but their design assumed a world of criminal trials and a simpler body of laws that no longer exists."[27] To elaborate a bit on this trenchant point, the Framers failed to anticipate—indeed, could not reasonably have anticipated—three especially pernicious features of our current system: (1) the rise of a professional criminal-justice class consisting of some three million police, prosecutors and prison guards, many of them organized into extremely potent public-employee unions[28] (and who have come to epitomize the very sort of faction that Madison famously described in Federalist 10 as being "united and actuated by some common impulse . . . *adverse[] to the rights of other citizens, or to the permanent and aggregate interests of the community*"[29]); (2) the government's astonishing success in replacing constitutionally prescribed jury trials with a point-and-convict system of coercive plea bargaining[30] that vastly increases the number of prosecutions the

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[25] *End Qualified Immunity*, CAMPAIGN TO END QUALIFIED IMMUNITY, https://perma.cc/EM62-JCHD (last visited Jan. 16, 2022) (listing coalition partners and supporters).

[26] BARKOW, PRISONERS, *supra* note 2, at 13.

[27] BARKOW, PRISONERS, *supra* note 2, at 126.

[28] *See* CHRIS W. SURPRENANT & JASON BRENNAN, INJUSTICE FOR ALL: HOW FINANCIAL INCENTIVES CORRUPTED AND CAN FIX THE US CRIMINAL JUSTICE SYSTEM 91 (2020).

[29] THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

[30] *See* BARKOW, PRISONERS, *supra* note 2, at 131 (explaining how the "one-two punch" of

government can pursue by delivering convictions cheaply and reliably without the expense, inconvenience, and uncertainty of jury trials;[31] and (3) a judiciary that imposes virtually no restraints on what conduct the other branches may criminalize, or the severity of punishments that can be inflicted on transgressors,[32] thus enabling the government to incarcerate people on a whim and inflict savage trial penalties[33] on those who buck the system by forcing prosecutors to prove their guilt rather than confessing it. Thus, as Prof. Barkow concludes, "[i]t is no surprise . . . that we have the bloated codes and prisons we have today because there is no one keeping an eye on this Leviathan to make sure it makes any sense."[34]

Yet, there is still hope, because while the system may be intransigent, it is not invulnerable. Indeed, as further explained below, in some ways the system's complacency represents more of an opportunity than an obstacle.

I. Pretrial Detention—Bail Funds

Despite the constitutional presumption of innocence and the Eighth Amendment's prohibition against excessive bail, it is widely understood that judges often set bail with an eye towards ensuring that certain defendants remain locked up pending trial, even if it cannot be shown that they represent a threat to public safety.[35] But as Prof. Barkow explains, "excessive use of pretrial detention under [the money bail] model creates public safety risks" because it severely disrupts the lives of detainees and their families and "correlates with longer sentences and higher recidivism rates."[36] In other words, "pretrial detention itself . . . is criminogenic" because "[a] person detained pretrial is, all else being equal, more likely to

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mandatory minimums and charge-stacking by prosecutors "virtually knocked jury trials out of the system"); *see also* Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 719–20 (2020) (describing various coercive levers American prosecutors use to induce guilty pleas and concluding that coercive plea bargaining has rendered the constitutional right to a jury trial functionally illusory).

[31] *See, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

[32] *See* BARKOW, PRISONERS, *supra* note 2, at 186–91 (explaining that "[t]he federal courts—led by the Supreme Court—have gutted many constitutional guarantees").

[33] *See* BARKOW, PRISONERS, *supra* note 2, at 131; *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 30, 34–35 (2018), https://perma.cc/DKR5-SFKS [hereinafter THE TRIAL PENALTY].

[34] BARKOW, PRISONERS, *supra* note 2, at 138.

[35] *See* BARKOW, PRISONERS, *supra* note 2, at 58.

[36] BARKOW, PRISONERS, *supra* note 2, at 58.

commit crimes later on."[37]

But in keeping with Prof. Barkow's overarching thesis, we should not be surprised that, while pretrial detention appears to inflict serious costs on individuals and society at large, it does yield short-term benefits to a particular group of people—namely, prosecutors. That's because pretrial detention increases the chances that a defendant will save the government the expense and inconvenience of a trial by agreeing to plead guilty.[38] This is particularly important from the standpoint of mass incarceration because, as discussed above, plea bargaining substantially increases the number of cases prosecutors can pursue by massively decreasing the unit cost-per-conviction. Because trials are so labor-intensive—it is not unusual in the federal system for a single trial to take weeks or months, and some have gone for more than a year—a prosecutor who expects half of her cases to go to trial will not be able to handle nearly the same caseload as one who can count on roughly two percent of her cases going to trial, which is the current figure in the federal system.[39] Thus, prosecutors who know the vast majority of their cases will end in guilty pleas instead of trials can cast their nets more broadly and be less selective about which cases they decline. They can afford, in other words, to process a much higher volume of defendants through the conviction machine. And they do.[40]

Bail funds have proven to be an effective antidote to the pathology of excessive pretrial detention, and their potential remains largely untapped. Simply put, a bail fund is a charitable organization that puts up bail for people who cannot afford it. Bail funds have been around in one form or another since the first ones were created by the ACLU in the 1920s to assist people arrested for sedition during the First Red Scare,[41] but their modern resurgence began about ten years ago in New York City with the advent of

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[37] BARKOW, PRISONERS, *supra* note 2, at 58.

[38] *See* BARKOW, PRISONERS, *supra* note 2, at 58 (citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–29 (2017)).

[39] John Gramlich, *Only 2% of Federal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CTR. (June 11, 2019), https://perma.cc/KTS6-8XDN.

[40] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (documenting pronounced increase over time in the likelihood that prosecutors will decide to pursue a given case instead of declining it).

[41] Robin Steinberg et al., *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA CRIM. JUST. L. REV. 79, 82 (2018).

the Bronx Freedom Fund[42] and the Brooklyn Bail Fund.[43] There is now a national organization called The Bail Project, which grew out of the Bronx Freedom Fund and whose mission statement elegantly summarizes the philosophy of bail funds:

> The Bail Project combats mass incarceration by disrupting the money bail system—one person at a time. We restore the presumption of innocence, reunite families, and challenge a system that criminalizes race and poverty. We're on a mission to end cash bail and create a more just, equitable, and humane pretrial system. Because bail is returned at the end of a case, donations to The Bail Project National Revolving Bail Fund can be recycled and reused to pay bail two to three times per year, maximizing the impact of every dollar.[44]

It is impossible to overstate the potential impact on our system if it suddenly became impossible to incarcerate people pending trial simply because they could not afford bail. To a high degree of certainty, prosecutors would find it more difficult to induce guilty pleas and would therefore pursue fewer cases, resulting in fewer lives derailed by the loss of jobs, housing, custody of children, and other life-shattering disruptions that pretrial detention so often precipitates.[45] True, the system has tried to push back against bail funds—including a pending bill in Texas that would limit which sorts of defendants bail funds are allowed to assist[46]—but those efforts face a steep uphill battle, both in court and in the court of public opinion. Moreover, in the small number of jurisdictions that adopt such measures, they should be fairly easy to circumvent through appropriately discrete acts of civil disobedience.

II. Involuntary Encounters with Police—"Pocket Lawyers"

This one has been a pet project of mine for several years. After watching countless YouTube videos of police cajoling,[47] intimidating, and deceiving[48]

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[42] *The Bronx Freedom Fund*, BRONX FREEDOM FUND, https://perma.cc/NRA8-ZCP2 (last visited Jan. 16, 2022).

[43] *Securing Freedom, Dismantling Injustice, Fighting for Transformative Change*, ENVISION FREEDOM FUND, https://perma.cc/M5Q2-ZN85 (last visited Jan. 16, 2022).

[44] *Mission*, THE BAIL PROJECT, https://perma.cc/99HH-V2KS (last visited Jan. 16, 2022).

[45] *See* BARKOW, PRISONERS, *supra* note 2, at 58.

[46] *See* Jen Rice, *A Texas GOP Bill Would Make It Harder for Nonprofits to Bail People Out of Jail*, NAT'L PUB. RADIO (July 29, 2021, 5:09 AM ET), https://perma.cc/W448-ECX6.

[47] Robby Soave, *Cop Asks Driver: 'Why Is It That Everyone Who Plays Frisbee Golf Smokes Weed?,'* REASON, (Oct. 10, 2014, 1:19 PM), https://perma.cc/BH4Y-82C2.

[48] Peter Holley, *Police Falsely Told a Man He Couldn't Film Them. 'I'm an attorney,' He Said. 'I*

people into waiving valuable rights during traffic stops and other police-initiated encounters, I began asking friends who were criminal defense attorneys to estimate what percentage of their clients said or did something during their initial contact with police that made it virtually impossible to defend them later on. The consensus figure was well above fifty percent. Based on what I was seeing in those videos, I became skeptical that people's inadvisable decisions to answer incriminating questions ("Have you been drinking tonight?"), consent to warrantless searches, or act in other ways contrary to self-interest were simply the result of not understanding their rights. Instead, it became increasingly clear to me that these unfortunate decisions often had less to do with the citizen's ignorance than with the officer's ability to exploit the combination of fear, uncertainty, and hope that so often attend involuntary encounters with armed and largely unaccountable agents of the state.

Consider how helpful it would be to have a lawyer during that incident—not to argue with the officer, but instead to provide some initial advice and then discreetly monitor the ensuing interaction to protect against any exploitative behavior by the officer, such as a suspicionless request to search the vehicle or an improper order to wait for a PCC dog to arrive.[49] Very simply, the concept is to use smartphones and other technology to provide free,[50] live legal counsel to people during involuntary encounters with law enforcement in order to help them make wise decisions and assert their rights with confidence.

There are of course myriad technical challenges to overcome, but I am convinced they are just that—technical challenges. Suffice to say, we all have a First Amendment right to communicate with others that, unlike many other constitutional rights, judges typically will not allow the government to infringe pretextually.[51] Accordingly, it will not be enough for a police officer

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Know What the Law Is.', WASH. POST (Mar. 10, 2017), https://perma.cc/MV5D-UANQ.

[49] *See* Rodriguez v. United States, 575 U.S. 348, 357 (2015) (holding that police may not prolong a traffic stop in order to await the arrival of a police dog). I use the term "probable-cause-creating" (PCC) dog rather than the more conventional "drug-sniffing dog" because I believe the former more accurately describes their actual role in our system.

[50] The cost of this service need not be prohibitive and could be supported through charitable donations of money and professional services. It might even be possible to make the entire operation self-financing.

[51] *Compare* Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (holding that the harms the government recites for regulating speech must be "real" and that its burden will not be satisfied by "mere speculation or conjecture"), *and* Snyder v. Louisiana, 552 U.S. 472, 479–84 (2008) (rejecting prosecutors' pretextual explanations for striking black jurors), *with* Whren v. United States, 517 U.S. 806, 813, 819 (1996) (holding that police may offer pretextual justifications for

to *assert* that a motorist's access to counsel during the traffic stop was distracting, or that it interfered with the investigation, or presented a safety concern—he will have to *prove* it. With improvements in technology—and as pocket lawyers and their clients optimize their behavior in light of experience—it will become increasingly difficult for police to prevent citizens who want access to real-time legal advice from getting it. Accordingly, it is not fanciful to imagine an alternative reality in which people rarely slip up during encounters with police, leading to fewer arrests, harder prosecutions, and more cases being declined.

III. Inadequate Representation—Public Defenders on Steroids

Most people would agree that public defenders are, on balance, chronically under-resourced. They earn relatively low salaries for the nature of the work they perform, they often carry enormous caseloads, and they have limited access to investigators, experts, paralegals, and other support staff that lawyers depend on to maximize their effectiveness. This can create a dynamic where prosecutors know full well that opposing counsel cannot possibly provide a fully zealous representation to every one of their clients because there are literally not enough hours in the day. Moreover, in many jurisdictions, indigent defense is provided by private lawyers working on a flat fee, which "incentivize[s] attorneys to do as little work as possible on each case . . . . because all costs for a case, such as investigation or consulting expert witnesses, come out of the same fee and thus directly eat away at whatever profit the attorney makes."[52]

The idea here is to stop thinking of indigent defense as something that only the government can or should fund and persuade private individuals and charitable foundations that a key element in addressing mass incarceration is forcing the government to work as hard as the Constitution requires for every single conviction. The more time prosecutors spend on a case with properly resourced defense counsel—responding to motions that might not otherwise have been filed; addressing facts discovered by investigators who might not otherwise have been available; bolstering expert testimony that would otherwise have gone unchallenged—the less time they have to work on other cases and the more selective they will have to be about which ones to pursue.

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constitutionally infirm traffic stops, including those motivated by race).

[52] BRYAN FURST, A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 6 (2019), https://perma.cc/99Y4-DSQG; *see also* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2284–88 (2014) (describing flat-fee and other perverse financial incentives in greater detail).

It is probably not possible to vastly augment indigent-defense resources simultaneously across the country, but it shouldn't be necessary either. Instead, the idea would be to deploy this strategy (or, even better, all of the unconventional, unilateral strategies proposed in this review and more) one jurisdiction at a time, suddenly making the work of a given prosecutor's office substantially more laborious by virtue of the suddenly level (or at least more nearly level) playing field between prosecutors and defendants. Ideally, this enervating change in working conditions would be sustained until the law-enforcement lobby in that particular jurisdiction finally comes to the bargaining table ready to embrace real changes instead of the usual meaningless window-dressing that so often poses as criminal justice "reform."

IV. Coercive Plea Bargaining—Founding-Era Informed Juries

The final unconventional reform I will propose relates to another interest Prof. Barkow and I share, which is revitalizing the criminal jury as an inherently political institution with the avowed power to check government power by making its own judgments about the application of the law and acquitting factually guilty defendants in order to prevent injustice.[53] As Prof. Barkow and others have observed, the constitutional right to a criminal jury trial ensures (or, more precisely, was meant to ensure) that the government cannot punish people "unless a group of ordinary citizens agreed."[54] Accordingly, it is impossible to have mass incarceration without mass adjudication. And it is impossible to have mass adjudication without coercive plea bargaining. Why is that? The answer is quite simple.

Our system is famously optimized to have a strong preference for producing false acquittals rather than false convictions. This bedrock tenet of post-Enlightenment criminal justice, sometimes referred to as "Blackstone's ratio," is typically expressed as the maxim that "it's better that ten guilty men go free than one innocent man be convicted."[55] The willingness to acquit the guilty in order to minimize the chances of convicting the innocent is manifested in various ways throughout our system, including particularly the requirement that a defendant's guilt be proven beyond a reasonable doubt to the satisfaction of a *unanimous* jury.[56]

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[53] *See* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–51, 63–65 (2003).

[54] *Id.* at 34.

[55] For an interesting discussion about different ratios that have been proposed by different thinkers over time, *see generally* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997).

[56] Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

Together with various defense-favoring evidentiary standards such as the Confrontation Clause and the exclusionary rule, these standards create an environment in which trials represent a far more attractive adjudicative mechanism to criminal defendants seeking to avoid convictions than to prosecutors seeking to obtain them.

And yet, more than ninety-five percent of criminal convictions in our system are obtained through guilty pleas by defendants who have somehow been persuaded to waive their extraordinarily valuable right to a jury trial and simply condemn themselves instead. What on earth could induce a rational person to exchange the possibility of acquittal and freedom for the certainty of conviction and punishment? The answer is pressure, and lots of it.

Though most prosecutors, judges, and Supreme Court justices continue to embrace the comfortable fiction that American-style plea bargaining is free from undue coercion, we know this to be false. Among other things, there are the hundreds of false guilty pleas uncovered by the Innocence Project[57] and various conviction integrity units, and documented in horrifying detail by the National Registry of Exonerations.[58] Indeed, even some judges have acknowledged how coercive plea bargaining can be, as have certain components of the Department of Justice.[59]

The question naturally arises whether there is any effective antidote to coercive plea bargaining given the fearsome array of levers available to prosecutors—including the infliction of often quite savage "trial penalties" on those recalcitrant defendants who gum up the works by refusing to plead guilty[60]—and the collective indifference of the judiciary.[61] I believe the answer is yes, and that the best place to look is into the hearts of prosecutors to determine which threats to the smooth functioning of the conviction machine scare them the most. As best I can tell the thing prosecutors fear most is this: A jury that understands how the system really works—or what I like to call a "Founding-era-informed jury."

Unlike modern juries, Founding-era juries generally knew what the consequences would be for the defendant if they voted to convict and about

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[57] *See generally* Glinda S. Cooper et al., *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234 (2019), https://perma.cc/E2KP-DP87.

[58] *See generally The National Registry of Exonerations*, U. MICH. L. SCH., https://perma.cc/QK9K-B7P7 (last visited Jan. 16, 2022).

[59] *See, e.g.*, Neily, *supra* note 30, at 736–39 (documenting examples).

[60] *See* THE TRIAL PENALTY, *supra* note 33, at 6.

[61] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978) (affirming life sentence imposed as trial penalty on defendant who refused five-year plea offer).

their power to acquit against the evidence (or "nullify") in order to prevent injustices.[62] But people who understand their ability to protect criminal defendants from unjust punishments and prosecutorial misconduct—including particularly coercive plea bargaining—by acquitting against the evidence are anathema to modern judges and prosecutors, who assiduously work to purge them from the jury pool.

Ultimately, however, the government's ability to reliably empanel such neutered juries depends on its ability to ensure that most people remain ignorant about the historical role of juries in our system and the key role they have played—and were meant to play—in protecting fellow citizens from unjust prosecutions.[63] In short, the government's ability to effect mass adjudication through coercive plea bargaining depends on its ability to deprive criminal jurors of truthful information about their historical role in the system. It depends, in other words, on censorship.

Now imagine that someone created a video with superb production values and A-list Hollywood talent that explained, in vivid and compelling terms, how people could protect one another from our system's many injustices—including not just coercive plea bargaining but also racial biases, rampant overcriminalization, and mass incarceration, to name a few—by exercising their power as jurors to acquit fellow citizens whenever the government failed to make the moral case both for conviction *and* the punishment it seeks to inflict. The video could remind jurors not just of their right to acquit against the evidence to prevent injustice, but also of their right to ask any questions they have about the case, such as what the consequences will be for the defendant if they convict and the substance of any plea offers made by the prosecution. The video could also suggest some of the reasons why this information might be withheld and remind potential jurors that ultimately it is up to them alone to decide whether they are persuaded that it would be just to convict a particular defendant.

Given modern methods for precisely disseminating particular media to a desired audience, judges and prosecutors might find it difficult to completely eliminate from the jury pool citizens who had seen the video. Prosecutors would also find it difficult to suppress the distribution of the video (though some would doubtless try), and if the campaign were successful, they would eventually have to live with the reality of jurors who understand just how far the government has gone to eliminate citizen

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[62] *See, e.g.*, Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 886 (2019); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 94–96 (2006).

[63] *See* Cover, *supra* note 62, at 905.

participation in the administration of criminal justice and how they can push back against that pernicious trend.

CONCLUSION

Strong medicine? Perhaps. But if the metaphorical state of our criminal justice system is closer to a metastasizing cancer than a bad case of the flu—as I am convinced it is (and as I suspect Prof. Barkow may agree)—then, to coin a phrase, the question is not what are we going to prescribe; the question is what *aren't* we going to prescribe?

In sum, *Prisoners of Politics* provides an unflinching look at a criminal justice system that fritters away its moral and political legitimacy with every indefensible new crime it enacts, every excessively harsh punishment it imposes, every innocent defendant it coerces into pleading guilty, and every shortcut it embraces for sidestepping constitutional provisions designed to protect us from the hypercarceral Leviathan that Prof. Barkow so chillingly describes. Whether the patient's pathologies can be cured remains to be seen. But it is clearly time to consider a more aggressive course of treatment. Much more.

Prisoners of Myth

JONATHAN SIMON*

INTRODUCTION

One of the most forceful lines of reform analysis and criticism in contemporary criminal law and procedure begins with the rather striking gap between executive action in criminal law and in almost every other part of our sprawling modern administrative state and proceeds to imagine closing that gap. Normally when executive actors wish to enact new rules or apply them to people in new ways, they have to go through various procedures of rulemaking designed to allow public notice and comment and to give impacted citizens an opportunity to a hearing before being subjected to any deprivations based on those rules. With the police and prosecutors who pull many of the levers that engage people in the criminal process, things are very different to say the least. Police can stop, search, or arrest a person, even using deadly force to do so, without any prior hearing (not even the summary ex parte hearing involved in a judge issuing a warrant). The police's actions will be reviewed, if at all, only at an arraignment some days later. In the rare situation police actions are held to be violations of a person's constitutional rights, the judge-made doctrine of qualified immunity protects officers from personal liability unless the violated right had been clearly established (generally by a past similar judicial ruling). Moreover, police departments can establish enforcement strategies at will and change them generally without public notice or comment.[1]

Prosecutors, generally the most influential actors in punishing, can select which of a potentially wide variety of crimes to apply to a citizen's conduct, and under many sentencing systems they virtually select a sentence

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1 *See, e.g.*, Boston Police Department, *Rules and Procedures*, BPD NEWS, https://perma.cc/9PWL-2EME (last visited Mar. 9, 2022) (noting for example in Rule 100 that changes were made to the rule but not listing when the rule was updated or in what ways).

that can range from probation to years or even decades of imprisonment with essentially no hearing or review and absolute immunity even from unconstitutional decisions. Prosecutors stand for election, and the public may be able to learn something about how many cases they have lost to jury acquittals or "hung juries," but their policies for case selection or use of enhanced sentencing provisions are generally unavailable to the public. Their discretion and its insulation from accountability has been enshrined as central to our entire system of criminal justice.[2]

No one has been a more compelling advocate for the administrative reform of criminal law and law enforcement than Rachel Barkow, the Vice Dean and Charles Seligson Professor of Law at NYU Law School. In her recent book, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*,[3] Barkow offers a host of practical and politically achievable administrative reforms at the prosecutorial and sentencing stages of the criminal process, steps that promise to move the country significantly away from its forty-year long infatuation with unleashing police and affirming prosecutorial discretion.

Professor Barkow understands well that mass incarceration is about more than institutions, especially given our deep history of racism in the administration of justice, but she makes a compelling case that institutions represent levers for change. Having observed recent efforts to reform federal sentencing law from the unique vantage point of a Commissioner on the U.S. Sentencing Guidelines Commission from 2013 to 2019, Barkow knows as much as anyone in academia can about how powerful the populist politics of "getting tough on crime" are, and how well they have served in aligning the representative institutions of government, like Congress and state legislatures, with the accumulation of power by law enforcement executives.

Part II of *Prisoners of Politics* is grounded in astute observation of the complexity and variability of the political environment for administrative reform. More than any other recent book on criminal justice reform, Barkow's analysis is disciplined throughout by a keen sense of the limits and opportunities for institutional reform built into the highly politicized space for criminal justice policy. For example, Barkow highlights the potential for reform-minded electorates in large urban areas to elect "progressive prosecutors" capable of wielding discretion to diminish incarceration even while proposing significant administrative constraints on prosecutorial

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[2] *See* Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, JRANK, https://perma.cc/6CGL-37H3 (last visited Mar. 9, 2022).

[3] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

discretion in other respects. These are not necessarily contradictory. Progressive prosecutors like Los Angeles District Attorney George Gascon have in fact implemented some of the kinds of proposals that Barkow supports.

The forward looking proposals in Part III are presciently crafted with an acute sensitivity to the kind of political backlash that we have already seen with the "defund the police" slogan.[4] They also reflect deft redeployment of the canon of purposes of punishment embraced by the federal and most state criminal legal systems, including the consequentialist goals of crime prevention through deterrence, incapacitation, rehabilitation–which Barkow identifies with–and retribution, which she is less keen on.[5]

I'm going to use this brief essay to add another layer to Professor Barkow's analysis of the political and institutional obstacles to reform, one that incorporates history into the present through attention to the culture generally,[6] and specifically the domain of myth. To tame the dragon of American punitiveness (or at least return it to something closer to its pre-1980s shape) administrative reforms of criminal justice have to be aligned with a social movement that makes the punitive state itself a direct threat to public safety and well-being.

At once both a kind of civil religion and a publicly-available-but-privately-consumed fantasy of control, punishment in the United States has long been invested with mythic meanings that are rarely, if ever, subject to close examination or testing. This helps explain why, as Rachel Barkow puts it, "very few powerful groups stand in the way of the push for broader and more severe criminal laws."[7] It is not simply because as the powerful they benefit from severe criminal laws–they may not always–but because hundreds of years of investing the power of punishment and punishers mythic beliefs in their social benefits have endowed them with a very real halo effect.

Making use of the tools of modern administrative law to make criminal justice institutions more accountable to empirical testing of the rationalist explanations given for punishment is an important step. It is in the nature of myths to avoid regular testing. But once we include the often archaic and

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[4] *See* Jessica M. Eiglin, *To 'Defund' the Police*, 73 STAN. L. REV. ONLINE 120, 120 (2021), https://perma.cc/P2LP-97E8.

[5] *See* Ewing v. California, 538 U.S. 11, 21–22 (2003) (discussing how a higher sentence under a recidivism statute does not violate the Eighth Amendment).

[6] *See generally* PHILIP SMITH, PUNISHMENT AND CULTURE (2008) (exploring the cultural influences behind our ideas of punishment).

[7] BARKOW, *supra* note 3, at 115.

theological meanings invested in punishment by the tradition of what was once called "western legality" in general, and its distinctive genealogy in the enterprise of colonizing North America in particular, the differences between punishment and the other organs of the modern welfare state come into focus. Older than almost any other part of the modern state, criminal courts have been repeatedly invested with mythical properties while tied to a progressively larger and more aggressive criminal justice machinery.

FOUR MYTHS OF THE AMERICAN PUNITIVE STATE

Law students learn about the four major "purposes of punishment" in the beginning of their 1L criminal law class.[8] While retribution, deterrence, reform, and incapacitation may also justly be called myths, they are not drivers of popular punitiveness like the myths I have in mind, although they are connected to them in many ways. Four evils in particular form the central pillars around which punishment has been invested with mythic powers of redemption and salvation. These "folk devils"[9] come from specific periods of our history, but they continue to haunt us in modern guise through the enabling discourses of clergy, criminology, journalism, and policy innovation: the penal debtor; the idle person or "vagrant"; the "dangerous degenerate" whose criminal traits are incorrigible; and the "disorderly" whose deviant norms can overwhelm the pro-social norms whose informal enforcement is the key to keeping neighborhoods safe. Individually and collectively, these myths make it difficult to cabin criminal law enforcement within rational administrative frameworks; indeed, they often invade such frameworks, overwhelming the boundary setting function.

Unless we heed these myths and demons, administrative reform of the criminal law may go the way of what was, in many respects, the most significant effort in American legal history to administratively reform a particularly problematic piece of the criminal legal system—i.e., the death penalty. All the things (e.g., racism, arbitrariness, inhumanity) that have convinced many over the years, including Supreme Court justices, that abolishing the death penalty is the only way to square with modern legal values, apply to the criminal justice system as a whole.[10] The Supreme

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[8] *See, e.g.*, CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 6, 11–12 (4th ed. 2019).

[9] STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1–2 (Routledge Classics 2011) (invoking another important strand of cultural criminology).

[10] *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 1–2 (2017).

Court's infamous *McCleskey v. Kemp*[11] decision, narrowly upholding the Georgia death penalty against Equal Protection and Eighth Amendment arbitrariness claims based on the statistical analysis of race effects in Georgia capital punishment (both race of the victim and race of the defendant), is a striking testimony to the Court's recognition of an inexorably mythic quality to punishment decisions and the sacredness of prosecutorial discretion.

Over the course of three centuries of political development, the American penal state[12] has experienced four phases of rapid institutional expansion of its punitive sector. The first one, which came along with colonization, was the criminal court and was the key legal technology through which the colonization project was undertaken.[13] The project of settlement and enslavement seems to have encouraged and enhanced development of the public prosecutorial function, which even pre-Revolution developed more rapidly here than in the metropolitan center.[14] The second phase, which began at the very end of the eighteenth century and the first decades of the nineteenth, saw the emergence in North America of penitentiary style prisons and, toward mid-century as the profits of slavery generated enormous growth through immigration in the large cites of the coast, public policing. The third, in the interwar years of the early twentieth century, often and misleadingly called the "Progressive era", expanded court powers to include juvenile and family court interventions, probation, and parole supervision following imprisonment. The fourth is associated with a scaling up and coordination in favor of incarceration of the existing parts of the punitive state.

Each of these expansions was met by considerable resistance.[15] Whether police or the juvenile court, many citizens viewed these new governmental institutions with alarm as to their intrusive power and their cost. The battle

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[11] 481 U.S. 279, 305–06 (1987).

[12] As with most aspects of political and governmental authority in the United States, it is difficult to speak singularly of the "state" since power is exercised through so many levels, and the local government can far exceed the reach of the federal government. Nonetheless, I will refer to the "penal" or "punitive" state to describe all legal authorities and institutions connected to crime and punishment.

[13] *See generally* CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865 (Cambridge Univ. Press 2010).

[14] S*ee generally* JOHN BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660–1750: URBAN CRIME AND THE LIMITS OF TERROR (2001) (explaining formally public prosecution in the Imperial center waited until the early 20th century and discussing the system of private prosecution in England).

[15] S*ee generally* ANTHONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES (2019) (discussing that resistance).

for them was ultimately won through the promotion of powerful myths about the threat posed by crime to the social order and the consequent benefits of punishment.

I'm not the first to call punishment a myth,[16] and many more than four myths could be named by most students of the field. While there are indeed many, these four stand out in the history of American punitive state development as the most generative myths, root myths that have given rise to numerous subsidiary myths. Each one objectifies crimes and those who commit them as a distinctive kind of threat to law and sovereignty itself.[17]

I. The Penal Debtor and the Myth That Punishment Strengthens Sovereignty

By penal debtor I mean not so much the recently rediscovered significance of fines and fees in dragging out the hold of criminal punishment on many American families, but something that helps explain why that kind of penal debt is so commonly imposed, including on people with already precarious existences. The oldest myth in our punitive religion (one that long predates settlement in North America) is that a crime itself creates a kind of debt to the law. Strikingly, this debt is not to the actual victim, if there is one, but to be collected by the sovereign in the form of the penal state. Whatever injury may have been done to the victim, it is this metaphorical injuring of the law's power that the one convicted is condemned for.[18] It is common to say of individuals who have served significant prison sentences that they have "paid their debt to society" (the latter being a popularization of sovereignty appropriate to democratic societies).

While paying debt sounds benevolent, since it implies that the criminal debtor will recover previous good standing by enduring the penalty

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[16] *E.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); Richard Lowell Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 REGENT U. L. REV. 1, 4 (1995); Philip Smith, *Narrating the Guillotine: Punishment Technology as Myth and Symbol*, 20 THEORY, CULTURE & SOC'Y, no. 5, 2003, at 27, 27–51 (2003).

[17] Elsewhere one might simply say "the state", but America's civil religion combines a deep belief in sovereignty, and the collective use of violence against perceived domestic enemies, with a skepticism about the state. The obvious contradictions in this is one of the reasons criminal law is so important to the civil religion. If punishment is an okay expression of sovereignty that does not set off alarms about state expansion, but welfare is not, then they are not equal ways of reducing crime.

[18] *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 76–77 (2011) (discussing the philosopher Friedrich Nietzsche's speculation about the origin of penal law in commercial law).

honorably, the myth has a double edge for both the punished and the society that punishes. Toward those "condemned" to penalty, the debt metaphor, with its demand for an accounting, contains a scarcely veiled presumption against under-payment and fear that some part of that debt will be evaded or forgiven. As the millions of Americans who experienced incarceration over the past decades of mass imprisonment can attest, the prison gate hardly marked an end to penalty for them, but rather perpetuated a path of continued correctional supervision, often tied to fees and fines, and spells of re-incarceration triggered by technical violations or new arrests.

For the punitive society, the debt metaphor invests punishment itself with a redemptive value. If the sovereignty of the law is impugned by criminal violations, punishment is uniquely able to restore it. This feature lies in the original theological roots of this metaphor, the parallel between divine law and judgment and that of earthly law and sovereign justice.[19] In both cases, an ontological divide prevents repayment in any other form since the sinful human and criminal citizen do not inhabit an equal state with the offended sovereigns (divine and territorial). This leaves the sovereign with the real power to enforce the law, or in some cases to recognize an exception in the form of pardon or clemency, but also creates a powerful negative association between mercy and weakness. Crime, like debts, must normally be paid. A sovereign that routinely ignores the flouting of its most important laws, the penal code, does not seem to be one at all. Around this metaphoric structure, the myth of sovereignty holds for punishment a unique power to sustain the larger beneficent framework of law and the guarantee of authority behind. From the Fourteenth Century to contemporary politicians like Donald Trump and Jair Bolsonaro, the association between punitive responses to crime and the overall strength of political leadership has remained a potent source of legitimacy. The slogan "law and order" does not even need to mention punishment. It is built in the linkage, the way law produces order, by the very meaning of the "and."

Debt, and the myth of sovereignty it promotes, helps make sense of one of the great problems of contemporary American criminal justice that Professor Barkow identifies and hopes to reform—i.e., the combination of very long prison sentences with intense institutional resistance to allowing those sentences to be revisited, revised, or relieved.[20] As the modern legitimacy crisis of the post-World War II welfare states pushed

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[19] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 71–73 (1983).

[20] Ironically, if prison sentences were analogized more directly to debt, there might be more pressure on states to discount the outsized numbers.

governments across the wealthy industrialized democracies to rely more on punishment to demonstrate sovereign strength,[21] use of the kind of revisions that Professor Barkow urges through several institutional mechanisms (clemency, parole, compassionate release) has withered, demonstrating the punitive edge of the myth. Many states have abolished or restricted parole as a mechanism for early release (although California is leading a possible countertrend). Traditional executive clemency, once relatively common, has shrunk to a tiny fragment of its past. Even compassionate release, a policy in the federal system and many state correctional systems that allows imprisoned people with less than six months to live to petition for administrative release, is almost never given. Most recently, President Biden has insisted that people imprisoned in federal prisons sent home to protect them from the COVID-19 virus return to prison to complete their sentences despite any serious risk of future crimes.

In *Prisoners of Politics*, Professor Barkow points to a different kind of "cultural" source of meaning that impinges on the rationality of sustaining law prison sentences, one anchored in a well-established cognitive bias (presumably acquired through cultural learning over generations) known as the "endowment effect," in which people "react far worse when those lose something they once had than they do if they do not receive something in the first place."[22] Barkow calls for reinvigorating the institutional mechanisms that once worked around this endowment effect, including parole and clemency,[23] and to grant even more power for experts to guide criminal justice policy more like they do in the regular administrative state, with empirical research and accountability for optimizing public safety perhaps enforced by reinvigorated courts.

I would argue that the mythic linkage of crime and debt and punishment and redemption is deeper than the endowment effect, and may be a necessary correlation for its application to something like a prison sentence that does not readily fit conventional understanding of an object that one has a possessory interest in. In the typical experiment demonstrating this effect, the subject is given a real object, like a coffee mug, tee-shirt, or pen as

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[21] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 29–30 (2001).

[22] BARKOW, *supra* note 3, at 75.

[23] Some evidence suggests that governors often felt politically pressured to grant clemency from friends and family of the person imprisoned. Parole was embraced in some states at the end of the 19th century to relieve some of this pressure on the elected executive and moving it to a less visible and appointed administrative commission. *See* Sheldon L. Messinger et al., *The Foundations of Parole in California,* 19 LAW & SOC'Y REV. 69, 69, 100, 102 (1985).

something the person possesses and is then asked to give up for compensation. These subjects do not need mythic associations to endow that possession with a sense of personal possession or attachment. Turning punishment in the form of a prison sentence into a possession that citizens (perhaps collectively) hold, while quite real now, required centuries to forge through metaphor and myth the belief that state punishment belongs to all of us and endows us and our laws with strength.

II. The Vagrant or Idle Poor Person and the Myth That Punishment Can Provide Discipline

The core idea that infused the great 19th century expansion of the punitive state in the post-Revolutionary United States to include prisons and eventually professional policing was the inevitable danger to property and even public peace posed by the idleness of the poor, especially those perceived as constitutionally inferior of character, like enslaved persons and eventually immigrants from colonized spaces like Ireland. Even today, the term idleness has an enduring resonance with moralistic judgment. Only in very recent years has there been grudging acknowledgment that time off work is necessary for mental and physical health, counterbalancing a historic belief that, to quote frequent religious formulation, "the devil will make work for idle hands."

Perhaps the most iconic version of this myth, born appropriately at the dawn of the commercial age in London, is William Hogarth's series of engravings, first published in 1747 entitled *Industry and Idleness* and depicting, over twelve images, the fates of two apprentices in an early industrial loom; one whose hard work and moral virtues ultimately make him Lord Mayor of London, and the other whose idleness and proclivity toward vice leads him to execution at Tyburn, London's infamous site of public hanging (now rebranded as Marble Arch Mound).[24] Hogarth, who specialized in luxury images for the rich, had these printed up inexpensively so that they could be put up on the walls of local commercial establishments to educate young apprentices as to the fates awaiting them.

Most historians agree that the modern prison, and later police, were introduced largely on the belief that they would discipline individuals (and the working class population more generally) with forced labor (or direct religious exhortation), close oversight, regulation of working class life, and punitive correction.[25]

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[24] Sean Shesgreen, *Hogarth's* Industry and Idleness: *A Reading*, 9 EIGHTEENTH-CENTURY STUD. 569, 569–70 (1976).

[25] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 25, 115 (Alan

While modern criminology no longer views the "idle poor" with the explicit tone of condemnation common among moral entrepreneurs of the 18th and 19th century, the myth that idleness among the urban poor leads to increasing criminality remains deeply embedded in our punitive institutions and assumptions. The specter of forced labor, and the supposed discipline it brings, hangs over prisons, even as it is interwoven with enforced idleness.

In an era of mass unemployment for many, and precarious work for many others, this mythic equation and the demonization of idleness at its heart drives a tendency toward mass incarceration and mass supervision. This is especially cruel when the long sentences and collateral exclusions facing formerly imprisoned people, which Professor Barkow rightly calls out about our current system, means sustainable employment is extremely unlikely for a great many former prisoners. As Professor Barkow points out, some 10 to 15 percent of people released from prison end up homeless.[26] One could also suspect a much higher percentage of people released from prison are older former prisoners and those living with chronic illness. And yet our entire system of correctional supervision and related fees and fines exerts a relentless punitive pressure on those convicted of crimes to engage in labor or live in a punitive simulation of labor made up of highly arbitrary and burdensome (for those with virtually no property) goals to achieve.

Unfortunately, the demonization of idleness and the myth of discipline continues to infect many reform minded ideas that propose returning to a more ambitious agenda of rehabilitation with our punishments. The belief that we can nip serious crime in the bud by disciplining the wayward tendencies of the idle poor to do bad things like use drugs, gamble, sex work, or other forms of survival transactions returns in full force as soon as we imagine reducing incarceration through improving our rehabilitative competence.

Yet this is exactly the ground that many reform agendas, including Professor Barkow's, would have to dig into. For example, adopting administrative measures that would hold prisons responsible for their outcomes sounds good: "prisons should be assessed on the basis of things like recidivism rates, post-release employment rates, and substance abuse desistance."[27] But actually, each of these is an extension of the vagrancy folk

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Sheridan trans., Vintage Books 2d ed. 1995) (1975); DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 93 (Routledge rev. ed. 2017).

[26] BARKOW, *supra* note 3, at 89.

[27] BARKOW, *supra* note 3, at 72. The degeneracy myth also expresses itself in another pathology Barkow nails: the tendency of contemporary reform measures, like post marijuana legalization expungement laws, to leave an exemption for "public safety," again giving

devil, the criminalization of "idleness," and the myth that punishment can discipline people in a way that will enable the kind of calculating self-governance that is the ideal of all liberal societies. Post-release unemployment, substance abuse (the usual companion of idleness in the myth of discipline), and recidivism itself are factors towards reincarceration since parole and probation officers are more likely to seek reincarceration for technical violations when supervisees are unemployed.

None of this is to imply that chronic unemployment or self-medication with unregulated drugs for a variety of illnesses and disabilities is good for anyone, nor that discouraging both is an inappropriate problem for government intervention. It is to question the mythic status that links these conditions to crime and public disorder. This linkage is forged out of the history of an extreme demand for labor extraction in the era of capitalist accumulation and fueled in the United States by the enslavement of much of the labor force. In this context, idleness was defined as virtually anything not exploitable by the owners, including self-care, solidarity building recreation with others, and labor in the service of one's self or family. The enslaved person fishing or gathering, or cottage farming, was deemed idle, and any enslaved person on the public roads without a pass was subject to immediate corporal punishment by the "slave patrol."[28] Those on probation or parole today often find themselves subject to similar demands that they perform labor or its bureaucratic equivalent even if they would benefit from spending their time on family or self-care.[29]

III. The "Dangerous Degenerate" and the Myth That Policing Could Eliminate Most Crime

The elements of the modern criminal justice system that we still have in the United States were set in place during the interwar years when a combination of criminal court reforms at the state and local levels, and Prohibition at the federal level, expanded the disciplinary punitive state in a number of ways.[30] The traditional core of the criminal law, the courts, received new powers over juveniles (juvenile justice) as well as a new kind

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prosecutors vast punitive power on the myth of their expertise.

[28] *See* WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 168, 222–23, 226, 228 (2017).

[29] *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 87–89 (2020).

[30] LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 7, 12 (2015); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 50 (Routledge 2017).

of sanction, probation, which allowed courts to sentence people convicted of (or pleading guilty to) misdemeanors and even felonies to a period of "supervision" by a court officer in place of a sentence to jail or imprisonment. The prison systems in many states were enhanced with new powers to permit early release (parole) followed by supervision in the community by a state agent. At the federal level, efforts to repress the burgeoning criminal market in alcohol distribution and sales led to an expansion of the whole federal criminal system, including new prisons and new enforcement agencies as well as growing federal oversight of the whole emerging system of criminal administration.

Now largely forgotten is how much this whole expansion was leveraged to the demonization of "degeneracy" and the widely accepted idea that most social problems, like criminality and mental illness, were the result of inherited traits that the largely Anglo-Saxon and upper class educated elites, who promoted eugenics as a governmental program, associated with non-White races as well as immigration from European races perceived as less advanced than "Nordics." The great myth of eugenics, widely accepted by political and scientific leaders in the interwar years (and for a good deal longer perhaps), held that crime and other social problems would largely be eliminated by removing the sources of degeneracy (through prohibition, immigration restriction, segregation, and anti-miscegenation laws) and using the new individualizing tools of criminal justice to remove the degenerates themselves.

After World War II the concept of "degeneracy" and the larger eugenic program fell into disrepute, a consequence of their overt racism, their association with Nazi era violations of human rights, and considerable advancement in biology that shattered the alleged scientific basis of race. Yet, importantly, there is a strong association between the demonization of degeneracy and the myth of eugenics forged by the high levels of crime in American cities and large-scale immigration or migration (such as the Great Migration).

Criminologists and sociologists soon replaced degeneracy as a biological notion, with related concerns about "deviance" rooted in culture, upbringing, or environment but always internalizing the criminal threat or dangerousness to the individual. With the restriction of immigration in the 1920s, African Americans, the new arrivals in large American cities, came to be the primary focus of crime prevention and increasingly the target of control-oriented policing and selection for harsher punishment in the courts and prisons. Most importantly, the sense embedded in punitive institutions that the core of the American crime problem involved a largely irredeemable criminal class, associated with young Black people in urban areas, remained

firmly in place.[31]

Few today would comfortably traffic in rhetoric like degeneracy or the very idea of a born criminal. But modern concepts like "career criminal" have taken its place, and a great deal of the edifice of mass incarceration has unleashed even greater punitive power throughout the system targeted at the dangerous, persistent, serious offender. This myth helps explain one of the pathologies that has been largely ignored by critics of mass incarceration until Rachel Barkow—the tendency of modern legislatures and Congress to define substantive criminal offenses very broadly to capture the maximum number of possible people breaking the law while setting the punishments around the most alarming and dangerous of them. It was the eugenic era and the myth of the dangerous degenerate that helped sell America on the necessity of individualized justice and gave to prosecutors a primary role in deciding which of the many people who meet the offense terms require the heavy incapacitative force of these sentences.

Barkow sensibly seeks to limit this prosecutorial discretion through a variety of institutional mechanisms ranging from resources to charging limitations to increasing judicial discretion. Unfortunately, efforts to reform administratively by imposing more transparency about the crime prevention rationality of punitive sanctions is likely to push the system to double down even further on the most modern version of the degeneracy demon: the antiseptic notion of risk and especially the much-discussed use of actuarial prediction, powered by algorithms, to identify the "high risk".[32]

IV. The Disorderly and the Myth of "Broken Windows" Enforcement

The era of mass incarceration, the exit from which is Professor Barkow's primary objective, represents the largest expansion of the punitive state in American (and world) history. While relatively few new institutions were formally added (and a few came back, like solitary confinement), all of the existing punitive institutions—courts, police, prisons, parole, and probation—were expanded and, until recently, programmed to be more networked in applying their punitive power. This overall effort can be called the "war on crime," to reflect the name given to it by advocates of punishment and to recognize its enduring military model.[33]

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[31] *See* Jonathan Simon, *"The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 790 (2020).

[32] BARKOW, *supra* note 3, at 59 (endorsing risk assessment tools to replace bail for pre-trial detention decision making and possibly other sentencing related decisions).

[33] *See generally* MICHAEL S. SHERRY, THE PUNITIVE TURN IN AMERICAN LIFE: HOW THE UNITED STATES LEARNED TO FIGHT CRIME LIKE A WAR (2020).

The rise of mass incarceration represents a reactivation of all the previous folk devils and myths of American crime control. As Barkow sharply outlines, the slogan "law and order" and criticism of overly lenient courts and parole systems highlighted the myth that leniency is weakness and led to new laws establishing harsh mandatory minimum prison sentences for many offenses and the elimination formally or informally of parole release from prison. The war on drugs of the 1980s and its demonization of young Black residents of high poverty, inner city neighborhoods endlessly emphasized their idleness and the lack of working role models (blamed at the time by many on "welfare dependency"). Young Black people were also the primary target of a revitalization of the degeneracy demon and its eugenic myth that the dangerous minority exists and can be effectively confronted by a more scientific law enforcement approach.

At the same time, the full expansion of punitiveness in this war on crime is inadequately captured by mass incarceration because it also involved an incredible increase in punitive policing and privatized exclusion (like gated communities and business improvement districts weaponized with private security) that did not center on prison or jail necessarily. The era of mass incarceration created its own folk devil, the disorderly (i.e., those with supposedly anti-social norms and habits), and its own myth that punitive responses were required to prevent minor disorder from becoming chaotic lawlessness, or "broken windows" policing in the name of its most famous theory.

Disorder, of course, is a long-term theme in our civil religion of punishment. Disorder in the post-Revolutionary period was part of the larger crisis of social order that brought about a systemic failure of punitive sentences to collect the debt of unpunished crime.[34] Disorder in the sense of lack of regulation was blamed along with squalor for some of the danger associated with the idleness of the poor in the early 19th century.[35] Disorder also went along with degeneracy, confirming in life habits the internal traits that eugenicists attributed criminality to.

What made the new demonization of disorder in the 1980s distinctive was its central role in producing crime or resisting it. Now it was not necessary to blame serious and violent crime on the bad people occupying high crime neighborhoods, or on their bad (idle) habits, but rather crime

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[34] *See generally* MICHAEL MERZANE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 (1996).

[35] *See* PATRICK COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS 13–14 (Good Press 2019) (1796).

could be blamed on disorder itself; the failure of formal and informal authorities to enforce pro-social norms, and to correct antisocial behavior, could itself lead to more serious and violent crime. In the influential article *Broken Windows: The Police and Neighborhood Safety*, published in the Atlantic Magazine in 1982 just as mass incarceration was becoming visible, two academic policing experts made the case that fighting violent and serious crime directly was too late.[36]

The way to save neighborhoods from the irreversible tipping point of becoming a dreaded "high crime neighborhood" was to encourage the norms and habits of law-abiding citizens and discourage the norms and habits of people who break the law or associate with them. Police could help favor the former by using their stop and arrest powers to enforce local pro-social norms against people, e.g., lying down in doorways or aggressively "panhandling." Some well-known examples of policing over the next decade seemed to enact this strategy—for example, the ticketing of so-called "squeegee men," mostly older Black men (many of them probably formerly imprisoned by the 1990s) who would wipe down windshields on busy Manhattan thoroughfares when the cars were stopped at traffic lights in the hopes of attaining a donation. Much of what was called "broken windows" policing was in fact just an intensification of aggressive policing in neighborhoods already considered high crime that had been going on since the 1960s.[37] In many middle-class communities this myth has become part of the rationale for placing police officers in schools and drug testing high school athletes. More broadly, at the mythic level, the "broken windows" theory encouraged a practice of leaning into prisons and police as a strategy to win a war not against crime itself but against norms of disorder and discord.

Today, the demonization of disorder and the myth of "broken windows" work directly against some of the reform policies for prosecutors touted by Professor Barkow and practically everybody else: policies that encourage prosecutors to simply not charge many minor crimes and to avoid using sentencing enhancements to lengthen prison sentences. Efforts to support these policies based on the kind of cost-benefit analysis that is central to an administrative model of reform run into the problem that the myth of "broken windows" has endowed both the enforcement of laws

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[36] James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety,* THE ATLANTIC MONTHLY, March 1982, at 29, 29–38.

[37] Policing is heavily local in the United States. For one study of an important city, Chicago, *see generally* SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER (2019).

against minor crimes and the imposition of long prison terms.

CONCLUSION: MYTH BUSTING AND THE ADMINISTRATIVE REFORM OF AMERICAN CRIMINAL JUSTICE

It is no secret that criminal law and criminal justice are lands of myth. That is surely why they make such repetitive grist for popular entertainment as well as politics. Twenty years ago, when I was studying the rise of what seemed like a new political rationality in democracies around the government's role in fighting violent crime,[38] I missed the significance of the deeper history of criminal justice in America and the myths that have made it a kind of civil religion. What I took for a short-term political logic had deeper roots and greater capacity for renewal and reinvention. In *Prisoners of Politics*, Professor Rachel Barkow has made a compelling case for thinking about criminal law in the post-mass incarceration era as largely a problem of administrative reform—that is, careful attention to decision making institutions and procedures to create the right incentives for decision makers inside those institutions, especially prosecutors, to exercise their discretion in ways that achieve public goals behind punishment. Yet, while Rachel Barkow's *Prisoners of Politics* is among the best books written on how to escape the political logic of mass incarceration, I now think that's not enough. In short, I'm saying "jump higher."

The elusive historical quest for rational criminal justice policies in the American experience is testament to a structural problem facing even the best recalibration of incentives. Judgments about the social benefits of punishment are highly inflated by the accumulation of powerful myths about punishment in political and legal culture. In distinction from the lived experience of punishment, which is nearly impossible to deny, the legislative vision of punishment is almost always a fantasy in which all of the complicated details of implementation are wished away. Bolstered by strong pre-empirical notions on the desirability of punishment, especially for the social groups that the American carceral state has historically concentrated on (Black people, queer people, unemployed people, young people), proposals to sustain or even extend the current scale of punishment have a huge advantage over proposals to shrink it.

Efforts to block mythic powers out with institutional solutions will never be entirely successful. Yet, the administrative reform vision for criminal justice is a promising start to contesting these myths. Making criminal justice

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[38] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 273 (2007).

institutions more accountable for what they do can create a context in which the racialized folk devils and idealized results that animate so much of America's history of campaigns to expand the criminal justice system can be exposed. But history teaches us that exposure alone is not enough. The power of punitive myths is that—like discipline, eugenics, and broken windows—they often represent themselves as innovative ways to accomplish the frequently frustrated goals of law enforcement (think about the popularity the "broken windows" myth still enjoys among many politicians and policy experts).

This means following up administrative reforms with substantial efforts to identify the way that specific historical constructions are programmed into the punitive aggravators in our system, including these myths of defaulting debtors, the vagrants or idlers, the "degenerates," and the disorderly. Revitalized by the latest journalism or criminology, these folk devils reappear along with renewed hopes that more focused efforts at discipline or risk selection will allow the system to escape its flawed strategies.[39] For example, serious efforts to audit the racial justice impact of new, algorithm-based pretrial release mechanisms should be considered an essential component of "bail" reform.[40]

Going forward, reformers need to identify these folk devils as powerful biases in even rational crime control policies and push for reforms that do not reproduce or rely on them. To take one concrete example, mandates to work in the absence of real jobs can often mean an extended punitive mandate to meet arbitrary performance goals set by a probation or parole officer on pain of being reincarcerated. Instead, we can imagine a reentry system that recognizes both the social and crime control value of having a formerly incarcerated person spend their time helping family and performing routine care activities in the household (if they are fortunate enough to have one) or neighborhood. But it would have to root out the deeply inscribed, and in this country often racialized, myth that links the poor to crime unless they are under the control of wage labor or worse.

All of Professor Barkow's recommendations are worth adopting, but sustained reductions in the scale of the carceral state will require strong bottom-up demand in the form of social movements directly opposed to the

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[39] *See generally* MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 176 (2009). An outstanding example and a really useful book for reformers by my late friend.

[40] Their absence was notable in California's Proposition 25 in 2020. *See* Nigel Duara, *What the Failure of Prop. 25 Means for Racial Justice in California*, CAL. MATTERS (Nov. 5, 2020), https://perma.cc/SS3S-VRBT.

current shape of punishment in America. In this we would all benefit from more engagement *between* institutionalists like Rachel Barkow and the largely activist (but sometimes also academic) community of abolitionists, some associated with the social movements who have rallied both in the streets and on social media under the Black Lives Matter (BLM) title or hashtag.[41] It is not necessary that the often abolitionist ethic of the BLM movement be compatible with the institutionalist logic of administrative reform. They respond to different contexts of strategic engagement and different historical timelines. What may be important is that institutional reforms that demand more rationality from criminal justice actors are enabled by a bottom-up struggle to diminish the popular hold that these myths historically have had.

Most importantly, these myths have to be directly contested by social movements grounded in clear experiences of how these myths are used to dispossess and injure Black people, queer people, and people of color more generally but always in location specific ways. The myths of the punitive state are formally color blind, but the anti-crime campaign against penal debtors, idleness, degeneracy, and disorder has come to focus on Black communities with increasing intensity since the beginning of the 20th century. No community has been more othered by these myths,[42] and while Black communities are not immune to them, the BLM movement is the first social movement in generations to make the anti-Black myths of the criminal justice system a central issue of civil rights. By rejecting the core premises behind each folk devil and punitive myth through the lived experience of Black communities, we can attack the presumption of good intentions that shields criminal justice institutions from any reckoning over harms done and avoided.

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[41] CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA 97–127 (2017).

[42] The experience of Asians, Latino, and Indigenous Americans rivals the Black experience of being othered and excluded in regions where these communities have been sufficiently numerous to be perceived as a threat.

Response to *Prisoners of Politics*: Decarceration Will Cost Women's Lives

WENDY MURPHY*

INTRODUCTION

In *Prisoners of Politics*, Professor Rachel Barkow argues that the mass incarceration of large swaths of criminals is the product of misguided reactionary public policies that fail to consider research showing that incarceration is ineffective and even harmful to society. She has a point, especially for crimes such as the sale of illegal drugs when people become involved because they struggle with addiction or simply because there is no alternative legal way for them to earn a living wage.[1] It makes sense not to incarcerate people who are sick or just need a good job. But applying a non-carceral approach to all crimes and all criminals conflicts with research showing that tough prosecution policies work well to reduce violent crime.[2] Regardless of the efficacy of non-carceral policies in some cases, Professor

* Adjunct Professor of Sexual Violence & Law Reform and Director of the Women's and Children's Advocacy Project at New England Law | Boston. I am grateful to my family for their patience when I became immersed in writing this article, and to Amanda Bray, Jessica Landry, Brooke Tideman, and Danielle Commisso for their support and research help. I also want to thank all the advocates, academics, researchers, and victims who bravely resist enormous political pressure to support the idea that abused women should want a weaker law enforcement response. As I discuss below, since the founding of our nation, women have been denied full Equal Protection rights under the Fourteenth Amendment, which means they are not yet entitled to equal treatment by police or prosecutors, or equal enforcement of the laws in court. This constitutionally authorized second-class citizenship is the primary reason women experience such high rates of violence and abuse. Before women can endorse the idea of decarceration, or any other policy that would weaken law enforcement's response to domestic violence, they have a right to experience the benefits of fully equal protection and enforcement of all laws that are supposed to protect them from harm.

[1] *See generally* ALYSSA STRYKER, RETHINKING THE "DRUG DEALER" 45 (2019), https://perma.cc/58CQ-XSEH.

[2] *See* Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L. J. 573, 580 (1999).

Barkow herself would probably resist applying a non-carceral policy to police who unlawfully shoot unarmed Black men even if research showed that an alternative to incarceration would protect public safety and deter similar offenses in the future. I feel similarly about applying a non-carceral policy to violence against women.

My review is not a criticism of the idea that public officials should consider alternatives to incarceration when methodologically valid science shows that a different approach will protect public safety and deter crime. I agree that alternatives are a good idea for some cases, but Professor Barkow ignores a wealth of scholarly research showing that incarceration and other strong law enforcement responses *are* effective—often life-saving—solutions for domestic violence crimes.[3] Thus, my review focuses on the impact of non-carceral policies in the context of violence against women.

I. Violence Against Women Is Fueled by Women's Inequality and Deserves Special Attention

A simple review of Professor Barkow's index suggests a lack of concern for abused women. It has no categories for "women," "rape," or "domestic violence." In fact, when Professor Barkow mentions victimized women in certain places in the book, it is sometimes with derision. For example, she writes that "victims' groups tend to focus on certain subgroups, such as women and children, and they often highlight cases involving white victims instead of the far more frequently victimized communities of color."[4] This derogatory sentence stands without citation and suggests, curiously, that victims' groups should not focus on women and children as "subgroups." I find this odd. As I establish later in this paper, women suffer violent harm ***because*** they are women. Pejorative labeling of groups that seek to recognize the class-based nature of their suffering as needless "subgrouping" is like criticizing the Anti-Defamation League for focusing on violence against Jews. People who are targeted for violence because of who they are in society have a right and a need to unite, politically and otherwise, in support of one another, and in opposition to the social and legal conditions that produce their suffering.[5]

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[3] *See* BARRY GOLDSTEIN, THE QUINCY SOLUTION: STOP DOMESTIC VIOLENCE AND SAVE $500 BILLION 47–50 (2014) (discussing that the "major elements of the Quincy Model that led to a dramatic reduction in domestic violence and other crimes were strict enforcement of criminal laws and protective orders, practices that made it easier for victims to leave their abusers").

[4] RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 114 (2019).

[5] *See generally* CRESSIDA HEYES, *Identity Politics*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY

In another section on "Policing Prosecutors," Professor Barkow bemoans the fact that police in the fifty-two largest cities in America arrested fewer homicide suspects when the victim was Black compared to when the victim was white.[6] This is a worthy observation, and it would have been a perfect place for Professor Barkow to also point out that police arrest fewer crime suspects when the victim is a woman,[7] but she says nothing about the way the criminal justice system discriminates against women by failing to address sex-based crimes fairly and effectively. Professor Barkow should care that every day in the United States an average of five females are killed by males,[8] a number almost twice as high as it was thirty years ago.[9] On the same page, Professor Barkow compares police "solve" rates on murder, rape, and robbery, and writes that "more than 59% of murders are solved, [but] only about 37% of rapes and 30% of robberies are [solved]."[10] This statement suggests that some form of justice occurred for the 37% of rapes that were "solved," and that rape is successfully addressed by law enforcement 37% of the time. In fact, one study found that only around 12% of rapes led to arrest and only 10% to prosecution.[11] The RAINN organization estimates that less than 3% of rapists serve even one day behind bars—[12] a number that has not changed in decades.

Professor Barkow even expresses concern about non-carceral restraints on the liberty of convicted sex offenders as a result of laws that restrict where

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(Edward N. Zalta ed., 2020 ed.), https://perma.cc/X2CT-3XRL.

[6] BARKOW, *supra* note 4, at 161.

[7] *See* MELISSA MORABITO ET AL., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 17 (2019), https://perma.cc/V327-AEY6 (summarizing that only 12% of rape cases reported by female victims to the Los Angeles Police Department from 2005 to 2009 led to arrests, and only 10% resulted in the filing of criminal charges).

[8] *See* Dawn Wilcox, *2018 Women & Girls Allegedly Killed by Men & Boys*, WOMEN COUNT USA: FEMICIDE ACCOUNTABILITY PROJECT (2018), https://perma.cc/PY2J-9S3V (identifying 1,864 women and girls allegedly killed by men and boys in the U.S. in 2018; 1,841 divided by 365 is 5.10).

[9] *But see* James Alan Fox & Emma E. Fridel, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976-2015*, 4 VIOLENCE AND GENDER 37, 39–40 (2017) ("[H]omicides involving females have been much more stable over time, exhibiting a general decline with relatively minor fluctuations since the late 1970s.").

[10] BARKOW, *supra* note 4, at 161.

[11] *See* MORABITO ET AL., *supra* note 7, at 17.

[12] *See The Criminal Justice System: Statistics*, RAINN, https://perma.cc/KH3H-XU9V (last visited Apr. 11, 2022) (noting that for every 1,000 sexual assault cases, only 310 are reported to the police, and only 25 perpetrators will be incarcerated).

they live and require them to register with the state as sex offenders.[13] But she says nothing about the serious restraints on liberty suffered by thousands of battered women living in secret shelters because the men who pose a threat to their lives are walking free in society. Is it not worth mentioning in a book about unjust restraints on liberty that battered women who have committed no crimes are forced to live in conditions of incarceration ***because*** the men who pose a risk to their lives are ***not*** incarcerated?

In another section entitled "The Constitution in Waiting," Professor Barkow writes at length about the various ways that courts have interpreted the Constitution such that it inadequately protects the rights of the accused.[14] Again, this is an important topic, but she never mentions the profoundly significant way that the Constitution authorizes inadequate protection of women in all areas of life by denying them full Equal Protection of the laws under the Fourteenth and Fifth Amendments. Women were excluded as "persons" from the Fourteenth Amendment's guarantee of Equal Protection when the Amendment was adopted in 1868,[15] which left courts free to treat women as second-class citizens subject to different and worse treatment under all laws, including laws against sexual and domestic violence. When women were finally recognized as persons for Equal Protection purposes in 1971, the Supreme Court qualified its ruling and held that the Equal Protection clause would provide lesser rights for women compared to other people in that sex discrimination claims would be subject to mere "rational basis" review by courts, while others would have their discrimination claims reviewed under the more protective standard of "strict scrutiny."[16] Things improved slightly for women in 1976, when the Supreme Court elevated the judicial review standard for women to "intermediate scrutiny," which was

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[13] BARKOW, *supra* note 4, at 179.

[14] BARKOW, *supra* note 4, at 187–91.

[15] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (ruling that Fourteenth Amendment's Equal Protection guarantee extended to "race, color, or nationality," but not sex); Strauder v. West Virginia, 100 U.S. 303, 307 (1879) (holding that the Fourteenth Amendment's Equal Protection guarantee was "primarily designed" for the "colored race"), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975). Note that the Supreme Court eagerly embraced, discussed, and applied the Equal Protection Clause to Strauder's and Yick Wo's discrimination cases, but completely ignored it and applied only the Privileges and Immunities Clause a few years earlier when addressing two women's claims of sex discrimination in Bradwell v. Illinois, 83 U.S. 130 (1873) and Minor v. Happersett, 88 U.S. 162 (1874). This different and worse treatment of women by the Supreme Court made clear that women were intentionally denied Equal Protection rights under the Fourteenth Amendment, even though such rights were granted to "persons."

[16] *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

better than "rational basis" review,[17] but much less protective than "strict scrutiny."

"Strict scrutiny" requires courts to strike as unconstitutional laws and policies that do not serve a "compelling" government interest, that are not "narrowly tailored" to serve that interest, and that fail to use the "least restrictive means" to accomplish the government's goal.[18] Under "intermediate scrutiny," the government's interest need only be "important," not compelling, and the "narrow tailoring" and "least restrictive means" tests do not apply.[19] The "narrow tailoring" and "least restrictive means" tests are crucial aspects of "strict scrutiny," but because they do not apply to sex discrimination, the government may enact laws and adopt policies that subject women to different and worse treatment.[20] This

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[17] *See* Craig v. Boren, 429 U.S. 190, 197–99 (1976).

[18] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).

[19] *Id*.; *see Craig*, 429 U.S. at 197–99.

[20] "Intermediate scrutiny" applies to sex/gender and illegitimate children (and LGBTQ persons according to some courts, though this is unsettled). In 1996, *Craig*'s intermediate standard was described by the Supreme Court as an "exacting" standard that requires the government to demonstrate an "exceedingly persuasive justification" for sex-discriminatory laws or policies. U.S. v. Virginia, 518 U.S. 515, 524, 533 (1996). While "exceedingly persuasive" was thought to be better than *Craig*'s "substantially related" test (*but see* National Org. for Marriage v. McKee, 649 F.3d 34, 56 (1st Cir. 2011) (holding that "exacting scrutiny" only requires proof of "substantial relation" not "exceedingly persuasive justification"), *abrogation recognized by* Gaspee Project v. Mederos, 13 F.4th 79, 84–85 (1st Cir. 2021)), there remain no requirements of "narrow tailoring" and "least restrictive means" (*but see* Americans for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2384 (2021) holding that "narrow tailoring"—but not "least restrictive means"—is required under "exacting scrutiny" in First Amendment disclosure law cases), and the government's interest still need only be "important" rather than "compelling," which leaves a lot of room for discrimination. Moreover, the "exceedingly persuasive justification" rule did not last long in Supreme Court jurisprudence after *Virginia*, because the Supreme Court ignored it entirely only a few years later in Nguyen v. INS, 533 U.S. 53, 58–59 (2001), where it required no proof from the government of "exceedingly persuasive justification" in a sex classification case. More recently, the Supreme Court decided Sessions v. Morales-Santana, 137 S.Ct. 1678 (2017), in which the "exceedingly persuasive justification" language reappeared, but the Court did not overturn *Nguyen*; it simply distinguished *Nguyen* on the grounds that the type of sex classification at issue in *Morales-Santana* was different. *Id*. at 1698. Because the Court in *Morales-Santana* denied relief, the reintroduction of *Virginia*'s "exceedingly persuasive justification" language is mere dictum. Regardless of whether "exceedingly persuasive justification" is presently a requirement under "intermediate scrutiny," the "exacting scrutiny" modification of "intermediate scrutiny" that women "won" in *Virginia* afforded women very little in terms of improved protections for their Equal Protection rights because *Virginia* added no requirement that the government "narrowly tailor" laws and policies and use the "least restrictive means" to achieve its goal.

means government officials—including lawmakers, police, prosecutors, and even the courts—have constitutional permission to subject women to second class treatment.

Women today remain second class persons under the Equal Protection clause because the Supreme Court has yet to grant them "strict scrutiny" review, and the Equal Rights Amendment, which would require "strict scrutiny" for women,[21] has yet to be adopted and validated.[22] A book about constitutionally unfair and inadequate treatment of human beings should include this vital information about half the population in the United States.

II. The Prevalence of Violence Against Women and the Failure of the Criminal Justice System

It is axiomatic that denying women full Equal Protection rights causes them to suffer high rates of violence and abuse.[23] Approximately ten million people per year experience domestic violence.[24] Women are much more likely to be victims of serious domestic violence than men.[25] Among the five females estimated to be killed each day by males in the United States in 2018, 92% were killed by males they knew.[26] The rate of male homicidal violence against females has increased since 2014.[27] Since many battered women are also raped by their batterers, it is significant that 90% of adult rape victims

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[21] *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (noting that adoption of the ERA would require courts to treat sex as a suspect classification subject to strict scrutiny review by the courts).

[22] Chris Marr, *Equal Rights Amendment Backers Sue to Void Deadline*, BLOOMBERG LAW (Jan. 7, 2020, 10:34 AM), https://perma.cc/HW4Z-E5DP.

[23] *See* In-Depth Study on All Forms of Violence Against Women, GAOR, 61st Session No. 122 (Add. 1), at 14, 27, 102, U.N. Doc. A/61/122/Add. 1 (2006), https://perma.cc/T6XY-HVEK (arguing that inequality is the root cause of violence against women); *see also Mobilizing Greater Global Investment in Gender Equality and Women's Empowerment*, U.N. WOMEN (Apr. 17, 2015), https://perma.cc/V3F5-X6NV.

[24] *National Coalition Against Domestic Violence*, NCADV, https://perma.cc/ARG7-F93U (last visited Apr. 11, 2022).

[25] *See* SHARON G. SMITH ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010-2012 STATE REPORT 126–27 (2017), https://perma.cc/BT5R-43Q2 (noting that more than 1 in 4 women experienced violence or stalking by an intimate partner during their lifetime as compared to 1 in 9 men); Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, 11 CRIME & JUST. 163, 181 (1989).

[26] VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2018 HOMICIDE DATA 3 (2020), https://perma.cc/6TJZ-GQM2; *see* Wilcox, *supra* note 8.

[27] VIOLENCE POLICY CTR., *supra* note 22, at 2.

are female,[28] and males account for most of those arrested for forcible rape.[29] In line with these data, the United States is ranked among the ten most dangerous nations on earth for women, and third most dangerous for sexual violence, tied with Syria.[30]

Without full Equal Protection rights, women do not receive effective response or redress from the state when they report domestic violence. In one study on family violence incidents involving children, only half of the domestic violence cases reported led to arrest, and only one in four of those arrested was convicted.[31] Overall, only 2% of the cases led to incarceration.[32] Approximately less than 3% of sexual assault perpetrators spend even one day behind bars.[33]

Given the woeful systemic response to violence against women, it is not surprising that women are reluctant to call police, and when they do, recantation is common, occurring in 80% of cases.[34] While victims recant for many reasons, a typical explanation is that they believe it is their safest option[35] and that the courts will take no effective steps to protect them.[36] In turn, reporting rates go down and rates of violence go up.[37] Not surprisingly, some victims of domestic violence take matters into their own hands, even killing their abusers and ending up incarcerated themselves, because they see no meaningful alternative.[38] It is a cruel irony that women are being

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[28] *Victims of Sexual Violence: Statistics*, RAINN, https://perma.cc/6TKG-CJQC (last visited Apr. 11, 2022).

[29] *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, *Crime in the United States 2011*, FBI: UCR, https://perma.cc/L3V6-ZY5S (last visited Apr. 11, 2022) (noting in 2011, males accounted for 98.9% of those arrested for forcible rape).

[30] Belinda Goldsmith et al., *Exclusive: India Most Dangerous Country for Women with Sexual Violence Rife – Global Poll*, REUTERS (June 25, 2018, 8:39 PM), https://perma.cc/MX2L-NSF6.

[31] *See* Sherry Hamby et al., *Intervention Following Family Violence: Best Practices and Help Seeking Obstacles in a Nationally Representative Sample of Families with Children*, 5 PSYCHOL. OF VIOLENCE 325, 330 (2015), https://perma.cc/4FMG-2R5A (noting that of the 130 incidents known to police in the study, 61 arrests were made, resulting in 16 convictions).

[32] *Id.*

[33] *See The Criminal Justice System: Statistics*, *supra* note 12.

[34] Joan S. Meier, Davis/Hammon, *Domestic Violence, and the Supreme Court: The Case for Cautious Optimism,* 105 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2006).

[35] *See* LUNDY BANCROFT ET AL., THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 99 (2d ed. 2011).

[36] *See* DONNA COKER ET AL., RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 2, 7–8 (2015), https://perma.cc/QF66-54WK.

[37] *Cf.* Emma Keith et al., *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, CENTER FOR PUB. INTEGRITY (Aug. 24, 2018), https://perma.cc/37G8-DVNG.

[38] *See* Starre Vartan, *Killing Your Husband to Save Yourself*, PAC. STANDARD (Oct. 16, 2014),

incarcerated for killing their abusers as a direct result of the men who abused them not being held accountable.

III. The Importance of Law Enforcement

The criminal justice system's pervasively inadequate response to violence against women is profoundly important, and while some of the data that demonstrates the benefits of tough prosecution policies in battering cases is not new, recent data from Russia makes clear that decarceration is a dangerous idea for the crime of domestic violence. In 2017, Russia passed a law decriminalizing domestic violence for offenses that result in bleeding or bruising, but do not cause substantial bodily harm such as broken bones or a concussion.[39] Such crimes are now considered administrative offenses and are subject to no more than fifteen days behind bars, or a fine, where previously such offenses were designated as crimes that carried up to two years of incarceration.[40] This decriminalization of domestic violence was followed by an increase in domestic violence,[41] and was cited as a key basis for an action filed against the Russian Government, on behalf of a domestic violence victim, with the European Court of Human Rights ("ECHR") under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[42] The ECHR agreed that the 2017 law caused a sharp drop in reporting[43] and was a move "in the wrong direction" that has led to "impunity for perpetrators," and the ECHR concluded that the legislation has failed to protect women from "widespread violence and discrimination."[44] The 2017 law was also cited as a reason why one abuser chopped off his wife's hands only days after police responded to her reports of abuse by merely admonishing the man,[45] and three sisters killed their abusive father in 2018.[46] In 2018, Russia's top human rights official called decriminalization a "mistake" and said new legislation was needed to

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https://perma.cc/BW5A-R3ST.

[39] Madeline Roache, *What Happened After Russia Decriminalised Domestic Abuse*, NEW HUMANIST (June 11, 2018), https://perma.cc/R7LJ-UXKS.

[40] Shaun Walker, *Putin Approves Legal Change That Decriminalizes Some Domestic Violence*, GUARDIAN (Feb. 7, 2017, 11:18 AM EST), https://perma.cc/PQH8-PX2R.

[41] *U.N. Committee Sides Against Russia in First Domestic Violence Ruling*, MOSCOW TIMES (Apr. 12, 2019), https://perma.cc/2PU9-8M9F.

[42] Volodina v. Russia, no. 41261/17, ¶¶49–50, ECHR 2019, https://perma.cc/7ZNM-458E.

[43] *Id.* ¶120.

[44] *Id.* ¶131.

[45] *Id.* ¶45.

[46] Anastasia Clark, *Russian Court Orders Tighter Laws to Stem Domestic Violence*, MOSCOW TIMES, https://perma.cc/M3GV-BDFA (last updated Apr. 9, 2021).

combat domestic violence.[47] The experience in Russia is consistent with other data including a major multinational study that found the mere existence of criminal laws that carry punitive sanctions has strengthened women's rights and helped to combat all forms of violence against women.[48]

Professor Barkow nowhere mentions what happened in Russia after 2017, and nothing in her book acknowledges the following research and scholarship that demonstrate why a strong law enforcement response to domestic violence, including incarceration, is vital to women's safety and literally saves lives:

A. *Arrests, Strong Law Enforcement Policies, and Recidivism*

1. The prevalence of re-offending for arrested offenders is half as frequent compared to non-arrested offenders.[49]
2. A meta-analysis of the findings from six studies found a deterrent effect from arresting batterers.[50]
3. A study of 3,495 incidents from 1987 to 2003 found a statistically significant deterrent effect from arresting batterers.[51]
4. A study of 5,466 couples in Seattle, Washington, found that arresting batterers was associated with statistically significant reductions in both the prevalence and frequency of future incidents of physical abuse.[52]
5. A study of sanctions for batterers between 1984 and 2005 found that more severe sanctions for batterers were associated with lower rates of recidivism.[53]
6. When police intervene in domestic violence cases, regardless of

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[47] *Decriminalization of Domestic Violence Was a "Mistake," Russian Official Admits*, MOSCOW TIMES (Dec. 3, 2018), https://perma.cc/AY8C-NAWB.

[48] *See* Andrew Morrison et al., *Addressing Gender-Based Violence: A Critical Review of Interventions*, 22 WORLD BANK OBSERVER 25, 33, 35 (2007).

[49] *See* LAWRENCE W. SHERMAN & RICHARD A. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT 1, 6 (1984), https://perma.cc/L3YQ-KTHW.

[50] David B. Sugarman & Sue Boney-McCoy, *Research Synthesis in Family Violence: The Art of Reviewing the Research*, 4 J. AGGRESSION, MALTREATMENT & TRAUMA 55, 66–69 (2000).

[51] Hyunkag Cho & Dina J. Wilke, *Does Police Intervention in Intimate Partner Violence Work? Estimating the Impact of Batterer Arrest in Reducing Revictimization*, 11 ADVANCES SOC. WORK 283, 290–92 (2010).

[52] Vivian H. Lyons et al., *Use of Multiple Failure Models in Injury Epidemiology: A Case Study of Arrest and Intimate Partner Violence Recidivism in Seattle, WA*, 6 INJ. EPIDEMIOLOGY, no. 36, 2019, at 1, 3–6.

[53] Joel G. Garner & Christopher D. Maxwell, *Crime Control Effects of Criminal Sanctions for Intimate Partner Violence*, 3 PARTNER ABUSE 469, 484–85 (2012).

the victim's wishes, the impact is positive, and arrest of the batterer is an effective deterrent.[54]

7. Arresting perpetrators of domestic violence deters recidivism.[55]
8. "Arrest of the batterer is the central element of an effective police response."[56]
9. Arresting domestic violence perpetrators resulted in substantially less future violence than advising or counseling.[57]
10. Arrest has a dramatic deterrent effect on reoffending.[58]
11. More aggressive law enforcement policies, including arrest and incarceration of batterers, increases victim reporting.[59]
12. Arresting batterers and employing firmer prosecutorial protocol prevents recidivism and saves women's lives.[60]
13. Arresting batterers deters recidivism and makes clear that domestic violence is a crime against society.[61]
14. In order to deter batterers, more severe sanctions must be imposed.[62]
15. "Civil protection orders coupled with strong enforcement provisions have played a key role in reducing violence against

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[54] *See generally* J. ZORZA & L. WOODS, ANALYSIS AND POLICY IMPLICATIONS OF THE NEW DOMESTIC VIOLENCE POLICE STUDIES (1994), https://perma.cc/7QJR-7FUR (noting in the abstract for the report that "domestic violence, if left unchecked, usually escalates in severity and frequency" and that arrest "allows the victim a window of opportunity to secure safety").

[55] *See* Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 315 (1993).

[56] Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problems, Forging the Solutions*, 60 WASH. L. REV. 267, 309 (1985).

[57] LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 16, 16 (1992).

[58] *See* Richard A. Berk & Phyllis J. Newton, *Does Arrest Really Deter Wife Battery? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253, 261–62 (1985).

[59] *See* Donald P. Van Blaricom, *Domestic Violence*, 52 THE POLICE CHIEF, no. 6, 1985, at 64–65.

[60] ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING & HOW TO STOP IT 5 (rev. ed. 2000).

[61] Esta Soler, *Domestic Violence Is a Crime: A Case Study—San Francisco Family Violence Project*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 21, 22, 26 (Daniel Jay Sonkin ed. 1987); *see* Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 874 (1994) (noting that no-drop policies prevent recidivism).

[62] *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 66 (1992).

women."[63]

B. *Pro- and Mandatory Arrests*

1. "Mandatory arrest substantially reduces the number of domestic assaults and murders."[64]
2. "Mandatory arrest is an essential step toward ending domestic violence, but without more—including prosecution and penalties commensurate with the nature of the offense—it may not significantly diminish the domestic violence epidemic."[65]
3. To date, society's response to domestic violence has focused almost exclusively on providing services to victims. While this is helpful, it has not reduced domestic violence, and this approach ignores the root of the problem. Mandatory arrest is a crucial step toward criminalizing and preventing domestic violence.[66]
4. Mandatory arrest statutes are an effective way to enable domestic violence victims to leave their abusers by offering a network of support, which will empower victims to end the cycle of violence. Mandatory arrest can also ensure a victim's safety by reducing the possibility of retaliatory abuse. Most importantly, mandatory arrest laws demonstrate that domestic violence and the exploitation of women will not be tolerated by our society."[67]
5. "Mandatory arrest will provide proper punishment for batterers, enhance awareness of domestic abuse in society in general, and, most importantly, help victims of domestic abuse to obtain safety and establish lives free from the violent attacks of their loved ones."[68]

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[63] Kathleen Curtis, Comment, *The Supreme Court's Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process in* Town of Castle Rock v. Gonzales, 32 WM. MITCHELL L. REV. 1181, 1214 (2006).

[64] Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J 213, 215–16 (1988).

[65] Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 569 (1996).

[66] *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problems, Forging the Solutions*, 60 WASH. L. REV. 267, 303–04 (1985).

[67] Allison J. Cambria, Note, *Defying a Dead End: The Ramifications of* Town of Castle Rock v. Gonzales *on Domestic Violence Law and How the States Can Ensure Police Enforcement of Mandatory Arrest Statutes*, 59 RUTGERS L. REV. 155, 189 (2006).

[68] Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for*

6. "[Mandatory arrest laws] [s]end a message that domestic violence shall not be treated as a less serious crime than violence between strangers, and thus they transform the private nature of domestic violence into a public matter. Otherwise, by refusing to intervene under a rationale that domestic violence is a private family matter, the state not only condones beating but in fact promotes it."[69]
7. "A pro-arrest policy is a less dogmatic alternative which, coupled with a coordinated program, has the potential to alter the cost/benefit ratio associated with battering without mandating the imposition of risks on the victim."[70]
8. "Research indicates that mandatory arrests by police and court-granted restraining orders are among the interventions taken for the protection of victims."[71]
9. Law enforcement protocol that included pro-arrest and no-drop policies led to reduction in recidivism.[72]
10. "[T]he law must acknowledge that police officers traditionally have failed to arrest batterers, and hence mandatory arrest laws are necessary. Arrest alone will not curb domestic violence[;] thus strong prosecution policies are needed."[73]
11. "[P]resumptive arrest and non-coercive no-drop policies may do more to respect the needs of victims while still sending the message that domestic violence will not be tolerated."[74]
12. "To ensure that victims obtain the full relief to which they are now entitled, prosecutors, judges, and the court system must implement extensive reforms. Such reforms are beginning to emerge in the criminal justice field, where an increasing number

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Mandatory Arrest in California, 85 CALIF. L. REV. 643, 700 (1997).

[69] Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 313 n.41 (2005) (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 186 (2000)).

[70] Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1164 (1994).

[71] Cindy S. Lederman & Neena M. Malik, *Family Violence: A Report on the State of the Research*, 73 FLA. B.J., December 1999, at 58, 62.

[72] *See* Richard M. Tolman & Arlene Weisz, *Coordinated Community Intervention for Domestic Violence: The Effects of Arrest and Prosecution on Recidivism of Woman Abuse Perpetrators*, 41 CRIME & DELINQ. 481, 489 (1995).

[73] Lanae L. Monera, Note, *Michigan's Domestic Violence Laws: A Critique and Proposals for Reform*, 42 WAYNE L. REV. 227, 258 (1995).

[74] Anna Rousseve, *Domestic Violence and the States*, 6 GEO. J. GENDER & L. 431, 458 (2005).

of jurisdictions police are operating under mandatory arrest laws and prosecutors are adopting no-drop prosecution policies."[75]

C. *No-Drop Policies*

1. In San Diego, homicides related to domestic violence fell from thirty in 1985 to seven in 1994 after successful implementation of a no-drop policy that prohibited prosecutors from dismissing domestic violence cases at the victim's request.[76]
2. When prosecutors maintain strong prosecution policies by refusing to drop the charges at a victim's request, batterers are less likely to intimidate and threaten their victims because they realize that victims cannot control the prosecutorial process.[77]
3. Aggressive prosecution policies lower recidivism rates by communicating a strong message that domestic violence will not be tolerated.[78]
4. Assailants who went through an initial court hearing were less likely to commit later violent acts against the same victims than those who did not; women who had the opportunity to drop the charges, but did not, were less likely to be assaulted six months later compared to cases where charges were dropped at the request of the victim.[79]
5. "This policy of aggressive prosecution adopts the wisdom that '[t]here is no excuse for domestic violence.' It tells batterers that violence against intimate partners is criminal, that offenders can and will go to jail, and that their victim's refusal to press charges

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[75] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 49 (1999).

[76] Gena L. Durham, Note, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of the Problem*, 71 S. CAL. L. REV. 641, 651 (1998); *see* Mark Hansen, *New Strategy in Battering Cases*, ABA J., Aug. 1995, at 14, 14.

[77] *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996). *See generally* Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 929 (1994) (finding that arrest is a "superior method of deterring future violence").

[78] Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 150 (1991); Gwinn & O'Dell, *supra* note 51, at 303–04.

[79] *See generally* D. A. Ford & M. J. Regoli, *Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127–64 (N. Zoe Hilton ed., 1993).

is not a 'get out of jail free' card."[80]

6. "No-drop policies benefit victims by reducing the chance that an offender would intimidate the victim, since it is the prosecutor who controls whether a criminal case progresses, and not the victim. As an additional benefit, the assistant district attorneys in no-drop jurisdictions are able to monitor a large number of offenders, since virtually all of them are involved in ongoing prosecutions. A policy of prosecuting and sentencing domestic violence offenders signals to the community and to offenders that the criminal justice system takes domestic abuse seriously and will intervene to stop it."[81]

There are other strong policy reasons to support an aggressive law enforcement response to domestic violence:

1. Law enforcement policies that require police to treat non-stranger violence against women with the same seriousness as crimes against strangers help to ensure the state does not discriminate against women.[82]
2. Arresting batterers represents a better distribution of justice between men and women.[83]
3. "The legal achievements of the battered women's movement—including mandatory arrest, no-drop prosecution, and the Model Code on Domestic and Family Violence—have dramatically improved victims' access to justice and the likelihood that perpetrators will be held accountable."[84]

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[80] Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 182 (1997).

[81] Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1427 (2013); *see also* M. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239, 256 (1995) (arguing that allowing domestic violence victims to drop the charges invites intimidation tactics).

[82] *See* Thurman v. City of Torrington, 595 F. Supp. 1521, 1527, 1531 (D. Conn. 1984) (denying defendant's motion to dismiss a woman's Fourteenth Amendment claim that police provided less protection to women abused by boyfriends or spouses than to victims of nondomestic violence).

[83] *See* Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCIENTISTS 651, 680 (1993).

[84] Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1904–05 (2002).

4. "There are several legislative, administrative, and prosecutorial changes that can be adopted to strengthen cases. . . . The adoption of these changes will not eliminate domestic violence. They will, however, lead to successful prosecutions, [and] take batterers off the streets . . . ."[85]
5. "Failure to critically evaluate procedures and systems currently in place and to at least attempt improvements will create a dangerous complacency, which effectively sanctions the life-threatening dangers for many Americans in their own homes and most intimate relationships."[86]
6. Mandatory law enforcement policies against domestic violence help reduce racism in law enforcement by ensuring that all offenders and victims are treated alike, regardless of race, social status, etc.[87]
7. "[T]he presence of mandatory and preferred arrest laws tended to mediate [racist] effects, such as by increasing the likelihood of arrest in intimidation cases and by making the likelihood of arrest less dependent on where the incident took place or on the race of the offender."[88]

CONCLUSION

Professor Barkow's argument in favor of decarceration may make sense for some criminals, and some crimes, in certain cases, but systemic application of such a rule without regard for how it will impact women's lives is dangerously irresponsible. Constitutionally authorized male supremacy already fuels a terroristic epidemic of sexual and domestic violence. This space between full equality and women's inequality is where men's violence against women occurs with impunity under the law. The least we can do is insist that police and prosecutors help fill in the constitutional gap by respecting abundant research amply demonstrating that an aggressive law enforcement response to domestic violence, including incarceration, reduces incidence rates and saves women's lives.

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[85] Ed Furman, Note, *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-Crawford*, 25 TEMP. POL. & C.R. L. REV. 143, 169 (2016).

[86] Lynn A. Combs, Note, *Between A Rock and A Hard Place: The Legacy of* Castle Rock v. Gonzales, 58 HASTINGS L.J. 387, 412 (2006).

[87] Hoctor, *supra* note 64, at 688–90.

[88] David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 296 (2007).

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Nudging Judges Away from Implicit Bias: Using Behavioral Science to Promote Racial Equity in Federal Sentencing

Samantha Cremin[*]

INTRODUCTION

In December of 2020, the U.S. Sentencing Commission ("USSC") reported its latest results regarding the demographic differences found in sentencing patterns under the Federal Sentencing Guidelines.[1] The results of the study reflect a resounding sentiment that has been the reality for our criminal justice system since its inception—people of color are and have been continually discriminated against in almost all phases of their interactions with the justice system.[2] By comparing average sentencing practices, the report supported the fact that Black men receive significantly longer sentences than their similarly situated white counterparts, even in recent years when discussions on inequitable treatment of people of color in the system have been frequent and prevalent.[3]

A possible explanation for these continued discrepancies in federal sentencing has been attributed to implicit biases held by decision-makers and the amount of discretion that they wield in making sentencing

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[1] U.S. SENTENCING COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 5–6 (2020), https://perma.cc/AD6S-S5LE [hereinafter INFLUENCE OF THE GUIDELINES].

[2] *See id*. *See generally* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), https://perma.cc/588A-PNCE [hereinafter REPORT TO THE U.N.].

[3] INFLUENCE OF THE GUIDELINES, *supra* note 1; *see* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017), https://perma.cc/4TUC-V4M8.

determinations.[4] Since implicit cognitive functions are at play in this type of discrimination, combating these functions with alterations to the Federal Sentencing Guidelines that account for theories based in behavioral science could produce effective results on an issue that desperately requires attention.[5] Nudge theory is the idea that individual decision-making can be altered by the way in which choices or information are presented to the chooser, through a process called choice architecture.[6]

This Note argues that the application of nudge theory to the everyday use of the Federal Sentencing Guidelines could bring judicial attention to the issue of racial sentencing disparities and implicit biases that could be motivating or overshadowing judges' sentencing decisions. This Note puts forth the recommendation including an advisory notice regarding racial inequity in sentencing in the packet containing the Federal Sentencing Guidelines, serving as the nudge for each judge. This shift of focus while seeing the advisory notice, even if brief, could improve consciousness of racial sentencing disparities as the decisions are being made in real-time and could potentially lead to more equitable trends in judicial choice architecture in sentencing people of color. Part I of this Note will lay out the concept of nudge theory in-depth, describing its real-world applications and potential for utilization in the courtroom.[7] It will also provide a comprehensive understanding of the operation of the Federal Sentencing Guidelines and judicial discretion therefrom.[8] Part II of this Note will explain the necessity for changes to be made to the Guidelines and the repercussions for not doing so, viewed through a Critical Race Theory lens.[9] Part III of this Note will argue how an intertwining of behavioral science and judicial decision-making could yield more equitable sentences for people of color, given the ways in which nudge theory has been applied and been successful in numerous other settings outside the courtroom.[10]

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[4] Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing* 1–3 (Coase-Sandor Inst. L. & Econ., Working Paper No. 661, 2013), https://perma.cc/RR87-VD7J.

[5] *See generally* MICHAEL BROWNSTEIN, *Implicit Bias*, STAN. ENC. PHIL., https://perma.cc/SCX6-TP5C (last updated July 31, 2019) (describing the psychology behind implicit social cognition and the ways in which the brain can jump to discriminatory behavior in brief snap judgements).

[6] *See* Anneliese Arno & Steve Thomas, *The Efficacy of Nudge Theory Strategies in Influencing Adult Dietary Behaviour: A Systematic Review and Meta-Analysis*, BMC PUB. HEALTH, July 2016, at 1, 2, https://perma.cc/X2YB-TMLC.

[7] *See infra* Part I.

[8] *See infra* Part I.

[9] *See infra* Part II.

[10] *See infra* Part III.

I. Background

A. *The Origin and Utilization of Nudge Theory*

Nudge theory lies within the realm of behavioral science.[11] Cass Sunstein and Richard Thaler formed this theory to fight against the common economic concept that humans are rational actors and that their decision-making is thus rational.[12] The idea essentially suggests that there are factors in our social environment, as well as societal standards and norms that pressure people into certain patterns of decision-making.[13] Without being coercive or using unethical incentives, nudges are ways to introduce information or choices that the actor otherwise may not have thought of into the decision-making process.[14] These nudges guide the actor to an answer or choice that may be more positive.[15] There are numerous ways to use this theory: from very basic nudges that yield relatively inconsequential results to incredibly intricate nudges yielding significant changes.[16] Examples are the best way to understand nudge theory in its actual application.[17] A nudge on the basic end would be asking customers to pay 5¢ for plastic bags at the supermarket: a seemingly minuscule change in policy that drives shoppers to begin bringing reusable bags instead—a more sustainable alternative to plastic bags.[18] As another example, to fight obesity, a small nudge can include moving candy to an obscure area of the store to remove it from the shopper's thoughts when checking out.[19] This nudge is based on the premise that the shopper did not plan on buying candy at the store that day.[20] But

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[11] *See* April Lea Pope, *To Behave or Not to Behave: How Behavioral Science Can Inform Policy and the Law*, 59 ADVOC. 41, 42 (2016).

[12] *See generally* RICHARD H. THALER & CASS. R SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 1–52 (Penguin Group (USA) Inc. 2009) (describing the origins of nudge theory and its application to the rational actor in order to structure choice architecture in such a way that alters decision-making of said actor).

[13] Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 MINN. L. REV. 1339, 1347 (2018).

[14] *See* Yi Xuan Li, *You've Heard the Term, but What Exactly Is 'Nudge Theory'?*, THE VARSITY (Oct. 18, 2020), https://perma.cc/3CHA-GJ6H.

[15] *See id.*

[16] *See* Pelle Guldborg Hansen, *The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?*, 7 EUR. J. RISK REG. 155, 155–70 (2016).

[17] *See* THALER & SUNSTEIN, *supra* note 12, at 17–19.

[18] *See* Hansen, *supra* note 16, at 156.

[19] *See* Hansen, *supra* note 16, at 156.

[20] Jessica Almy & Margo G. Wootan, *Temptation at Checkout: The Food Industry's Sneaky Strategy for Selling More*, CSPI: CTR. FOR SCI. IN THE PUB. INTEREST (Aug. 2015),

upon seeing the candy in the check-out lane, the shopper decided to purchase some.[21] By moving the candy out of view, shoppers might not purchase the candy because they are no longer tempted by it.[22] The store is not banning the sale of candy or even discouraging it; instead, the store is making it easier to skip the candy, rather than venture back into the aisles to find it, a nudge that produces positive results when the goal is to fight obesity.[23]

On the more significant end of the scale, government entities have used nudge theory to encourage positive participation in and engagement with implementing and sustaining policy within their countries.[24] In the United States, former President Obama signed an Executive Order in 2015 that mandated the use of behavioral economics and analysis to mold and adopt his administration's policies and programs through the creation of a Social and Behavioral Science Team.[25] Nudge theory has been used in simplifying college application processes to allow for higher rates of participation by potential students, such as sending text messages reminding them that they qualify and should apply for Free Application for Federal Student Aid (FAFSA) for college.[26] This nudge actually increased college enrollment.[27] The nudge theory also sits on the premise of focus and choice architecture in that while some people may be comfortable making the same decision in a repetitive manner, adding choices and diverting the choice maker's attention can cause a slight "nudge" to rethink the choice, and perhaps change it, simply based on how the options were presented.[28]

There are two types, or systems, of nudges.[29] Comprehension of both is critical to understanding nudge theory and why it works in application.[30]

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https://perma.cc/NS8A-53WV.

[21] *Id.*

[22] *Id.*

[23] *See* Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 178–79 (2016); Almy & Wootan, *supra* note 20.

[24] *See* Sunstein, *supra* note 23, at 179–80; *see also* Pope, *supra* note 11, at 41.

[25] Pope, *supra* note 11, at 41.

[26] Lindsay Page, *Small Nudges Can Improve How Students Apply to College*, HARV. BUS. REV. (Nov. 29, 2016), https://perma.cc/EQZ8-5AKE.

[27] *Id.*

[28] IAN SAMPLE, FROM THE ARCHIVES: NUDGE THEORY AND THE PSYCHOLOGY OF PERSUASION, (The Guardian podcast Feb. 22, 2017), https://perma.cc/RLC6-626X.

[29] *See generally* Cass R. Sunstein, *People Prefer System 2 Nudges (Kind of)*, 66 DUKE L.J. 121, 123–27 (2016) [hereinafter Sunstein, *People Prefer*].

[30] *See id.*

When humans consider a situation that is developing in front of them or around them, their brains have two functions by which they process the information: intuitive reactions and more deliberate reactions.[31] Sunstein offers the example of the immediate reactions one has when a plane a person is flying on begins to shake: the intuitive brain panics, and the person immediately fears the worst.[32] Deliberate thinking, which resides in the prefrontal cortex, can digest the situation and rationally conclude that the odds of a plane crash are small and the person is likely overreacting.[33] These two reactionary measures that humans utilize call for two systems of nudges to be applied.[34] A System One nudge (a nudge catering to instinctual reactions) causes an intuitive, immediate reaction, such as a photo of cancer-ridden lungs on a pack of cigarettes.[35] A System Two nudge (a nudge that caters to an individual's deliberate thinking) would include statistical facts about lung cancer for the choice maker to digest and make a thoughtful determination without basing that choice on an initial emotional reaction.[36] These types of nudges and the effects that they can have on a decision-maker are crucial for understanding their potential utilization with the Federal Sentencing Guidelines.[37]

B. *Federal Sentencing Guidelines*

Congress passed the Sentencing Reform Act of 1984 to bring uniformity to federal courts and allow for more transparency in federal judicial sentencing.[38] In passing the Sentencing Reform Act, Congress created and tasked the USSC with constructing a roadmap for federal judges to follow to determine the appropriate sentence in a case.[39] The Commission produced the Federal Sentencing Guidelines ("FSG"), which were composed from a series of studies done on tens of thousands of cases, sentences typically

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[31] SAMPLE, *supra* note 28.

[32] SAMPLE, *supra* note 28.

[33] SAMPLE, *supra* note 28.

[34] SAMPLE, *supra* note 28.

[35] SAMPLE, *supra* note 28; *see* Sunstein, *People Prefer*, *supra* note 29, at 124–27.

[36] SAMPLE, *supra* note 28; *see* Sunstein, *People Prefer*, *supra* note 29, at 124–27.

[37] *See* Sunstein, *People Prefer*, *supra* note 29, at 124-127.

[38] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv (2004), https://perma.cc/ZM5N-432Q [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING].

[39] *Id.*

handed down, and relevant statutes.[40] What exists now is a series of ranges that attach to "base-level crimes," and these ranges can become longer or shorter based on aggravating or mitigating factors.[41] Federal judges consult these ranges when looking at a case's facts and circumstances, and they have a certain level of discretion in deciding the range of sentencing for a crime, with the aforementioned factors typically driving this discretion.[42]

Federal judges are provided a chart with two axes.[43] On the vertical axis, "zones" A-D correlate to the offense level, or the category of crime committed.[44] On the horizontal axis, criminal history points (calculated by a points system) correlate to past sentences that the defendant may have served.[45] The more points, the higher the criminal history category into which the defendant is placed (I–VI).[46] Wherever these two axes meet on the chart will lead to a defendant's sentencing range, which is typically calculated in months.[47] For example, the base offense level for involuntary manslaughter is twelve; but, if the crime involves reckless conduct or reckless operation of transportation, the base offense level rises from eighteen to twenty-two respectively.[48] If the defendant has three criminal history points from a prior sentence exceeding thirteen months, and the involuntary manslaughter put them at base-level twelve, the suggested sentence would be twelve to eighteen months for this new charge.[49]

The FSG are strong advisories to federal judges, and there is a relatively strict list of acceptable departures and variances from the proscribed sentencing range that is produced by the process explored above.[50] A departure is a change that is made to the suggested range of sentencing—

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[40] *Id.*; *Aggravating and Mitigating Factors in Criminal Sentencing*, JUSTIA, https://perma.cc/532G-4C3W (last updated Oct. 2021).

[41] FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at v.

[42] FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at xiii.

[43] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2018).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* § 2A1.4; *see also* Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 809 (2018).

[49] U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A; *see* Newman, *supra* note 48, at 809.

[50] *See* U.S. SENTENCING COMM'N, PRIMER ON DEPARTURES AND VARIANCES 1 (2018) https://perma.cc/MNL9-AG7V [hereinafter DEPARTURES AND VARIANCES]; *see also* Kimberley Kaiser & Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, 19 J. CRIMINOLOGY, CRIM. JUST., L. & SOC'Y, no. 2, 2018, at 44, 45.

most commonly used to reward a defendant's cooperative behavior.[51] It is a change that is made from within the Guidelines themselves—a departure from the previously calculated range to account for a change in one of the factors that played into the initial computation of the range.[52] A variance is considered an increase or decrease in the sentencing range as a result of more discretionary considerations such as the defendant's health problems, family circumstances, a need for a "just" punishment, and so on.[53] The most typical reasons for these types of departures and variances are to "reflect the seriousness of the offense" as well as the "nature and circumstances of offense."[54]

This level of judicial discretion in sentencing is relatively new following *United States v. Booker*, which changed the status of the FSG from mandatory to advisory.[55] *Booker* established that the Guidelines violated the Constitution because their application created "binding requirements on all sentencing judges" and led to instances in which facts controlling sentencing were implicated after a jury verdict had been rendered.[56] While the Guidelines are no longer mandatory, they are still strongly advised, and if judges significantly depart from the sentencing ranges, their decisions are scrutinized.[57] While the FSG were implemented to promote transparency and uniformity in sentencing by preventing a judge's bias and personal opinions from seeping into the judge's sentencing practices, the USSC has repeatedly acknowledged that sentencing disparities blatantly remain.[58] These discrepancies are often attributed to the level of discretion that still exists in sentencing, and critics argue that this allows room for bias to creep in.[59]

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[51] DEPARTURES AND VARIANCES, *supra* note 50, at 1.

[52] DEPARTURES AND VARIANCES, supra note 50, at 1.

[53] See 18 U.S.C. § 3553 (2021); DEPARTURES AND VARIANCES, supra note 50, at 43.

[54] Kaiser & Spohn, *supra* note 50, at 52.

[55] 543 U.S. 220, 245 (2005).

[56] *Id.* at 233.

[57] *See* Kaiser & Spohn, *supra* note 50, at 45.

[58] *See* FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at 113.

[59] *See* Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 397 (2017).

II. The Importance and Relevance of the Issue

A. *Racism from the Bench: Judicial Discretion and the Federal Sentencing Guidelines*

There is no question that racial disparities continue to persist in numerous areas of the criminal justice system, and federal sentencing is one of those areas.[60] Implicit bias in judicial decision-making is one explanation for these incredible discrepancies.[61] Empirical data shows strong correlations between darker skin and longer sentences, which reveals as false the premise that the criminal justice system and its decisions are colorblind.[62]

According to the USSC's report, sentence length continued to be associated with demographic features—one of the most striking being race.[63] The report states that between 2012 and 2016, Black men received 19.1% longer sentences than similarly situated white male offenders.[64] These discrepancies have largely been attributed to judicial decision-making, as the report states that the disparities are shown most in "non-government sponsored departures and variances."[65] While the premise of implicit bias and its effects on decision-making are widely discussed and acknowledged, there are few viable solutions that have been implemented to directly address this issue.[66]

Since implicit biases are beliefs and social norms that lead to cognitive jumps often made without a decision-maker's knowledge, using a behavioral science technique such as nudge theory could prove worthy of integrating into the FSG and the ultimate manner in which federal sentencing occurs.[67] Because judges apply the Guidelines with their own biases and perpetuate the racialized sentencing practices that the data has

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[60] *See* REPORT TO THE U.N., *supra* note 2, at 7.

[61] *See* REPORT TO THE U.N., *supra* note 2, at 12.

[62] Bennett, *supra* note 59, at 403.

[63] *See* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 7 (2017), https://perma.cc/4VW7-JNX4 [hereinafter DEMOGRAPHIC DIFFERENCES IN SENTENCING].

[64] *Id.* at 6.

[65] Ingraham, *supra* note 3.

[66] *See generally* REPORT TO THE U.N., *supra* note 2, at 12 (stating that merely four states have adopted racial impact statement requirements).

[67] *See generally* Brownstein, *supra* note 5 (describing the psychology behind implicit social cognition and the ways in which the brain can jump to discriminatory behavior in brief snap judgements).

shown, introducing nudges into the application of the Guidelines, particularly in the departure and variance practices of federal judges, could combat massive differences in sentence lengths.[68] This could lead to significantly more racial equity in federal sentencing and attempt to address the devastating effects of racism in this portion of the criminal justice process.[69]

ANALYSIS

III. Nudge Theory Should Be Used to Combat Implicit Judicial Bias

A. *Integrating Nudge Theory into the Use of the Federal Sentencing Guidelines*

Implicit biases are just that—implicit.[70] These are "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner."[71] The way that these biases present themselves are of significant importance to the issue of federal sentencing.[72] "These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control."[73] The very nature of human biases can be subconscious; therefore, other methods of identifying and accounting for these biases could include cognitive and behavioral solutions.[74] If these biases affect an individual's heuristics and the way in which an individual makes decisions, it can be assumed that use of the FSG does not stop an individual from allowing bias to creep into decisions.[75] If this is the case, knowledge of bias in decision-making should be met with potential solutions—ways in which to fight these biases in our criminal justice system must be explored in order to maintain

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[68] *See* Yang, *supra* note 4, at 76.

[69] *See* REPORT TO THE U.N., *supra* note 2, at 11–12.

[70] *Implicit*, MERRIAM-WEBSTER DICTIONARY, https://perma.cc/KK2H-TAH8 (last visited Feb. 7, 2022).

[71] Artika R. Tyner, *Unconscious Bias, Implicit Bias, and Microaggressions: What Can We Do about Them?*, ABA (Aug. 26, 2019), https://perma.cc/XUY9-VAG4.

[72] *See id.*

[73] *Id.*

[74] *See* Implicit Bias Task Force, *What Is Implicit or Unconscious Bias?*, ABA, https://perma.cc/Y2JF-NQGA (last visited Feb. 7, 2022).

[75] *See* Ian D. Marder & Jose Pina-Sánchez, *Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clusters*, 20 CRIMINOLOGY & CRIM. JUST. 399, 403 (2018).

legitimacy and fairness.[76] The use of nudge theory is one method by which these biases can be confronted and attempts to push back against them can be made.[77]

The FSG are an example of choice architecture: the way that a decision-maker's options are laid out can determine the choices that individual will make.[78] While the Guidelines are suggestive, they are a roadmap for judges.[79] Judges use the Guidelines to lead them to their decisions, which gives the Guidelines even more power than most judges realize.[80] Making an addition to the Guidelines that draws judges' attention to disparities in federal sentencing based on race is a change in the roadmap–-a slight diversion through which decision-makers have to route their thinking to reach conclusions.[81] This small addition is the nudge—the alteration to each judge's decision-making process that could lead that judge to a more positive decision.[82]

An advisory notice, which emphasizes the racial disparities in sentencing and is printed on the Guidelines, also acts as a nudge that slightly moves each judge's anchor, which is the base or norm by which the decision-maker builds choices.[83] "During decision making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor."[84] Anchor bias theory also states that decision-makers are highly unlikely to stray far from where they have already set the anchor base without significant or striking reason to do so.[85]

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[76] *See Is the System Racially Biased?*, PBS, https://perma.cc/QK4T-DEF9 (last visited Feb. 7, 2022).

[77] *See generally* Ashleigh Woodend, Vera Schölmerich & Semiha Dentkaş, *"Nudges" to Prevent Behavioral Risk Factors Associated with Major Depressive Disorder*, 105 AM. J. PUB. HEALTH 2318, 2318 (2015) (discussing how nudges originating from behavioral economics can be used to create interventions in a person's mental biases).

[78] *See* Hansen, *supra* note 16, at 156.

[79] *See* U.S. v. Booker, 543 U.S. 220, 245 (2005).

[80] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018).

[81] *See* Sunstein, *supra* note 23, at 179.

[82] *See* Sunstein, *supra* note 23, at 179.

[83] ROD HOLLIER, ANCHORING BIAS IN THE COURTROOM 6–7 (2017), https://perma.cc/LMX4-VYAJ.

[84] PON Staff, *The Anchoring Effect and How It Can Impact Your Negotiation*, PON: PROGRAM ON NEGOT. HARV. L. SCH. (Nov. 26, 2019), https://perma.cc/QAX2-D4FR [hereinafter *Anchoring Effect*].

[85] *See id.*

Introducing a nudge related to racial discrepancies in sentencing will allow a receptive judge to move a preset anchor to explicitly account for inherent biases that may cause the judge to bow to preconceived notions about the sentence that the judge would otherwise likely deliver.[86]

Anchor biases can be quite flexible and are subject to adjustment through suggestion.[87] The power of suggestion can be strong and can be used as a nudge to bring judges away from their disparate sentencing tendencies.[88] There has been ample research conducted on anchor bias and the ways in which suggestion can affect the floors by which we build our decisions.[89] A popular example of how this line of thinking works is the "textbook . . . estimation study."[90] Students are asked to guess how much a textbook may cost; one group is asked whether it would cost more or less than an astronomical number (in this example, $7,163.52).[91] Even though common knowledge dictates that this number is exceptionally and unreasonably high, the students who were given that question estimated the cost of the textbook to be much higher than the students who were asked to guess with no comparative number given in their question.[92] It is this power of suggestion that nudge theory will focus on to affect disparate sentencing, but perhaps in reverse; when confronted with the exceptionally high rates of sentencing and incarceration for Black defendants compared to white defendants, the power of suggestion may ground a judge's anchor in more equitable ranges than otherwise would have been used due to the judge's unconscious bias.[93]

B. *Are Nudges Coercive?*

If nudges are such fantastic and renowned behavioral science tools, it is easy to question why they have not been implemented worldwide in every aspect of life.[94] There are several critiques of the method and its effect on

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[86] *See* Marder & Pina-Sánchez, *supra* note 75, at 5.

[87] *See* Eva Krockow, *Outsmart the Anchoring Bias in Three Simple Steps*, PSYCHOL. TODAY (Feb. 11, 2019), https://perma.cc/46P4-YKDC.

[88] *See generally id.* (describing numerous examples of the ways in which the power of suggestion in combination with anchor theory can affect decision-making).

[89] *See Anchoring Effect*, *supra* note 84; Krockow, *supra* note 87.

[90] HOLLIER, *supra* note 83, at 7.

[91] HOLLIER, *supra* note 83, at 7.

[92] HOLLIER, *supra* note 83, at 7.

[93] *See* HOLLIER, *supra* note 83, at 7; *see also* INFLUENCE OF THE GUIDELINES, *supra* note 1, at 6. Ingraham, *supra* note 3.

[94] *See* Richard H. Thaler, *The Power of Nudges, for Good and Bad*, N.Y. TIMES (Oct. 31, 2015),

human decision-making.[95] These criticisms are not unfounded but are unconvincing in the face of the positive outcomes that result from nudges, but deserve attention to better understand why nudges could still be beneficial in the courtroom setting.[96]

Ethical issues at the forefront of the nudge conversation include accusations of coercion, manipulation, and infantilization of those who are subject to the nudges.[97] Critics of nudges argue that free will is encroached upon when choice architecture is employed to guide an individual's thinking.[98] If a nudge narrows the array of a person's choices, is that choice actually of the person's own volition, or is it so constrained that it is a product of manipulation and thus not a choice made of free will?[99] These are some of the most common questions that come up in the debate surrounding nudge theory.[100]

Additionally, those in favor of nudge theory have been accused of infantilizing the public or perpetuating the idea that the government, or whoever engages in the construction of choice architecture, knows "better" than the person making the decision.[101] This line of questioning is driven by the idea that our true preferences can be gleaned by our public officials (or those who build the choice architecture) to ensure that the chooser picks the option that best suits those true preferences.[102] Cass Sunstein argues that sometimes people genuinely need a helping hand to make positive decisions:

> [O]ur intuitions are both adequate and helpful in the situations in which we ordinarily find ourselves. But there is no question that intuitions can badly misfire, and that good nudges, and good choice architecture, will often provide indispensable assistance, by

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https://perma.cc/GH79-TNA9.

[95] *See* Henry Farrell & Cosma Shalizi, '*Nudge*' *Policies Are Another Name for Coercion*, NEW SCIENTIST (Nov. 2, 2011), https://perma.cc/5FXW-5CW5.

[96] *See generally* Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REG. 413, 445 (2015) [hereinafter Sunstein, *Ethics of Nudging*] (explaining how some criticisms may mislead individuals and wrongfully detract from unobjectionable conduct).

[97] *See* Evan Selinger, *When Nudge Comes to Shove*, SLATE (July 7, 2013, 7:00 AM), https://perma.cc/N5FP-AGAH.

[98] Joe Humphreys, *Unthinkable: When Does a Nudge Become Coercion?*, IRISH TIMES (Oct. 18, 2015, 6:00 AM), https://perma.cc/4PQA-F335; *see* Pope, *supra* note 11, at 42.

[99] *See* Humphreys, *supra* note 98.

[100] *See* Farrell & Shalizi, *supra* note 95.

[101] *See* Selinger, *supra* note 97.

[102] *See* Sunstein, *People Prefer*, *supra* note 29, at 126–27.

> helping people move in directions that they themselves prefer.[103]

In essence, the question is whether intervention on the part of these misfires in intuition is warranted.[104]

The Bloomberg-Soda debacle illustrates an example of this contention.[105] In 2012, New York City Mayor Michael Bloomberg attempted to enact policies that would lower the consumption of soda and other sugary drinks by limiting the "super-sized" options for consumers.[106] In an effort to fight obesity, Mayor Bloomberg set his sights on soda as one of the unhealthiest items available to New Yorkers.[107] While it is not the only item that perpetuates American obesity, soda is the "largest contributor of added calories to the American diet."[108] Proponents of the limitations on soda sizes argued that they were not banning the purchase of more than sixteen ounces of soda, but that they simply were attempting to pull away from the facilitation of such large soda purchases.[109] The proponents argued that consumers could still buy as much soda as they wanted; they just might have to buy two bottles or cups at a time to get the amount that they wished.[110] The Bloomberg-Soda debacle is a perfect example of a policy nudge enacted to push people towards making better choices, as Sunstein and Thaler's original premise had hoped.[111]

There was major pushback to attempts at limiting the sizes of soda available to purchasers with vocal outcry from the Center for Consumer Freedom.[112] The core of the criticism came from the potential for a slippery slope of government regulation on free choice, with detractors asking, "[w]hat's next? . . . Limits on the width of a pizza slice, size of a hamburger[,]

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103 Sunstein, *People Prefer*, supra note 29, at 126–27.

104 *See* Sunstein, *People Prefer*, *supra* note 29, at 126–27; *see also* Farrell & Shalizi, *supra* note 95 (noting decision-makers should intervene by tweaking options and information to help individuals make the right choice).

105 *See* Daniel Engber, *Will New York's Super-Size Drink Ban Work?*, NEW SCIENTIST (Sept. 19, 2012), https://perma.cc/TR48-DPYD.

106 *Id.*

107 *See* Ruth Marcus, *Bloomberg's Soda Ban and the Rise of Noodge Government*, WASH. POST (June 5, 2012), https://perma.cc/Y99T-V3W5.

108 *Id.*

109 Engber, *supra* note 105.

110 *See* Editorial Bd., *Slurping Less Soda in New York*, WASH. POST (June 2, 2012), https://perma.cc/8NPD-NCWT.

111 *See* Furth-Matzkin & Sunstein, *supra* note 13, at 1347–48.

112 Engber, *supra* note 105.

or amount of cream cheese on a bagel?"[113] Bloomberg and other supporters of the attempted policy argued public protection efforts are almost always met with pushback, but that does not mean that they are not for the best.[114] Mayor Bloomberg maintained that "[s]moke-free bars and restaurants, trans fat restriction and calorie posting in restaurants were all met with skepticism but are now widely popular in New York City."[115]

Ultimately, the policy failed.[116] In 2014, the New York State Court of Appeals dealt the final blow to the proposed large-scale nudge and determined that the attempted restriction made by Bloomberg and his Board of Health "exceeded the scope of its regulatory authority."[117] The majority maintained that the administrative agency attempted to overreach into the lives of everyday people.[118] In a scathing dissent, Judge Susan Read argued that this ruling would significantly diminish the ability of the agencies to address public health emergencies, such as obesity.[119] The majority's argument, however, rested on autonomy.[120] Relating back to Mayor Bloomberg's defense of the policy, the majority argued that health related issues such as calorie counts and trans fats were a "minimal interference with the personal autonomy"; where the court opined that this restriction on soda purchases interfered too significantly, an advisory (including facts and statistics) that is added to a packet is unarguably a minimal interference.[121]

C. *Ethical Implications from the Creators' Perspective: Freedom of Choice*

Cass Sunstein has heard the critiques of his and Thaler's nudge theory, and he does not outright condemn all questions regarding whether a level of free choice is altered in this process.[122] In fact, he argues that these impositions do occur, and the public must be careful of them; Sunstein

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[113] Engber, *supra* note 105.

[114] *See* Marcus, *supra* note 107.

[115] Marcus, *supra* note 107.

[116] Michael M. Grynbaum, *New York's Ban on Big Soda's Is Rejected by Final Court*, N.Y. TIMES (June 26, 2014), https://perma.cc/BLP6-2E4K.

[117] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 549 (N.Y. 2014).

[118] Grynbaum, *supra* note 116.

[119] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 16 N.E.3d at 550 (Read, J., dissenting).

[120] *See* Grynbaum, *supra* note 116.

[121] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 16 N.E.3d at 548.

[122] *See* Sunstein, *Ethics of Nudging*, *supra* note 96, at 445; *see also* Hansen, *supra* note 16, at 155–56.

points to the fact that nudges happen all around us, all the time, whether we call them nudges or not.[123] He argues that the logic used to paint nudges as manipulative must also take issue with subliminal advertising, such as the way music and colors are used to impact our thoughts on something without our conscious awareness; he points to restaurants, clothing stores, companies, social media, and even medical care as being arenas that influence or appeal to consumers in ways that "bypasses their own deliberative capacities."[124] He states that "a great deal of conduct, however familiar, can be counted as manipulative in some relevant sense, but it would be extreme to condemn it for that reason."[125]

Sunstein also points out that choice architecture is inherent in any government, no matter how minimal.[126] If this is the case, the best interest of any entity tasked with serving the public is to make sure that the choices presented are positive and created with as much information as possible so that each decision-maker can make an informed choice.[127] Professor Pierre Schlag suggests, "[s]till another form of nudge is simply to provide information that could be useful in making choices. Sunstein and Thaler believe it's useful to compel better information disclosure in everything from mortgages to car sales."[128] Sunstein contends that even in the face of criticism, nudge theory is highly preferable to mandates and bans, which would be considered legitimate coercion.[129] Sunstein suggests that nudges actually maintain freedom of choice and respect autonomy, especially where many nudges simply inject transparency into the choice-making process and give the choice maker more relevant information to make a decision.[130]

This process also lowers the ways in which decision-makers' individual heuristics or biases can affect their decision-making, all while maintaining legitimacy and freedom in their choices.[131] This makes nudge theory not only

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[123] Sunstein, *Ethics of Nudging*, *supra* note 96, at 445.

[124] Sunstein, *Ethics of Nudging*, *supra* note 96, at 444–45.

[125] Sunstein, *Ethics of Nudging*, *supra* note 96, at 445.

[126] Sunstein, *Ethics of Nudging*, *supra* note 96, at 450.

[127] *See, e.g.*, *Government Transparency: Open Government Plan*, DOJ, https://perma.cc/G7Q4-54SK (last updated Dec. 15, 2021) (discussing the importance of transparency initiatives in government for the benefit of the public).

[128] Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 916 (2010).

[129] Sunstein, *Ethics of Nudging*, *supra* note 96, at 423; *see* Todd Newcombe, *When Is a Federal Mandate Coercion?*, GOVERNING (May 1, 2012), https://perma.cc/7XBD-JRZC.

[130] *See* Sunstein, *Ethics of Nudging*, *supra* note 96, at 439.

[131] *See* Schlag, *supra* note 128, at 915.

difficult to hold out as a manipulative practice due to the inability to parse out its effects from those subliminal tactics that are commonly used, but also because the positive results from helpful nudges far exceed any concerns regarding impeding free will by optimizing the choices in sensibility and leaving decision-makers free to make whatever choices they wish.[132]

D. *Success of the Nudge: Utilization and Achievements*

While nudge theory has not yet been utilized in the particular manner suggested in this Note, it has found great success in other areas of public service.[133] "Behavioral science has captured the attention of the United States government, as well as other countries' governing bodies, and increasingly is being used to inform policy making. Scholars are also using behavioral science to understand how culture affects the way in which people perceive adjudicatory facts."[134] In the United States, nudge theory and other behavioral science insights have begun shaping the ways in which government entities create programs and implement policies that affect the everyday life of the public.[135]

On September 15, 2015, former President Barack Obama issued an executive order that charged agencies and offices within his White House with creating and implementing the administration's policies using behavioral science.[136] The Order stated that "[a] growing body of evidence demonstrates that behavioral science insights—research findings from fields such as behavioral economics and psychology about how people make decisions and act on them—can be used to design government policies to better serve the American people."[137] The Executive Order also instituted the creation of the Subcommittee on the Social and Behavioral Sciences Team (SBST), whose mission statement is as follows:

> [C]oordinate the application of social and behavioral science research to help Federal agencies advance their policy and program goals and better serve the Nation. SBST works to identify opportunities for Federal agencies to leverage social and

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132 Schlag, *supra* note 128, at 917; *see* Sunstein, *Ethics of Nudging*, *supra* note 96, at 445; *see also* Humphreys, *supra* note 98.

133 *See, e.g.*, Social and Behavioral Sciences Team: 2016 Annual Report (Nat'l Sci. &Tech. Council Sept. 2016), https://perma.cc/2J5C-DJBE [hereinafter S.B.S. Team].

134 Pope, *supra* note 11, at 41.

135 *See* Pope, *supra* note 11, at 41.

136 Using Behavioral Science Insights to Better Serve the American People, Exec. Order No. 13,707, 80 Fed. Reg. 56,365 (Sept. 18, 2015).

137 *Id.*

> behavioral science insights to advance the goals of their policies and programs, demonstrate the impact of these applications, and build capacity for applications of social and behavioral science across Federal agencies.[138]

The administration's institution of the SBST led to a promotion of progression in overall efficiency of the programs, through which they utilized behavioral science either in a policy creation or implementation.[139] The SBST 2016 annual report showed increases in public participation or impact in eight separate public policy initiatives: "[1] promoting retirement security, [2] advancing economic opportunity, [3] improving college access and affordability, [4] responding to climate change, [5] supporting criminal justice reform, [6] assisting job seekers, [7] helping families get health coverage and stay healthy, and [8] improving government effectiveness and efficiency."[140]

The SBST argues that "[b]ehavioral science research demonstrates that how people understand and act on information depends not only on the quality and completeness of that information, but also on the manner in which it is presented."[141] This should sound familiar; it is a very close definition to nudge theory and choice architecture.[142] Former President Obama was familiar with the idea of nudge theory and the usefulness of behavioral science years before the Executive Order was signed; he chose Cass Sunstein in 2009 to be the Administrator of the Office of Information and Regulatory Affairs for the Office of Management and Budget.[143]

One successful initiative that SBST undertook attempted to aid members of the public who were defaulting or in danger of defaulting on loans.[144] Repayment plans that included loan reconstruction in relation to income (and even loan forgiveness) were created to try to help Americans manage these debts, but the problem was encouraging individuals to sign up for the plans.[145] SBST collaborated on a promotion plan by which individuals who

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[138] S.B.S TEAM, *supra* note 133, at ii.

[139] *See* Office of the Press Secretary, *FACT SHEET: New Progress on Using Behavioral Insights to Better Serve the American People*, OBAMA WHITE HOUSE (Sept. 15, 2016), https://perma.cc/5N7S-7GCK.

[140] S.B.S. TEAM, *supra* note 133, at i.

[141] S.B.S. TEAM, *supra* note 133, at 37.

[142] *See* Li, *supra* note 14.

[143] *See* Jeri Zeder, *Cass Sunstein on New Directions in Regulatory Policy*, HARV. L. TODAY (Apr. 12, 2012), https://perma.cc/2YMG-D39Q; Pope, *supra* note 11, at 41.

[144] S.B.S. TEAM, *supra* note 133, at 15.

[145] S.B.S. TEAM, *supra* note 133, at 13.

qualified would receive tailored emails that made it clear to the reader that the plan was not only beneficial, but easy to enroll in.[146] This nudge to sign up, paired with relevant information that showed the value of doing so, led to about 6,000 more applications for a revised payment plan (totaling about $300 million of debt).[147] This nudge was successful—it created positive, helpful change for members of the public at a very low cost, which is a large part of the premise behind nudges and their utility.[148]

Another nudge success story to come out of SBST revolved around a military personnel savings proposal for retirement, which was done in collaboration with the Department of Defense.[149] "This experiment was intended to increase savings among military personnel in the defined-contribution retirement plan offered to federal government employees, a program in which the government already offers monetary incentives for saving (retirement-plan contributions are tax-deductible)."[150] The email campaign, with nudge attributes baked into the process, yielded an increase in participation by more than 5,000 people and "increased savings by approximately $8 million total."[151]

The United States is not the only country that has found success in the integration of nudge policy.[152] A group called the Behavioral Insights Team, colloquially known as the "Nudge Unit," has used the nudge to create a substantial impact in the United Kingdom.[153] The Unit, for example, managed to garner an extra *100,000 organ donors per year* from the public after "encouraging people to register as organ donors by using a reciprocity-based message on the registration website."[154] Some of the group's other accolades regarding the use of nudge theory include:

> a 34% increase in acceptances of pupils from underrepresented schools to top universities, following a letter to the pupils from a

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[146] S.B.S. TEAM, *supra* note 133, at 13–14.

[147] S.B.S. TEAM, *supra* note 133, at 14.

[148] *See* Sunstein, *supra* note 23, at 180.

[149] Shlomo Benartzi et al., *Should Governments Invest More in Nudging?*, 28 PSYCHOL. SCI. 1041, 1041–42 (2017) [hereinafter *Invest More in Nudging?*]; Shlomo Benartzi et al., *Governments Are Trying to Nudge Us into Better Behavior. Is It Working?*, WASH. POST (Aug. 11, 2017), https://perma.cc/B83V-UR5N.

[150] Benartzi, *Invest More in Nudging?*, *supra* note 149, at 1042.

[151] Benartzi, *Invest More in Nudging?*, *supra* note 149, at 1042.

[152] *See* Sunstein, *People Prefer*, *supra* note 29, at 124.

[153] *See* Ben Quinn, *The 'Nudge Unit': The Experts That Became a Prime UK Export*, THE GUARDIAN (Nov. 10, 2018, 11:00 EST), https://perma.cc/PS38-2JUZ.

[154] Pope, *supra* note 11, at 41.

> top-tier student with a similar background[;] . . . a 38% reduction in patient referrals to overbooked hospitals, resulting from installing a pop-up prompt in the GP referral system[; and] . . . a 37% rise in tax declaration rates following text-message reminders to 750,000 businesses in Mexico. This built on early work in the UK, where reminders about self-assessment brought forward £200m in tax revenue in a year.[155]

These are not insignificant changes; they are effective, small nudges that led to exceptional results for those people who the nudges were aimed to serve.[156] Analyzing the second percentage mentioned above, a pop-up that prevented the overbooking of hospitals led to a 38% reduction in that error; a notification on the FSG bringing a judge's attention to racial sentencing disparities will have a similar impact.[157] It is not to be argued that a change or alteration will be made to every federal sentencing as a result of an added nudge drawing attention to these important facts, especially because not all intuitive decisions are bad or made mistakenly; what is relevant for our purposes is that even the slightest change to inform judges about disparities and potentially bring down future discrepancies would be significant to a defendant who otherwise might be sentenced unfairly.[158]

E. *Nudging the Judge: Why the Federal Sentencing Guidelines Are Apt for This Addition*

Judges have an immense amount of power over defendants who come before them in the courtroom.[159] Especially when dealing with federal sentencing, "as key gatekeepers to (criminal) justice . . . sentencers make decisions in their working lives which have significant, long-term implic[a]tions for offenders and victims, their families and wider society."[160] As a society, the hope is always held out that those who are in positions of power are wielding that power equitably; in the face of information suggesting this is not the case, it is imperative to look at the ways in which these decisions are being influenced and shaped to ensure that the goals of equity are being realized.[161] Since the FSG are strong suggestions to judges

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[155] Quinn, *supra* note 153.

[156] *See* Quinn, *supra* note 153.

[157] *See* Quinn, *supra* note 153.

[158] *See generally* Sunstein, *People Prefer*, *supra* note 29, at 124.

[159] *See* Thomas A. Zonay, *Judicial Discretion: 10 Guidelines for Its Use*, NAT'L JUD. C. (May 21, 2015), https://perma.cc/2AGV-PRAM.

[160] Marder & Pina-Sánchez, *supra* note 75, at 4–5.

[161] Marder & Pina-Sánchez, *supra* note 75, at 3–4.

on how the sentencing ranges should be determined, they are utilized and consulted relatively consistently.[162] Because judges regularly use the Guidelines, applying a nudge in the Guidelines would allow for maximum impact in terms of exposure to decision-makers in a way that is not intrusive to a judge's thought process and ultimate judgement.[163]

It is important to note that in November of 1987 Congress enacted FSG § 5H1.10, which stated that "race, sex, national origin, creed, and socioeconomic status" were not to be offender characteristics that would explicitly be used in the determination of a sentence or sentence range.[164] The nudge suggested in this Note would serve simply as an advisory to judges regarding their implicit biases—it in no way suggests that race should be used as the determinative factor in a judge issuing a sentence.[165] An advisory notice regarding racial inequalities, located somewhere around the sentencing chart in the Guidelines, would serve as just a nudge; it would not become one of the factors *on* the chart to be used in sentence calculation or reasons for departures or variances.[166] A clear delineation here is incredibly important: the goal is to promote equity in sentencing, not to utilize race alone as the determinative factor in sentencing.[167] It is the mere glance at the advisory, just a piece of information that can anchor a judge back to center; a judge's awareness of implicit biases is the nudge that is suggested to keep the judicial decision-maker on notice that sentencing inequities exist and persist.[168]

Integration of behavioral science into judicial sentencing is neither a new concept nor without scholarship.[169] In a 2018 article exploring how heuristics and implicit biases affect judicial decision-making, Ian Marder and Jose Pina-Sánchez articulated that sentencing guidelines (and decisions brought therefrom) are an incredibly important area to begin integrating behavioral science and analysis.[170] While the authors do not contemplate the racial

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[162] *See Sentencing 101*, FAMM: FAMILIES AGAINST MANDATORY MINIMUMS, https://perma.cc/5ZJV-MM42 (last visited Feb. 7, 2022).

[163] *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018). *See generally* Sunstein, *People Prefer*, *supra* note 29, at 124.

[164] U.S. SENTENCING GUIDELINES MANUAL § 5H1.10.

[165] *See id.*

[166] *See id.*; *see also* DEPARTURES AND VARIANCES, *supra* note 50, at 14–15.

[167] *See generally* REPORT TO THE U.N., *supra* note 2, at 5–6.

[168] *See generally* HOLLIER, *supra* note 83.

[169] *See generally* Marder & Pina-Sánchez, *supra* note 75 (describing studies on sentencing biases judges may encounter).

[170] *See* Marder & Pina-Sánchez, *supra* note 75, at 399.

divides that are extremely apparent in American federal sentencing, their logic regarding choice architecture and heuristics by judges during sentencing supports this Note's suggested application to racial disparities.[171] Consistent with the suggestion to integrate disparity-conscious information and reminders into the FSG to positively influence choice architecture, Marder and Pina-Sánchez state that:

> Nudge theory posits that choice architecture can be designed in a manner which reduces the negative influences of heuristics on decision making, without restricting the choices available to decision-makers (Thaler and Sunstein, 2009). This could be useful in the context of sentencing, where judges often resist efforts to constrain their discretion (Dhami, 2013a), but where it is nonetheless important to structure their decision making to maximize the chances that the goals of sentencing are realized.[172]

When whittled down to the basics, incorporating a nudge into the FSG is necessary to allow judges to be aware of all pertinent information when making their sentencing decisions.[173] Their decisions are the product of choice architecture—whether they are referred to and treated that way or not.[174] As Cass Sunstein reiterates in his works regarding nudge theory, nudges and choice architecture are happening all around us all of the time; the question is whether to acknowledge that they exist and harness the power and influence that they have for the benefit of the public, or fail to utilize them, likely at a detriment to that same public.[175] "Nudge theory could help policy-makers to design sentencing guidelines which improve decision quality, without prompting the resistance associated with compulsory, restrictive or prescriptive measures."[176] Integrating a nudge into the FSG would maintain a judicial decision-maker's sentencing autonomy, and it would combat inherent biases or heuristics that could unfairly impact a defendant of color.[177]

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171 *See* Marder & Pina-Sánchez, *supra* note 75, at 407.

172 Marder & Pina-Sánchez, *supra* note 75, at 410.

173 *See* Sunstein, *People Prefer*, *supra* note 29, at 126–27.

174 *See* Sunstein, *People Prefer*, *supra* note 29, at 124.

175 *See* Sunstein, *People Prefer*, *supra* note 29, at 124.

176 Marder & Pina-Sánchez, *supra* note 75, at 12.

177 *See* Sunstein, *Ethics of Nudging*, *supra* note 96, at 439; *see also* Marder & Pina-Sánchez, *supra* note 75, at 12.

CONCLUSION

Black people in this country are being discriminated against in the American federal sentencing system and, in a consistent and systemic showing of inherent biases and racism, are receiving longer sentences than similarly situated white defendants. With behavioral sciences such as nudge theory showing such promise toward positive changes in thinking, drawing the line between judicial discretion and sentencing cannot ignore the inherent biases that affect sentence length. The information and the potential changes to bring about an equitable solution are out there—it is their integration into the system that must be pushed forward. "[G]uidelines matter: where in force, they are an important part of the choice architecture in which sentencing takes place . . . researchers must seek to assess both the likely interaction between heuristics and sentencing guidelines, and the implications of this relationship for achieving the goals of sentencing."[178] The criminal justice system can achieve these equitable goals by integrating changes that are minimal in cost, but potentially high in reward: the precise premise behind nudges. Curbing the ability for judicial biases to seep into sentencing, biases which perpetuate the ever-prevalent discrimination against people of color in America, should be reason enough to make this jump to the use of the nudge to encourage equitable outcomes in sentencing.

[178] Marder & Pina-Sánchez, *supra* note 75, at 8.

First Amendment Rights or the Best Interests of the Child?: The Tension Between Parents' and Children's Rights in Non-Disparagement Agreements

Anna Hagg[*]

INTRODUCTION

Non-disparagement agreements and clauses represent a common feature of negotiated marital settlements in the Commonwealth of Massachusetts.[1] A non-disparagement clause is a provision often found in divorce and child custody agreements that requires one or more parties to refrain from making negative comments about another.[2] Courts typically consider non-disparagement clauses as a part of their legal obligation to decide divorce and child custody proceedings under the best interests of the child standard.[3] However, a recent decision by the Supreme Judicial Court of Massachusetts (hereinafter "SJC") in *Shak v. Shak* has called the constitutionality and continued legitimacy of non-disparagement orders into question.[4] Non-disparagement orders are sometimes difficult to enforce, not because of constitutional concerns, but rather because of the difficult nature of proving disparagement.[5] Prior to the decision in *Shak*, many family law experts considered non-disparagement orders to be constitutionally supported by a parent's right to control the upbringing of

[*] J.D., New England Law | Boston (2022). B.A., History and Political Science, Simmons College (2018). Thank you to the entirety of the *New England Law Review* for providing support throughout the entire writing process.

[1] *See* Mass. Continuing Legal Educ., Inc., *Marital Separation Agreements*, *in* TRYING DIVORCE CASES IN MASSACHUSETTS § 12.6.1 (Donald G. Tye ed., 6th ed. 2020).

[2] Maurice Robinson, *The Holidays and Non-Disparagement Clauses*, FAM. KIND (Dec. 1, 2014), https://perma.cc/4NR5-C7L3.

[3] *Id.*

[4] 144 N.E.3d 274, 280 (Mass. 2020).

[5] Robinson, *supra* note 2.

his or her child.[6]

This Comment will illustrate that although the SJC followed Massachusetts and federal precedent regarding the prior restraint doctrine in *Shak*, the SJC's holding that the non-disparagement order in *Shak* was an unconstitutional prior restraint is wrong. The holding is improper because it both misapplied the standard for determining the existence of a compelling interest and because the alternatives it suggested are not reasonable alternatives for one going through a contentious divorce proceeding. Part I discusses how both the U.S. Supreme Court and Massachusetts courts have defined and applied the law of prior restraints and defined First Amendment speech protections. Part II explains the facts, procedural history, and the SJC's analysis in *Shak v. Shak*. Part III articulates the complexity of the prior restraint doctrine that the SJC overlooked. Part IV argues that the child's age and the permanent nature of social media caused the SJC to incorrectly find that the state did not have a compelling interest in protecting the Shaks' child from disparaging language. Part V asserts that reasonable alternatives do not exist because the trial court's order as written was narrowly tailored. Part VI suggests that the SJC's precedent will cause confusion in other jurisdictions.

I. Background

A. *U.S. Supreme Court Prior Restraint Jurisprudence*

The free speech clause of the First Amendment of the U.S. Constitution protects people's right of expression from government restriction because of the expression's message, idea, subject matter, or content.[7] Prior restraints represent one example of a heavily disfavored government restriction on speech.[8] Because prior restraints are judicial orders prohibiting certain forms of communications before they happen, courts consider these instruments to be one of the most extreme judicial remedies.[9] Consequently, courts place a heavy presumption against the validity of prior restraints.[10] Even though courts do not consider prior restraints to be unconstitutional per se, courts will only uphold their constitutionality in the most extreme of

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[6] Jennifer M. Paine, *Non-Disparagement Clauses: How Do I Enforce It?*, DADS DIVORCE, https://perma.cc/497E-9YBP (last visited Feb. 9, 2022).

[7] U.S. CONST. amend. I.; Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002).

[8] *See generally* Alexander v. United States, 509 U.S. 544, 550 (1993) (noting a variety of decisions where courts declined to enforce government restrictions on speech).

[9] *Id.*; Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[10] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

circumstances.[11]

The U.S. Supreme Court formulated a three-part test to determine when prior restraints could be constitutionally permissible.[12] First, a court must determine the nature and extent of the speech in question.[13] Second, a court must determine whether other measures would be likely to mitigate the effects of unrestrained speech.[14] Third, a court must determine how effectively a restraining order would operate to prevent the threatened danger.[15] Additionally, the Supreme Court outlined three safeguards that prior restraints must possess to be constitutional.[16] These constitutional safeguards include placing the burden of proof on the censor, limiting prior restraints for only a particular brief period, and assuring a prompt judicial decision.[17]

B. *Massachusetts Prior Restraint Jurisprudence*

In comparing U.S. constitutional principles to Massachusetts law, the Massachusetts Constitution offers the same protection of free speech as the U.S. Constitution.[18] Similar to the U.S. Supreme Court's tests, the SJC will only permit the prior restraint of speech if (1) there is a compelling state interest that the prior restraint would advance and if (2) there is no less restrictive alternative to serving that interest.[19] Further, the SJC has ruled that prior restraints require a particularly heavy burden to pass constitutional muster.[20] In *Commonwealth v. Barnes*, the SJC also emphasized the heavy presumption against the validity of prior restraints.[21] On the whole, the SJC is not reluctant to declare prior restraints on speech as unconstitutional.[22]

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[11] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[12] *Neb. Press Ass'n*, 427 U.S. at 562.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559–60 (1975).

[17] *Id.* at 560.

[18] Care & Protection of Edith, 659 N.E.2d 1174, 1176 (Mass. 1996).

[19] *Id.* at 1177.

[20] George W. Prescott Publ'g Co. v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998).

[21] 963 N.E.2d 1156, 1165 (Mass. 2012).

[22] *E.g.*, *id.* (recognizing that stopping the publication of reports of juvenile records and proceedings is an unconstitutional prior restraint); *George W. Prescott Publ'g Co.*, 701 N.E.2d at 309 (recognizing that prohibiting internet streaming of court cases is an unconstitutional prior

The U.S. Supreme Court has ruled that protecting children's well-being and mental health can be a compelling state interest to overcome the unconstitutional presumption against prior restraints.[23] To evaluate the strength of this compelling interest, Massachusetts courts utilize the best interest of the child standard.[24] Though not an exhaustive list, some factors that a court can consider include: the minor's age, the minor's psychological maturity and understanding, the nature of the speech attempting to be restrained, the desires of the child, and the interests of the parents.[25] The SJC narrowly applies this standard, as it requires a detailed showing that a particular action has caused specific harm to the child.[26]

When applying the second prong of the SJC's test for determining the validity of prior restraints, the SJC will declare a prior restraint to be unconstitutional if any reasonable alternative is available.[27] Courts have considered voluntary agreements between private parties, court orders such as protective orders, and civil causes of action as reasonable alternatives that will defeat the constitutionality of prior restraints.[28] Ultimately, Massachusetts jurisprudence on both the constitutional and family law aspects of prior restraints will only find prior restraints constitutional in the most extreme of circumstances.[29]

II. *Shak v. Shak*

A. *Factual and Procedural History*

Ronnie and Masha Shak were married for fifteen months and had one child together.[30] When the child was a one-year-old, Masha filed for

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restraint); *Care & Protection of Edith*, 659 N.E.2d at 1176 (recognizing that preventing father from publicly commenting about court and department proceedings is an unconstitutional prior restraint).

[23] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 607 (1982).

[24] *Barnes*, 963 N.E.2d at 1167.

[25] *Id.*

[26] Felton v. Felton, 418 N.E.2d 606, 607 (Mass. 1980).

[27] *Barnes*, 963 N.E.2d at 1165.

[28] *See* Shak v. Shak, 144 N.E.3d 274, 280 (Mass. 2020) (stating that a voluntary non-disparagement agreement or a harassment prevention order are viable alternatives to court imposed non-disparagement orders); *see also* Roman v. Trustees of Tufts Coll., 964 N.E.2d 331, 341 (Mass. 2012) (establishing the requirements for intentional infliction of emotional distress); White v. Blue Cross & Blue Shield of Mass., Inc., 809 N.E.2d 1034, 1036 (Mass. 2004) (establishing the requirements for defamation).

[29] *See* Care & Protection of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[30] *Shak*, 144 N.E.3d at 276.

divorce.[31] She also filed an emergency order to remove Ronnie from the house due to his violent behavior and substance abuse problems, fearing for the child's safety.[32] A probate and family court judge temporarily granted Masha sole custody of the child and ordered Ronnie to vacate the marital home.[33] Masha then filed for various orders, including an order prohibiting Ronnie from disparaging her, or the ongoing litigation, on social media.[34] After a hearing on these orders, the judge issued specific non-disparagement clauses applicable to both parties, which read, "Neither party shall disparage the other -- nor permit any third party to do so -- especially when within hearing range of the child. . . . Neither party shall post any comments, solicitations, reference or other information regarding this litigation on social media."[35]

After Ronnie allegedly posted disparaging remarks about Masha and the litigation on social media, which was accessible to Masha's rabbi and business clients, Masha filed a civil contempt order alleging that Ronnie violated the non-disparagement provisions.[36] Ronnie answered that he did not receive timely notice of the judge's order and that the hearing judge lacked the authority to issue non-disparagement orders in the first place because they functioned as a prior restraint on his speech.[37]

A second judge failed to find Ronnie in contempt because he found the orders as written to be an unconstitutional restraint on speech.[38] The judge then reissued the orders with a narrower focus, stating:

> 1) Until the parties have no common children under the age of [fourteen] years old, neither party shall post on social media or other Internet medium any disparagement . . . consist[ing] of comments about the party's morality, parenting of or ability to parent any minor children. . . . 2) While the parties have any children in common between the ages of three and fourteen years old, neither party shall communicate, by verbal speech, written speech, or gestures any disparagement to the other party if said children are within [one hundred] feet of the communicating party or within any other farther distance where the children may be in

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Shak*, 144 N.E.3d at 276.

[37] *Id.*

[38] *Id.*

a position to hear, read, or see the disparagement.[39]

Masha then reported two questions on direct review to the SJC, but the Court declined to answer those questions and instead focused on deciding the correctness of the trial judge's non-disparagement orders.[40]

B. *The SJC's Holding and Analysis*

The SJC began its analysis by identifying that the state's desire to protect the mental and emotional well-being of the Shak's child could constitute a compelling state interest.[41] However, the Court clearly stated that state interest alone is not enough to warrant a prior restraint on parents' disparaging speech.[42] Next, the SJC evaluated whether the Shak's child suffered sufficient harm from the disparaging speech to necessitate a prior restraint on Ronnie's speech.[43] The SJC emphatically decided that the extreme level of harm that would justify a non-disparagement order against the child's parents did not exist in the present case.[44] The Court focused its analysis on Masha's failure to present evidence that the child suffered any harm directly because of Ronnie's disparaging remarks.[45] Specifically, the SJC reasoned that because the child was too young to understand any spoken disparagement or read and comprehend written disparagement on social media, the potential harm to the Shaks' child did not justify the issuance of prior restraint orders.[46] Additionally, the SJC rejected any potential argument about future harm the child may experience as being too speculative.[47] To support the previous finding, the SJC also stated that nothing in the Shaks' child's mental or physical condition suggested that he was overly susceptible to disparaging remarks.[48] Ultimately, the Court concluded that Masha did not prove a compelling interest specific enough to justify a prior restraint on Ronnie's speech.[49]

Even though the SJC asserted that its analysis of the constitutionality of

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[39] *Id.* at 276–77.

[40] *Id.* at 277.

[41] *Id.* at 279.

[42] *Shak*, 144 N.E.3d at 279.

[43] *Id.* at 279–80.

[44] *Id.* at 280.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Shak*, 144 N.E.3d at 280.

[49] *Id.*

the prior restraint order ended when the Court determined that a compelling state interest did not exist, it went on to discuss why the order was not narrowly tailored to achieve its stated purpose.[50] First, the SJC emphasized that nothing in the holding or ruling would affect non-disparagement orders that parents voluntarily entered into without court involvement.[51] Next, the SJC stated that parents still have other judicial remedies to deal with disparaging speech including harassment prevention orders, defamation lawsuits, and intentional infliction of emotional distress lawsuits.[52] In addition to these judicial remedies, the SJC suggested that other judicial proceedings, such as how judges take disparaging language into account during child custody hearings, can serve as a natural check against parents disparaging one another.[53] The SJC concluded its analysis of alternatives to non-disparagement orders by asserting that the most effective alternative to these orders is for parents to cooperate for the sake and well-being of their child.[54]

Ultimately, the SJC held in *Shak v. Shak* that the trial judge's non-disparagement orders were unconstitutional under both the U.S. Constitution and Article 77 of the Massachusetts Constitution and thus should be vacated.[55] The holding was specific to the particular non-disparagement order, as the SJC did not hold that all non-disparagement orders in divorce and child custody proceedings are unconstitutional per se.[56] However, the SJC also held that non-disparagement orders that serve as a prior restraint on parental communications in family law litigation matters will only be held as constitutional in the most exceptional of circumstances.[57]

ANALYSIS

The SJC wrongfully decided *Shak v. Shak* despite applying the traditional prior restraint doctrine soundly because the particular circumstances of the case, especially the child's countervailing constitutional rights, the child's very young age, the permanent nature of social media communications, and

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Shak*, 144 N.E.3d at 280.

[55] *Id.*

[56] *See id.*

[57] *Id.* at 279–80.

the lack of practical feasibility for suggested alternatives, should have compelled the Court to exercise discretion and flexibility in applying the prior restraint doctrine.

III. The SJC's Characterization of Prior Restraints Was Too Simplistic

A. *Prior Restraints Are Not Simply or Easily Defined*

The Supreme Court of the United States cemented the concept of prior restraints as a leading concern in free expression litigation in *Near v. Minnesota ex rel. Olson*.[58] Even though the Court articulated four limitations to the prior restraint doctrine, the Court's opinion did not define exactly what constitutes a prior restraint.[59] The SJC in *Shak* utilized a definition of prior restraint that the Supreme Court advanced in *Alexander v. United States*, defining it as an "administrative and judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur."[60] The SJC then unequivocally declared an injunction on speech, such as a non-disparagement order, as a prior restraint by definition.[61]

However, prior restraints are not that clearly defined, which may lead to an over classification of limitations on speech as prior restraints.[62] According to constitutional law expert Michael Meyerson, prior restraints are most offensive to freedom of speech when the preemptive restriction on speech also violates separation of powers principles.[63] The theory behind this definition of prior restraints is that a branch of the government cannot overstep its constitutional bounds by restricting speech.[64] However, judicial orders that regulate a party's speech or conduct in the courtroom should *not* be considered a prior restraint because the judge is acting within his or her constitutional duties.[65]

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[58] Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087 (2001); *see* 283 U.S 697, 715–16 (1931).

[59] *Near*, 283 U.S. at 716 (stating that the four limitations are: (1) troop movement during wartime, (2) obscenity, (3) incitement to violence, and (4) protection of private rights); s*ee* Meyerson, *supra* note 58, at 1106.

[60] 144 N.E.3d at 278 (quoting Alexander v. United States, 509 U.S. 544, 550 (1993)).

[61] *Id.*

[62] *See, e.g.*, Meyerson, *supra* note 58, at 1106–07; Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

[63] *See* Meyerson, *supra* note 58, at 1107.

[64] Meyerson, *supra* note 58, at 1107.

[65] Meyerson, *supra* note 58, at 1107–08.

Even though the non-disparagement order in *Shak* fits Meyerson's definition of prior restraints, it is not as obvious as the SJC suggests it is.[66] The probate and family court judge issued the non-disparagement order as a remedy for Masha, which is within the judiciary's constitutional mandate.[67] The SJC's decision reflects the trend of classifying all preemptive restrictions on speech as prior restraints without deeply probing whether they actually share other characteristics of prior restraints.[68] The lack of explanation for this classification increases confusion in applying the prior restraint doctrine.[69] The SJC's decision to gloss over and simplify the prior restraint doctrine weakens its overall argument because its decision lacks a robust explanation of how restricting a private person's personal communications should be considered a prior restraint where the judge acted within his or her constitutional mandate.[70]

B. *The SJC Ignored Other Constitutional Concerns Invoked by Non-Disparagement Orders*

Prior to the decision in *Shak*, family law practitioners and legal experts presumed a parent's constitutional right to control the upbringing of his or her child allowed the judicial enforcement of non-disparagement orders.[71] The Supreme Court of the United States has historically recognized a parent's right to control the upbringing of his or her child as a part of his or her liberty interest protected under the Fifth and Fourteenth Amendments.[72] In the case of the Shaks, though the non-disparagement order may infringe on Ronnie's freedom of speech, removing it also equally impedes on Masha's right to control her child's upbringing.[73] Other jurisdictions recognize that disparaging conduct can affect a parent's ability to raise a child, thus violating the parent's constitutional liberty interest.[74] A parent's

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[66] *See* 144 N.E.3d at 279; Meyerson, *supra* note 58, at 1096 (proposing a definition of prior restraints that restricts speech prior to communication or formulating rules on speech in contravention of the proper constitutional chronological order).

[67] *See Shak*, 144 N.E.3d at 276; Meyerson, *supra* note 58, at 1096.

[68] *See Shak*, 144 N.E.3d at 279; Scordato, *supra* note 62, at 8.

[69] Scordato, *supra* note 62, at 8 (arguing that because of this confusion, only governmental physical action aimed to stop speech violates the prior restraint doctrine).

[70] *See Shak*, 144 N.E.3d at 279; *see also* Meyerson, *supra* note 58, at 1107.

[71] *See* Paine, *supra* note 6.

[72] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[73] *See Shak*, 144 N.E.3d at 276.

[74] *See, e.g.*, Borra v. Borra, 756 A.2d 647, 650 (N.J. Super. Ct. Ch. Div. 2000) (finding the

constitutional right to free speech is not absolute, especially when one parent's free speech rights impedes the other parent's constitutional liberty rights.[75]

Additionally, a child's constitutional right to his or her own welfare, reflected in the best interests of the child standard, can supersede a parent's freedom of speech rights.[76] Courts in both Washington and New Jersey, for example, have found that one parent's disparagement of the other parent can indirectly harm their child.[77] In Washington, an appeals court found that the father's continued labeling of the mother as insane harmed their children because the harm to the mother's reputation negatively affected the children's opinion of their mother. [78] Similarly, a trial court in New Jersey found that a husband's objection to his ex-wife's country club application would harm their children because they had shared the membership for many years and ending it would upset their daily lives.[79] New Jersey recognizes that parental rights, though fundamental, are not absolute.[80] Though Massachusetts jurisprudence does not reflect these principles exactly, previous cases recognize the basic principle that parental rights can be subservient to the best interests of the child.[81]

Accordingly, the SJC in *Shak* ignored other constitutional concerns that conflicted with Ronnie's freedom of speech.[82] The SJC overlooked the argument that the non-disparagement order protected Masha's constitutional right to raise her child free from the mental anguish that

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mother's liberty interest of raising children without emotional harm caused by the father is superior to the father's freedom of speech interests); Dickson v. Dickson, 529 P.2d 476, 479-80 (Wash. Ct. App. 1974) (finding that the father's defamatory remarks about the mother caused her emotional harm, thus affecting her constitutional right to raise her children as she saw fit).

[75] *See, e.g.*, *Borra*, 756 A.2d at 650 (finding that New Jersey case law illustrated that the importance of safeguarding a child's best interest can supersede other fundamental rights); *Dickson*, 529 P.2d at 479-80.

[76] *See, e.g.*, *Dickson*, 529 P.2d at 479–80.

[77] *Borra*, 756 A.2d at 650-51; *Dickson*, 529 P.2d at 479–80.

[78] *Dickson*, 529 P.2d at 479–80.

[79] *Borra*, 756 A.2d at 650–51.

[80] In re Guardianship of K.H.O., 736 A.2d 1246, 1251 (N.J. 1998).

[81] *See* Op. of the Justices to the Senate, 691 N.E.2d 911, 913 (Mass. 1998) (advising legislature that parental constitutional rights are not absolute when they conflict with the best interests of the child); *see also* Youmans v. Ramos, 711 N.E.2d 165, 172 (Mass. 1999) (holding that in custody proceedings, a parent's constitutional right to a relationship with their child can be outweighed by the best interests of the child standard).

[82] *See* 144 N.E.3d 274, 276–77 (Mass. 2020).

Ronnie's disparagement could cause to her, and consequently, to the child.[83] Similarly, the state's interest in protecting the child from the harm caused by Ronnie's disparaging remarks could serve as a limitation on Ronnie's constitutional rights.[84] Thus, the SJC's holding and analysis is vulnerable because it did not conduct a complete constitutional analysis; the Court failed to discuss how the non-disparagement order protected both Masha and her child's constitutional right to liberty.[85]

IV. The Court Inappropriately Applied the Traditional Notion of "Specific Harm" Given the Facts and the Permanence of Social Media

In an interview after the SJC's decision, Masha's attorney stated that the decision ultimately was legally correct.[86] The SJC followed both federal and state precedent in emphasizing that prior restraints are heavily disfavored, and, absent a specific showing of harm, prior restraints are unconstitutional.[87] However, Attorney Novitch further explained that practicality and common sense creates lingering doubts about the propriety of following precedent in his client's case.[88]

A. *The SJC's Reliance on Other Jurisdictions' Distinguishable Cases Undermines the Strength of Its Argument*

Courts refusing to grant prior restraints simply out of a desire to prevent speculative harm is a well-established tenet of constitutional law.[89] Massachusetts case law also follows this precedent and requires a detailed showing of harm to trigger the compelling interest of protecting children's welfare.[90] In a footnote to its decision in *Shak*, the SJC asserted that other jurisdictions also require a very high bar to order prior restraints in the

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[83] *Id.*; *see Dickson*, 529 P.2d at 479.

[84] *Shak*, 144 N.E.3d at 276; *see Dickson*, 529 P.2d at 479.

[85] *Shak*, 144 N.E.3d at 276.

[86] Kris Olson, *Non-Disparagement Orders Improperly Restrained Speech*, MASS. LAW. WKLY. (May 13, 2020), https://perma.cc/C5HY-4AT2.

[87] *See, e.g.*, Southeastern Promotions Ltd. v. Conrad 420 U.S. 546, 559 (1975); Care & Protection of Edith, 659 N.E.2d 1174, 1176 (Mass. 1996).

[88] *Richard Novitch Quoted in NYT Article on Landmark MA Ruling Concerning Nondisparagement Orders in Divorce Cases*, TODD & WELD LLP (May 2020), https://perma.cc/9ZBT-JZX9.

[89] *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (requiring the gravity of harm to demonstrate a clear and present danger to justify imposition of a prior restraint).

[90] Fenton v. Fenton, 418 N.E.2d 606, 607 (Mass. 1981).

family law setting.[91] However, the SJC did not cite decisions involving non-disparagement clauses and instead included other family law proceedings.[92] Thus, the cited cases did not directly speak to the issue in *Shak*, consequently undermining the SJC's reliance on those cases.[93]

Some courts agree that a prior restraint meant to protect children's welfare will only be constitutional if the restraint will prevent specific harm to the children and if the prior restraint is not overbroad or vague.[94] For example, Colorado will only find that a child's welfare can serve as a compelling state interest if a parent's free speech rights threaten the child with physical or emotional harm or actually cause said harm.[95] *In re Marriage of Newell* further defined that such harm must be substantial and cannot be assumed.[96] Illinois courts will only allow prior restraints on extrajudicial comments on an upcoming trial, even a trial involving children, if there is a clear and present danger to the fairness of the trial.[97] Nevada similarly requires a specific showing of a serious and imminent threat to the integrity of a trial to issue a gag order on extrajudicial comments.[98] New York and Texas both require prior restraints and gag orders to be narrowly tailored to prevent the order from being overbroad.[99]

Most of these cases that the SJC relied on involved prior restraints in the form of gag orders to prevent parents and other trial participants from communicating with the press.[100] Cases in other jurisdictions that involve both prior restraints and child welfare that require a showing of specific harm to qualify as a compelling state interest also overwhelmingly involve gag orders restricting speech with the press.[101] Additionally, the three

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[91] 144 N.E.3d 274, 279 n.7 (Mass. 2020).

[92] *Id.*

[93] *Id.*

[94] *See* Johanson v. Eighth Judicial Dist. Ct. of Nev. ex rel. Clark County, 182 P.3d 94, 98 (Nev. 2008); Grigsby v. Coker, 904 S.W.2d 619, 620 (Tex. 1995); In re Marriage of Newell, 192 P.3d 529, 536 (Colo. Ct. App. 2008); Adams v. Tersillo, 245 A.D.2d 446, 447 (N.Y. App. Div. 1997); In re Summerville, 547 N.E.2d 513, 517 (Ill. App. Ct. 1989).

[95] *Newell*, 192 P.3d at 536.

[96] *Id.*

[97] *Summerville*, 547 N.E.2d at 517.

[98] *Johanson*, 182 P.3d at 98.

[99] *See Grigsby*, 904 S.W.2d at 620; *Adams*, 245 A.D.2d at 447.

[100] *See Johanson*, 182 P.3d at 98; *Grigsby*, 904 S.W.2d at 620; *Summerville*, 547 N.E.2d at 517.

[101] *See, e.g.*, In re T.R., 556 N.E.2d 439, 455 (Ohio 1990) (holding gag orders against speaking with the media allowable to protect best interest of children only with a showing of demonstrated harm); Marriage of Geske v. Marcolina, 642 N.W.2d 62, 70 (Minn. Ct. App. 2002)

Massachusetts cases that found prior restraints to be unconstitutional all involved prior restraints preventing access to the press and media.[102] *Shak* does not involve a gag order against the press; rather, it prevents Masha and Ronnie from disparaging one another in the presence of the child or on social media.[103] For this reason, the SJC should not have relied on these other cases.[104] This reliance weakens the SJC's holding because not all prior restraints are equally offensive to free speech rights, and there exists substantially less support for the prevention of private communications compared to communications with the press.[105]

B. *The Child's Very Young Age Makes the Child More Vulnerable to Disparaging Comments*

In explaining why the non-disparagement order did not serve a compelling interest in *Shak*, the SJC explained that there were no medical or psychological records to indicate the child was especially vulnerable to the disparaging language.[106] The SJC also reasoned that Masha failed to provide any evidence that Ronnie's disparaging language caused the child any specific kind of harm.[107] However, the SJC failed to consider that the child's very young age makes it more difficult to show specific instances of harm caused by the disparaging speech.[108] For example, courts sometimes look at how restricted speech might cause harm to a child in school.[109] Since Masha and Ronnie's child is too young to attend school, one common indicator for determining harm to the child is not applicable here.[110] Thus, this limitation demonstrates one way that the child's very young age makes it impractical to use the traditional harm standard because its application works to exclude

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(holding a prior restraint preventing father from showing pictures of his children to the media constitutional because his children suffered specific harm).

[102] *See* Commonwealth v. Barnes, 963 N.E.2d 1156, 1167 (Mass. 2012); George W. Prescott Publ'g v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998); Care & Protection of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[103] *See* 144 N.E.3d 274, 279 (Mass. 2020).

[104] *See id.*

[105] *See* Meyerson, *supra* note 58, at 1107.

[106] 144 N.E.3d at 280.

[107] *Id.*

[108] *See id.*

[109] *See* Marriage of Geske v. Marcolina, 642 N.W.2d 62, 67 (Minn. Ct. App. 2002) (finding that a child's unwillingness to go to school constitutes a harm to the child sufficient to justify a prior restraint).

[110] *Shak*, 144 N.E.3d at 279.

harm to very young children.[111]

The SJC also failed to acknowledge that the child's young age makes him psychologically more susceptible to harm caused by disparaging language.[112] Scientific research and studies demonstrate that parents disparaging and fighting with one another can negatively affect infant brain development and growth.[113] Because of the high degree of plasticity of infants' brains, they are highly susceptible to the stress caused by parental arguments, which can affect their ability to adjust and function later in life.[114] The kind of speech that non-disparagement agreements prohibit parents from saying to one another is considered destructive conflict that can eventually lead to both development and physical problems.[115] Consequently, scientific research shows an infant's exposure to disparaging fights and arguments themselves can cause substantial harm to the child.[116] Therefore, the SJC erred by not considering the long-term harm that disparaging words can cause to a child as young as Masha and Ronnie's child.[117]

Disparaging comments can also negatively affect a child's relationship with the child's parents in addition to negatively affecting the child's cognitive development.[118] A parent who routinely badmouths the other parent often alienates the child from the non-disparaging parent.[119] Unwarranted alienation from a parent also harms children because having a healthy relationship with both parents is in the best interest of a child.[120] Alienation of a child caused by a parent's disparaging remarks could also

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[111] *See id.*; *Geske*, 642 N.W.2d at 70.

[112] *See* Gwen Dewar, *Can Babies Sense Stress in Others? Yes They Can!*, PARENTING SCI., https://perma.cc/9HZV-TLK7 (last updated July 2018) (explaining that babies can notice and subsequently feel a parent's stress).

[113] Ashik Siddique, *Parents' Arguing in Front of Baby Alters Infant Brain Development*, MED. DAILY (Mar. 25, 2013, 6:38 PM), https://perma.cc/BD93-7BY8.

[114] *Id.*

[115] Diana Divecha, *What Happens to Kids When Parents Fight*, GREATER GOOD MAG. (Jan. 26, 2016), https://perma.cc/72CD-P4SU (defining destructive conflict as verbal aggression such as name calling or insults).

[116] *See* Siddique, *supra* note 113.

[117] *See* Shak v. Shak, 144 N.E.3d 274, 277 (Mass. 2020).

[118] *See* Edward Kruk, *Parental Alienation as a Form of Emotional Child Abuse: Current State of Knowledge and Future Directions for Research*, 22 FAM. SCI. REV. 141, 144 (2018).

[119] *Id.* at 149.

[120] *See id.* at 142. *See generally* Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV., no. 3, 2001, at 249 (explaining what differentiates an alienated child from children with healthy parental relationships).

impact a parent's constitutional right to raise and control the upbringing of that child.[121] Scientific studies and psychology demonstrate that the risk of harming a child transcends mere speculative harm because the younger a child is, the more vulnerable he or she is to suffering harm by his or her parents disparaging one another.[122]

C. *The Very Nature of Social Media Requires a Reexamination of Speculative Harm*

The SJC emphasized that Masha failed to demonstrate that the child suffered harm because of Ronnie's disparagement, in part because the child cannot read social media posts due to his age.[123] After the hearing, Masha's attorney critiqued that portion of the decision by pointing out that the social media posts will not disappear anytime soon.[124] Social media and the internet age requires reformulating the prior restraint doctrine.[125] The nature of social media magnifies the amount of damage that speech can cause since online postings can be accessed by almost anyone, including children with smartphones.[126] For example, in the United Kingdom, nearly one third of children use the internet by the age of three.[127] This fact demonstrates another flaw in the SJC's decision because Ronnie and Masha's child was closer to using the internet and accessing disparaging content than the SJC suggested.[128] Thus, the easily accessible nature of social media makes the risk of harm less speculative than the SJC's opinion asserted, especially for an infant.[129]

The permanence of social media posts also contributes to harm infants suffer.[130] Parents' social media use can directly harm children because the

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[121] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[122] *See Shak*, 144 N.E.3d at 277.

[123] *Id.* at 280.

[124] Olson, *supra* note 86.

[125] *See* Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155, 1158 (2019) (arguing that in part because of the lasting damage a permanent social media post can cause, courts should be allowed to remove expressions from online).

[126] *Id.* at 1172; *see* Natalie Frank, *Young Children and the Internet: What Puts Them at Risk?*, WE HAVE KIDS (Jun. 23, 2019), https://perma.cc/8U29-F9FV.

[127] Frank, *supra* note 126.

[128] *See Shak*, 144 N.E.3d at 280; Frank, *supra* note 126.

[129] *See* Bendor & Tamir, *supra* note 125, at 1170–71; Frank, *supra* note 126.

[130] *See, e.g.*, Elizabeth Fernandez, *What We Post on Social Media May Harm Our Children's Development*, FORBES (Jul. 8, 2019, 2:01 PM EDT), https://perma.cc/WKS2-6L9J; Adrienne

photos and other posts parents make about their children create an online presence for children while they are too young to have any input on what is posted.[131] This phenomenon is known as "sharenting."[132] Sharenting mirrors the tension inherent in non-disparagement agreements as a parent's right to freedom of expression collides with a child's right to privacy.[133] Thus, non-disparagement orders can serve to protect children from negative posts that could reflect poorly back on the child.[134]

Ultimately, even though the SJC's decision was squarely in line with Massachusetts and federal precedent, the child's age and the digital landscape inherent in social media communications demonstrate that the SJC erred in holding the harm to Ronnie and Masha's child was too speculative to warrant a prior restraint on Ronnie's ability to disparage Masha.[135]

V. The SJC Erred in Determining That Reasonable Alternatives to the Non-Disparagement Order Existed

A. *The SJC's Suggested Legal Alternatives Are Not Practicable*

Though the SJC ended its analysis after it erroneously found that a compelling state interest did not exist, it nonetheless suggested alternatives to non-disparagement orders.[136] The SJC suggested three categories of alternatives: (1) civil lawsuits against the disparaging parent; (2) government assistance in the form of a harassment prevention order; and (3) voluntary cooperation between parents.[137]

The legal actions that the SJC suggested accurately reflects legal actions available to Masha, but they do not reflect reasonable alternatives.[138] First, the Court's suggestion that Masha could institute a defamation lawsuit against Ronnie in lieu of the non-disparagement order is not reasonable because of the extreme difficulty in proving a prima facie defamation case and the exorbitant cost associated with it.[139] Second, the SJC's dicta

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LaFrance, *The Perils of 'Sharenting'*, THE ATLANTIC (Oct. 6, 2016), https://perma.cc/3XV5-KC7M.

131 LaFrance, *supra* note 130.

132 Fernandez, *supra* note 130.

133 *See* LaFrance, *supra* note 130.

134 *See* LaFrance, *supra* note 130.

135 Shak v. Shak, 144 N.E.3d 274, 280 (Mass. 2020).

136 *Id.*

137 *Id.*

138 *See id.*

139 *See* Jennifer M. Paine, *Non-Disparagement Clauses: The Tooth Fairy Story and Other Times to*

explaining that Masha could file an intentional infliction of emotional distress (IIED) claim as an alternative to the non-disparagement order is likewise not reasonable because of the high burden of proof Massachusetts requires to grant IIED claims.[140] Finally, the SJC's recommendation that Masha apply for a harassment prevention order under Massachusetts General Laws chapter 258E is not reasonable because Masha would only be able to apply for an order after three instances of Ronnie's disparaging comments, thus unnecessarily exposing the child to further harm.[141]

The SJC concluded by reminding future parties, "the best solution would be for parties in divorce and child custody matters to rise above any acrimonious feeling that they may have and, with the well-being of their children paramount in their minds, simply refrain from making disparaging remarks about one another."[142] This sentiment completely overstates how contentious divorce proceedings could be and how honest communication and cooperation might not be possible.[143] The SJC emphasized that its holding would not affect voluntary non-disparagement orders and subsequently suggested such orders as a vehicle to deal with heated divorce proceedings.[144] However, signing a voluntary non-disparagement agreement only goes so far because non-disparagement clauses represent one of the most common forms of custody agreement violations.[145] The SJC's proffered alternatives arguably put a greater burden on Masha than the non-disparagement order's burden on Ronnie's free speech, highlighting the weakness of the SJC's holding.[146]

Bite Your Tongue, DADS DIVORCE, *https://perma.cc/E32B-8Y6G* (last visited Feb. 9, 2022) (explaining non-disparagement clauses are preferable to defamation suits because of the time and money involved).

[140] *See* Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (Mass. 1976) (establishing that even though non-physical injuries can satisfy the four requirements, severe distress must be demonstrated); Justin McCarthy, *Intentional Infliction of Emotional Distress*, LAW OFFICE OF JUSTIN R. MCCARTHY (Nov. 9, 2017), https://perma.cc/6B2F-Y7HR.

[141] MASS. GEN. LAWS ch. 258E, § 1 (2022); *Find out What Qualifies as Harassment*, MASS.GOV, https://perma.cc/LCJ8-3AZL (last visited Feb. 9, 2022).

[142] *Shak*, 144 N.E.3d at 280.

[143] *See Managing Your Divorce When Your Spouse Will Not Cooperate*, ANDREW CORES FAM. L. GROUP (Oct. 31, 2018), https://perma.cc/P9M5-GGTN (explaining that in some cases a party in a divorce case will be uncooperative especially if the divorce came as a surprise or there is still emotional attachment).

[144] *Shak*, 144 N.E.3d at 280.

[145] *See Common Violations of Custody Agreements*, LAW OFFICE OF KENT L. GREENBERG, https://perma.cc/D2KK-ULHR (last visited Feb. 9, 2022).

[146] *See Shak*, 144 N.E.3d at 280.

B. *The Non-Disparagement Order Itself Was Already Narrowly Tailored*

The SJC's erroneous decision in failing to find enough specific harm to trigger the state's compelling interest caused the Court to gloss over the fact that the non-disparagement order, compared to non-disparagement orders from other jurisdictions, was actually already narrowly tailored, thus negating the need for alternatives in the first place.[147] The New York appellate court, for example, ruled that a non-disparagement order that prohibited either party from making derogatory comments to one another was constitutionally over broad.[148] However, the court found that modifying the order to bar disparaging remarks made only in the presence of the children was constitutionally permissible.[149] The order approved in *Adams v. Tersillo* is very similar in substance to the order the probate judge issued in *Shak*, as both orders prohibited disparaging comments made in the presence of children.[150] In fact, the *Shak* order was even more narrowly tailored than the *Adams* order because the *Shak* order defined "in the presence of children."[151] *Adams* provides an example of a court approving a similarly worded non-disparagement agreement without an extensive discussion of harm suffered.[152] Thus, the SJC mistakenly relied on *Adams* as an example of a case requiring a high burden for proving a child suffered harm because *Adams* actually undermines the SJC's argument rather than supporting it.[153]

The SJC acknowledged that the probate and family court judge put "careful thought" into the order, but that this did not matter because the situation did not justify an imposition of a prior restraint.[154] Here, the SJC implicitly acknowledged that the non-disparagement order actually was

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147 *See* Adams v. Tersillo, 245 A.D.2d 446, 447 (N.Y. App. Div. 1997); *see also* Karantinidis v. Karantinidis, 186 A.D.3d 1502, 1504 (N.Y. App. Div. 2020) (modifying a non-disparagement order only to prevent an ex-spouse from disparaging her ex in front of her patients); Nash v. Nash, 307 P.3d 40, 49 (Ariz. Ct. App. 2013) (finding that a non-disparagement order that prohibits ex-wife from disparaging ex-husband on social media to be narrowly tailored because ex-husband is a famous athlete).

148 *Adams*, 245 A.D.2d at 447.

149 *Id.*

150 *Id.*; 144 N.E.3d at 277.

151 144 N.E.3d at 277 (defining in the presence of a child as meaning one hundred feet); 245 A.D.2d at 447.

152 245 A.D.2d at 447.

153 *See id.*; *Shak*, 144 N.E.3d at 278–79.

154 *Shak*, 144 N.E.3d at 280.

narrowly tailored.[155] Once again, the SJC failed to thoroughly consider the second part of the prior restraint analysis on whether there was a less restrictive alternative.[156] Other jurisdictions' jurisprudence that have found that compelling interests existed to protect children from disparaging language weakens the SJC's argument because the weight of persuasive authority is against its holding that a compelling interest did not exist in the present case.[157]

VI. The SJC's Decision Has the Potential to Disrupt a Settled Portion of Family Law

Beyond the legal flaws in the SJC's decision, the SJC failed to consider the decision's potential to disrupt other jurisdictions' precedents.[158] Though *Shak* does not represent binding precedent outside Massachusetts, other jurisdictions may follow *Shak's* holding and cite *Shak* as persuasive authority.[159] The SJC's decision marks the first time a court has struck down a judicially ordered non-disparagement order based solely on First Amendment concerns, as the Massachusetts precedent the SJC relied on did not concern non-disparagement orders, but rather gag orders related to trial proceedings or parents communicating with the press.[160] The SJC's decision has already caused confusion in other states, demonstrated by law offices informing clients that courts may be persuaded by the SJC's decision to strike down non-disparagement orders.[161] For example, a Pennsylvania

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[155] *Id.*

[156] *Id.*

[157] *Id.*; *see, e.g.*, Schutz v. Schutz, 581 So.2d 1290, 1293 (Fla. 1991) (finding a substantial state interest in enjoining mother from making disparaging comments about father in order to ensure the child had a healthy relationship with both parents); Stephanie L. v. Benjamin L., 602 N.Y.S. 2d 80, 82 (N.Y. Sup. Ct. 1993) (stating that a court's ability to infringe on parents' First Amendment rights in order to protect the best interests of the child is so common it's often not even reported by courts).

[158] *See Shak*, 144 N.E.3d at 280.

[159] *See* Jennifer A. Brandt & Megan K. Feehan, *The Constitutionality of Nondisparagement Provisions in Custody Orders*, LEGAL INTELLIGENCER, https://perma.cc/W5HV-HCF3 (last visited Feb. 9, 2022).

[160] *See* Commonwealth v. Barnes, 963 N.E.2d 1156, 1167 (Mass. 2012); George W. Prescott Publ'g v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998); Care & Prot. of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[161] *See* John J. Beski, *Badmouthing in Divorce: Parental Alienation or Free Speech?*, GRAHAM L. (June 4, 2020), https://perma.cc/NE42-HGME (informing potential clients that *Shak* could serve as persuasive authority in Colorado courts); K.O. Herston, *Is Tennessee's Automatic Injunction Unconstitutional?*, HERSTON L. GROUP (May 13, 2020), https://perma.cc/ESS4-FQN4 (expressing

lawyer's analysis of *Shak* expressed a concern that Pennsylvania and other states may follow Massachusetts's example.[162] Thus, the SJC's decision in *Shak* casts doubt on a well-established power of judges in custody and divorce proceedings, and the SJC erred by not considering the effect its decision could have in upending a practice designed to protect children.[163]

CONCLUSION

In *Shak v. Shak* the SJC held that a parent's constitutional right to free speech superseded the best interests of the child. The SJC followed prior restraint precedent blindly insofar that it did not adequately consider the kind of harm a toddler could suffer by hearing his parents disparage one another. In a way, the SJC penalized Masha and Ronnie's child for being very young as his age precluded him from showing some of the common signs of harm or distress that courts usually look to in determining harm. Scientific studies demonstrate that the harm that an infant suffers because of disparaging comments is not as speculative as the SJC assumed that it was. The SJC adopted the heavy presumption against prior restraints without adequately analyzing the case's circumstances, which in this case did in fact justify a prior restraint against Ronnie.

The SJC's decision also demonstrates a lack of understanding of the true nature of divorce and custody proceedings. When emotions are running high, rational thought may not be as easy as the SJC assumed. The SJC failed to appreciate that the alternative actions it suggested to Masha place a greater burden on her proportionate to Ronnie's inability to post negative things about her on social media. At its essence, *Shak v. Shak* is about the tension inherent in preserving the best interests of the child while balancing a parent's constitutional right both to free speech and the freedom to control a child's upbringing. With this decision, the SJC made a definitive declaration that freedom of speech trumps both a child's well-being and a parent's right to control the raising of a child by shielding the child from harmful words and speech. The true losers of this decision are the countless children who may not be adequately protected from disparaging speech in the future because of the SJC's holding in *Shak v. Shak*.

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concern that *Shak's* precedent could undermine a Tennessee law that imposes an automatic injunction in every divorce settlement to prevent parents from disparaging one another).

[162] Brandt & Feehan, *supra* note 159.

[163] *See* 144 N.E.3d at 280; Beski, *supra* note 161.

Who's the Boss? Determining a Test for Joint Employer Liability Under the Massachusetts Wage Act

Kevin Shanahan[*]

INTRODUCTION

In Massachusetts, when an employee makes a claim against an employer for failing to properly pay under state law, the employee files a claim pursuant to the Wage Act.[1] The Wage Act in Massachusetts is a remedial statute meant to protect workers from the "unreasonable detention of wages."[2] The basis for determining liability for who owes an employee wages lies in the answer to the threshold question: Who is the individual's employer?[3] In most situations, such an answer is a relatively straightforward analysis, as most employment relationships are uncomplicated, and a worker's employer is the one who cuts the worker's paycheck and directs and controls the individual's work.[4] However, situations can arise where multiple entities are jointly and severally liable for a worker's wages and are thus joint employers of the same employee.[5]

Currently, under the Wage Act, the concept of joint employer liability is ill-defined.[6] Stemming largely from the fact that the Wage Act provides no universal definition of "employer," courts use statutory and common law

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[1] *See generally* Am. Mut. Liab. Ins. Co. v. Comm'r of Labor and Indus., 163 N.E.2d 19, 21 (Mass. 1959); Mark F. Murphy & Michael P. Murphy, *Wage Act Claims: Recent Developments in Massachusetts*, 48 BOS. B.J., May/June 2004, at 19 *passim*.

[2] *Am. Mut. Liab. Ins. Co.,* 163 N.E.2d at 21; Murphy & Murphy, *supra* note 1, at 19.

[3] *See generally* Carl H. Petkoff, Note, *Joint Employment Under the FLSA: The Fourth Circuit's Decision to Be Different*, 70 S.C. L. REV. 1125, 1126 (2019) (explaining that where an employee has multiple employers, the various employers can be held liable for violations of the Wage Act).

[4] *Id.*

[5] *Id.*

[6] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501–02 (Mass. App. Ct. 2017).

tests to search for a consistent application of joint employment.[7] However, these tests lead to inconsistent results, leaving the question of who a worker's employer is unanswered.[8]

This Note will begin by introducing the concept of joint employment and providing examples of how joint employment materializes in the workplace.[9] It will provide background on the Massachusetts Wage Act and discuss a recent appeals court decision that set out the current interpretation of joint employment under the Wage Act.[10] This Note will also detail recent trial court cases where the uncertainty in defining "joint employer" has led to inconsistent results.[11] Next, this Note will show how a stronger joint employment test will help prevent wage theft while providing employers with certainty.[12] This Note will argue that using the Independent Contractor Statute to find an employment relationship in a joint employment context is inappropriate, and instead argue that courts should interpret the Wage Act in accordance with the Fair Labor Standards Act (hereinafter "FLSA").[13] This Note will then review the different tests for joint employment under the FLSA and argue that the best test is the one adopted in *Zheng v. Liberty Apparel Co.* by the Second Circuit.[14] Finally, this Note will assert that an appropriate approach is to redefine "employer" within the Wage Act by drawing inspiration from the Workers Compensation Statute and the Temporary Workers Right to Know Law.[15]

I. Background

A. *Joint Employment in General*

Under the joint employment doctrine, an employee who is formally employed by one employer, such as the one who issues a paycheck, may be deemed to be employed by a second employer if the second employer exercises sufficient control over the terms and conditions of the worker's

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[7] *See id.*

[8] *Compare* Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with* Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[9] *See infra* Part I(A).

[10] *See infra* Part I(B)–(C).

[11] *See infra* Part I(D).

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

employment.[16] Generally, joint employment can be classified as vertical or horizontal.[17] A vertical joint employment relationship exists when two employers permit one employee to work simultaneously for them and arises in familiar contexts such as when a contractor hires a subcontractor who has its own employees or when a staffing agency provides employees for a business.[18] The second scenario, a horizontal joint employment relationship, exists when multiple employers employ the same employee who works separate hours for each employer during the same work week.[19] If the companies are sufficiently associated regarding the employment of the employee, the companies may aggregate their managerial responsibilities.[20]

The FLSA, enacted in 1938, sets the nationwide standards for minimum wage and overtime pay but does not mention "joint employment" directly.[21] However, one year after the passage of the FLSA, the Department of Labor ("DOL") introduced the concept of joint employment in response to unscrupulous employers attempting to avoid compliance with the law.[22] The concept has evolved through various circuit court decisions and DOL interpretations.[23] The different decisions in federal circuits have created a murky definition of joint employment.[24] The concept is even less clearly defined when applied to the Massachusetts Wage Act.[25]

B. *The Massachusetts Wage Act*

The Massachusetts Wage Act, specifically Mass. Gen. Laws. ch. 149, §§ 148–150 ("Wage Act"), provides "strong statutory protection for employees and their right to wages."[26] It was enacted to prevent the

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[16] Petkoff, *supra* note 3, at 1126.

[17] *See generally* Petkoff, *supra* note 3, at 1139 (defining vertical and horizontal joint employment).

[18] Scott M. Prange, *Managing the Workforce in the Gig Economy*, 20 HAW. B.J., June 2016, at 4, 9.

[19] *Id.*

[20] *See id.*

[21] Petkoff, *supra* note 3, at 1126.

[22] Jason Schwartz & Ryan Stewart, *FLSA Turns 80: The Divide Over Joint Employment Status*, LAW 360 (June 18, 2018, 12:49 PM EDT) (sub. req.), https://perma.cc/7SUT-63LW.

[23] *See* Petkoff, *supra* note 3, at 1126.

[24] New York v. Scalia, 464 F. Supp. 3d 528, 536 (S.D.N.Y. 2020); Petkoff, *supra* note 3, at 1126.

[25] *See generally* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 502 (Mass. App. Ct. 2017) (holding defendant was not plaintiff's joint employer under the Wage Act because she did not provide direct services to defendant).

[26] Crocker v. Townsend Oil Co., 979 N.E.2d 1077, 1086 (Mass. 2012).

"unreasonable detention of wages," and as such it requires employers to make prompt and full payment of wages to their employees. [27] The Wage Act is broad and inclusive; it provides that any worker providing any services, unless exempted by the Independent Contractor Statute ("ABC Test"), should be paid the wages earned.[28] Wages are "earned" once an "employee has completed the labor, service, or performance required of him . . . ."[29]

In addition to ensuring that employees are paid on a timely basis, the Massachusetts wage and hour laws provide other employee protections.[30] For instance, the Minimum Wage Statute requires employers to pay at least the required minimum wage, while the Overtime Statute requires that many employers pay time and a half when employees work more than forty hours in a week.[31] Further, employees are protected from being misclassified as independent contractors, protected from retaliation for seeking proper payment of wages, and entitled to Sunday and holiday premium pay under the Massachusetts Blue Laws. [32]

"The Wage Act 'impose[s] strict liability on employers.'" [33] Under Mass. Gen Laws ch. 149, § 148, (hereinafter "§ 148"), liability extends beyond just the business entity itself; § 148 includes individual liability for those operating the business.[34] Specifically, under § 148 the president and treasurer of a corporation, as well as any officers or agents who manage the corporation, are deemed to be employers.[35] A manager of a limited liability company who "'controls, directs, and participates to a substantial degree in formulating and determining' the financial policy of a business entity" may also be subject to personal liability for violations of the Wage Act.[36] Other than a few narrow exceptions in the statute, no employer is exempt from the

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[27] Am. Mut. Liab. Ins. Co. v. Comm'r of Labor and Indus., 163 N.E.2d 19, 21 (Mass. 1959); Murphy & Murphy, *supra* note 1, at 19.

[28] *See generally* MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004) (listing exceptions to status as an employee); Awuah v. Coverall N. Am., Inc., 952 N.E.2d 890, 896 (Mass. 2011).

[29] *Awuah*, 952 N.E.2d at 896.

[30] *E.g.*, MASS. GEN. LAWS ANN. Ch. 151, § 1 (West 2021) (setting the minimum wage); *id.* § 1A (providing that employees shall be paid overtime).

[31] *Id.* §§ 1, 1A.

[32] MASS. GEN. LAWS ANN. Ch. 136, § 6 (West 2021); MASS. GEN. LAWS ANN. Ch. 149, § 148A (West 1977); *id.* § 148B.

[33] Dixon v. City of Malden, 984 N.E.2d 261, 265 (Mass. 2013) (citation omitted).

[34] *See* MASS. GEN. LAWS ANN. Ch. 149, § 148.

[35] Donis v. Am. Waste Servs., LLC, 149 N.E.3d 361, 366 (Mass. 2020).

[36] Cook v. Patient Educ., LLC, 989 N.E.2d 847, 849 (Mass. 2013).

Wage Act.[37]

Pursuant to Mass. Gen. Laws ch. 149, § 27C, when an employer violates the Wage Act the employer faces the possibility of civil or criminal penalties from the Attorney General.[38] In addition to enforcement initiated by the Attorney General's Office, Mass. Gen. Laws ch. 149, § 150 provides a private right of action for employees.[39] This private right of action allows an employee to file a civil action up to three years after the violation for injunctive relief, damages, lost wages, and other benefits on the employee's own behalf and for others similarly situated.[40] When an employee prevails, the employee is entitled to treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of litigation and reasonable attorney's fees.[41]

C. *Status of Joint Employment Under the Massachusetts Wage Act*

The status of joint employment under the Massachusetts Wage Act is unclear—largely because the Wage Act does not define "employer."[42] While Mass. Gen. Laws. ch. 149, § 1 does provide a definition, it is not applied to the Wage Act or Overtime and Minimum Wage Statutes.[43] Because the Wage Act lacks a coherent definition, courts have applied multiple tests to determine who is an employer and joint employer.[44]

In 2017, in *Gallagher v. Cerebral Palsy of Massachusetts, Inc.* ("*Gallagher*"), the Massachusetts Appeals Court reviewed two tests for determining who is an employer and briefly applied them to the theory of joint employment.[45] In *Gallagher*, the plaintiff was a personal care attendant for an elderly man and brought a claim against Cerebral Palsy of Massachusetts, Inc. ("CPM") alleging that CPM was her employer.[46] The Court noted that neither the Wage Act nor the Overtime Statute included a "self-contained definition of 'employer.'"[47] Instead, the Court applied the ABC Test and a common law

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[37] *Donis*, 149 N.E.3d at 366 (citation omitted).

[38] MASS. GEN. LAWS ANN. Ch. 149, § 27C (West 2004).

[39] *Id.* § 150.

[40] *Id.*

[41] *Id.*

[42] Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501 (Mass. App. Ct. 2017).

[43] MASS. GEN. LAWS ANN. Ch. 149, § 1 (providing that the definition of "Employer" applies only to Mass. Gen. Laws. Ch. 149, §§ 105A–105C).

[44] *See Gallagher*, 86 N.E.3d at 498.

[45] *See id.*

[46] *Id.* at 497.

[47] *Id.* at 498–502 (citation omitted).

"Right to Control Test" and then briefly applied both to the concept of joint employment.[48]

The ABC Test provides a presumption that "an individual performing any service" for another is an employee.[49] A purported employer can rebut the presumption by meeting the following three elements, known as the ABC Test:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
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> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[50]

As a result, before reaching the ABC Test, the threshold question of whether the individual provided services to the alleged employer must be answered.[51] The Court in *Gallagher* held that as to the Wage Act and the Overtime Statute, the ABC Test provided the appropriate test for determining if there is an employer-employee relationship and that it superseded the common law Right to Control Test.[52]

The *Gallagher* Court also reviewed the common law "Right to Control Test" as applied to joint employment and acknowledged that the U.S. Supreme Court defined the concept of joint employment as "a company possessing 'sufficient control over the work of the employees' of another company."[53] The *Gallagher* Court stated the basis of a joint employer relationship is simply where one employer, "contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."[54] The Court remarked that it was not making a determination whether the ABC Test had supplanted the common-law Right to Control Test when applied to a joint employment theory under

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[48] *Id.* at 499.

[49] MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004).

[50] *Id.*

[51] *Gallagher*, 86 N.E.3d at 499.

[52] *See id.*

[53] *Id.* at 501–02 (quoting Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964)).

[54] *Gallagher*, 86 N.E.3d at 501 (quoting Commodore v. Genesis Health Ventures, Inc., 824 N.E.2d 453, 456 (Mass. App. Ct. 2005)).

the Wage Act and Overtime Statute.[55]

D. *The Current Two Test Approach to Joint Employment Under the Wage Act Has Led to Inconsistent Results*

Due to the lack of clarity, trial courts have approached the concept of joint employment under the Wage Act differently; such different approaches have led to inconsistent results.[56] Some state courts have looked to federal courts' interpretations of the FLSA regarding joint employment, while others have tried to piece together a meaning using the different ways "employer" is described in various parts of the Wage Act.[57] For instance, § 148 references "an employer," the Minimum Wage Statute references "any employer," and the Overtime Statute references "no employer."[58] In attempting to define employer and joint employers from these terms, courts' interpretations end up on opposite ends of the spectrum.[59]

1. *Jinks v. Credico (USA), LLC*

In *Jinks v. Credico (USA), LLC* ("*Jinks*") three individuals worked for DFW Consultants, Inc. ("DFW") doing face-to-face sales for the business clients of Credico (USA), LLC ("Credico").[60] DFW and Credico entered into contracts where DFW provided services for Credico, and in return DFW agreed to have its employees comply with Credico's code of business ethics and conduct; however, DFW made clear that Credico had no right to control the work performed by DFW employees.[61] Three employees filed suit alleging that DFW and Credico were their joint employers.[62] The Court held that "joint employers can both be held liable under the [W]age [A]ct and [O]vertime [S]tatute" and that "the 'right to control' test determines whether

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[55] *Id.* at 502.

[56] *Compare, e.g.*, Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with, e.g.*, Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[57] *See, e.g.*, *Jinks*, 2020 WL 1989278 at *3; *Cerulo*, 2017 WL 11496924 at *3.

[58] MASS. GEN. LAWS ANN. Ch. 149, § 148 (West 2009) (stating that "an employer may make payment of wages prior to the time that they are required"); MASS. GEN. LAWS ANN. Ch. 151, § 1 (West 2021) (making it unlawful for "any employer" to pay subminimum wages); *id.* § 1A (providing that "no employer" in the commonwealth shall fail to pay overtime).

[59] *Compare, e.g.*, *Jinks*, 2020 WL 1989278, *with, e.g.*, *Cerulo*, 2017 WL 11496924.

[60] 2020 WL 1989278 at *1.

[61] *Id.* at *2.

[62] *Id.* at *1.

more than one company is a joint employer."[63] However, based on the facts of the case, the Court concluded that Credico was entitled to summary judgment because it did not have a right to control the DFW employees and thus was not a joint employer.[64]

In determining if Credico was a joint employer, the Court looked both to the ABC Test and the Right to Control Test.[65] The Court held that Credico was not a joint employer under the statutory test, as the workers did not provide services to Credico, and thus did not meet the threshold question under the ABC Test.[66] Likewise, the Court held that Credico was not the joint employer of the workers under the Right to Control Test.[67] The Court looked to how federal courts have applied the concept under the FLSA and applied the following four-part test:

> To determine whether an employment relationship exists for purposes of the FLSA, courts "must look to the totality of the circumstances, including whether the alleged employer: (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[68]

In applying the four-part test, the Court held that Credico had no power to hire or fire workers, did not supervise or control their work schedule, and did not have the power to establish rates of payment nor did they maintain employment records.[69] As a result, while the Court explicitly acknowledged that a joint employment relationship can exist under the Wage Act, and even applied the four-part test as applied to the FLSA, the facts of the claim in *Jinks* meant that there was no joint employment relationship in that particular instance.[70]

2. *Cerulo v. Chambers*

In *Cerulo v. Chambers* ("*Cerulo*"), two car salesmen at the Herb Chambers car dealerships in Massachusetts filed complaints against the parent

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[63] *Id.* at *3.

[64] *Id.*

[65] *Id.* at *5–7.

[66] *Jinks*, 2020 WL 1989278 at *5–7.

[67] *Id.* at *8.

[68] *Id.* at *7 (quoting Romero v. Clean Harbors Surface Rentals USA, Inc., 368 F.Supp.3d 152, 159 (D. Mass. 2019).

[69] *Id.*

[70] *Id.*

company Jennings Road Management Corp., d/b/a The Herb Chambers Companies ("JRM").[71] The dealerships were separate Massachusetts corporations, but the complaint alleged that they were "operated" by JRM.[72] The plaintiffs alleged that the commission policy violated the Wage Act and that JRM was their joint employer.[73]

The Court in *Cerulo* held that while the Wage Act does not formally define "employer," the language in § 148 "strongly points to the entity that cuts the paycheck."[74] Unlike in *Jinks*, the Court in *Cerulo* declined to look to federal interpretation of the FLSA's definition of employer.[75] Thus, the Court did not consider the four-part joint employment test under the FLSA interpretation.[76] Instead, *Cerulo* limited the definition of employer to the more narrow "entity from which the employee gets his or her paycheck, and its management."[77]

Because the Wage Act does not have a comprehensive definition of employer, and the *Gallagher* decision only briefly discusses joint employment, the results at the trial court level are quite broad.[78] The Court in *Jinks* held that it "makes good sense" that two entities could both be liable to a single employee as joint employers under the Wage Act and Overtime Statute, and that the argument against it "has no merit."[79] However, the Court in *Cerulo* narrowed the definition of "employer" to just the entity that cuts an employee's paycheck, all but doing away with the viability that joint employment liability is possible under the Wage Act.[80]

II. Importance/Relevance

A. *A Strong Test for Joint Employment Will Help Deter Wage Theft*

Wage theft is a pervasive problem in the United States that costs workers

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[71] Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *1 (Mass. Super. Ct. Dec. 15, 2017).

[72] *Id.* at *2.

[73] *Id.* at *1.

[74] *Id.* at *3.

[75] *Id.* at *4.

[76] *See id.*

[77] *Cerulo*, 2017 WL 11496924 at *5.

[78] Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501–02 (Mass. App. Ct. 2017). C*ompare* Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with Cerulo*, 2017 WL 11496924 at *3–5.

[79] *Jinks*, 2020 WL 1989278 at *4.

[80] *Cerulo*, 2017 WL 11496924 at *5.

an estimated fifty-billion dollars a year.[81] In Massachusetts alone, between 2015 and 2016 the Massachusetts Attorney General's Office found that $5,406,900 had been stolen from workers in the cases her office opened.[82] Wage theft largely affects low-wage workers and can take multiple forms, such as paying less than the minimum wage, failing to pay premium pay for overtime hours, taking unauthorized deductions from a worker's pay, or failing to pay for all hours worked.[83]

The fissuring of the workplace has led to employment situations that are more likely to result in wage theft occurring.[84] Fissuring occurs when companies increasingly outsource activities through a system of contracting, franchising, and using staffing agencies.[85] Fissured employment is spreading in a growing number of industries with a large concentration of low wage workers.[86] This leads to more workplaces breaking into pieces and shifting to third-party companies and subcontractors.[87] Fissuring does not always occur due to efforts to thwart liability under the wage and hour laws, but the end result is employment relationships become "more tenuous, responsibility for legal compliance is shifted, and the workforce becomes vulnerable to violations of even the most basic protections."[88] In particular, workers at the bottom of the fissured workplace, those who are most vulnerable to wage theft, receive lower pay and face insecure employment situations and violations of the wage and hour laws.[89]

A strong and certain interpretation of joint employment should lead to decreased wage theft by employers.[90] With a weak interpretation, companies can cut labor costs by outsourcing the work, and thus liability, to other

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[81] Celine McNicholas et al., *Two Billion Dollars in Stolen Wages Were Recovered for Workers in 2015 and 2016—And That's Just a Drop in the Bucket*, ECON. POL'Y INST. (Dec. 13, 2017), https://perma.cc/42CJ-PCJ7.

[82] *Id.*

[83] *See* Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 761 (2019); McNicholas et al., *supra* note 81.

[84] See David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. AND LABOUR REL. REV., no. 2, 2011, at 33, 34, https://perma.cc/YSS3-TCNH.

[85] *Id.*

[86] *Id.*

[87] David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, PERSPS. ON WORK, 2016, at 26, 27, https://perma.cc/ADQ6-59QY.

[88] *Id.*

[89] *Id.*

[90] *See* Vin Gurrieri, *5 Things to Watch as DOL Wades into Joint-Employer Debate*, LAW 360 (Apr. 2, 2019, 10:12 PM EDT) (sub. req.), https://perma.cc/KGH7-L6CW.

parties while maintaining a fair amount of control.[91] A stronger test is more likely to result in the finding of a joint employment relationship in any given case, and there will be more opportunities for employees to file suit against the larger, usually more financially stable, employer.[92] This increased potential liability may also increase the deterrent effect for potential wage theft.[93] Businesses fearing potential joint liability will be less likely to hire undercapitalized firms that offer the lowest bid, thus reducing the chances of wage theft.[94]

B. *A Clear Test for Joint Employment Will Help Protect Well-Intentioned Employers*

Joint employment liability exposes businesses to significant risk if they are not careful in setting up appropriate systems of employment.[95] The level of exposure can affect preferred business models, particularly in the developing world of the gig economy.[96] Because the Wage Act imposes treble damages plus attorney's fees and costs, the exposure to liability could be fairly damaging to a business.[97] Further, imposing individual liability on certain officers of corporations and managers of limited liability companies makes potential claims of Wage Act violations all the more serious.[98]

The joint employment doctrine needs to strike a balance between protecting workers from unscrupulous employers and allowing businesses to continue to function.[99] While a weak test for joint employment allows some businesses to avoid liability, it leaves too much opportunity for dishonest employers to violate the law.[100] Predictability and certainty, however, are valuable to businesses making both long-term investment and

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[91] *Id.*

[92] *See* Celine McNicholas & Heidi Shierhol, *EPI Comments Regarding the Department of Labor's Proposed Joint-Employer Standard*, ECON. POLICY INST. (June 25, 2019), https://perma.cc/32FL-NQUW.

[93] *Id.*

[94] *Id.*

[95] Schwartz & Stewart, *supra* note 22.

[96] Schwartz & Stewart, *supra* note 22.

[97] Rebekah D. Provost, Note, *Punishing and Deterring the Unknowing: Mandatory Treble Damages Under the Massachusetts Wage Act*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 305, 317–18 (2013).

[98] *See* MASS. GEN. LAWS ANN. ch. 149, § 148 (West 2009).

[99] *See generally* Petkoff, *supra* note 3, at 1144.

[100] *See generally* McNicholas & Shierhol, *supra* note 92.

daily operational decisions.[101] With a clearer, stronger test for joint employment, projected costs will be more certain, and businesses forming new contractual arrangements will have an easier time negotiating prices for goods and services.[102] Additionally, businesses will be able to decide whether entering into a contract is worth the risk of potential liability under the Wage Act.[103] However, if the joint employment test is too expansive, it may accidentally include traditional subcontracting and franchising arrangements in the employment context, which will lead to unpredictability in liability and limit business flexibility.[104] As a result, a strong and clear joint employment test will also benefit honest and well-intentioned employers by providing them the predictability they desire.[105]

III. Massachusetts Courts Should Not Use the ABC Test or "Paycheck" Test but Should Follow the FLSA Interpretation of the Common Law

A. *The ABC Test Is the Wrong Test—It Tests Who Is an Employee, Not an Employer*

The purpose of the ABC Test is to protect workers by ensuring that they are properly classified as employees.[106] With that classification comes a myriad of rights and benefits.[107] Misclassification hurts both employees as well as state and federal governments in lost tax and insurance revenue.[108] An employer who misclassifies employees, thus failing to pay the additional taxes and benefits that are associated with proper classification, also gains an unfair advantage over the employer's competitors.[109] However, the ABC Test is of questionable utility in determining if an employment relationship exists and is particularly inappropriate when considering the concept of joint employment.[110]

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[101] Petkoff, *supra* note 3, at 1144.

[102] Petkoff, *supra* note 3, at 1145.

[103] Petkoff, *supra* note 3, at 1145.

[104] *See generally* Petkoff, *supra* note 3, at 1144.

[105] *See generally* Petkoff, *supra* note 3, at 1144.

[106] Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1066 (Mass. 2013).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* Henderson v. Equilon Enters., LLC, 253 Cal. Rptr. 3d 738, 752–53 (Cal. Ct. App. 2019) (refusing to apply the California ABC Test to joint employment claims, noting that joint employment claims "raise different concerns, such as when the primary employer is unwilling or no longer able to satisfy claims of unpaid wages and workers must look to another business entity that may be separately liable as their employer").

The policy purpose of the ABC Test, ensuring employees are properly categorized as employees, is usually already true in a joint employment situation.[111] In the joint employment context, the employee is typically already considered the employee of the primary employer.[112] The issue then becomes whether a second business can also be deemed a secondary or joint employer.[113] The primary employer is already responsible for paying taxes and providing legal protections to the employee.[114] Thus, the policy purposes of the ABC Test are typically satisfied, and using the ABC Test to disprove the worker's status as an employee is unnecessary.[115]

Even if a situation arises wherein a worker is misclassified and is filing a claim of joint employment liability, the ABC Test is inappropriate to determine the employment relationship.[116] This is because, before a court can apply the ABC Test to find if a worker was an employee, the court must first determine who employed the worker.[117] Because the ABC Test does not define "employer," using it as the basis to determine if an employment or joint relationship exists is backwards and illogical.[118] While the ABC Test does not define "employer," it does reference an "employer" in the second prong of the test when it examines whether a worker performed a service "outside the usual course of the business of the employer."[119] The usage of "employer" within the statute, but the failure to define it, makes it clear that the ABC Test is intended to determine if a worker is an employee and nothing else.[120] It would be circular and illogical if the test to determine an employer used the term "employer" within that definition.[121]

Given that the ABC Test is not an appropriate means to determine if an employment relationship exists, it is particularly unreasonable to use it to determine if a joint employment relationship exists.[122] Other states with

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111 *See* Curry v. Equilon Enters., LLC, 233 Cal. Rptr. 3d 295, 313 (Cal. Ct. App. 2018).

112 *Id.*

113 *Id.*

114 *See Henderson*, 253 Cal. Rptr. 3d at 753.

115 *Curry*, 233 Cal. Rptr. 3d at 313.

116 *See Henderson*, 253 Cal. Rptr. 3d at 753.

117 *Id.*

118 MASS. GEN. LAWS ANN. Ch. 149, § 148B (West 2004).

119 *Id.*

120 *See generally* Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1066 (Mass. 2013).

121 Alberty-Vélez v. Corporación de Puerto Rico Para La Difusión Pública, 361 F.3d 1, 6 (1st Cir. 2004) (explaining that a definition of employee as "an individual employed by an employer" is "completely circular and explains nothing").

122 *See generally Henderson*, 253 Cal. Rptr. 3d at 753.

similar ABC Tests have examined the issue and determined that the ABC Test should be used only to determine whether the worker is an employee or independent contractor of the hiring entity, and a separate joint employment test should apply to the secondary employer.[123] At various levels, those states' courts have determined that in a joint employment context other tests are more appropriate.[124]

B. *The "Paycheck" Test in* Cerulo *Is Also Inappropriate–It All but Removes the Prospect of Joint Employment*

Cerulo narrows the definition of employer to just the entity issuing employee paychecks, which appears to contradict both state and federal precedent.[125] Massachusetts courts have found that joint employment liability can exist in claims involving discrimination, workers compensation, and wage and hour violations.[126] Joint employer liability has also existed under the FLSA in some form since 1939.[127] Federal courts have consistently found that one company issuing a paycheck is only one criterion in determining if an employment relationship exists and does not preclude joint employer liability.[128]

Thus, there should be ample room for a finding that two employers may

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[123] *Id.* (holding that that the "ABC test was not intended to apply to joint employer claims" and that the "relevant inquiry is instead whether the secondary entity has the power to control the details of the employee's working conditions, or indeed, the power to prevent the work from occurring in the first place"); *see* Camillo Echavarria v. Williams Sonoma, Inc., No. 15-6441, 2016 WL 1047225, at *4 (D.N.J. Mar. 16, 2016) (applying a joint employer and Economic Realities Test instead of the ABC Test); Curry v. Equilon Enters., LLC, 233 Cal. Rptr. 3d 295, 313 (Cal. Ct. App. 2018) (holding that the ABC Test is "directed toward the issue of whether employees were misclassified" and that it is "not relevant in the joint employment context").

[124] *Echavarria*, No. 15-64412016 WL 1047225 at *4; *Henderson*, 253 Cal. Rptr. 3d at 753; *Curry*, 233 Cal. Rptr. 3d at 314.

[125] Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

[126] *See* Whitman's Case, 952 N.E.2d 983, 989 (Mass. App. Ct. 2011) (applying joint employment to the Workers' Compensation Act); Commodore v. Genesis Health Ventures, Inc., 824 N.E.2d 453, 456 (Mass. App. Ct. 2005) (applying joint employer liability to employment discrimination claims). *Contra* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 501 (Mass. App. Ct. 2017) (arguing fiscal intermediaries may not qualify as employers for purposes of the Wage Act).

[127] Schwartz & Stewart, *supra* note 22.

[128] *E.g.*, Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 130 (4th Cir. 2017); Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 676 (1st Cir. 1998) ("[I]t is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer.").

both be liable to an employee for unpaid wages.[129] However, the test put forth under *Cerulo*, which limits the employment relationship to the entity which cuts the paycheck, runs contrary to both state and federal interpretation.[130] If the *Cerulo* test was to prevail, it would all but remove the concept of joint employer liability from the wage and hour laws.[131] Unless employees collect paychecks from multiple entities in a particular pay week, only the entity issuing the check could be held liable.[132] As a result, the test is clearly too narrow and should not be applied when claims of joint employment arise.[133]

C. *Massachusetts Courts Should Apply the Economic Realities Common Law Test to Joint Employer Liability*

1. The Economic Realities Test Is Best Suited for the Question of Joint Employment

Given that the ABC Test is not well suited for questions of joint employment, Massachusetts courts should apply the common law when determining if a purported joint employer should be liable for unpaid wages.[134] The Right to Control Test is the traditional common law test, and holds that a company is deemed to be a joint employer when it has "sufficient control over the work of the employees" of another company.[135] A purported joint employer does not need to exercise actual control—it only needs to have the right to do so.[136] However, the Right to Control Test is not sufficiently broad to capture all joint employment relationships.[137] Joint

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[129] *See Gallagher*, 86 N.E.3d at 502 (noting that the basis of joint employer liability under the Wage Act is a question of how much control an employer has retained over employment conditions of employees employed by another employer).

[130] *See generally Cerulo*, 2017 WL 11496924 at *3.

[131] *See id.*

[132] *See id.*

[133] *Compare id.*at *3, *with Gallagher*, 86 N.E.3d at 501–02.

[134] *See generally Gallagher*, 86 N.E.3d at 501–02.

[135] Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964); *see* Silvia v. Woodhouse, 248 N.E.2d 260, 264 (Mass. 1969) (holding that determining an employment relationship "depends on whether there is a right to control").

[136] Cowan v. E. Racing Ass'n, 111 N.E.2d 752, 756 (Mass. 1953) ("The test of the relationship is the right to control. It is not necessary that there be any actual control by the alleged master to make one his servant or agent, but merely a right of the master to control.").

[137] Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (holding courts should "look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA").

employment relationships may exist where an employer controls some of the workplace situation, but where their actual control may be somewhat limited.[138] Given that there is no definition of "employer" under the Wage Act, and case law as to joint employment in Massachusetts is underdeveloped, Massachusetts courts should look at the Economic Realities Test as applied by federal courts when interpreting the FLSA.[139] This more expansive test allows for a finding of joint employer liability where a more rigid Right to Control Test may be limited.[140]

2. Massachusetts Courts Should Read the Wage Act Harmoniously with the FLSA

Because the FLSA and Wage Act are both corrective statutes that are intended to be construed broadly, and Massachusetts state courts have found that joint employer liability can exist in a number of contexts including under the Wage Act, state courts should adopt the joint employment test under the FLSA.[141] Courts already interpret the Massachusetts Overtime Statute consistently with the FLSA.[142] The Supreme Judicial Court ("SJC") held that the Massachusetts Overtime Statute was "intended to be 'essentially identical'" to the FLSA.[143] As a result, the SJC "ascribe[d] the legislative purpose underlying the FLSA" to the Overtime Statute.[144] Thus, when state courts interpret the Massachusetts Overtime Statute, they routinely look to the FLSA for guidance.[145] Just as state courts interpret the Overtime Statute in adherence with the FLSA, courts should also interpret the concept of joint employment consistently.[146]

Just like the FLSA, the Massachusetts Wage Act is a remedial statute that is meant to be interpreted broadly.[147] Massachusetts courts have regularly

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[138] *See id.*

[139] *See* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008); *see also Zheng*, 355 F.3d at 69.

[140] *See Zheng*, 355 F.3d at 69.

[141] *See* Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1067 (Mass. 2013).

[142] *Mullally*, 895 N.E.2d at 1281.

[143] *Id*. (internal quotations omitted).

[144] *Id*.

[145] *See id*. (ascribing the legislative purpose underlying the FLSA to the state Overtime Statute); *see also* Goodrow v. Lane Bryant, Inc., 732 N.E.2d 289, 293 (Mass. 2000) (applying the definition of "bona fide executive" under the FLSA to the state Overtime Statute).

[146] *See Mullally*, 895 N.E.2d at 1281.

[147] *See* Bos. Police Patrolmen's Ass'n, Inc. v. City of Boston, 761 N.E.2d 479, 481 (Mass. 2002); *see also* Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998) ("[T]he remedial

interpreted the Wage Act expansively to effectuate its intended purpose.[148] The FLSA broadly defines "employer," yet the Wage Act is silent as to a formal definition.[149] In *Goodrow v. Lane Bryant, Inc.*, the SJC held that when a statute does not effectively define a term, the Court should assume that the legislature "adopted the common meaning of the word, as assisted by a consideration of the historical origins of the enactment."[150] The SJC noted that the term "*bona fide* executive" does not have a definition in the Overtime Statute and therefore held that "[i]n such instances we may look to interpretations of analogous Federal statutes for guidance . . . ."[151]

While the Wage Act does not have a definition for "employer" that applies to the entirety of the Act, the term is defined in the regulations promulgated by the Department of Labor Standards ("DLS").[152] The regulations define "employ" as "to suffer or permit to work," and "employer" as "[a]n individual, corporation, partnership or other entity, including any agent thereof, that employs an employee or employees for wages, remuneration or other compensation."[153] Notably, the definition of "employ" under the DLS regulations is identical to that of the FLSA.[154] Further, the Wage Act's definition of "employer," while not identical to that in the FLSA, is sufficiently broad to allow for the concept of joint employer liability.[155] The DLS regulations clarify Minimum Fair Wages Act policies, and they apply to any employer who employs any person in an occupation in accordance with Mass. Gen. Laws ch. 151.[156] While the regulations are not binding, the SJC grants "substantial deference to an interpretation of a statute by the administrative agency charged with its administration" unless that interpretation is contrary to the plain language of the statute and its

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purposes of the FLSA require courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications.") (internal quotations omitted).

148 *See, e.g.*, Cook v. Patient Educ., LLC, 989 N.E.2d 847, 852 (Mass. 2013) (expanding individual liability from just the President and Treasurer of a corporation as stated in the statute to Managers of LLCs); DiFiore v. Am. Airlines, Inc., 910 N.E.2d 889, 897 (Mass. 2009) (adjusting the definition of "service charge" by concluding that it need not be charged by an employer, but may be imposed by any person or entity).

149 29 U.S.C. § 203(d), (g) (2018); *see* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. 2017).

150 732 N.E.2d at 294 (citations omitted).

151 *Id.*

152 454 Code Mass. Regs. § 27.02 (2021).

153 *Id.*

154 *Id.*; 29 U.S.C. § 203(g) (2018).

155 *See* 454 Code Mass. Regs. § 27.02.

156 454 Code Mass. Regs. § 27.01.

underlying purpose.[157] Notably, the DLS regulations apply to the Minimum Wage and Overtime Statutes outlined in Mass. Gen. Laws ch. 151, but not to Mass. Gen. Laws ch. 149; thus, the regulations do not apply to the entirety of the Wage Act.[158] Given that the Wage Act lacks a formal definition, the DLS regulations apply to the Minimum Wage and Overtime laws, and the DLS regulations do not conflict with the Wage Act, it is sensible to take these facts into consideration when interpreting the Wage Act.[159] If not taken into account, there may be situations where the courts apply the Wage Act definition when enforcing the timeliness of payment and the DLS definition when enforcing the Overtime or Minimum Wage Statutes.[160]

The purpose of the Wage Act is "to protect employees and their right to wages" by preventing the unwarranted detention of their wages.[161] Massachusetts courts have found joint employer liability can exist under the Wage Act, as well as other employment related statutes.[162] Because the Wage Act is meant to be interpreted expansively, and the DLS definition is consistent with the finding that joint employer liability can exist under the Wage Act, the definition in the DLS regulations should be granted deference.[163] That definition can be construed consistently with the FLSA definition of "employer," and, similar to the Overtime Statute, state courts should look to the interpretation of the FLSA for guidance.[164]

IV. When Interpreting Joint Employment, Massachusetts Courts Should Adopt the *Zheng* Test

A. *The Definition of Employer in the FLSA Has Led to a Circuit Split*

Unlike the Wage Act, the FLSA provides a definition for "employer" and "employ."[165] The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and it

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[157] Swift v. AutoZone, Inc., 806 N.E.2d 95, 101 (Mass. 2004) (internal citations omitted).

[158] *See* 454 Code Mass. Regs. § 27.01.

[159] *See id.*

[160] *See* MASS. GEN. LAWS ANN. ch. 149, § 148 (West 2009); MASS. GEN. LAWS ANN. ch. 151, § 1 (West 2021).

[161] Electronic Data Sys. Corp. v. Att'y Gen., 907 N.E.2d 635, 641 (Mass. 2009).

[162] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 499 (Mass. App. 2017).

[163] *See Gallagher*, 86 N.E.3d at 499; Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1067 (Mass. 2013).

[164] *See* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008).

[165] 29 U.S.C. § 203(d), (g) (2018).

defines "employ" as "suffer or permit to work."[166] The definition for "employ" is one of the broadest that has been included in any one act and encompasses working relationships not covered prior to the FLSA.[167] The purpose of including such broad definitions was to effectuate the remedial and humanitarian purposes of the FLSA by including a large number of workers.[168] The U.S. Supreme Court has noted that the definition does not solve the problem of defining the limits of the employer-employee relationship under the FLSA.[169] However, the Court has been silent on which test to apply to determine joint employer liability, and, as a result, multiple tests have been used by the circuit courts.[170]

Federal courts have generally analyzed joint employment questions using common law agency principles and the economic realities of a situation, though the courts differ on which factors to consider.[171] The Economic Realities Test originated in *Bonnette v. California Health and Welfare Agency* ("*Bonnette*"), a Ninth Circuit case regarding chore workers under California's in-home supportive services program.[172] The Court ruled that two or more employers may jointly employ a person under the FLSA and looked to DOL regulations to provide examples of joint employment.[173] In *Bonnette*, the Court affirmed the district court's ruling, which acknowledged the determination for joint employment "must be based on 'a consideration of the total employment situation and the economic realities of the work relationship,'" and looked to a four factor test: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[174]

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[166] *Id.*

[167] Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003) (internal citations omitted).

[168] Salinas v. Com. Interiors, Inc., 848 F.3d 125, 133 (4th Cir. 2017) ("Consistent with the FLSA's 'remedial and humanitarian' purpose, Congress adopted definitions of 'employ,' 'employee,' and 'employer' that brought a broad swath of workers within the statute's protection.") (internal citations omitted).

[169] Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947).

[170] *See* Vano Haroutunian & Avraham Z. Cutler, *The Conflict Between the Circuits in Analyzing Joint Employment Under the FLSA: Why the Supreme Court Should Grant Certiorari in* Zheng v. Liberty Apparel, 12 ENGAGE, no. 1, June 2011, at 77, 77, https://perma.cc/UQP6-GGB6.

[171] Petkoff, *supra* note 3, at 1133.

[172] 704 F.2d 1465, 1467–68 (9th Cir. 1983); Petkoff, *supra* note 3, at 1133.

[173] *See Bonnette*, 704 F.2d at 1469–70.

[174] *Id.* at 1470.

While circuit courts agree that the Economic Realities Test is the basis for the joint employment determination, there are a number of different iterations of the test across the circuits.[175] Within these variations, the *Bonnette* factors have been adopted either in their entirety or at least as a portion of the joint employment test.[176] For instance, the First Circuit adopted them in their totality in *Baystate Alternative Staffing v. Herman* ("*Baystate*"), whereas the Third Circuit uses a version of the Economic Realities test and considers whether the secondary employer is routinely involved in disciplining employees.[177] The Fifth Circuit also relies on the *Bonnette* factors but clarifies that plaintiff-employees "need not establish each element in every case."[178] Moreover, the Eleventh Circuit's eight-factor test, which includes the *Bonnette* factors, also considers "ownership of facilities where work occurred," "performance of a specialty job integral to the business," and "investment in equipment and facilities."[179] Even though several circuits have adopted the *Bonnette* factors in some form, there are some circuits that have not adopted a test for determining joint employment liability under the FLSA; those include the Sixth, Seventh, Eighth, and Tenth Circuits.[180]

The Second Circuit adopted a six-part test, first developed in *Zheng v. Liberty Apparel Co.* ("*Zheng*"), which weighs the following six factors to determine if the secondary employer exercised "functional control" over the workers:

> (1) whether the putative employer owns the work premises and equipment; (2) whether the nature of the business allows shifting "as a unit from one putative joint employer to another"; (3) whether the worker performed a specific job that was an integral part of the putative employer's production process; (4) whether job functions under particular contracts could pass from one employer to another without material effects; (5) how much supervision the putative employer exerted over the worker; and (6) whether the work was performed "exclusively or predominantly" for the putative employer.[181]

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[175] Haroutunian & Cutler, *supra* note 170 at 77.

[176] Petkoff, *supra* note 3, at 1133–39.

[177] In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012); Petkoff, *supra* note 3, at 1134–35.

[178] Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014).

[179] Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276, 1294 (11th Cir. 2016) (internal quotations omitted); Petkoff, *supra* note 3, at 1138.

[180] Petkoff, *supra* note 3, at 1136–38.

[181] Petkoff, *supra* note 3, at 1134; *see* 355 F.3d at 68; Greenawalt v. AT & T Mobility LLC, 642

The court in *Zheng* held that the *Bonnette* factors were appropriate in some instances, but they were not a sufficient test to cover all employment relationships.[182] The Ninth Circuit has combined the *Bonnette* factors and the Second Circuit's six-factor test to create a thirteen-factor test.[183] Essentially, the test combines the Economic Realities Test and common law agency principles.[184]

Finally, in 2017, the Fourth Circuit established a new joint employment test in *Salinas v. Commercial Interiors, Inc.* ("*Salinas*").[185] In *Salinas*, the court rejected the *Bonnette* factors because the factors "(1) improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers, and (2) incorrectly frame the joint employment inquiry as a question of an employee's 'economic dependence' on a putative joint employer."[186] The Court looked to the DOL regulations, which held that joint employment exists if one employer is "not completely disassociated from employment by the other employer."[187] Rather than looking at the economic realities between the secondary employer and the employee, the Court focused solely on the relationship between the two employers.[188] Since the two entities were not "completely disassociated" with respect to the plaintiffs' employment, the Court then turned to a test to analyze whether the workers were employees or independent contractors.[189] The Fourth Circuit test adopted under *Salinas* is a substantial departure from how all other circuits have analyzed the joint employment relationship.[190]

B. *Massachusetts Should Follow the Six-Factor Test from* Zheng

Massachusetts courts should adopt the six-factor test as laid out in *Zheng* and apply it to the Wage Act when determining joint employer liability.[191] The six-factor test from *Zheng* is the best test for joint employment as it looks beyond just common law agency principles while maintaining the focus of

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Fed. Appx. 36, 37–38 (2d Cir. 2016).

[182] *See* 355 F.3d at 68.

[183] Petkoff, *supra* note 3, at 1137.

[184] Petkoff, *supra* note 3, at 1138.

[185] *See* 848 F.3d 125, 137 (4th Cir. 2017).

[186] *Id.*

[187] *Id.*

[188] *Id.* at 142; Petkoff, *supra* note 3, at 1140.

[189] *Salinas*, 848 F.3d at 150.

[190] Petkoff, *supra* note 3, at 1139.

[191] *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003).

the test on the employer-employee relationship.[192] Unlike *Zheng*, the *Bonnette* factors are insufficient to hold joint employers liable, and the *Salinas* test is likely overly expansive.[193]

1. The *Bonnette* Factors Are Too Narrow to Be Relied on as a Stand-Alone Test

The *Bonnette* test has been adopted by the First Circuit in a number of cases and reflects a common law test for determining whether an agency relationship exists.[194] In determining the economic realities, the test instructs the court to "look to the totality of the circumstances, including whether the alleged employer: (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[195] The test is fairly restrictive in its ability to find joint employer liability, as it demands direct control of workers.[196] The test is sufficient to find that a joint employer relationship exists, but it is limited to those situations where employers are directly supervising, hiring and firing employees, and controlling their pay.[197]

As explained in *Zheng*, measured against the expansive definition of "employment" under the FLSA, addressing only the secondary employer's control is "unduly narrow" and "cannot be reconciled with the 'suffer or permit' language . . . which necessarily reaches beyond traditional agency law."[198] The *Bonnette* factors only test for control of the employee and do not focus sufficiently on the economic realities.[199] In an increasingly fissuring economy, a test that finds joint employment only when such a direct level of control exists is insufficient and overly restrictive.[200]

Further, in 2020, DOL issued a final rule announcing a four-factor balancing test for determining if a joint employment relationship exists, thus

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[192] *See* Petkoff, *supra* note 3, at 1142–43.

[193] *See Salinas*, 848 F.3d at 140–42; Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

[194] Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, 676 (1st Cir. 1998); Romero v. Clean Harbors Surface Rentals USA, Inc., 368 F. Supp. 3d 152, 159 (D. Mass. 2019).

[195] *Romero*, 368 F. Supp. 3d at 159 (citing to *Baystate* in applying the *Bonnette* factors).

[196] *See Bonnette*, 704 F.2d at 1470.

[197] *See id.* at 1470; Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003).

[198] *Zheng*, 355 F.3d at 69.

[199] *See id.*

[200] *See id.*

adopting a slightly more restrictive version of the *Bonnette* factors.[201] That rule was challenged by the attorneys general of eighteen states and Washington, D.C., when they sued and argued that the definition of joint employment was too narrow.[202] In September 2020, a motion for summary judgment was granted in district court, striking down the test as to vertical joint employment and holding it was contrary to the FLSA's definition of employer and employee.[203] There, the Court cited to and agreed with the holding in *Zheng* that the *Bonnette* factors were insufficient because they "focus[] solely on the formal right to control the physical performance of another's work [and are thus] unduly narrow"; the Court also agreed with the holding in *Zheng* that "a control-based test conflicts 'with the "suffer or permit" language in the FLSA'" as the FLSA "reaches beyond traditional agency law."[204] As a result, it appears the *Bonnette* factors, while relevant to finding joint employer liability in certain instances, are insufficient and too narrow when compared to the broad definitions set out in the FLSA.[205]

2. Conversely, the *Salinas* Test Is Likely Too Expansive in Determining Joint Employer Liability

On the other end of the spectrum is the recent Fourth Circuit decision in *Salinas*, which rejected the *Bonnette* factors and instead focused on the economic realities of the situation between the two employers rather than between the employer and the employee.[206] The test in *Salinas* focused more on the horizontal joint employment relationship rather than the typical vertical joint employment relationship.[207] The test holds that if the two entities are not "completely disassociated with respect to [the worker's] employment," they both may be liable as joint employers.[208] The test is a considerable departure from how all other circuits have analyzed the joint employment relationship.[209]

The *Salinas* test is likely too expansive given its low threshold and could lead to unpredictable results and threaten previously accepted business

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[201] New York v. Scalia, 490 F. Supp. 3d 748, 761–62 (S.D.N.Y. 2020).

[202] *Id.* at 785–86.

[203] *Id.* at 796.

[204] *Id.* at 759–60.

[205] *Id.* at 787–89.

[206] Salinas v. Com. Interiors, Inc., 848 F.3d 125, 137 (4th Cir. 2017).

[207] Petkoff, *supra* note 3, at 1139.

[208] *Salinas*, 848 F.3d at 150.

[209] Petkoff, *supra* note 3, at 1139.

relationships.[210] In applying the new test, the Court in *Salinas* rejected the secondary employer's argument that its relationship with the primary employer was "nothing more or less than the contractor-subcontractor relationship which is normal and standard in the construction industry."[211] Many traditional business relationships are in jeopardy of joint employer liability under *Salinas*, such as franchising and contracting arrangements, which occur in a number of industries, including warehousing, logistics, and construction.[212] Under the *Salinas* test, it is possible that nearly all subcontracting arrangements would result in joint employer liability.[213] Thus, employers who may believe they have effectively subcontracted work out to another party may need to "think again" as they could unknowingly "be on the hook" for employee wages.[214]

3. Massachusetts Courts Should Adopt the *Zheng* Test

The six-factor test in *Zheng* strikes the appropriate balance of protecting traditional business arrangements while still allowing for joint employer liability outside of the very narrow instance of direct control by the secondary employer.[215] It interprets the broad language of the FLSA to create a joint employment test that is more expansive than the *Bonnette* factors but restrictive enough to not eliminate all types of subcontracting arrangements.[216] In *Zheng*, the court held that the "'economic reality' test" is meant to "expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA."[217]

The *Zheng t*est is consistent with the state common law Right to Control Test as well as the DLS regulations.[218] The six-factor Economic Realities Test makes clear that the right to control can go beyond just physical control of a worker and instead focuses on if an employer "has functional control over workers even in the absence of the formal control measured" by the *Bonnette*

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[210] Petkoff, *supra* note 3, at 1144.

[211] 848 F.3d at 147.

[212] Petkoff, *supra* note 3, at 1144.

[213] Fiona W. Ong, *DOL Issues Final Joint Employer Rule, Making Such Findings Less Likely*, LAB. & EMP'T REPORT (Jan. 13, 2020), https://perma.cc/EU3H-6XV3.

[214] Michael S. Arnold & Donald C. Davis, *Fourth Circuit Offers New Test for Joint Employment Under FLSA*, NAT'L L. R. (Feb. 21, 2017), https://perma.cc/EKP9-PXSD.

[215] *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 69 (2d Cir. 2003).

[216] *Id.* at 76.

[217] *Id.*

[218] *See id.* at 72; *see also* 454 Code Mass. Regs. § 27.02 (2021).

factors.[219] The test arose by rejecting the unduly narrow interpretation of the *Bonnette* factors as inconsistent with the "suffer or permit" to work language of the FLSA.[220] Because the DLS regulations include the same language, following the *Zheng* interpretation would be consistent with the Wage Act.[221]

Moreover, applying *Zheng* to the Wage Act rather than the *Bonnette* factors, which have been adopted by the First Circuit, will still allow for consistent interpretation in the Commonwealth.[222] The *Zheng* test does not reject the *Bonnette* factors, as it allows for them to be applied in particular circumstances.[223] As noted in *Zheng*, satisfaction of the four "formal control" *Bonnette* factors is sufficient but not necessary to establish a joint employment relationship.[224] Thus, applying *Zheng* to the Wage Act will still allow for predictability for employers in the state of Massachusetts.[225]

In addition, *Zheng* provides supplementary guidance when the employment relationship does not clearly show joint employment based on common law principles of control.[226] The additional factors included in *Zheng* are more in line with determining the economic realities of an employment relationship than the *Bonnette* control factors.[227] When the *Zheng* factors weigh in the employee's favor, they demonstrate that the secondary employer has "functional control over workers even in the absence of . . . formal control."[228] The *Zheng* test appropriately considers typical business arrangements and thus strikes the proper balance between protecting employees from unscrupulous employers and allowing employees to subcontract ethically.[229]

The first factor regarding the use of the secondary employer's property by an employee is relevant as it may support the inference that the secondary employer has control over the employee's work.[230] In addition, the second factor as to "whether the putative joint employees are part of a business

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[219] *Zheng*, 355 F.3d at 72 (analyzing the Second Circuit test, which is identical to the Ninth Circuit *Bonnette* factors).

[220] *Id.* at 68–69.

[221] *See* 454 Code Mass. Regs. § 27.02.

[222] *See* 355 F.3d at 71.

[223] *Id.* at 67.

[224] *Id.* at 71.

[225] *See id.*

[226] *Id.* at 72.

[227] *Id.*

[228] *Zheng*, 355 F.3d at 72.

[229] *See id.*

[230] *Id.*

organization that shifts as a unit from one putative joint employer to another" is useful because a subcontractor that contracts with multiple entities is "less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client."[231] The third factor, which focuses on employees working on the production line, focuses on how "integral" the employee is to the secondary employer's business.[232]

The fourth factor, if the contract for the primary employer could pass to another contractor with no material change, is particularly relevant.[233] If a secondary employer can swap out subcontracting agencies with little change, this demonstrates the employees are more linked to the secondary employer than the primary employer, thus "it is difficult *not* to draw the inference that a subterfuge arrangement exists."[234] However, if changing contracting agencies *would* affect the business, as the employees actually work for their direct employer, then a finding of a joint employment relationship would be inappropriate.[235] The fifth factor relating to the degree of supervision by the primary employer is clarified in *Zheng*, which holds that "extensive supervision weighs in favor of joint employment only if it demonstrates effective control of the terms and conditions of the [worker]'s employment."[236] The Court was clear that regular supervision as to quality and time of delivery is consistent with a typical subcontracting arrangement and thus would have no bearing on joint employment liability.[237] Finally, the sixth factor indicates that if the employee works "exclusively or predominantly" for the secondary employer, that employer may become the de facto employer.[238] Alternately, if the employee simply performs a "majority" of the work for the secondary employer, then no joint employment relationship exists. [239]

Accordingly, Massachusetts courts should adopt the six-factor *Zheng* test when interpreting joint employer liability under the Wage Act.[240] Since the *Zheng* test is consistent with the common law Right to Control Test and

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[231] *Id.*

[232] *Id.* at 73.

[233] *See id.* at 74.

[234] *See Zheng*, 355 F.3d at 74.

[235] *See id.*

[236] *Id.* at 74–75.

[237] *Id.* at 75.

[238] *Id.*

[239] *Id.*

[240] *See generally* 355 F.3d at 75–76.

the DLS regulations, it reads harmoniously with the Wage Act.[241] Moreover, the test strikes the appropriate balance between allowing businesses flexibility and allowing for the continuation of traditional subcontracting relationships while providing protection for employees from unscrupulous employers.[242] Furthermore, the test is consistent with the *Bonnette* factors already adopted by the First Circuit because it still allows for a finding of joint employment if the *Bonnette* factors are met.[243] However, given that the narrow *Bonnette* factors are inconsistent with the broad statutory definitions in the FLSA and DLS regulations, the *Zheng* factors more effectively find joint employer liability where the narrow *Bonnette* factors would not.[244] Finally, the *Zheng* test correctly focuses on the employer-employee relationship, as opposed to the *Salinas* "completely disassociated" test, which makes joint employer liability possible in very traditional subcontracting arrangements.[245]

V. Alternatively, the Legislature Should Amend the Wage Act to Define Employment

A. *The Lack of Clarity Stems in Large Part from the Lack of Definition of Employer*

The Wage Act's failure to include any definition of "employer" has prompted courts to search for a way to comprehensively conceptualize joint employment.[246] The ABC Test is best used to find if an employee has been misclassified as an independent contractor, not if the employee has one or more employers.[247] Likewise, the common-law Right to Control Test is a heavily fact-based inquiry with little judicial explanation as to what constitutes "right to control" under the Wage Act.[248] As a result, the application of both tests has led to inconsistent results at the trial level.[249]

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[241] *See generally* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008).

[242] *Zheng*, 355 F.3d at 76.

[243] *Id.* at 69.

[244] *Id.*

[245] *See* Petkoff, *supra* note 3, at 1139–40.

[246] *See, e.g.*, Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. Ct. 2017).

[247] *See* Henderson v. Equilon Enters., LLC, 253 Cal. Rptr. 3d 738, 753 (Cal. Ct. App. 2019).

[248] *See Gallagher*, 86 N.E.3d at 502.

[249] *Compare, e.g.*, Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *3 (Mass. Super. Ct. Mar. 31, 2020), *with, e.g.*, Cerulo v. Chambers, No. 16-3749, 2017 WL 11496924, at *3 (Mass. Super. Ct. Dec. 15, 2017).

The more expansive definition in the FLSA, in conjunction with the DOL regulations and their guidance, has led federal courts to provide more concrete tests for joint employment liability.[250] While state courts may look to the interpretation of the FLSA for guidance, this guidance is limited in part due to the circuit split on the issue of interpretation and because the FLSA and the Wage Act are not as similar as the Overtime statute and the FLSA.[251] Therefore, an appropriate solution for the problem would be for the state legislature to include a more expansive definition of employment in the Wage Act.[252] The legislature has defined employment quite expansively in a number of different employment-based statutes and should apply those definitions to the entirety of the Wage Act, the Overtime statute, and the Minimum Wage statute.[253]

B. *Other Massachusetts Statutes Already Have Expansive Definitions of Employer*

1. The Temporary Worker Right to Know Law

The Temporary Worker Right to Know Law (hereinafter "TWRKL") requires that staffing agencies provide workers with certain basic notice of their rights and limits the amount of fees that worksite employers and staffing agencies may charge.[254] TWRKL makes it unlawful for a "staffing agency or work site employer or a person acting directly or indirectly in either's interest" to make certain deductions from employees or to charge them excessive transportation fees.[255] The "directly or indirectly" language in the statute comes from the FLSA definition of employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[256]

Courts use this more expansive definition of "employer" in TWRKL to find that joint employment relationships can exist in the temporary staffing

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[250] *See generally* Petkoff, *supra* note 3, at 1126–27.

[251] *See* Petkoff, *supra* note 3, at 1126–27; *see also* Mullally v. Waste Mgmt. of Mass., Inc., 895 N.E.2d 1277, 1281 (Mass. 2008) (explaining that the Overtime statute was "intended to be 'essentially identical'" to the FLSA).

[252] *See Gallagher*, 86 N.E.3d at 498 (noting that the Wage Act does not define "employer").

[253] *E.g.*, MASS. GEN. LAWS ANN. ch. 149, § 159C (West 2013); MASS. GEN. LAWS ANN. ch. 152, § 26B (West 2021).

[254] *Employment, Placement, and Staffing Agency Definitions and the Law*, MASS.GOV, https://perma.cc/LS49-DND8 (last visited Jan. 10, 2022).

[255] MASS. GEN. LAWS ANN. ch. 149, § 159C.

[256] Palacio v. Job Done, LLC, No. 1584CV00813BLS2, 2018 WL 3431698, at *2 (Mass. Super. Ct. June 15, 2018).

agency realm.[257] It has been held to mean that workers may be jointly employed by a staffing agency and the job site employer when they work simultaneously for each entity and are subject to the direction and control of each entity.[258] The definition's more inclusive language makes it clear that the legislature intended for joint employment liability to be available when a client company uses a staffing agency.[259]

2. The Workers' Compensation Statute Allows for Concurrent Employment

The Massachusetts Workers' Compensation statute explicitly allows for more than one employer and contains one of the more expansive definitions of employer in the Commonwealth.[260] The section of the Workers' Compensation Statute, titled "Concurrent service of two or more employers; joint and several liability of insurers," states:

> When an employee employed in the concurrent service of two or more insured employers receives a personal injury compensable under this chapter while performing a duty which is common to such employers, the liability of their insurers under this chapter shall be joint and several. Each insurer or self-insurer liable under this section shall pay compensation according to the proportion of the wages paid by its insured in relation to the concurrent wage which the employee received from all insured employers.[261]

As a result, cases interpreting the Workers' Compensation Statute have held that joint employer liability may exist.[262] The cases distinguish between joint employment, which involves "a person under the simultaneous control of two employers simultaneously perform[ing] services for both," and dual employment, where "an employee performs services for each of two employers separately and the services for the two employers are unrelated."[263] Courts have shown an increasing tendency to find that joint employment exists, rather than arbitrarily assigning an employee to either

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[257] *Id.* at *3.

[258] *Id.* at *2.

[259] *See id.* ("The Legislature recognized in § 159C that joint employment occurs when a staffing agency provides temporary or part-time employees to provide services to a work site employer that controls where and when the employees work and how they do their jobs.").

[260] *See* MASS. GEN. LAWS ANN. ch. 152, § 26B (2021).

[261] *Id.*

[262] *E.g.*, Whitman's Case, 952 N.E.2d 983, 984 (Mass. App. Ct. 2011).

[263] Williams v. Westover Finishing Co., 506 N.E.2d 166, 168 (Mass. App. Ct. 1987).

employer.[264]

When the concept of joint employment was challenged, the Massachusetts Appeals Court looked to the more expansive definition in the Workers' Compensation Statute to hold an employer liable.[265] In *Williams v. Westover Finishing Co.*, the Massachusetts Appeals Court noted that joint employment relationships are common and "a well-recognized phenomenon."[266] In discussing the *Williams* decision in a later case, the Appeals Court noted that "[i]n instances of symbiotic business arrangements, the trend of courts is 'to dispose of close cases . . . by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both.'"[267] Notably, the Court pointed to the expansive definition in the Workers' Compensation Statute as the basis for its decisions; it held the "[w]orkers' compensation law in Massachusetts allows separate entities to constitute joint employers."[268] Additionally, the Court observed that Mass. Gen. Laws ch. 152, § 26B "explicitly acknowledges a covered worker's employment 'in the concurrent service of two or more insured employers' and the assignment of joint and several liability to their respective insurers for compensable injury incurred in work 'common to such employers.'"[269] Clearly, a robust and well-articulated definition of "employer" allows for an easier finding of joint employment liability than the current Wage Act.[270]

C. *The Legislature Should Adopt an Expansive Definition of Employer*

The Massachusetts Legislature must correct the ambiguity by providing a comprehensive definition of employer and applying it to the Wage Act, Overtime Statute, and Minimum Wage Statute.[271] Currently, the definition for "employer" in the Wage Act does not apply to the majority of the Wage Act, and the definition that applies to the Minimum Wage and Overtime Statutes is set by nonbinding DLS regulations that also do not apply to the Wage Act.[272] The legislature's definition should be expansive and, similar to the Workers' Compensation definition, explicitly allow for joint employer

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[264] *Id.*

[265] *Whitman's Case*, 952 N.E.2d at 989.

[266] 506 N.E.2d at 168.

[267] *Whitman's Case,* 952 N.E.2d at 989 (internal citation omitted).

[268] *Id.*

[269] *Id.*

[270] *See id.*

[271] *See* Gallagher v. Cerebral Palsy of Mass., Inc., 86 N.E.3d 496, 498 (Mass. App. Ct. 2017).

[272] *Id.*; *see also* 454 Code Mass. Regs. § 27.02 (2021).

liability.[273] Additionally, it should include the language "directly or indirectly" to clarify that it is referencing the FLSA so courts may interpret the Wage Act consistently with the FLSA.[274] The definition should be included in the definition sections of Mass. Gen. Laws chapters 149 and 151 and apply to the entirety of each chapter.[275]

CONCLUSION

In an increasingly fissured economy, strong joint employer liability is more important than ever. From subcontracting out work down multiple levels to undercapitalized entities, to the use of fly by night temp agencies, workers are at risk of wage theft if they cannot hold a worksite employer liable. Moreover, when unscrupulous employers hire the cheapest subcontractor or temp agency without fear of liability under the Wage Act, they can cut labor costs and gain a competitive advantage over conscientious companies. As a result, firms that are following best practices and ensuring that all workers on their projects are being paid appropriately should welcome stronger joint employer liability.

Therefore, it is imperative that Massachusetts courts interpret the Wage Act consistently with the well-developed joint employer doctrine under the FLSA. Ideally, the courts will resist the urge to follow the simple *Bonnette* factors that have already been applied in the First Circuit, and instead use the *Zheng* test, which does a better job of balancing employer-employee interests. Alternatively, the problem could be more easily resolved by the legislature including an expansive and consistent definition of employer in all relevant statutes.

*** This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. ***

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[273] *See* MASS. GEN. LAWS ANN. ch. 152, § 26B (West 2021).

[274] *See* MASS. GEN. LAWS ANN. ch. 149, § 159C (West 2013).

[275] *See id.* § 1; MASS GEN. LAWS ANN. ch. 151, § 2 (West 2017).

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