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SYMPOSIUM ISSUE

CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)

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A New Purpose: Shifting Foundations That May Reprioritize the Needs of Corporate Stakeholders and Social Movements

NATASHA VARYANI*

INTRODUCTION

Kent Greenfield's book *Corporations Are People Too* is a thoughtful and timely analysis that sits at the nexus of Constitutional and Corporate Law, and at the heart of a chord that has recently been struck in contemporary American culture.[1] As recently as the nineteenth century, the idea of corporations did not exist.[2] In modern times, however, corporations are the most common form for business to take and account for the vast majority of business receipts in the United States.[3] Greenfield identifies and explores several tensions regarding corporations, including: a simultaneous love and disdain for corporate brands; the virtually unpopulated nexus of corporate and constitutional law; and the degree to which corporations have "personhood" with all its attendant rights and burdens. On the last point, Greenfield explores the genesis and history and evolution of legal personhood and concludes by suggesting (as his subtitle indicates) that corporate entities should be held to more robust standards than profits for shareholders.

* Natasha N. Varyani is an Associate Professor of Law at New England Law | Boston. She comes to academia after roughly a decade of practice where she represented large corporate clients on a number of multi-jurisdictional tax issues. She is grateful to Professor Greenfield and the *New England Law Review* for this thoughtful symposium and scholarship, particularly Brie Mainiero, and all students in her Critical Race Theory seminar who have been a constant source of inspiration.

1 KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO: AND THEY SHOULD ACT LIKE IT (2018).

2 ROBERT CLARK, CORPORATE LAW ch. 1 (1986).

3 *Id.*

I. The Legal Fiction of Corporate Personhood and Associated Constitutional Rights

Legal fictions surround us. In a world that is constantly becoming more digital and less tangible, we are continually trying to fit these new products and services into categories we already know. Telecommunications have undergone a complete revolution in the past fifty years, though we still consider and refer to these small computers and communication devices as "phones" despite barely resembling the first telephones. In the world of electronic commerce, as the line between goods and services gets ever blurrier, many jurisdictions treat digital goods such as software and e-Books as "tangible personal property" though there is nothing tangible relevant to the transaction. Recently, the U.S. Supreme Court even accepted a proxy for "physical presence" in a number of transactions.[4]

The law has long accepted the fiction of legal personhood, as well. In addition to the personhood of corporations discussed at length by Greenfield, trusts and estates are often availed of the benefits and burdens of legal "personhood" despite, like corporations, being comprised of no flesh and blood. Corporations, and more specifically business corporations, have a particular set of dynamics surrounding them that come with attendant issues. Defining the edges of any legal fiction gives rise to complex legal and cultural questions, and Greenfield engages in a thorough and succinct analysis as it relates to corporate personhood.

Throughout history, the fundamental idea of corporations as people has remained a difficult one for many to accept, as Greenfield points out. From the Lord Chancellor of England to Governor Mitt Romney's campaign dooming comments, public perception of corporations does not give rise to the same feelings of sympathy and trust that may come between humans.[5] Despite the obvious fact that corporations are not actually people, Greenfield points to three reasons why corporate entitles are, despite our instincts, legally persons.

First, corporations are entities that are legally separate from any one person: indeed, legal separateness is an essential part of their reason for being. A corporation may hold property, enter into contracts, and be held accountable in our system of justice (by being sued) in a way that is distinct from any single person.[6] Legal separateness is what allows the system of shareholders to invest in enterprises without having to micromanage the details and also allows for an entity to exist beyond the life of any human while continuing to serve its originally intended purpose.[7] As Greenfield points out, there is a wide range of dynamics between corporations and their

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[4] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087–88 (2018).

[5] GREENFIELD, *supra* note 1, at 1.

[6] GREENFIELD, *supra* note 1, at 2, 9–12.

[7] GREENFIELD, *supra* note 1, at 10.

shareholders: from closely held family corporations, to publicly held mega-entities, and everything in between.[8] The nuances that exist in the relationship between the shareholders and management, as well as between the corporate entity itself and all of its stakeholders, including customers, employees, and community, work differently on our collective psychology and impact the way we feel about corporate personhood.

Second, Corporations are made up of people. As Greenfield notes: "Corporations are collective bodies in which humans come together as employees, investors, managers, or suppliers to create goods or services to sell for a profit."[9] Though the term "Corporate Purpose" is frequently used in statutes, those statutes often use the term to refer to the business in which a corporate person is engaged. The legal community and common law understanding of the general purpose of a corporation is that the "ultimate purpose of a business corporation is to make profits for its shareholders."[10] As Greenfield will discuss at length, this concept of "shareholder primacy," which is nuanced in origin, is ultimately flawed and increasingly untenable in our modern society. Historically, corporate law understands the primary purpose of all people involved in a centrally managed corporate business is to maximize profit for shareholders and believes that service to other stakeholders, including employees, community members, and supply chain, will all be well and ethically maintained in service to the larger goal of profit maximization.[11] Though the common purpose that unites the people that make up a business corporation is usually understood to be profit maximization, each entity may have an area or theme that also unites the people within it. Greenfield uses the example of the New York Times—and indeed could have included many other publications. Though the purpose of the business corporation is to maximize profits, it also has the purpose to be the principal publication of record in the United States.[12] As will be discussed, these purposes, once ancillary or complimentary to the drive for profits, have taken on a new place in modern society.

Third, Greenfield argues that the rights of corporations to constitutional protections are another indicator of their personhood.[13] Of the three reasons Greenfield presents, this one is the most nuanced, fluid, and the subject of a great deal of judicial review and legal scholarship. If there exists an opposite of a constitutional right, Greenfield argues, it is governmental power. In this dichotomy, the argument that corporations have *no* constitutional rights is

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[8] *See* GREENFIELD, *supra* note 1, at 10.

[9] GREENFIELD, *supra* note 1, at 2.

[10] CLARK, *supra* note 2, at 17, 18 n.46.

[11] *See* GREENFIELD, *supra* note 1, at 20–21.

[12] *See, e.g.*, GREENFIELD, *supra* note 1, at 3.

[13] GREENFIELD, *supra* note 1, at 3.

not supported by history, jurisprudence, or public perceptions.[14] Beginning with the Supreme Court ruling that permitted the New York Times and Washington Post to lawfully publish the Pentagon papers,[15] Greenfield identifies points in United States history when the assertion of constitutional rights by corporate entities was widely accepted. Considering the dichotomy between constitutional rights and governmental powers, if the New York Times and Washington Post had not been allowed to assert the constitutional rights related to personhood, then government intervention would have led to a result in that case that set the entire democratic framework of the United States on a different course.

Professor Greenfield engages in a cogent review of constitutional rights as they pertain to corporations, beginning with "The Easy Cases" of Eminent Domain, Due Process, and guarding against government overreach.[16] These rights ascribed to corporations are in line with the role that corporations have in our society of creating social wealth. The more difficult cases Greenfield discusses relate to criminal law and procedure.[17] The bulk of his review and analysis, however, is saved for the very interesting questions surrounding the protections of corporate speech. Building on an understanding of the myriad ways that corporate entities influence the marketplace and engage the public in debate, Greenfield examines the different ways in which corporate "speech" may be protected or impacted by constitutional rights and protections.

After an examination of the complexities in defining and categorizing corporate speech, Greenfield focuses on the nuanced and fraught question of corporate political speech. From *Buckley v. Valeo* to *Citizens United*, the American electorate is paying more attention to corporate spending on elections than ever before because corporate contributions to politics have never been more influential. Recognizing that corporations are collective enterprises that are dominated by a management team seeking an economic advantage in line with their goals to maximize profits for shareholders, Greenfield sets the stage for setting out where we currently stand with regard to what First Amendment jurisprudence may insist on from corporations.[18] Veracity and transparency of statements by corporations, whether on commercial or political topics, is the foundation of what the First Amendment demands from corporate speech.[19] Greenfield builds on those responsibilities and expectations by considering the place of the corporation in our culture and insisting on protections of the whole rather than special

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[14] *See* GREENFIELD, *supra* note 1, at 3.

[15] New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[16] GREENFIELD, *supra* note 1, at 70–74.

[17] GREENFIELD, *supra* note 1, at 74–81.

[18] GREENFIELD, *supra* note 1, at 155–67.

[19] GREENFIELD, *supra* note 1, at 168.

interests.[20] Greenfield helpfully establishes that First Amendment jurisprudence will not permit corporations to benefit a subset of their stakeholders (such as shareholders or management), and that political activity is limited to items that are related to the business of the corporation.[21]

II. Shaking the Foundations of Law and Economics

Greenfield predicates his analysis of constitutional and speech rights of corporations on a foundation of law and economics. Starting with a pronouncement from the magnate William Henry Vanderbilt in 1882 that revealed a truth about the relationship between those making decisions impacting the public interest and the public at large, Greenfield summarizes the evolution of social welfare concern on the part of businesses.[22] After detailing the ebbs and flows of the extent to which business enterprises have been beholden to the public, whether by government regulation or public influence, Greenfield outlines some of the highlights of our corporate history through the lens of law and economics.

From the *Lochner* case, which struck down New York's requirement of a maximum sixty hour work week, to its cultural fall out, Greenfield moves through the ever evolving ideology of the United States with regard to expectations of corporations.[23] From the academic skepticism of corporate influence in the 1960s and 1970s, to the change in tide that came with the election of Ronald Regan, which included a newfound adherence to belief in free market systems, the history of the push and pull of law and economics informs our analysis of corporate personhood and responsibility.[24]

In the section of his book titled "Three Shocks and a Pushback," Greenfield identifies three moments that shaped the continually evolving relationship between corporations and citizens. First, the Financial Crisis of 2008. Second, the Deepwater Horizon oil spill in the Gulf of Mexico. And finally, the U.S. Supreme Court's decision in *Citizens United*.[25] The response to these three events was rapid and profound. Scholars and public citizens were calling into question the validity of the essential stated purpose of corporations: to maximize shareholder value. Quickly, the concept of "shareholder primacy" began to slide out of popularity, or rather, be reframed as a long term goal. As some remarked:

> There's a growing body of evidence . . . that the companies that are most successful at maximizing shareholder value over time are

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[20] GREENFIELD, *supra* note 1, at 169–70.

[21] GREENFIELD, *supra* note 1, at 169–70.

[22] GREENFIELD, *supra* note 1, at 29–30.

[23] GREENFIELD, *supra* note 1, at 31–33.

[24] GREENFIELD, *supra* note 1, at 44–45.

[25] GREENFIELD, *supra* note 1, at 51–54.

> those that aim toward goals other than maximizing shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do.[26]

There are two additional factors that support Greenfield's conclusion in this section. The first is the change in the way the general public receives and consumes information, and the second is the promulgation of concepts in the area of Behavioral Economics.

In addition to the moments in history that Greenfield highlights, the past few decades and a new generation of consumers have a completely novel relationship with information. Advances in technology have made all sorts of information instantly available, heightening the public's ability to demand accountability from corporations. Although in the Regan era, a corporate enterprise may have been able to paint a longer term picture of their plans and impacts, in today's information-sharing age, snippets of short term action get more attention than ever before, resulting in more transparency in every aspect of our commercial lives. This constant review of corporate activity has forced a change in behavior. Instead of a longer term sum of good corporate behavior, entities are head accountable for each individual action with less regard to how a long term strategy may fit together.

Related to this is the popular field of Behavioral Economics, which has been applied to many different disciplines and become a popular lens through which to re-view many established concepts. Where traditionally the field of economics is based on the idea that a rational person will act in a way that will maximize value, the field of Behavioral Economics upends that notion by marrying concepts of psychology into economics and realizing that people rarely act in a way that rational economists would expect.[27] Among other things, this field recognizes various heuristics to explain the most common ways people respond to their choices that do not maximize value. In line with some of these heuristics that account for human nature is the concept "value" that may not always be best measured in shareholder profits.[28]

Recent application of principles from behavioral economics have

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[26] GREENFIELD, *supra* note 1, at 53 (quoting Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV. (2012), https://perma.cc/HK6J-QW8S).

[27] *Richard H. Thaler*, THE NOBEL PRIZE, https://perma.cc/5WS4-RZT7 (last visited May 9, 2021) (stating that the 2017 Nobel Memorial Prize in Economic Science was awarded to Richard Thaler for his contributions to the field of Behavioral Economics); *Psychological Science Underlies Nobel Prize-Winning Work*, ASS'N FOR PSYCHOL. SCI. (Oct. 11, 2017), https://perma.cc/KL36-9DKX (noting that Thaler's work was largely shaped by the work of Daniel Kahneman, who received the Nobel Prize in Economics in 2002, and Amos Tversky).

[28] RICHARD THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS 25–34 (2016) (explaining "Value Theory").

become commonly considered and used by business entities and policy makers alike.[29] A new focus on this field has changed the way we can consider basic principles of economics and may have contributed to a recent shift in the essential purpose of business corporations.

III. A Response to the Call: Realignment of Priorities

Greenfield's work is timely because it comes at the confluence of all of these forces-shifting attitudes about business corporations, continuously evolving jurisprudence and public opinion about the scope of constitutional rights available to corporations, continuously available and publicized information, and changing ideas of what is value for stakeholders. At the end of his book, Greenfield identifies some of the flaws in the traditional tenet of corporate law that calls for the protection of shareholder primacy, as well as the Regan-esque, free market reasons for protecting it.

Given the recent exacerbation of income inequality on a global scale and the attention paid to those individuals and entities that create it, [30] Greenfield's pleas for the end of shareholder primacy are timely. Accordingly, in August of 2019, the Business Roundtable, comprised of Chief Executive Officers of some of the world's largest corporations, promulgated a "Statement on the Purpose of a Corporation" that was signed by 181 member CEOs.[31] Carefully crafted over the course of about a year (coincidently, shortly after the publication of Greenfield's book), this document is a recognition in the form of a policy shift away from shareholder primacy and toward a system that serves all stakeholders, including customers, employees, suppliers, communities and shareholders.[32] While this policy statement is certainly a response to the position of Professor Greenfield and others who agree with his perspective, a certain skepticism will remain.[33] There is a fear that the income elite are savvy about their position and aim to appease the concerns of the many with policy changes and even small concessions.[34]

The march of time and progress is strong, and whether forces of the free market work or principles of fairness, justice, and equity demand it, there is hope in the signs that considerations more valuable to society as a whole are

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[29] *See* Tim Harford, *Behavioural Economics and Public Policy*, FIN. TIMES (Mar. 21, 2014), https://perma.cc/VL2R-RVVH.

[30] *See generally* ANAND GIRIDHARADAS, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 3–7 (2018).

[31] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'an Economy that Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), https://perma.cc/V5F5-LZB9.

[32] *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://perma.cc/N3DE-YNSX (reflecting signatures added as recently as February 2021).

[33] *See* Jay Coen Gilbert et al., *Don't Believe the Business Roundtable Has Changed Until Its CEOs' Actions Match Their Words*, FAST COMPANY (Aug. 22, 2019), https://perma.cc/6938-HDVX.

[34] *See generally* GIRIDHARADAS, *supra* note 30, at 226.

supplanting the desire for shareholder primacy, thanks to the thoughtful work of authors like Professor Greenfield.

Pitching the Big Tent of Corporate Citizenship: Reconciling Kent Greenfield's Humanist Corporate Personhood with an Enlightened Shareholder Primacy

AISHA I. SAAD*

INTRODUCTION

Debate over the corporation's proper role in society and its responsibilities to the public has recently taken center stage in American popular discourse. On the campaign trail, Senators Elizabeth Warren and Bernie Sanders have espoused ambitious corporate reforms including breaking up tech giants like Google, Amazon, and Facebook[1]; establishing employee stock funds and giving workers seats on company boards of directors[2]; and expanding criminal accountability for corporate executives.[3] In Washington, federal regulators including the Federal Trade Commission, the Securities and Exchange Commission, and the Justice Department have increased oversight of, and launched investigations into, America's largest tech companies.[4] The courts have made some headline-grabbing decisions concerning corporate obligations to the public, with the Supreme Court recently allowing a high-profile antitrust

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1 Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://perma.cc/28LU-TSNK.

2 Jeff Stein, *Bernie Sanders Backs 2 Policies to Dramatically Shift Corporate Power to U.S. Workers*, WASH. POST (May 28, 2019, 12:43 PM EDT), https://perma.cc/A885-CGYC.

3 *Senator Warren Unveils Bill to Expand Criminal Liability to Negligent Executives of Giant Corporations*, ELIZABETH WARREN (Apr. 3, 2019), https://perma.cc/P3KK-8DMU.

4 *See, e.g.*, *16 Ways Facebook, Google, Apple and Amazon Are in Government Cross Hairs*, N.Y. TIMES (Sept. 9, 2019), https://perma.cc/P37G-XQH5.

class-action lawsuit to proceed against Apple,[5] and an Oklahoma judge ruling against Johnson & Johnson for its role in the opioid crisis, finding that the company had breached state public nuisance law.[6] Wall Street has also joined the conversation, with the country's largest investment funds publicly urging corporations to take seriously their environmental, social, and governance impacts.[7] Most recently, CEOs have joined the fray of a popular concern with the corporation's public role. In August 2019, 181 CEOs of some of the country's largest companies, including Amazon, Apple, JPMorgan Chase, and Walmart, signed a *Statement on the Purpose of a Corporation,* disavowing the long-enshrined principle of shareholder primacy and committing themselves to leading their companies "for the benefit of all stakeholders."[8] The public zeitgeist is, apparently, witnessing a dramatic shift in its perception and expectations of corporations.

Against this background debate over the corporation's proper role in, and obligations to, society, Kent Greenfield's *Corporations are People Too (And They Should Act Like It)*[9] offers timely and discerning guidance for making sense of the corporation's status from the perspective of contemporary American legal doctrine. Greenfield has been a leading voice in progressive corporate law for over two decades.[10] In 2006, long before progressive accounts of the corporation's role in society had become mainstreamed in the United States, Greenfield's *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*[11] offered a compelling counternarrative to the prevailing law and economics account of the corporation. In that book, he went beyond the principal-agent problem at the center of mainstream corporate law scholarship to outline key failures of corporate law including costly externalities, the absence of corporate commitment to communities, shareholder primacy at the expense of other stakeholders, and short-termism. He sketched out possibilities for reforming the American

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[5] Adam Liptak & Jack Nicas, *Supreme Court Allows Antitrust Lawsuit Against Apple to Proceed,* N.Y. TIMES (May 13, 2019), https://perma.cc/J72H-9YDY.

[6] Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial,* N.Y. TIMES (Aug. 26, 2019), https://perma.cc/G6R9-ZDMW.

[7] *See, e.g.,* Larry Fink, *A Fundamental Reshaping of Finance,* BLACKROCK, https://perma.cc/6QV9-DTCL (last visited Feb. 4, 2020).

[8] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans',* BUS. ROUNDTABLE (Aug. 19, 2019), https://perma.cc/BT3S-6ZU5.

[9] KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018) [hereinafter CORPORATIONS ARE PEOPLE TOO].

[10] *See, e.g.,* Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy,* SEATTLE U. L. REV. 37, 749–73 (2014); Kent Greenfield, *The Place of Workers in Corporate Law,* 39 B.C. L. REV. 283, 283–328 (2001); Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society,* 34 GA. L. REV. 1011 (2000).

[11] KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006) [hereinafter THE FAILURE OF CORPORATE LAW].

corporation to make it "more rational, democratic, accountable, and law-abiding."[12] Greenfield argued that a public conception of corporate law should replace the current private conception, and took direct aim at the canonical notion of shareholder supremacy.[13] In the years since, these once-fringe arguments have become part of the mainstreamed scholarly and popular discourse.

Now, in his newest book, Greenfield once again takes a bold position, claiming the controversial notion of "corporate personhood" from the conservative right and championing it for the progressive left. He offers us even-tempered analysis and nuanced argument that move beyond rhetorical sparring to focus on the essence of what's really at stake in the fight for or against corporate personhood. Greenfield situates personhood in the context of constitutional and corporate law, and advances it as the answer for bringing corporations more in line with the public interest. He argues that corporate personhood, properly construed, actually furthers the ends that progressives support by limiting some dimensions of corporate power,[14] increasing corporate accountability,[15] and enabling corporate management to govern in the interests of all stakeholders.[16] In the constitutional law domain, Greenfield develops a framework for determining which rights should be granted to a corporation, based on the nature of the corporation and on the right in question. In the corporate law domain, he elaborates a vision of corporate law reform that incorporates the interests of all corporate stakeholders in managerial decision-making.

Greenfield's formulation also presents corporate personhood and corporate citizenship as foils to shareholder primacy, the notion that corporate management should govern first and foremost in the interest of a firm's shareholders. In this symposium response, I will offer an alternative framing. Rather than relegate shareholder primacy outside the parameters of corporate citizenship, I propose instead that we leverage corporate citizenship as a broad conceptual umbrella with the potential to reconcile a self-aware and socially conscious construction of the corporation that Greenfield advances with the interests of today's "enlightened shareholders." Such an approach to corporate citizenship can move us closer to the desired outcome of better aligning corporate decision-making with a broader public interest. This response will proceed in three parts. I will begin Part I by mapping out the most popular, yet divergent, uses of "corporate citizenship" to situate Greenfield's position within its discursive context. In Part II, I will focus on the core arguments of *Corporations Are People Too* and

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[12] *Id.* at 241.

[13] *See id.* at 2.

[14] *See* CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 9.

[15] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 12.

[16] *See* CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 27.

highlight the tools that it offers us for navigating questions concerning the corporation's rights and responsibilities. I will then conclude with Part III, pointing to some new possibilities for reconciling an enlightened shareholder primacy with Greenfield's account of corporate personhood under an inclusive interpretation of corporate citizenship.

I. Mapping Corporate Citizenship

In a 1970 New York Times article, Milton Friedman famously declared that the social responsibility of business is to increase its profits.[17] Nearly half a century later, an op-ed by Lionel Barber, editor of the Financial Times, noted that the liberal capitalist model has come under strain "particularly the focus on maximizing profits and shareholder value" and advanced that, "[t]he long-term health of free enterprise capitalism will depend on delivering profit with purpose." As these two contrasting interpretations evidence, an account of corporate citizenship is animated by an underlying conception of the corporation and represents a corresponding vision for that corporation's role in its wider society.[18] A survey of the academic literature and popular applications yields various accounts of corporate citizenship that can be broadly grouped as conservative, liberal, and progressive. This section will provide a brief account of each of these conceptions of the corporation and introduce the corresponding interpretation of corporate citizenship it implies. It will locate Greenfield's approach to corporate citizenship within the progressive account.

A. *The Conservative Corporation*

An economic rationalism dominates the conservative account of the corporation. This account considers the firm to be an artificial creation of the state and an aggregate of individual shareholders bound to one another through bi-lateral contracts. The conservative corporation exists to maximize efficient transactions. In the Milton Friedman tradition, the social obligation of the conservative corporation is to maximize benefit to shareholders by increasing profits. Any participation in a public arena or attentiveness to the public interest is purely elective, if not suspect. The conservative corporation inspires a model of corporate citizenship best

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[17] Milton Friedman, 32 *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 126, https://perma.cc/Z5VP-XTYU ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.").

[18] *See* Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FINANCIAL REG. (May 28, 2017), https://perma.cc/8BFY-TMJM ("The reason for this confusion over the metes and bounds of the obligation to engage in socially responsible behavior is that the essential nature of the corporate form is not well understood.").

described as corporate philanthropy. The corporate philanthropist acts out of rational self-interest and aims to improve shareholder returns by generating social legitimacy for the company. Corporate philanthropic projects are not necessarily related to a company's industry or core operations and mostly take the form of charitable initiatives in areas like education and health.[19] The conservative corporate citizen rationalizes decision-making with reference to the corporate bottom line. One view within this camp more closely aligns the company's philanthropic ventures with its core operations and casts corporate social responsibility as part of a firm's long-term financial planning and as a check against short-termism in managerial decision-making.[20] This is captured, for example, by Michael Porter and Mark Kramer's emphasis on the relationship between a company's philanthropy and its competitive context, "the more closely a company's philanthropy is linked to its competitive context, the greater the company's contribution to society will be."[21] More generally, however, the conservative account of corporate citizenship has become largely passé.

B. *The Liberal Corporation*

More popular today is the liberal account of the corporation. It conceives of the corporation as an artificial creation of the state and a citizen with a public inclination. It attempts to meet dual commitments to shareholder dividends while also being attentive to the public good. The liberal account upholds the fiduciary relationship as a defining feature of the corporate arrangement. Accordingly, a liberal corporation maintains legitimacy by being internally accountable to the interests of its shareholders, while also being conscious of the ways that its public legitimacy affords it a social license to operate.[22] The liberal corporation animates most accounts of

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[19] *See* Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. (Dec. 2002), https://perma.cc/KFE3-6NG9 ("The majority of corporate contribution programs are diffuse and unfocused. Most consist of numerous small cash donations given to aid local civic causes or provide general operating support to universities and national charities in the hope of generating goodwill among employees, customers, and the local community. Rather than being tied to well-thought-out social or business objectives, the contributions often reflect the personal beliefs and values of executives or employees.").

[20] *See generally id.* ("Understanding the ways in which philanthropy creates value highlights *how* they can achieve the greatest social and economic impact through their contributions.").

[21] *Id.*

[22] *See* Olivier Jan, *The Board and ESG* (Feb. 25, 2019), HARV. L. SCH. F. ON CORP. GOVERNANCE & FINANCIAL REG., https://perma.cc/QE3G-4EQG ("It can be useful to think of ESG risks in terms of the organization's social license to operate. Unlike a legal license to operate, the social license to operate is granted, in part, by customers through their purchasing decisions. If your ESG reputation is tarnished or people associate your enterprise with global warming, water pollution, resource abuse, child labor, or poor working conditions, your business may suffer

socially responsible investors (SRIs), and the enlightened shareholder primacy demonstrated in Larry Fink's advocacy for both purpose and profit. Michael Jensen's work provides a popular rationale for the social orientation of the liberal corporation. In a 2002 article,[23] he argued that in order for a corporate entity to exercise purposeful behavior, it must direct its operations towards a singular function. He identified this function to be maximizing the firm's long-term value. Jensen distinguished value maximization from stakeholder theory, clarifying that value maximization allows for goal-directed decision-making by management. By contrast, stakeholder theory does not provide decision criteria for making tradeoffs between conflicting and/or inconsistent stakeholder demands.[24] Jensen advanced a theory of corporate citizenship whereby "social welfare is maximized when all firms in an economy maximize total firm value."[25] This account of corporate citizenship is the most dominant today.

C. *The Progressive Corporation*

The progressive corporation is conceptualized as an artificial creation of the state comprised of many participating stakeholders including shareholders, employees, and citizens, among others. The progressive corporation deviates from a presumed exclusivity of shareholder property rights. It most commonly takes the form of a stakeholder theory of the corporation that aims to maximize value for all of a company's stakeholders and not just its shareholders. Corporate citizenship in the progressive account is concerned with questions of power, representation, and governance within the corporate entity and in corporate decision-making.[26] Kent Greenfield's vision for corporate citizenship falls within the progressive account. His characterization of the "corporate person" provides shorthand for a relational understanding of the corporation that incorporates "non-equity investors"[27] in corporate governance and grants

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either a gradual or rapid decline in demand."); *e.g.*, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 1:10 (Ved P. Nanda ed., 1981) ("Recently, Ernst & Young ranked "social license to operate" third in its top 10 strategic business risks in the global mining and metals sector.[2] The focus on mitigating "above the ground" or "non-technical" risk has led many companies to address risks by spending as much money as deemed necessary to secure a social license to operate (SLTO) from local communities and community leaders. As a result, many companies seek to increase their level of social investment as a way of demonstrating benefits to communities and obtaining a social license to operate.").

[23] Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 237 (2002).

[24] *Id.* at 241–42.

[25] *Id.* at 239.

[26] *See* Jedrzej George Frynas & Sian Stephens, *Political Corporate Social Responsibility: Reviewing Theories and Setting New Agendas*, 17 INT'L J. MGMT. REV. 483, 483 (2015).

[27] Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1,

them entitlements to corporate wealth.[28] This of course has direct implications for how we should allocate rights within the corporation and how we define the corporation's social role.[29] From this progressive standpoint, Greenfield's new book takes on the challenge of elaborating how corporate personhood translates into constitutional and corporate law.

II. In Defense of Corporate Personhood and Progressive Corporate Citizenship

In *Corporations Are People Too*, Greenfield tackles the concepts of corporate personhood and corporate citizenship from a progressive position that takes as its starting point the claim that corporations should be good for society. The claim that "corporations are people" has incited fervent mobilization on the political right and left, with the right brandishing it as a victory for the free market and the left attacking it as an erosion of democratic accountability. In a surprising, yet compelling, reformulation of this common narrative, Kent Greenfield's *Corporations Are People Too* backs corporate personhood as a progressive objective. He argues that corporations are people in three key ways: (1) they are legally separate entities who "can sue, be sued, enter into contracts, own property, buy stuff, and sell stuff," (2) they are made up of people, and (3) they hold constitutional rights.[30] Asserting corporate personhood in the constitutional and corporate law domains, Greenfield argues, advances progressive demands by making corporations more accountable to the public. Personhood prevents shareholders from attaching their religious beliefs to companies,[31] it provides a limit on government power by granting corporations standing to assert their due process rights when those rights are germane to their economic purpose,[32] and it affords the public a deep pocket to sue when harmed.[33] Greenfield refocuses the essence of the personhood debate, moving it away from the question of *whether* corporations are people with constitutional rights, to focus instead on determining *what* corporations are for, and, accordingly, *which* rights they should be afforded.

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20 ("[T]he use of the term 'non-equity investor' as a way to characterize stakeholders embodies the last premise of this article: corporations are collective entities, demanding a variety of investments from a variety of sources.").

28 CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 211 ("If corporations were required to take into account the interests of all their stakeholders and include their views within a pluralistic, more democratic corporate structure, the voices of corporations themselves would be more pluralistic and democratic.").

29 *See* Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 927 (2010).

30 CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 2–3.

31 CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 9–11.

32 *See* CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 66–69.

33 CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 11–12.

Greenfield centers his discussion of corporate personhood in constitutional law on the presumption that "corporations should receive the rights necessarily incidental to serving [their] economic purpose and should not receive those that are not germane to that purpose."[34] He identifies some easy legal cases where corporations should obviously have constitutional rights. Some examples are cases concerning checks on government power like protection from uncompensated takings under the Fifth Amendment, procedural due process protections against capricious governmental acts, and protections against government actions outside the scope of executive power like violations of the Commerce Clause.[35] Other more difficult cases have to do with criminal procedure, such as the Fourth Amendment right to be free from unreasonable searches and seizures and the Fifth Amendment protection against self-incrimination. For these cases, "[t]he difference between the public nature of corporations and the private . . . nature of humans should make a difference in constitutional analysis."[36] Greenfield identifies the most difficult legal cases as those concerning equality, religion, and fundamental rights.[37] For these cases, "we need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations."[38] Greenfield uses some of the most high-profile corporate personhood cases of the past years to show where the Supreme Court has gotten personhood right, and where it has gotten it wrong. He urges that progressive factions should actually be backing corporate personhood to advance their objective of creating constraints on corporate power.

In the later chapters of his new book, Greenfield pivots to the domain of corporate law, and identifies it as the proper realm for dealing with the types of problems that progressives have been trying to address through constitutional law. He advances that "[t]he best hope for constraining corporate power and legitimizing corporations' participation in the public square is not an adjustment in constitutional doctrine but an adjustment to corporate governance within corporate law."[39] In the corporate law context, Greenfield argues for a shift away from shareholder primacy and towards corporate personhood. Here he uses "personhood" as shorthand for a complex decision-making rationality that is both self-aware and socially conscious. This rationality sharply contrasts with the more familiar

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[34] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 62, 103 ("[W]e need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations.").

[35] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 70–74.

[36] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 75.

[37] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 81.

[38] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 103.

[39] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 170.

economic account of personhood that is far less public-facing or altruistic and that takes the form of the rationally self-interested actor.[40] It is important then to acknowledge that what Greenfield is advocating for is a particular type of personhood, consistent with the progressive account elaborated in Part I. We might distinguish this as *humanist* corporate personhood, expressed in the form of a responsible corporate citizen who "owe[s] a robust set of duties to society and to stakeholders that go beyond shareholder primacy."[41] Stakeholder governance, Greenfield argues, would allow for organizational, economic, and political benefits including better corporate decision making, less economic inequality, and a shift away from short-termism.[42]

Greenfield aptly notes that the contemporary public appetite for corporate reform, and the apparent political will to drive this agenda, provide an opportunity to reformulate corporate governance and to bring about an orientation to corporate citizenship that is good for society. A window of opportunity has also opened up for reforming securities law in line with this progressive vision, and for integrating diverse commitments into corporate decision-making. The "reasonable investor" archetype that has dominated American securities law for the past fifty years[43] is now evolving, as evidenced by investor demands and behaviors that increasingly undermine classic shareholder primacy doctrine. Investors' concern with corporate environmental, social, and governance disclosure and decision-making has implications for how both investors and companies conceive of shareholder primacy. The shift in investor preferences and behavior also brings today's reasonable investor into closer alignment with the vision of the corporate person, and of corporate citizenship, that Greenfield advances. The next section will summarize two notable trends in the nature of today's "reasonable investor" and will point to some implications these have for reforms to securities law that align with Greenfield's progressive corporate personhood.

III. The New "Reasonable Investor" and Expanded Possibilities for A Liberal-Progressive Alliance

Kent Greenfield's account of personhood in corporate law frames shareholder primacy as the foil to corporate citizenship.[44] In recent decades,

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[40] *See generally* CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 170 (explaining that this is most familiar in the notion of a rationally self-interested homo economicus).

[41] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 208.

[42] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 214–23.

[43] *See* TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976).

[44] CORPORATIONS ARE PEOPLE TOO, *supra* note 9, at 175 ("As a matter of internal corporate governance, 'citizenship' stands in contrast to 'shareholder primacy,' the notion that shareholder interests are the sum by which corporations should be measured.").

however, hard lines separating a shareholder primacy model from stakeholder governance have become perforated as a result of increasing investor concern with corporate environmental, social, and governance (ESG) decision-making. In recent decades, shareholder preferences and demographics have evolved in two key ways: (1) mainstream investors have been demanding ESG disclosures from companies and relying on this information in their engagement strategies and portfolio allocations, and (2) SRIs have been gaining market share and undermining traditional assumptions about the "reasonable investor." These trends present an opportunity for bringing enlightened shareholders into the fold of corporate citizenship as allies in advancing a version of corporate governance that accords with a broader public interest, in line with the vision Greenfield sets out.

Over the past century, mainstream investor demographics and preferences have evolved, with investors becoming more attuned to their long-term sustainability and the social repercussions of their activities.[45] In his 2018 letter to CEOs, Laurence Fink[46] affirmed that "BlackRock is eager to participate in discussions about long-term value creation and work to build a better framework for serving all [company] stakeholders."[47] Fink's January 2019 letter took this message further, asserting that "[p]rofits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked."[48] As Fink's letters capture, ESG performance is increasingly important to firms of all ethical persuasions and is being integrated across entire investment platforms. BlackRock's attentiveness to ESG appears representative of a broader trend in the investment community. A 2018 study by Amir Amel-Zadeh and George Serafeim surveyed investors to understand why and how they use ESG data.[49] Their findings showed that 82% of investors consider ESG data when making investment decisions and that they primarily use ESG information for financial rather than ethical motives. 63% of investors reported that they consider ESG information in their investment decisions because it is financially material to investment

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[45] *See* Daniel C. Esty & Todd Cort, *Corporate Sustainability Metrics: What Investors Need and Don't Get*, 8 J. ENVTL. INVESTING 1, 13 (2017).

[46] *See generally* Alicia McElhaney, *Larry Fink to CEOs: Contribute to Society or Lose BlackRock's Investment*, INSTITUTIONAL INVESTOR (Jan. 16, 2018), https://perma.cc/X7RN-G9V2 (explaining that Laurence Fink is the Chairman and CEO of BlackRock, the world's largest investment firm which manages more than $6 trillion in investments. BlackRock is an industry icon and Fink's annual letter has come to represent a proxy for the pulse of the mainstream investment world).

[47] Larry Fink, *Larry Fink's Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK, https://perma.cc/ZL8U-YDZD (last visited Oct. 16, 2019).

[48] Fink, *supra* note 7.

[49] Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, FIN. ANALYSTS J., 74:3 (2018) (examining responses of largely mainstream investors, comprising 43% of global institutional assets under management).

performance.

Parallel to the changing rationality of mainstream investors, the increasing popularity of socially responsible investment has also been undermining assumptions about the reasonable investor archetype in securities law. SRIs[50] set themselves apart from mainstream asset managers by committing to particular ethical and environmental performance indicators and by screening for companies that meet these standards when making their portfolio allocations. They ground their operational mandates in the procurement of ESG performance data and predictive ESG indicators, and allow investors to direct their capital to companies that adhere to selected social and/or environmental values. In this sense, the reasonable SRI diverges from the conventional economically rational mainstream investor who is the current focus of legal doctrine.[51] A 2018 U.S. SIF report on sustainable, responsible, and impact investing trends in the United States observed that United States domiciled assets under management reached $12 trillion in 2018, representing 26% of total assets under professional management.[52] Investors today are soliciting ESG disclosures and influencing company ESG decision-making as reflected in their shareholder proposals, proxy voting behavior, and engagement reports.[53] In 2018, social and environmental proposals comprised 43% of all shareholder proposals submitted.[54] In a review of shareholder proposals from 2000 to 2018, Kosmas Papadopoulos found that support for environmental and social shareholder proposals increased from 6% of votes cast in 2000, to 24% of votes cast in 2018. Today, the percentage of "ethical funds" comprising mutual fund

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50 Liz Smith, *Socially Responsible Investing Defined,* SMARTASSET (Aug. 21, 2019), https://perma.cc/59NV-GFEL (explaining the shorthand designation socially responsible investors (SRIs) which will be used to refer to the broad category of sustainability-minded investors who incorporate considerations of sustainability in addition to profit).

51 A growing body of literature links superior ESG performance to superior stock performance. *See, e.g.*, Tensie Whelan & Carly Fink, *The Comprehensive Business Case for Sustainability,* HARV. BUS. REV. (Oct. 2016); Gunnar Friede, Timo Busch & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies,* 5 J. SUSTAINABLE FIN. & INV. 4 (2015); Robert Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance,* 60 MGMT. SCI. 11 (Nov. 2014).

52 *Report on U.S. Sustainable, Responsible and Impact Investing Trends,* USSIF 1 (2018), https://perma.cc/UKK9-NP3M; *see* Jon Hale, *Sustainable Funds U.S. Landscape Report: More Funds, More Flows, and Strong Performance in 2018,* MORNINGSTAR 2–3 (Jan. 2018), https://perma.cc/92D7-44C2.

53 *See, e.g., BlackRock Investment Stewardship's Approach to Engagement on Climate Risk,* BLACKROCK INC. 1 (Jan. 2019) https://perma.cc/W75J-PQN9.

54 *See Shareholder Proposal Developments During the 2018 Proxy Season,* GIBSON DUNN (July 12, 2018), https://perma.cc/6BXV-Q2B9 (Governance proposals comprised 36%, corporate civic engagement proposals comprised 12%, executive compensation proposals comprised 7%, and other proposals comprised 2%.).

assets and the percentage of shareholder proposals concerning environmental and social issues affirm that investor interest in these matters is significant and growing.

What these trends in mainstream and socially responsible investing show is that, whether for financial or for ethical reasons, investors are already inclined to push corporations to incorporate socially responsible goals into their managerial decision-making, in addition to maximizing returns. Investor demand for mandatory ESG disclosure promises a number of direct and secondary effects that would further Greenfield's model of corporate personhood. As investors expect and demand improved ESG performance from companies, management will be forced to monitor and measure social and environmental dimensions of the company's operations. At best, this will have an iterative effect in determining what variables companies factor into their decision-making. At worst, it will make available more evidence that can support shareholder and consumer litigation. This is not to argue that expanded corporate disclosure provides a panacea to the limitations and disadvantages of shareholder primacy. It is, however, to claim that enlightened shareholders might be leveraged as allies in the campaign for a more humanist corporate personhood.

CONCLUSION: CORPORATE CITIZENSHIP AS A "BIG TENT" THEORY

The modern corporation is facing a long-overdue public reckoning. Kent Greenfield's rich legacy of progressive corporate law scholarship, now with the addition of his newest book, offers us a framework for navigating difficult questions about the corporation's role in society. Greenfield redirects the national conversation about *whether* we should have corporate personhood (his answer is a decided yes), and focuses on what the corporation's purpose is and what related rights are at stake in the constitutional and corporate law domains. These questions will also have to be addressed in other areas of the law, like securities law, labor law, criminal law, and tort law.

Greenfield's valuable contribution can be bolstered by an interpretation of corporate citizenship that unifies disparate ideological strands with their varying conceptualizations of the corporate entity. Rather than present corporate citizenship and shareholder primacy as *foils* of one another, an alternative formulation might grant space to enlightened shareholder primacy *under* the umbrella of corporate citizenship. Such an interpretation has the potential to build off of the momentum that enlightened shareholders have been gaining, to reconcile between enlightened shareholder primacy and a progressive take on corporate personhood. Such rhetorical framing might allow us to take advantage of present-day investor demographics and dynamics, with their appetite for ESG data and their

demand for corporate ESG decision-making, in order to push corporate and securities law in a direction that furthers the progressive ends Greenfield is advancing.

The noted trends in investor behavior and demographics, elaborated above, provide a window of opportunity to join cause between liberal and progressive conceptions of corporate citizenship. Enlightened shareholders of the liberal variety can advance the objectives of a corporate personhood agenda by advocating for a broader set of "material" considerations that corporations must publicly report on and, consequently, internally measure and monitor. This could prompt an iterative cycle whereby they modify internal rationalities and the types of stakeholder interests they incorporate into decision-making. Corporate personhood advocates of the progressive variety might advance the enlightened shareholder primacy agenda by supporting investor calls for mandatory ESG disclosure requirements from the Securities and Exchange Commission, and advocating for judicial interpretations that find ESG disclosures to be material and therefore legally actionable in securities litigation.

In *The Failure of Corporate Law*, Greenfield observed, "the question is not one of the existence of good progressive possibilities but the presence of political will" and argued that "there are meaningful alliances that could be built that have yet to be attempted."[55] Thirteen years since he published those words, the political will for corporate reform is present, and the potential for meaningful alliances should not be passed up.

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[55] THE FAILURE OF CORPORATE LAW, *supra* note 11, at 243.

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Corporate Personhood and Constitutional Rights for Corporations

ADAM WINKLER*

INTRODUCTION

Are corporations people? Should they, like ordinary individuals, be able to claim constitutional protections? These questions, which form the heart of Professor Kent Greenfield's book, *Corporations are People Too (And They Should Act Like It)*,[1] have become among the most important in modern constitutional law due to a trio of high-profile, landmark cases. In *Citizens United v. Federal Election Commission*, the Court held that business corporations have the same free speech rights as ordinary people to spend their money on election advertisements.[2] In *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that business corporations have religious liberty under a federal law, the Religious Freedom Restoration Act, entitling the chain of craft stores to an exemption from a federal law requiring birth control coverage in employee health plans.[3] More recently, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court ruled that business corporations have religious liberty rights under the First Amendment, allowing a for-profit bakery to refuse to comply with a state law prohibiting public accommodations from discriminating on the basis of sexual orientation.[4]

One prominent criticism of these controversial decisions is that the Supreme Court relied on corporate personhood—the legal doctrine that treats corporations as if they are legal persons with their own rights. In the wake of *Citizens United*, Occupy Wall Street protestors held up signs saying "Corporations Are NOT People" and adopted a resolution declaring that "one critical threat to authentic democratic self-governance comes from the fact that corporations have been defined as legal persons. . . . [H]uman

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1 KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018).

2 558 U.S. 310, 365 (2010).

3 573 U.S. 682, 736 (2014).

4 138 S. Ct. 1719, 1729 (2018).

beings, not corporations, are persons entitled to constitutional rights."[5] A proposed amendment to the Constitution has been introduced that would limit the "rights protected by the Constitution of the United States" to "natural persons only."[6]

In *Corporations Are People Too*, Greenfield offers a powerful rebuttal to these critics. Although Greenfield, too, believes that *Citizens United* is a problematic decision, he argues that the critics are wrong about corporate personhood. According to Greenfield, corporations should be considered legal persons for some purposes, including constitutional analysis. "Corporations do, and should, receive constitutional protections," Greenfield contends, even if not all of the same ones that ordinary people enjoy. To sort out which rights corporations should have, Greenfield offers a nuanced test that looks at the type of corporation and the nature of the right. "In other words, when it comes to the Constitution, corporations are people some of the time. And sometimes they are not."

Inspired by Greenfield's book, this article provides a historical analysis of the role of corporate personhood in the rise of constitutional protections for corporations.[7] By surveying the most important corporate rights cases decided by the Supreme Court over the course of American history, this article finds that corporate personhood has not played the central role in justifying the steady expansion of corporate constitutional rights that some critics of *Citizens United* might assume. Start, for example, with Justice Anthony Kennedy's majority opinion in *Citizens United*; it never refers to corporations as people and nothing in the logic or reasoning of the opinion depends upon corporate personhood. Justice Kennedy employs instead a different metaphor for the corporation: corporations are associations. Describing the corporation as "an association that has taken on the corporate form," Justice Kennedy's opinion declares, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[8] In Justice Kennedy's view, corporations have rights not because they are persons but because corporations are comprised of people, and those people have rights that ought to be respected regardless of the use of the corporate form.

Citizens United, we will see, follows the approach the Supreme Court has

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[5] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS xvi, 375 (2018). *See generally, e.g.*, Heather Gautney, *What Is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST (Oct. 10, 2011), https://perma.cc/X92Z-RNNR; *Facts About Occupy Wall Street*, OCCUPY WALL ST. (Oct. 28, 2019, 11:58 AM EST), https://perma.cc/6WS3-MK7G.

[6] *Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, https://perma.cc/A98J-A84A (last visited Mar. 13, 20201).

[7] I developed some of these themes, too, in WINKLER, *supra* note 5.

[8] *Citizens United*, 558 U.S. at 349.

typically taken to corporate rights controversies. Corporations have been winning constitutional protections since America's earliest days, and the prevailing pattern has been for the Supreme Court to treat corporations as associations or to ignore the relevance of the corporate entity entirely. In the majority of cases extending constitutional rights to corporations, the Court tends to portray corporations as simply groups of people who have come together for a common purpose.[9] While the Supreme Court has occasionally referred to corporate personhood, the associational understanding of the corporation has been far more influential in justifying the extension of constitutional rights to corporations. Because the courts look through the corporate veil and base the constitutional analysis on the members of the corporation—or sometimes on the rights of other people—corporate entities are afforded nearly all the same rights as people. The personhood of the corporation, however, plays little role in these cases.

Surprisingly, in the handful of cases when the Supreme Court has embraced the principle of corporate personhood, the result has usually been to *limit* the rights of corporations. When the corporation is taken to be a person in its own right, separate and apart from its members, it is often accorded lesser and fewer rights than ordinary people; a corporate person is not equal to a human person. Rather than justify expansive rights for corporations, corporate personhood historically has had the opposite effect, invoked most frequently in judicial decisions that restrict the range of corporate rights claims. When courts recognize corporations as legal persons, they treat them as having rights of their own instead of affording them the same rights as their members have as individuals. And because corporations are special types of legal persons, they should only have those rights appropriate for corporate persons.

I. Corporations as Legal Persons

What is corporate personhood? For all the criticism of corporate personhood in the controversy over *Citizens United*, it is easy to overlook the fact that corporate personhood is an ancient and well-established principle in business law. More than 250 years ago, before the birth of the United States, William Blackstone in his influential *Commentaries on the Law of England* described the corporation as an "artificial person."[10] Open up any introductory law school textbook on corporate law or business associations and one of the very first lessons will be that corporations are legal persons. "One of the law's most economically significant contributions to business life," writes Robert Charles Clark in his popular *Corporate Law* textbook, "has

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[9] In a few cases, the Supreme Court has extended rights to corporations in order to protect the rights of third parties, like the public at large. *See* Thomas W. Joo, *Corporate Speech and the Rights of Others*, 30 CONST. CMT. 335 (2015).

[10] 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 455 (1876).

been the creation of fictional but legally recognized entities or 'persons' that are treated as having some of the attributes of natural persons."[11]

To say that corporations are legal persons is not to make an existential claim that corporations are just like human beings. It is, rather, a claim that for certain legal purposes, a corporation is an independent entity in the eyes of the law. Independence is key: the corporation's powers and rights belong to the corporation and are separate and distinct from the powers and rights of the corporation's members. As the Supreme Court has recognized, the "basic purpose" of incorporation is "to create a legal entity distinct from those natural individuals who created the corporation, who own it, or whom it employs."[12] Former Delaware Chief Justice Leo Strine, a leading expert on corporate law, and his co-author Nicholas Walter write that the "whole point of corporate law" is to make the corporation "a distinct entity that is legally separate from its stockholders, managers, and creditors."[13]

This legal separation between the corporate entity on the one hand and its members on the other was one of the basic motivations for the development of the corporation. The earliest prototype of the corporation was the *societas publicanorum,* which arose in ancient Rome about three hundred years before Christ.[14] Roman law had already recognized partnerships, which allowed people to join together to pursue common callings, including business activities. But partnerships were unstable because the property managed by the partnership was still owned by the individual partners. Whenever one partner would die, become insolvent, or transferred an ownership interest, the whole partnership had to be reorganized. In a time of short life spans, the constant disruption led business people to seek out an alternative business form that was more stable and durable.

The *societas publicanorum* was Roman law's answer. It was allowed to own property and form contracts in its own name – not in the names of its partners.[15] As a result, it did not have to be reorganized any time one of the people who had pooled money into the enterprise exited. The investors could come and go, but the *societas publicanorum* would carry on. This early version of the corporation became popular and was used for mining,

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[11] ROBERT CHARLES CLARK, CORPORATE LAW 15 (1986).

[12] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 158 (2001).

[13] Leo E. Strine Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History,* 91 NOTRE DAME L. REV. 877, 887 (2016).

[14] *See* Ulrike Malmendier, *Law and Finance "at the Origin,"* 47 J. ECON. LIT. 1076 (2009); ULRIKE MALMENDIER, *Roman Shares, in* THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS 31 (William N. Goetzmann & K. Geert Rouwenhorst eds., 2005); ANDREW STEPHENSON, A HISTORY OF ROMAN LAW 371–74 (1912).

[15] *See* MALMENDIER, *Roman Shares, supra* note 14, at 32–33.

shipbuilding, public works projects, and tax collection.[16]

In the centuries that followed, organizations that were not businesses also found the corporate form attractive for that same independence of identity. Collective groups that wanted to lock in capital and hold property over time sought to create a legal distinction between the property of the entity and that of its members. The Catholic Church, for example, wanted to be able to own property in the name of the church, not the names of the particular people who held positions of authority within the church.[17] The City of London was incorporated, as many municipalities are in the United States today, in order to possess property and form contracts in the city's name.[18] Oxford University, English guilds, and even the King of England were all described as corporations.[19]

The legal separation between the members and the corporate entity remains a staple of business law today. If someone slips and falls at a Starbucks, that person cannot bring a lawsuit against the individual shareholders who hold Starbucks stock. If that person were to sue, the lawsuit would have to be against the corporate entity itself, the Starbucks Coffee Company.[20] The shareholders are not personally liable for the company's wrongdoing, nor are they legally responsible for any debt or judgment against the company. The company is its own legal person, with an independent standing in the eyes of the law. It has its own debts, in its own name, that it pays out of its own property.

In addition to independence of identity, another attractive feature of the corporate form was the ability to exercise at least some legal rights. In his *Commentaries*, Blackstone explained that "personal rights die with the person" so "it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued" to form corporations.[21] Blackstone wrote that corporations always had "many powers, rights, capacities, and incapacities" and that certain rights were "necessarily and inseparably incident to every corporation."[22] Among the corporate rights recognized by Blackstone were the right to own property

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[16] Malmendier, *Law and Finance*, *supra* note 14, at 1087–88.

[17] *See* Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499, 1504 (1973).

[18] JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA (2003) (describing the evolution of the Corporation of London).

[19] *See* Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1, 3–8 (2001); *see also* Frederic Maitland, *The Crown as Corporation*, 17 LAW Q. REV. 131, 134–35 (1901).

[20] *See* GREENFIELD, *supra* note 1, at 50 (describing the connection between personhood and liability).

[21] BLACKSTONE, *supra* note 10, at 186–87.

[22] BLACKSTONE, *supra* note 10, at 189.

(to "purchase lands, and hold them"), the right to form contracts (to "bind the corporation"), and the right of access to court (to "sue or be sued . . . by its corporate name").[23]

Unlike a partnership, a corporation owned property as a legal person. The property did not belong to the members; they may have supplied the capital as investors, but the capital was locked into the corporation.[24] The property belonged to the entity, and only the entity had the legal authority to use or dispose of it. When a corporation formed a contract, it bound the entity, not the members personally; the entity had its own right to contract. And the members could not sue or be sued on behalf of the corporation; such lawsuits had to be brought by or against the corporation. Corporate personhood meant that corporations were independent entities under the law, with their own rights and duties, wholly separate and distinct from the rights and duties of their members.

II. The Expansion of Corporate Rights

Given that Blackstone identified these three legal rights—property, contract, and the right to sue—even before the founding of the United States, perhaps it should be no surprise that these were among the very first rights corporations sought under the Constitution. Yet the first corporate rights cases in the Supreme Court, decided two centuries before *Citizens United*, did not rely on corporate personhood. While the Court ruled in favor of the corporations' claims of constitutional rights, the justices rejected a core principle of corporate personhood: that the rights and duties of corporations were separate and distinct from the rights and duties of their members. Instead, the Court extended to corporations those rights belonging to the corporations' members.

A. *The First Corporate Rights Case*

Claims by corporations for constitutional rights are nothing new. The first Supreme Court case to ask explicitly if corporations had rights under the Constitution was decided in 1809.[25] To add some perspective, the first Supreme Court case to ask whether African Americans had rights under the Constitution, the *Dred Scott* case, was not decided until 1857.[26] The first Supreme Court case explicitly on the rights of women under the Constitution, *Bradwell v. Illinois*, was not decided until 1873.[27] The Court

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[23] BLACKSTONE, *supra* note 10, at 190.

[24] *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003) (discussing capital lock-in as a key feature of the corporate form).

[25] *See* Bank of United States v. Deveaux, 9 U.S. 61 (1809).

[26] *See* Dred Scott v. Sandford, 60 U.S. 393 (1857).

[27] *See* Bradwell v. Illinois, 83 U.S. 130 (1873).

ruled against the African American in *Dred Scott* and the woman in *Bradwell*, denying them their rights. A half century earlier, in the first corporate rights case, the Supreme Court went the other way, ruling for the corporation and granting it constitutional protections.

That corporation was the Bank of the United States, and it went to the Supreme Court seeking one of the three inherent corporate rights identified by Blackstone: the right of access to court. In the early 1800s, the Bank was perhaps the richest and most powerful corporation chartered in the United States.[28] Although chartered by Congress, it was a for-profit business corporation that sold shares to the public and was managed by a board of directors that were accountable to investors.[29] The United States government was the largest shareholder and held seats on the board[30] but the Bank resembled what Americans today would call a private business. At a time when most corporations were small and of local concern, the Bank was a national business, headquartered in Philadelphia with branches from New Orleans to Boston.[31]

Unhappy with the Bank, Jeffersonians in Georgia passed a law taxing the Savannah branch.[32] The Bank refused to pay, prompting a tax collector named Peter Deveaux to seize the funds. The Bank then filed suit in federal court challenging the Georgia law and seeking to recover the money seized by Deveaux. The Bank's primary claim was that the state of Georgia did not have the authority to tax the Bank, which was created by Congress. These facts may seem familiar to constitutional law students because they mirror those of *McCulloch v. Maryland*, on whether a state can tax a federal bank.[33] *McCulloch*, decided a decade later, only remained to be decided because the Supreme Court in *Bank of the United States v. Deveaux* focused on a different question: whether a corporation could sue in federal court under Article III.

The Bank's case required the Supreme Court to decide whether corporations could invoke diversity jurisdiction under Article III, section 2, which promises access to federal courts in cases "between Citizens of different states."[34] Although the text would seem to exclude corporations, who are not generally thought to be citizens, the Supreme Court ruled in

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[28] *See generally* Andrew T. Hill, *The First Bank of the United States*, FED. RES. HIST. (Dec. 4, 2015), https://perma.cc/3R4W-98A4.

[29] *See generally id.*

[30] *See generally The First Bank of the United States: A Chapter in the History of Central Banking*, FED. RES. BANK OF PHILA. (June 2009), https://perma.cc/9Z6H-5FCP.

[31] *See* Hill, *supra* note 28.

[32] *See* W. CALVIN SMITH, *Banks, Law, and Politics: The Origins, Outcome and Significance of the* Deveaux *Case, in* THE PROCEEDINGS OF THE SOUTH CAROLINA HISTORICAL ASSOCIATION 1991 at 9, 11 (1991), https://perma.cc/42PL-JHY4.

[33] *Id.*; McCulloch v. Maryland, 17 U.S. 316, 319 (1819).

[34] U.S. CONST. art. III, § 2; Bank of United States v. Deveaux, 9 U.S. 61 (1809).

favor of the Bank. Writing for the majority, Chief Justice John Marshall admitted that a corporation was "certainly not a citizen."[35] Yet, this did not resolve the matter, according to Marshall, because the Constitution should be read expansively. "A Constitution, from its nature, deals in generals, not details. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of "broad and general principles."[36]

Employing this early version of living constitutionalism, Marshall then extended Article III's protections for citizens to corporations because of their members. "Substantially and essentially, the parties in such a case" are the "members of the corporation."[37] Marshall explained that the individuals who associate together within the corporation were citizens. It was the Court's duty to "look beyond the corporate name and notice the character of the individual" behind it.[38] In short, the corporation had the right to sue in federal court because its members had that right. The rights of the corporate entity were derivative of the members' rights.[39]

Had the Court embraced rather than rejected corporate personhood, the outcome might well have been different. Indeed, in an effort to defeat the Bank's claims, Deveaux's counsel emphasized corporate personhood to restrict and limit the rights of corporations. He argued it was inappropriate for the Court to "raise the veil which the corporate name interposes, and see who stand behind it."[40] The case was brought by a corporation "in the corporate name" to recover the property belonging solely to the corporation.[41] The members of the corporation "expressly averred themselves to be a body corporate, and to sue in that capacity."[42] When it came to legal rights, a corporation cannot "derive aid from the personal character of its members; nor does it incur any disability from [their] disabilities."[43] The citizenship status of the individual members of a corporation was irrelevant. The corporation was an independent entity in the eyes of the law. To sue under Article III, the corporation itself must be a citizen.

Rejecting the core tenet of corporate personhood—the separation of the rights and duties of the corporate entity from those of its members—*Bank of*

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[35] *Deveaux*, 9 U.S. at 86.

[36] *Id.* at 87.

[37] *Id.* at 87–88.

[38] *Id.* at 90.

[39] *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1681 (2015).

[40] *Deveaux*, 9 U.S. at 75.

[41] *Id.* at 74.

[42] *Id.* at 75.

[43] *Id.*

the United States v. Deveaux set a foundation for two hundred years of corporate rights cases to come. The Supreme Court ruled in favor of the corporation, granting it rights under a textual provision of the Constitution that by its terms applied only to citizens. Moreover, the Court did not justify its decision by insisting that corporations were people. It was the opponent of corporate rights that argued for corporate personhood: recognizing the independent legal identity of the corporation, wholly apart from its members. The Court instead looked right through the corporate entity and based the decision on the rights of the corporation's members. In the Court's view, a corporation was an association, not a person.

B. *Property Rights*

Numerous Supreme Court decisions expanding constitutional rights to corporations followed *Bank of the United States v. Deveaux*. These decisions also tended to ignore the separate legal identity of the corporation and collapse the rights of the members into those of the corporation.

In 1819, the Supreme Court held that corporations had property rights protected from infringement by the Constitution's Contract Clause in *Dartmouth College v. Woodward*.[44] The case arose out of a struggle for control of Dartmouth, which was formed as a corporation, after the passing of the school's founder, Eleazar Wheelock.[45] His son, John Wheelock, was named to run the college but was eventually ousted by the school's trustees. Wheelock, however, had many friends in New Hampshire politics, and the state legislature passed legislation that amounted to a hostile takeover. The new laws revised Dartmouth's corporate charter to expand the board of trustees, create a new board of overseers, and give the governor the power to appoint trustees.

Represented by the legendary Daniel Webster, the original trustees challenged the new laws. They argued the reforms were unconstitutional due to the provision in Article I, section 10 of the Constitution, which prohibits states from passing any law "impairing the Obligation of Contracts."[46] The corporation's charter was a contract negotiated with New Hampshire, they claimed, and so was not subject to unilateral revision by the government. Perhaps influenced by Marshall's reasoning in *Deveaux*, Webster did not base his argument on corporate personhood. Instead, he insisted that this case was about "the rights of the individuals who compose" the corporation.[47] "The twelve trustees were the sole legal owners of all the property" and the new laws impinged upon "the legal rights, privileges, and

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[44] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 518 (1819).

[45] *See generally* FRANCIS N. STITES, PRIVATE INTEREST & PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE 1819 (1972) (providing background information on the legal dispute).

[46] U.S. CONST. art. I, § 10.

[47] *Deveaux*, 9 U.S. at 63–92; *Dartmouth Coll.*, 17 U.S. at 555–56.

immunities which belong to them, as individual members of the corporation."[48]

The Supreme Court agreed. Marshall's opinion is sometimes viewed as embracing corporate personhood,[49] especially his description of a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."[50] At one point in the opinion, Marshall suggests that corporations are a means "by which a perpetual succession of many persons are considered as the same, and may act as a single individual."[51] Yet Marshall quickly returns to the pass-through approach of *Deveaux* and justifies the decision as necessary to protect the rights of the people behind the corporation. The New Hampshire laws infringed on the authority of the trustees guaranteed in the charter and violated the property rights of the donors who contributed to the corporation. It was not that the corporation had rights of its own, equivalent to those of individuals; the corporation is the "assignee of [the donors'] rights" and "stands in their place."[52]

When Marshall referred to the corporation as "artificial" and "existing only in contemplation of law," he was explaining why the case should *not* be decided on the basis of the separate legal personality of the corporations; the corporation was an ephemeral, fictional entity, not a person with rights of its own.[53] Instead, the case should be decided on the basis of the members' rights, because they were the ones who Marshall saw as the real parties involved.

C. *Equal Protection of the Laws*

A controversial, even bizarre, expansion of corporate rights came out of a series of Supreme Court cases in the 1880s involving the Southern Pacific Railroad. After California adopted a special tax rule for property owned by railroads, the Southern Pacific in a series of cases challenged the law as a violation of the Fourteenth Amendment equal protection and due process clauses.[54] The Supreme Court would ultimately hold that corporations

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[48] *Dartmouth Coll.*, 17 U.S. at 555.

[49] *See, e.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635, 1639 (2011).

[50] *Dartmouth Coll.*, 17 U.S. at 636.

[51] *Id.*

[52] *Id.* at 642.

[53] Consider Marshall's phrasing in the earlier *Deveaux* case: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued . . . ." Bank of U.S. v. Deveaux, 9 U.S. 61, 86 (1809).

[54] *See* Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby, Conestoga Wood, *the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. HEALTH L. & POL'Y 201 (2014).

were entitled to Fourteenth Amendment protections,[55] although corporate personhood would play an ambiguous and easily exaggerated role.

Without doubt, the Southern Pacific's cases raised the question of whether a corporation was a "person" under the text of the Fourteenth Amendment, which prohibits states from denying to any "person" due process and equal protection of the laws. While that amendment was adopted after the Civil War to protect the rights of the freedmen, Southern Pacific argued it also protected business corporations. Roscoe Conkling, Southern Pacific's lead lawyer in the first of two Southern Pacific cases, *San Mateo County v. Southern Pacific Railroad Co.*,[56] claimed that corporations were persons: "[T]he Southern Pacific Railroad Company and its creditors and stockholders are among the 'persons' protected by the Fourteenth Amendment to the Constitution of the United States."[57]

Conkling had unusual credibility with the Justices. He had been twice nominated to sit on the Supreme Court himself, most recently in the spring of 1882, the same year he appeared before the Court in the *San Mateo County* case.[58] He was confirmed by the Senate but declined the seat; he remains the last person to refuse a Supreme Court appointment after being confirmed.[59] Moreover, as a young congressional representative, Conkling had served on the committee that drafted the Fourteenth Amendment.[60] Conkling suggested he and his fellow committee members drafted the amendment to protect corporations. The committee, he said, had changed the proposed text, which originally guaranteed equal protection to "citizens of the United States," to guarantee rights to every "person."[61] In law, the word *person* "has by long and constant acceptance, and by multiplied judicial construction, been held to embrace artificial persons as well as natural persons."[62] "The American people, in giving [The Fourteenth Amendment] their imprimatur understood what they were doing, and meant to decree what has, in fact, been decreed."[63] Conkling supported his account by producing an old journal that purported to be an unpublished record of the deliberations of

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[55] *See* Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181 (1888).

[56] 116 U.S. 138 (1885).

[57] APPENDIX TO THE JOURNALS OF THE SENATE AND ASSEMBLY OF THE LEGISLATURE OF THE STATE OF CALIFORNIA: VOLUME VIII (1889).

[58] *See* William F. Swindler, *Roscoe Conkling and the Fourteenth Amendment*, 1983 Y.B. S. CT. HIST. SOC'Y 46, 47 (1983).

[59] *See* Harkins, *supra* note 54, at 237.

[60] Harkins, *supra* note 54, at 237.

[61] Harkins, *supra* note 54, at 238.

[62] WINKLER, *supra* note 5, at 2; Transcript of Oral Argument at 12, County of San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1885) (No. 1063).

[63] WINKLER, *supra* note 5, at 133.

the Fourteenth Amendment's drafting committee.[64]

Although the somewhat suspicious journal was in fact an unpublished record of the drafting committee's deliberations, it did not provide the evidence Conkling suggested. Howard Jay Graham, a legal historian who thoroughly studied Conkling's argument in the *San Mateo County* case, found that the committee had never revised the Equal Protection Clause from "citizens" to "person," as Conkling claimed.[65] And none of the other drafters had ever suggested that corporations were covered by the amendment, either during the hotly contested and much publicized ratification debates or after. Graham concluded that Conkling, a trusted lawyer of outstanding reputation, had engaged in "a deliberate, brazen forgery" to win new rights for corporations.[66]

The Court never issued a final ruling in the *San Mateo County* case, holding onto it for three years until Southern Pacific unexpectedly settled the case.[67] One is tempted to speculate that the Justices discovered the misconduct, but it remains uncertain. Nonetheless, the Southern Pacific had another case against another California county raising the same Fourteenth Amendment question ready for Supreme Court review: *Santa Clara County v. Southern Pacific Railroad Co.*[68] With Conkling no longer involved, the railroad corporation's lawyers continued to argue that corporations were covered by the Equal Protection Clause. The Court ruled in favor of the railroad but on state law, not constitutional, grounds. The majority opinion explained that "it is not necessary to consider any other questions," including the "grave questions of constitutional law" relating to corporations and the Fourteenth Amendment.[69]

One justice, Stephen Field, was particularly unhappy with the Court's avoidance of the corporate rights question. Riding circuit, Justice Field had authored the lower court opinions in both *San Mateo County v. Southern Pacific Railroad Co.* and *Santa Clara County v. Southern Pacific Railroad Co.*, ruling that corporations were covered by the Equal Protection Clause.[70] In a companion case decided by the Supreme Court on the same day as *Santa Clara County*, Field wrote separately to criticize his colleague's avoidance of the corporate rights question. "At the present day, nearly all great

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[64] Harkins, *supra* note 54, at 237–38.

[65] *See* HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 40–41 (1968).

[66] *Id.* at 417.

[67] *See* Swindler, *supra* note 58, at 52.

[68] 118 U.S. 394 (1886).

[69] *Id.* at 411, 416.

[70] County of San Mateo v. Southern Pac. R.R. Co., 13 F. 722, 748 (C.C.D. Cal. 1882); County of Santa Clara v. Southern Pac. R.R. Co., 18 F. 385, 403–04 (C.C.D. Cal. 1883).

enterprises are conducted by corporations," wrote Field.[71] "Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in their hands."[72] He expressed "regret that it has not been deemed consistent with [the Court's] duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the circuit court."[73]

Although Field and the other justices all understood that the *Santa Clara County* Court did not decide whether corporations had Fourteenth Amendment rights, that fact eluded the Supreme Court's Reporter of Decisions. In the summary of the *Santa Clara County* opinion published in the official volumes of the *United States Reports*, the first sentence describes the Court's holding: "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws."[74] And the Reporter added an unusual headnote just before the first lines of the Court's opinions reporting that the Chief Justice had said at the beginning of oral argument that the "Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of the opinion that it does."[75] As a result, the *Santa Clara County* case has mistakenly been cited in numerous cases for holding precisely what Field and the other justices explicitly said it did not: that corporations are protected by the Fourteenth Amendment.[76]

A few years after *Santa Clara County*, Field wrote the majority opinion upholding double liability on railroads for damage to livestock in *Minneapolis & St. Louis Railway Company v. Beckwith*.[77] Although it was unnecessary given the outcome of the case, Field went out of his way to address corporate rights under the Fourteenth Amendment. "It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in

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[71] County of San Bernardino v. Southern Pac. R.R. Co., 118 U.S. 417, 422 (1886) (Field, J., concurring).

[72] *Id.*

[73] *Id.*

[74] *See* County of Santa Clara v. Southern Pac. R.R. Co., 118 U.S. 394 (1883).

[75] *Id.*

[76] *See, e.g.*, Power Mfg. Co. v. Saunders, 274 U.S. 490, 493 (1927); Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923); Smyth v. Ames, 169 U.S. 466, 522 (1898); Covington & Lexington Turnpike Rd. Co. v. Sanford, 164 U.S. 578, 592 (1896).

[77] Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889).

question. It was so held in *Santa Clara County v. Southern Pacific Railroad.*"[78] Although Field's statement was obviously incorrect about the holding of *Santa Clara County*, the justices ultimately agreed that corporations were protected by the Fourteenth Amendment.

Indeed, in the more than 140 years since *Santa Clara County*, all but three or four of the Justices who have sat on the Supreme Court have agreed that corporations have rights under the Fourteenth Amendment. Yet, to this day, there has never been an opinion of the Court explaining why corporations are covered by the Fourteenth Amendment. It is thus somewhat hard to say how corporate personhood influenced the extension of these rights. Much of the argument by the lawyers in the Southern Pacific Railroad cases emphasized personhood: whether a corporation was a "person" under the text of the amendment. Field specifically embraces this conclusion too in *Minneapolis & St. Louis Railway Company*, although without explanation in one passing sentence.

For Field, however, personhood was little more than a textual hook. In his lower court opinions in the Southern Pacific Railroad cases, Field rejected the core tenet of corporate personhood, independence of identity. The court, he wrote, should not look to "the name under which different persons are united, but to the individuals composing the union."[79] Taking Chief Justice Marshall's approach from *Bank of the United States v. Deveaux*, Field insisted that the true parties were the "members" of the corporation who "do not, because of such association, lose their rights to protection."[80] Corporations had Fourteenth Amendment rights not because corporations were equivalent to people but because corporations were comprised of actual people who had rights that would be burdened by business regulation.

Legal historians who have studied the Southern Pacific Railroad cases have generally rejected the idea that *Santa Clara County* turns on corporate personhood, despite the textual reliance on "persons." Morton Horwitz argues that the doctrinal development of corporate rights at this time was not "a dramatic example of judicial personification of the corporation."[81] Instead, Horwitz, Greg Mark, and others contend that the lawyers and justices of the era emphasized a "partnership" theory of the corporation that looked right through the corporate veil and based corporate rights on the rights of the members.[82] So while corporate personhood certainly played some role, at least as a textual matter, in the *Santa Clara County* line of cases,

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[78] *Id.* at 28.

[79] County of Santa Clara v. S. Pac. R.R. Co., 18 F. 385, 403 (C.C.D. Cal. 1883).

[80] *Id.* at 402.

[81] Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 174 (1985).

[82] Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

the Court never explicitly embraced any overarching theory of the corporation to justify the extension of Fourteenth Amendment rights. And the explanation we have from Field rested on a theory that denied the fundamental separation between the corporate entity and its members.

D. *The Freedom of Association*

The Supreme Court first held that corporations have a freedom of association under the First and Fourteenth Amendments in *NAACP v. Alabama ex rel. Patterson*, decided in 1958.[83] Although, as we will see in the next section, the Court had previously declined to extend such a right to corporate entities in the early 1900s, the Southern effort to disable the National Association for the Advancement of Colored People (NAACP) during the Civil Rights Era pushed the justices to reverse course. The NAACP was not a business, of course, but it was formed as a corporation.[84] And it was the NAACP's corporate status that Alabama targeted in an effort to push the organization out of the state.

After the NAACP won *Brown v. Board of Education*, elected officials in Alabama set out to prohibit the NAACP from operating within the state. The state sued the NAACP claiming the organization had failed to register as an out-of-state corporation as required by state law.[85] Alabama required that "foreign" corporations doing business in the state file a copy of their articles of incorporation and identify a local agent for service of process. The NAACP had never made these filings in the belief that, as a voluntary membership organization rather than a business, it was not covered.[86] Once sued, the NAACP offered to provide this information to the court, but the judge ordered the organization to turn over its membership list too.[87] Fearing persecution of its members, the NAACP refused and was held in contempt. The Supreme Court overturned the contempt finding on the ground that the requirement to reveal the NAACP's membership list violated the NAACP's freedom of association.[88]

In its briefs, the NAACP argued that the mandated disclosure would violate both the rights of the individual members and the entity's "own right of freedom of association."[89] Alabama in its briefs argued vigorously that the case was about the NAACP's status as a corporation: "A corporation,

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[83] 357 U.S. 449 (1958).

[84] *Id.* at 451.

[85] *Id.* at 465.

[86] *Id.* at 452.

[87] *Id.* at 461.

[88] *Id.* at 449.

[89] Brief for Petitioner at 18, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (No. 91), 1957 WL 55387.

being an artificial entity, is subject to the restraints of the police power more than a natural person and has fewer rights."[90] The Court's opinion, however, focused on the rights of the NAACP's members. Without directly addressing whether the NAACP, as an entity, had its own freedom of association, the Court said the NAACP was an appropriate party to protect the rights of the people who have joined the organization—even while recognizing that the controlling doctrine "has generally insisted that the parties rely only on constitutional rights which are personal to themselves."[91] Nonetheless, given that people join the NAACP "to make more effective the expression of their own views," the Court said there was a special "nexus" between the NAACP and its members that made the two "in every practical sense identical."[92]

NAACP v. Alabama ex rel. Patterson remains a landmark case on freedom of association—for individuals and corporations. Once again, the Supreme Court expanded corporate rights, but not because corporations were people. Rather, as it has in the past, the Court all but ignored the separateness of the corporate entity and simply viewed the case as involving an association of individuals that happened to use the corporate form. And while that approach seems justified in the context of a voluntary membership organization like the NAACP, the Court has employed it in numerous corporate rights cases that involved ordinary for-profit businesses too.

E. *Political Speech Rights*

More than thirty years before *Citizens United*, the Supreme Court first held that corporations had political speech rights under the First Amendment in *First National Bank of Boston v. Bellotti*, decided in 1978.[93] Massachusetts had prohibited corporations from spending money on certain ballot measure campaigns, and a group of politically active companies challenged the law.[94] Writing for a 5-4 majority, Justice Lewis Powell Jr. struck down the Massachusetts law as a violation of business corporations' freedom of speech.[95] Although the Court justified the decision on different grounds from the cases discussed above, once again, corporate personhood was irrelevant to the Court's reasoning.

"The proper question therefore is not whether corporations 'have' First

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[90] Brief for Respondent at 10, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (No. 91), 1957 WL 87605.

[91] *NAACP*, 357 U.S. at 459.

[92] *Id.* at 458–59.

[93] First Nat. Bank of Boston v. Belotti, 435 U.S. 765 (1978); Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 37 LAW & HIST. REV. 943 (2018).

[94] Bowie, *supra* note 93, at 943–44.

[95] Bowie, *supra* note 93.

Amendment rights and, if so, whether they are coextensive with those of natural persons," wrote Powell.[96] The case did not turn on whether corporations were just like people under the law and enjoyed the same rights. "Instead, the question must be whether [Massachusetts's law] abridges expression the First Amendment was meant to protect."[97] Because the Massachusetts law restricted political speech valuable to the voting public, it was unconstitutional regardless of the identity of the speaker. The speech itself was protected.

Commentators have criticized the majority opinion in *Bellotti* for failing to grapple with the identity of the speaker. According to Daniel Greenwood, *Bellotti* (and a handful of other Supreme Court decisions from the 1970s) transformed the First Amendment "to a protector of 'speech'" rather than a guarantee of freedom to human beings.[98] Instead of protecting the speech right of individual people, the Court expanded the First Amendment to encompass "disembodied notions of the 'free flow of information.'"[99]

Unlike earlier decisions that expanded constitutional protections for corporations, *Bellotti* did not focus on the rights of the people *inside* the corporation. Yet, like those earlier decisions, the Court once again reasoned from the premise that the corporate entity was essentially irrelevant to the analysis. The Court did not say that corporations were just like people and enjoyed the same rights as individuals. Instead, the Court emphasized that the substance of the speech was protected, and the identity of the speaker made no difference. In the end, of course, the ruling effectively gave corporations the same free speech rights as individuals. But the logic and reasoning did not depend on corporate personhood.

F. Citizens United v. Federal Election Commission

Considering how the Supreme Court's decision in *Citizens United* sparked intense protests, many of which blamed corporate personhood for the expansion of rights to business corporations, it is surprising that the notion of corporate personhood is nowhere to be found in the Court's opinion. The Court, which struck down a provision of federal campaign finance law restricting corporations from using general treasury funds to finance election ads in the weeks before an election,[100] surely expanded the free speech rights of corporations to include speech about candidate

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[96] *Bellotti*, 435 U.S. at 776.

[97] *Id.*

[98] Daniel Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1015 (1998) (centering his analysis on Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), which established the "listeners rights" theory of the First Amendment that was used in *Bellotti*).

[99] *Id.* at 1016.

[100] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

elections. Yet, personhood had little to do with it.

As mentioned in the Introduction, Justice Anthony Kennedy's majority opinion does not mention corporate personhood, and his reasoning does not depend on any unarticulated notions of corporate personhood. Like the earlier Supreme Court decisions broadening the rights of corporations, *Citizens United* focuses on the rights of the people who associate together within the corporate form. The decision describes a corporation as an association of people who simply use the corporate form. According to Justice Kennedy, the challenged law targeted "disfavored associations of citizens—those that have taken on the corporate form."[101] Once again, corporations were not envisioned as individuals or people with the same rights. Rather, the corporation was merely a cover under which an association of people operated, and it was those people whose rights were being protected by the Court.

The Supreme Court in *Citizens United* also said that political speech was protected regardless of its source, echoing *Bellotti*. "The First Amendment protects speech and speaker, and the ideas that flow from each," explained Kennedy's majority opinion.[102] "Political speech is indispensable to decision-making in a democracy and this is no less true because the speech comes from a corporation rather than an individual."[103] Indeed, the Court wrote that the First Amendment prohibited the government from "distinguishing among different speakers, allowing speech by some but not others."[104] Although the Court would not maintain adherence to that principle—two years later, the Justices summarily affirmed a lower court ruling upholding a ban on political contributions and expenditures by foreign nationals residing in the United States[105]—it nonetheless served as a justification for corporate rights in lieu of the idea that corporations are people.

G. *Religious Liberty*

Along with *Citizens United*, the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*[106] helped to bring the controversy over rights for corporations to the forefront of political and legal debate. The Court in *Hobby Lobby* held that corporations had religious liberty rights under a federal law, the Religious Freedom Restoration Act (RFRA), and were permitted to opt out of a requirement to cover birth control in employee health insurance

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[101] *Id.* at 356.

[102] *Id.* at 341.

[103] *Id.* at 349.

[104] *Id.* at 340.

[105] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *summarily aff'd*, 565 U.S. 1104 (2012).

[106] 573 U.S. 682 (2014).

plans.[107] The case was not a constitutional law case; nevertheless, it involved the same fundamental value of religious liberty that motivates the First Amendment. And, importantly for our purposes, it largely followed the pattern in corporate constitutional rights cases. The Court looked right through the corporate entity and granted legal rights to corporations based on the rights of the corporation's members.

Corporate personhood nonetheless plays a role in Justice Samuel Alito's majority decision in *Hobby Lobby*. For purposes of the RFRA, the Court held that corporations are indeed "persons" protected by the statute's provision that promises the federal government "shall not substantially burden a *person's* exercise of religion" absent compelling reasons.[108] The Court agreed that business corporations fit under this provision because of another federal law, the Dictionary Act, which defines the terms used in federal statutes: "Under the Dictionary Act, 'the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .'"[109] Thus, at least for purposes of RFRA, corporations were people.

Although the Court says corporations are persons under RFRA, the Court's reasoning quickly abandons the core tenet of corporate personhood: that a corporation is an independent legal entity with rights and duties wholly separate and apart from those of its members. While recognizing that for-profit corporations cannot themselves exercise religion, the Court held that the law burdened the religious beliefs of the Green family, the owners of Hobby Lobby. "[A]llowing Hobby Lobby . . . to assert RFRA claims protects the religious liberty of the Greens . . . ."[110] Indeed, the Court suggests that looking through the corporate form and focusing on the owners of enterprises is necessary. "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[111]

Instead of treating the corporation as its own legal entity with its own rights, the Court in *Hobby Lobby* rejected the legal principles that inform corporate personhood. While the Court extended a legal right to a corporation, the reason was to protect the rights of the people behind the corporation. Of course, the legal mandate to cover birth control did not fall on the Greens as individuals; they were not required to cover birth control, the corporation was. If there was any liability for failure to include birth control coverage, it would be imposed on the corporation, not the members of the Green family. If a customer slipped and fell at a Hobby Lobby store,

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107 *Id.* at 706, 731.

108 *Id.* at 705–06.

109 *Id.* at 707–08.

110 *Id.* at 709.

111 *Id.* at 706–07.

any liability would be borne by the corporate entity, not the members of the Green family. Indeed, the Green family would surely insist they were not personally liable because of corporate personhood; they are separate legal persons, with separate rights and duties than the entity. When it came to expressions of the Greens' religious beliefs, however, the Greens insisted—and the Court agreed—that they and the corporation were one and the same.

III. Personhood as a Justification for Limiting Corporate Rights

Over the two hundred years that the Supreme Court has been hearing corporate rights cases, the justices have occasionally voiced support for corporate personhood. Yet, when the Court has embraced corporate personhood—saying that corporations are legal persons who stand separate and apart from their members—the result has often been to limit or restrict the rights of corporations as compared to ordinary people. When the Court takes the corporate entity seriously, rather than all but ignoring it, the justices tend to see that the corporate person is fundamentally different than an ordinary person, warranting rights of lesser scope. Corporate personhood, in other words, has had precisely the opposite effect than what some critics of *Citizens United* imagine.

A. *Privileges and Immunities*

The first case reflecting this pattern was *Bank of Augusta v. Earle*, decided in 1839.[112] The case involved a challenge to a type of law common in the nineteenth century, when states often imposed special conditions on out-of-state, or "foreign," corporations seeking to do business there: taxes, license fees, bond requirements, and even outright prohibitions.[113] Today states use labor laws, workplace safety laws, consumer protection laws, and Blue Sky laws to regulate such businesses. During the early to mid-1800s, however, corporations were regulated almost exclusively through their corporate charters.[114] That meant that no states other than the home state of the corporation had much influence on the corporation's behavior. Instead, states imposed special conditions on out-of-state corporations to protect their residents from unscrupulous companies (or, in some cases, competition). Corporations seeking to take advantage of the increasingly national marketplace of the era challenged these special conditions as a violation of the Constitution.

In *Bank of Augusta*, the Supreme Court affirmed the right of states to impose special conditions on foreign corporations.[115] When a group of banks

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[112] 38 U.S. 519 (1839).

[113] *See id.* at 586–87.

[114] *See generally id.* at 587.

[115] Bank of Augusta v. Earle, 38 U.S. 519, 606 (1839).

tried to collect on a loan they had made to some Alabama residents, the Alabamians argued that the loans were invalid due to an Alabama law limiting certain banking operations in the state.[116] The banking corporations involved argued that the law did not apply in these circumstances and, if it did apply, was unconstitutional under the Comity Clause of Article IV, section 2. That provision reads, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[117] The Comity Clause prohibits states from affording lesser rights to newly arrived immigrants from other U.S. states than they give to their own native citizens. The banks claimed that they too should be protected by the same principle and out-of-state companies should be allowed to operate on the same terms as local companies, without special conditions.

In the argument before the Supreme Court, the corporations invoked *Bank of the United States v. Deveaux*, which read "Citizens" in Article III to allow corporations to sue in federal court under diversity jurisdiction.[118] The Court, they argued, should follow *Deveaux* and focus not on the citizenship of the corporate entity itself but on the citizenship of the corporation's members. The ordinary people who managed and owned the corporation were themselves citizens entitled to move into states and do business without discrimination. Corporations "may do in their corporate character . . . all such acts, authorized by their charter, as the members thereof would have a right to perform as individuals."[119]

The Court, however, broke from *Deveaux* and refused to "look behind the act of incorporation and see who are the members" of the corporation.[120] Instead, the Court explained that corporations were legal persons with legal rights and duties separate and distinct from the legal rights and duties of the members. A corporation "is a person for certain purposes in contemplation of law," Chief Justice Roger Taney's opinion explained.[121] "Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members."[122] A corporate person may have legal rights under its state-issued charter but the "only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state."[123] In Taney's view, corporate personhood did not translate into equal rights for corporations. Instead, corporate personhood

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116 *Id.* at 522.

117 U.S. CONST. art. IV, § 2.

118 9 U.S. 61, 84–85 (1809).

119 *Bank of Augusta*, 38 U.S. at 550.

120 *Id.* at 586.

121 *Id.* at 520.

122 *Id.* at 587.

123 *Id.*

meant that the corporation was a separate legal entity, with distinct, different, and lesser rights.

Taney noted that stockholders enjoy the separation guaranteed by corporate personhood when it comes to corporate liability. Limited liability for stockholders meant the members of the corporation were not personally responsible for the corporation's debts. If, however, "the members of a corporation were to be regarded as individuals carrying on business in their corporate name . . . it is very clear that they must at the same time take upon themselves the liabilities of citizens and be bound by their contracts in like manner."[124] The members could not claim the protections of limited liability but ignore the legal separation between the entity and its members when it came to making contracts across state lines. "The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation," the Court explained.[125]

Bank of Augusta v. Earle is the first Supreme Court case to reject categorically the extension of a particular constitutional protection to corporations. Corporate personhood, rather than leading the Court to give corporations equal rights to individuals, was used for precisely the opposite purpose. The Court relied on corporate personhood to explain why corporations should have fewer rights than ordinary human beings.

B. *Fourth and Fifth Amendment Rights*

Hale v. Henkel[126] arose out of President Theodore Roosevelt's famous effort to break up the trusts. Among his targets was the tobacco trust. When his Justice Department subpoenaed officers of the companies involved in the tobacco trade to testify and provide evidence to a grand jury, the corporations objected. They argued that requiring their own officers to testify against the companies was a violation of the corporations' Fifth Amendment right against self-incrimination.[127] Requiring them to provide evidence, such as business records and contracts, was also a violation of the corporations' Fourth Amendment right to be free from unreasonable searches and seizures, they claimed.[128] In 1906, the Supreme Court issued a split decision, holding that corporations had the Fourth Amendment right against unreasonable searches but not the Fifth Amendment right against self-incrimination.[129]

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[124] *Bank of Augusta*, 38 U.S. at 586.

[125] *Id.*

[126] Hale v. Henkel, 201 U.S. 43 (1906).

[127] *Id.* at 66.

[128] *Id.* at 76.

[129] *Id.* at 74.

The Court's opinion, written by Justice Henry Billings Brown, the author of the notorious *Plessy v. Ferguson*,[130] is not exceptionally clear and coherent. Indeed, the Court seems to take two inconsistent approaches to corporate rights within the same case. In the Fourth Amendment discussion, where the Court finds corporations are protected, the Court follows cases like *Bank of the United States v. Deveaux* and describes corporations as associations that simply exert the rights of their members: "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."[131]

In the discussion of whether corporations have a Fifth Amendment right against self-incrimination, corporate personhood appears to play a more prominent role. Although Justice Brown initially says the "question of whether a corporation is a 'person' . . . really does not arise,"[132] he then turns to the core tenets of corporate personhood to explain why corporations do not have the right against self-incrimination. First, the Court recognizes a strict, formal legal separation between the entity and its members. The Court said that while Edwin Hale, the company officer called to testify, had a right not to incriminate himself, Hale could not assert the right to avoid incriminating a third party—in this case, the corporation. The Fifth Amendment "was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . ."[133] The Court could have said instead that the corporation is just an association of people and requiring any of those associated to testify compels a form of self-incrimination. Yet, the Court here treated the corporation as distinct from members, including the people who worked for the company. The Court treated the corporation as a separate legal person. "The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation."[134] As legal scholar Peter Henning notes, *Hale*'s Fifth Amendment analysis turned on the idea that "the corporation existed apart from its agents."[135]

Second, the Court's Fifth Amendment discussion emphasized the "clear distinction in this particular between an individual and a corporation":

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[130] Plessy v. Ferguson, 163 U.S. 537 (1896).

[131] *Hale*, 201 U.S. at 76.

[132] *Id.* at 70.

[133] *Id.* at 69–70.

[134] *Id.* at 70.

[135] Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 818 (1996).

> The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him.[136]

But a corporation is fundamentally different than an ordinary person: "[T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law."[137] Like the Court in *Bank of Augusta v. Earle*, which used the unique corporate privilege of limited liability to distinguish between people and corporations, the *Hale* Court insisted that, "[w]hile an individual may lawfully refuse to answer incriminating questions . . . it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."[138]

Hale v. Henkel thus seems to reflect the larger pattern in the corporate rights jurisprudence: cases expanding corporate rights tend to view the corporation as nothing more than an association of people capable of exerting the members' rights, while cases limiting corporate rights tend to embrace the idea that a corporation is a separate legal person with distinct rights from those of its members. The oddity is that both these views operate in the same case and the Court's logic seems to flip when shifting from one right to another.

C. Berea College v. Kentucky

Another case denying corporations a constitutional right is *Berea College v. Kentucky*.[139] Although the Court's opinion in *Berea College* does not take an explicit position on whether a corporation should be thought of as an association or a separate legal person, the reasoning of the opinion resonates with elements of corporate personhood. The case involved a racially integrated college that challenged a Kentucky law prohibiting the teaching of whites and racial minorities together.[140] The college claimed the law infringed on its fundamental rights of property, due process, and association. The Court, however, ruled against the college.[141]

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136 *Hale*, 201 U.S. at 74.

137 *Id.*

138 *Id.* at 75.

139 211 U.S. 45 (1908).

140 David E. Bernstein, Plessy *Versus* Lochner: *The* Berea College *Case*, 25 J. SUP. CT. HIST. 93, 94 (2000).

141 *Berea College*, 211 U.S. at 58.

The Court's opinion, written by Justice David Brewer, emphasizes that the corporate entity is fundamentally different than an ordinary person or an association of people.[142] The Court noted that the Kentucky law explicitly barred "any person, corporation or association of persons" from operating any racially integrated college.[143] In considering the constitutionality of the law, the Court insisted it was necessary to break it up into its distinct parts: "The act itself, being separable, is to be read as though it, in one section, prohibited any person, in another section any corporation and, in a third, any association of persons to do the acts named."[144] The underlying reason for the distinction between persons, corporations, and associations was that the law might well be invalid when applied to persons or associations, even though it was constitutional as applied to corporations: "In creating a corporation a state may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike."[145] Although corporations might be made up of people, the corporation did not automatically take on the members' rights. "In granting corporate powers the legislature may deem that the best interests of the state would be subserved by some restriction, and the corporation may not plead that, in spite of the restriction, it has more or greater powers because the citizen has."[146]

Berea College does not say that corporations are people and thus entitled to fewer rights because of corporate personhood. Yet, the Court did draw a strong distinction between corporations on the one hand and individuals and associations on the other, and that distinction was crucial to the Court's reasoning. And, once again, when the Court approached corporations as legal persons, with distinct rights from their individual members, the corporations ended up with fewer rights than ordinary people.

CONCLUSION

While critics of *Citizens United* have condemned the principle of corporate personhood, the Court rarely relies on corporate personhood to justify the extension of constitutional rights to corporate entities. Rather, the Court has typically based the rights of corporations on the rights of others, most often the members of the corporation. When, however, the Court relies on the core tenets of corporate personhood—that the corporation is an independent entity, with rights and duties separate and distinct from those of its members—the Court usually affords corporations fewer or lesser rights

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142 *See id.* at 57–58.

143 *Id.* at 51.

144 *Id.* at 57.

145 *Id.* at 54.

146 *Id.*

than ordinary individuals.

When courts take seriously the principle that the corporate entity is independent and legally separate from its members, this opens up the possibility that courts will focus on what Greenfield recommends: the nature of the particular corporation before a court. As Greenfield recognizes, there are many different kinds of corporations. There are for-profit corporations, some of them publicly held and others closely held. There are media corporations. There are charitable organizations, voluntary membership associations, and not-for-profit hospitals and schools that take the corporate form. The Court's current way of approaching corporate rights questions does not distinguish among these different organizations easily: they are all, in varying degrees, associations of ordinary people. If, however, the courts distinguish the corporate entity from its members and ask which rights that particular type of corporation should have, then a business corporation like Exxon will not necessarily have the same rights as a voluntary membership association like Common Cause, even if both are corporations.

Of course, focusing on the corporate entity as an independent legal person and asking which rights that type of corporate person should have does not guarantee that judges will reach the right conclusion in every corporate rights case. But at least the judges would be asking the right question.

Corporations Are Organizations and Footnote 4, Too

DANIEL J.H. GREENWOOD*

INTRODUCTION

Professor Greenfield's important book, *Corporations Are People*, underscores that both corporate and constitutional law are too critical to be left to sloganeering and simplistic analysis. The Fourteenth Amendment's reference to "persons" is not the basis for the Supreme Court's repeated holdings that corporations have constitutional rights. Conversely, a constitutional amendment declaring that constitutional rights are restricted to human people would not resolve the problem of the status of corporations in our corporate order. Instead, Greenfield argues, as a matter of theory, we need a more careful analysis and, as a matter of actual law reform, we need to give greater voice and power to corporate constituents, especially employees.

In this essay, I do not attempt to summarize or respond to Greenfield's careful argument point by point. He is, in my view, entirely correct to argue that constitutional doctrine has little to do with the text of the Fourteenth Amendment: its language itself precludes that result. The core of the Amendment is the repeal of the infamous three-fifths clause by requiring that apportionment be based on the "whole number of persons in each State."[1] The word "persons" here can refer only to human beings; if it included corporations, any state could get extra representatives in the House by creating more corporate "persons." In any event, the Court began finding constitutional rights for corporations well before the Civil War or the

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[1] *Compare* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons."), *with* U.S. CONST. amend. XIV, § 2.

Amendments passed in its wake.[2] Similarly, Greenfield is correct that "legal personality" is fundamental to corporate law: the law's recognition of each corporation as a single legally recognized actor independent of the people who make it up at any given time is critical to the success of bureaucratic enterprise and, therefore, any modern economy.

But it does not follow that corporations are people, or that corporations must have the same constitutional rights as citizens, or indeed that they ought to have any constitutional rights at all.[3] The law can, and often does, recognize legal actors in some areas and not others. For example, a married couple is a single person in the eyes of the Internal Revenue Code, but we long ago abolished coverture and its equivalents in other areas of the law.[4] Children generally are not full legal persons in contract law—they cannot bind themselves in contract[5]—but they can commit their own crimes and torts. Classical international law recognizes only sovereign states, not their citizens, as rights-bearing legal persons entitled to sue and be sued, but modern human rights law grants rights to individuals.

Perhaps most relevantly, municipal corporations—cities—are universally granted the basic corporate personality rights. The city is an actor in its own right, with both continuity and the rights and obligations of tort, contract, and property law. Municipal property belongs to the municipal entity; even if all the officers or inhabitants move to another location, they cannot take it with them. Yet it is uncontroversial American law that municipal corporations have no Federal due process rights whatsoever against the state legislatures that create them; a state may decide

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[2] *See, e.g.*, Bank of U.S. v. Deveaux, 9 U.S. 61 (1809) (holding that a corporation could sue in diversity despite the explicit language of the Diversity Clause, using the rationale that a corporation is not separate from its members); Trs. of Dartmouth College v. Woodward, 17 U.S. 518 (1819) (holding that corporate charter granted by King George was a "contract" under the U.S. Constitution and therefore that New Hampshire could not modify it without consent of Dartmouth trustees); *see also* Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 221 n.89 (2017).

[3] *See generally* Daniel J.H. Greenwood, *Person, State, or Not: The Place of Business Corporations in Our Constitutional Order*, 87 U. COLO. L. REV. 351 (2016).

[4] *Cf.* U.S. CONST. amend. XIX (extending perhaps the most fundamental right of citizenship to women generally); Married Women's Property Act of 1848, 1848 N.Y. Laws 307 (abolishing the doctrine of coverture, which denied a married woman separate legal existence in contract, property, and certain other areas of the law, because the married couple was deemed a single actor and only the husband was entitled to act for it, making New York the first state to give married women substantially complete control over their own property and contracts); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 68–70 (2010) (describing the interspousal immunity doctrine, which effectively denied married women legal status against their husbands in tort until late in the twentieth century).

[5] *See, e.g.*, Joseph v. Schatzkin, 181 N.E. 464, 465 (N.Y. 1932) (holding a minor's contract is voidable by the minor).

to reform or even dissolve a municipal corporation without concern of a Federal court intervening.[6]

Instead, the issue of the corporation's rights under the Constitution is largely separate from its status as a legal person in other areas of the law. That a corporation has the right to own property does not mean that its property rights must be the same as the property rights of human beings, let alone that it must have a right to representation in the legislatures that define, limit, and tax its property rights.

Corporations are not people. Instead, they are legally structured governance mechanisms, often, but not necessarily, reflecting bureaucratically structured organizations. Corporate law is a set of rules defining when particular people may make decisions binding on other people regarding particular assets or in particular hierarchies.

The law of business corporations empowers planners to create an institution that the law recognizes as a single actor—the corporeal embodiment that is why we call it "corporate." The corporation must have defined boundaries—assets it controls and human beings whose actions are its actions, to recognized degrees. It must have a board of directors empowered to make or delegate decisions with respect to corporate goals, projects, assets, contracts, employees, and customers. In most other respects, corporate law is fairly flexible, nudging towards an investor-controlled, short-term, return-seeking, top-down hierarchal enterprise, but permitting many variations and alternatives.[7]

This legal entity is often congruent with an actual business enterprise—most business corporations are organized to govern an actual

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[6] *See, e.g.*, City of Newark v. New Jersey, 262 U.S. 192, 196 (1923); City of New Orleans v. New Orleans Water-Works Co., 142 U.S. 79, 89–91 (1891); Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907); *see also* South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500, 505 (6th Cir. 1986) (holding a municipal corporation may not sue another such corporation contending that a state statute has allowed the latter to infringe the former's constitutional rights; the relative rights of these corporations are left entirely to the discretion of the state); Municipality of San Sebastian v. Puerto Rico, 89 F. Supp. 3d 266, 277–78 (D.P.R. 2015) (holding, on allegations that state cut municipal appropriation due to party affiliation of mayor, that city had no due process rights, and that the city's lack of personality under the Fourteenth Amendment does not preclude it from enforcing First Amendment rights).

[7] *See generally* FREDERICK ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH A PURPOSE 149 (2017) (explaining there are limits to corporate flexibility; for example, corporate servants (employees) have the ability to bind the corporation by their acts under legally specified circumstances and have various rights under labor law; independent contractors have less or no such ability. Corporate law gives corporate planners almost complete discretion to determine whether to have corporate work done by employees or independent contractors. But managers must respect the distinction. If they create a corporate role that appears sufficiently similar to that of an employee, courts may declare the role-holder to be an employee, with all the associated rights, regardless of the label corporate managers use).

bureaucratically organized firm. However, the law does not require this; a corporation may encompass multiple sociological organizations or only a part of one, and indeed, it is entirely permissible to form a corporation with no organization at all. A corporation must have at least one or three (depending on the state) actual people on its board of directors, but it need not have any employees. Some corporations are formed as no more than vessels to hold a bundle of assets separate from other claims and claimants. A business corporation must have at least one shareholder. But shareholders need not be human—most shares of publicly traded corporations are owned by other legal entities—and indeed, non-business corporations need not have shareholders at all.

Corporate law, then, creates legal rights and responsibilities for a vast array of enterprises. It grants them legal personality—the right to sue and be sued, to hold property and contracts in the corporate name. But the law cannot make an organization into a human or a moral person. Neither the vast bureaucratic armies of the multinational corporations that power our economy, with hundreds of thousands of employees and millions of shares, nor the smallest incorporated sole proprietorship is a human being.

Professor Greenfield, of course, does not disagree. To be sure, he calls corporations "people," deliberately ignoring standard usage, in which the plural of legal person is "persons" and "people" can only refer to humans. Nonetheless, he is careful not to assert that corporations have the moral status of human beings or ordinary human rights. It is perfectly legal to buy and sell corporations, unlike people. We do not hold funerals for corporations when they are dissolved or merged into another, nor do we argue about whether an aborted business plan is entitled to rights against its parents, hosts, and caretakers prior to birth or up to eighteen years afterwards. In general, if shareholders and managers agree to loot, transform, or simply dissolve a corporation, the law will not intervene; against unified shareholders and directors, the corporation has no right to life, liberty, or property.[8] All this would be inconceivable if corporations were "people" within the meaning of the Fourteenth Amendment or in any other sense.

Rather, Professor Greenfield's book sits squarely in a century-old tradition, dating back to the Legal Realists, contending that corporate theory decides no cases. The Realists ended (at least for a while) the long and silly debates over whether corporations should be seen as "artificial" or

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[8] *See generally* George D. Hornstein, *Voluntary Dissolution: A New Development in Intracorporate Abuse*, 51 YALE L.J. 64, 64–65 (1941) (presuming that shareholders and board are in agreement; if they are not, the board may prevent any shareholder action, except elections of a new board, and shareholders holding a majority of votes may veto many reorganizations and any shareholder may assert in court that the board's plans breach its fiduciary duty. The courts are clear, however, that dissolving the corporation—causing it to cease to exist—is not murder and, indeed, typically is not a breach of the directors' duty to act in its interest).

"natural," "aggregates" or "entities," by showing that the Supreme Court's decisions could be justified (or not) under any theory.[9] The decisions granting corporations the right to sue in diversity switched seamlessly from an "aggregate" theory to an "entity" theory in order to maintain the same result as economic conditions changed. Similarly, the famous *Dartmouth College*[10] case, which barred a state legislature from modifying a corporate charter under the Contracts Clause, is often seen as a precursor to the Robber-Baron era constitutionalization of contract law epitomized by *Lochner*.[11] But *Dartmouth* explicitly relied on the "artificial entity" theory that corporations are mere "creatures of law," while *Lochner* remains a metonym for the claim that an employee's right to contract away essential protections—even with a corporation—is pre-political, exempt from the ordinary politics of a self-governing people.

Still, even if it is not determinative, theory matters. Greenfield's aphoristic title is thought provoking but ultimately misleading. Corporations are not people. Only by ignoring the law and the demands of role morality can we expect them to act like people.[12] Nor are they "naturally" entitled to the respect we would give a person, or a great Sequoia tree, or a beautiful ecosystem. On the contrary, they are legally defined tools, which exist only because an elected legislature concluded that allowing them, under a specified set of rules and regulations, would promote the "general Welfare."[13]

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[9] *See generally* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820–21 (1935).

[10] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

[11] *See* Lochner v. New York, 198 U.S. 45, 57–58 (1905) (holding that the Fourteenth Amendment, *sub* silentio, required that bakers be permitted to work in unsafe conditions for inhumane hours); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762–63 (1976) (finding laissez-faire limitations on economic regulation in the incorporated First Amendment); Buckley v. Valeo, 424 U.S. 1, 19–20 (1976) (equating campaign finance regulation with censorship); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (holding that public-sector unions may not charge non-members for services rendered, effectively interpreting free speech to require a "right-to-work" rule). *But see* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–93 (1937) (promising that the Fourteenth Amendment would no longer be used to impose so-called laissez-faire economic policy).

[12] *See, e.g.*, Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1044–45 (1996) (emphasizing that managers and employees are agents, required by law to set aside their own views and act in the interest of their principal, even when, as in a business corporation, that principal is a legal construct with interests determined by law, and so they will often be legally compelled to act differently than they would as "people"). *Cf.* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253–79 (Penguin Books rev. & enlarged ed. 1977) (1963) (discussing the banality of bureaucrats following bureaucratic norms and congratulating themselves for doing so).

[13] *See generally* U.S. CONST. pmbl.

Corporate law, then, is fundamentally a form of constitutional law. It constitutes the corporation, giving corporeality to what would otherwise be a mob or a common law conspiracy in restraint of trade. Like the law of cities and similar governmental structures from which it is descended, corporate law creates a legally recognized actor out of many people (and non-human entities), determines who has which powers to act on behalf of or control the legal entity and its assets, grants it continuity and separation from the people who compose it or have claims on it, and sets out the powers of and rules for replacing the officials who govern it. Corporate law sets out the rules for establishing and governing these organizations, for defining their boundaries and participants, and for determining the conditions when individuals can act as the corporation.

All of this is *governmental* in nature; most of it has no equivalent in the law regarding human individuals. Theory matters, because people and their governments are different. This is as true of the governments of our critically important economic enterprises as it is of the more familiar public institutions of states and localities.

The image of a corporation as an individual invites us to imagine that corporate rights benefit human beings or that corporate freedom is human freedom. But organizations are not the same as humans and organizational rights are never the same as human rights. We know this when the organization in question is a government. It would be easier to see that the same is true of businesses, if we abandoned the metaphor of corporate "personhood" for, instead, a more straightforward acknowledgment that we—not the Creator of unalienable rights—have invented an organizational form with quasi-governmental characteristics. The metaphor of corporations as "people," even with the care and caveats of Greenfield's approach, obfuscates instead of illuminating.

I suggest, instead, that we admit that corporations are organizations of, by and (hopefully) for people, more like governments than citizens. It will be easier to see both what is wrong with current corporate law and the appropriate place of business corporations in our liberal, democratic, and republican constitutional regime.

Setting aside the "people" metaphor, it should be obvious that corporations will share the benefits and dangers of all governing institutions. We need them. We benefit from them. But they are not "us" in any simple way. We must always worry about how to ensure that they act in our interest and remain under our control—as well as who is included in this "we" and "us."

Corporations are valuable only to the extent that they are useful to real people and their ends. In this way too, they are like republican governments generally, "instituted among Men . . . laying its foundation on such principles and organizing its powers in such form, as to them shall seem

most likely to effect their Safety and Happiness."[14] After the Second World War, we generally reject the fascist notions that the state is more important than its citizens, or that citizens must praise the state's inerrant leaders, or that the People is a sacred unity entitled to suppress anyone who dares to dissent. So too, we should see that corporate leaders cannot always—and in times of corruption, will rarely—reflect the actual values, needs, and desires of the people who depend on corporations, work for them, and make them up.[15]

Moreover, just as in any other democratic politics, disagreement is fundamental. Even if corporate leaders were fully committed to representing the corporate interest, there is no unified corporate People to represent, let alone any clear or uncontroversial interest. How we are to live and act together is always contested in politics. It is just as contested in corporate life.[16]

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[14] THE DECLARATION OF INDEPENDENCE para. 2 (1776).

[15] *See, e.g.*, ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2016); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (2d ed. 2016); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 5–125 (1947); *see also* Kim Lane Scheppele, *The Inevitable Corruption of Transition*, 14 CONN. J. INT'L L. 509, 511 (1999) (arguing that corruption implies violation of enforceable norms. I disagree with Scheppele's position that corruption is impossible where "enforceable" social norms are absent. To the contrary, corruption usually requires the breakdown of enforceable norms. Often, as the cliché has it, the scandal is what is legal. Corruption is a moral claim, not a legal one. American corporate norms, for example, are largely unenforceable in court. Nonetheless, it is an obvious breach of duty for a corporate officer to place his own self-interest ahead of the firm's, as where a company official revises a budget to increase his own salary at the expense of R&D. (*Id.* at 513). So too, traders seeking to profit from food shortages may be acting contrary to anti-price gouging norms, even if they are within the law. Similarly, the system of "they pretend to pay us and we pretend to pay us," massive institutional failure, and disregard for formal norms that Scheppele describes in Communist and transitional Eastern Europe demanded "survival skills" that, in my opinion, epitomize corruption. That the corruption at the bottom results from corruption at the top is characteristic of corrupt societies and organizations, not a reason to classify it as non-corrupt. Moreover, Scheppele is wrong to oppose corruption to "rational" or "sensible." From the perspective of the self-interested office holder, corruption is usually rational and sensible, at least in the absence of effective sanctions, even as it is destructive for society as a whole. Mob loyalty and patronage systems are corrupt even when they are functional responses to larger failures.

[16] *See* Greenwood, *supra* note 12, at 1025–26, 1055 (arguing that corporate law seeks to create an artificial unity by mandating that corporate leaders pursue the interests of a legal fiction—an undiversified shareholder with no commitments or values except to maximum financial returns to shareholders. In that regime, disagreement would be limited to issues of strategy, competence and honesty rather than more fundamental issues). Professor Greenfield and others have long since convinced me that this argument was overstated then and has become more wrong since. In reality, corporate law allows a broad diversity of corporate goals—so disagreement within the corporation is as fundamental as in the polity as a whole. Rawls

Professor Greenfield's call for internal democracy would be unnecessary and even silly if business corporations were, in fact, people. We do not ask individuals to give their hearts and guts, or egos and superegos, equal say in making individual decisions, or argue that cuticles should have the right to organize or to due process prior to being removed from the body. But corporations are not people. That is why we need democratic and other good government norms.

Once we shift to a more realistic metaphor, contemporary American corporate law becomes obviously anomalous. Our corporate law denies the vote to most subjects of a corporation, provides for no internal process at all—due or otherwise—before dissidents are summarily dismissed, and allows the sole vote holders, share owners, to freely buy and sell their governance rights.

These rules contradict both fundamental values and well-understood principles of good government. We have known that rulers need critics at least since the prophets of ancient Israel. Yet, corporate law permits corporations to have no institutions at all to assure criticism and debate, defying the basic rules of sound decision making. We have long since accepted that governments need to treat all their subjects as fellow members of the enterprise, not—as business corporations and colonial powers do—to deem some mere helots to be used as tools for the good of others. Our corporate law, which allows—or in the view of some, requires—corporate managers to consider the interests of employees, customers, and the public only to the extent that doing so increases shareholder returns, is a form of self-colonization that should be indefensible in the modern era.[17]

The metaphor of personhood decides no cases. But it makes some arguments easier and others harder. Were Professor Greenfield comparing business corporations to other governmental agencies rather than citizens, he might not have been so quick to conclude that business corporations need to have rights exempt from ordinary political reform contrary to public interests. Much as family "autonomy" in the days before the abolition of coverture meant that courts would not intervene to protect wives and children against abusive husbands, or states' rights meant that the Federal

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notwithstanding, we do not even have an "overlapping consensus." *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993). Some people see profit as a tool to human flourishing; others see humans as a tool to profit.

17 *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 22 (2007) (criticizing the "shareholder primacy" view, which argues that the fiduciary duty of directors and managers to act in the interest of "the corporation" requires them—contrary to plain meaning—to place corporate profit, or in some versions, shareholder profit, above all other values); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH 2, 7 (2012) (rejecting shareholder primacy); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996) (explaining implications of shareholder primacy theory).

government would not protect citizens against Jim Crow, corporate "rights" typically protect corporate officers who wish to use corporate assets in ways that others might prefer they did not: to influence voters or politicians, to build polluting plants, to protect their secrets, to drive down wages or cut corner on consumer safety. It is core to the modern understanding of government that no one can have a property right in an office and that a politician who uses secrecy to protect his position from critics is abusing his powers. Is it really obvious that constitutional law must, in all cases and as a matter of unchangeable constitutional law, take the opposite view with respect to our economic governments?

In Part I, I contest Professor Greenfield's central metaphor. Business corporations should never be considered people; to do so is to repeat the mistake Rousseau made in his theory of the general will. Instead, we must take them seriously as organizations, with all the well-understood internal conflicts of all organizations. Often, "corporate" rights merely help incumbent corporate officers impose their will on other corporate participants; the public interest often will be better served by reducing these rights or balancing them with others.

In Part II, I argue for a new-old understanding of constitutional law in this area. Business corporations are economic enterprises. If our economy is to succeed in providing productive jobs, reasonable pay, and useful, sustainable goods and services, governments must play an active and ongoing role in adjusting the rules of the marketplace. No market-based economy can survive if economic incumbents can purchase rules that allow them to accumulate ever more wealth without limit. Ours in particular, on the edge of ecological catastrophe, requires immediate and massive shifts in energy sources and emissions. These, in turn, require taming our economic incumbents' well-compensated impulse to ignore costs they impose on others and the ecosphere and changing the rules of the market place to redirect profit seekers into more productive, less destructive enterprises.

The details of the rules we need are far beyond the scope of this essay and, indeed, largely beyond the scope of corporate law. But one element is quite clear. Backwards looking constitutional interpretation is not going to show us how to resolve problems that we are only beginning to identify.

Footnote 4 and the Switch In Time were fundamentally correct. The judiciary is structurally incompetent to regulate our economy. There is no guarantee, of course, that the political branches will do any better, especially if one of our two political parties continues to dedicate itself to the causes of upward income distribution, grift, and destruction of American ideals and institutions. But judges are trained to look in the wrong direction. Economic regulation does not belong in our Constitution, but in our politics.

I. Corporations Are Legal Persons, Not Moral Persons or People

Professor Greenfield convincingly argues for reforming corporate law to

make corporate leaders more responsive to actual corporate constituents—not merely or even especially shareholders, but the citizens and non-citizens who work for or depend on the firm.

Greenfield has long argued against the view that corporations should single-mindedly pursue profit, leaving it to markets and the regulations and law that surround them the task of ensuring profitable activities are socially useful. On the profit-maximization view, internal corporate democracy is mostly pointless; the pursuit of profit is largely a technocratic enterprise. But it is difficult to write, let alone enact and enforce, market rules that ensure that pursuit of profit will be socially useful. It is impossible to do so in the face of the power, money, and prestige of major corporations dedicated to preventing and subverting them.

Markets require rules. Without rules, they degenerate into a war of all against all in which the easiest way to profit is simply to steal. But any time most players abide by a set of rules, cheating is profitable. The company that does not pay its bills has a cost advantage over those that do. Companies that leave their messes for others to clean up have lower costs than those that responsibly avoid risks of ecological devastation, super-fund sites, financial instability, the occasional plant explosion, or products that may pose long term risks. Monopolists can charge higher prices and monopsonists can pay lower wages or less for supplies.

Moreover, successful market economies rely on high pay. Employee income, after all, is the same as consumer demand. But any individual company will be more profitable if it sweats its labor, paying as little as possible or, if it can, even less. Walmart famously pays so little that many of its employees need governmental assistance to make ends meet. If we allow every firm to follow this business model, we will be in perpetual demand-deficit recession.

In short, for any given business, cheating, or better yet convincing politicians or regulators to change the rules to allow the business to legally avoid its costs, is likely to be the simplest way to short-term profit. Irresponsibility—paying lower wages, not cleaning up, or spending less on safety—is far easier than finding a new and better technology to create more from less.

Accordingly, some profit-motivated corporations will marshal all the power of private initiative and bureaucratic resources to subvert the system that makes profit possible. To make matters worse, it is always easier to find a way around a rule than to write or enforce one in the first place.

To make our market succeed, then, we cannot rely on external regulation. Given the inherent difficulty of writing effective regulation, the well-known problem that the targets of regulation are likely to be better organized and more motivated, and the American political system's strong tilt towards inaction and many veto points, external regulation will never be enough to keep profit-seeking corporations on the straight and narrow.

Instead, we need corporate law—the internal reforms that Greenfield proposes—to press our most important economic actors to switch sides. Only internal corporate governance, not external regulation, can lead corporate officers to seek to promote social norms, rather than subvert or evade them to maximize private profit,[18] and to assume responsibility for effects that are, today, legally deemed outside of the corporation's responsibility, such as pollution, labor exploitation, and torts committed by dominated suppliers and "independent" contractors.

But our thinking would be clearer if we started with exactly the premise that Professor Greenfield rejects. Corporations are not people. Business organizations are organizations, and organizations are always different from the people who make them up.

As Greenfield emphasizes, corporate law makes the firm "firm" and the body "corporate" by distinguishing between the corporation and its participants. The Corporation of the City of New York is still New York City, Harvard is still Harvard, and GM is still GM, even though in each case every person connected with its origin is long since dead. Similarly, everyone agrees that if an Amazon shareholder walked into an Amazon warehouse and took his "share" of Amazon products, he'd be a thief—even if his last name were "Bezos." Conversely, even when corporations do bad things, it is uncontroversial that shareholders have no legal responsibility, regardless of how much they have profited from corporate wrongs. Even if the American Tobacco Company were to be held liable for the deaths its products have caused, neither the Duke family nor Duke University would share in the legal consequences.

This separation is the core of corporate law and the basic meaning of legal personality. The property and obligations of any corporation are presumptively separate from the property and obligations of any of the human beings (or other entities) that do its work, make its decisions, invest time or money in it, or extract profits from it. None of this is the slightest bit controversial, at least in the abstract and apart from constitutional litigation.[19]

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[18] *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO 208–09 (2018); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH (2012). *See generally* Andrew Ross Sorkin, *Ex-Corporate Lawyer's Idea: Rein in 'Sociopaths' in the Boardroom*, N.Y. TIMES (July 29, 2019), https://perma.cc/EUX9-B9XK (stating this imperative has been widely recognized for as long as the "shareholder supremacy" norm has been dominant; in recent years it has reentered the mainstream, with Elizabeth Warren's corporate law reform, the first politically significant reform proposal since Ralph Nader's).

[19] *See* CRAIG J.J. SNYDER, *Professional Service Limited Liability Companies*, *in* KARON S. WALKER, NEW YORK LIMITED LIABILITY COMPANIES AND PARTNERSHIPS: A GUIDE TO LAW AND PRACTICE § 12:2 (2d ed. 2019); Clifford R. Ennico, Business Corp. Law, *in* West's MicKinney's Forms § 7:110 (2019); Citizens United v. Fed. Election Comm'n (Citizens United), 558 U.S. 310, 342–56

While corporations are made up of people, assets, and other organizations, and the law recognizes corporations as legal "persons," none of this makes corporations into "people." The Declaration of Independence contends, and most of us accept, that people are endowed by their Creator (or, for secularists, by the principles of morality) with certain unalienable rights. In contrast, no one believes that corporations have a right to life or happiness, least of all those who argue most strongly for the autonomy of corporate officers. A corporation is merely a human tool for human ends, often useful and sometimes dangerous.

Indeed, corporate law as we know it depends on the fundamental principle that the corporation itself has no rights. Thus, one central task of corporate management is to determine when to merge or dissolve the corporation. Perhaps the most important aspect of the business judgment rule is that corporate managers have largely unchecked discretion to make this decision. They may manage, merge, grow or shrink the organization, successfully, unsuccessfully, or even disastrously, without answering to other corporate participants and dependents, the citizenry as a whole, or our courts and legislatures.[20] Destroying a corporation is never manslaughter and rarely even civilly actionable.

Business firms may be sociological entities with continuity, norms and even a metaphorical personality; it is notoriously difficult to change the way bureaucracies work. But the corporation as a legal entity is different from a firm. It has no existence apart from the legislation that authorizes and defines it, sets out its powers and the powers of those who act for it, and

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(2010) (arguing that corporation might have unique contribution to political debate apart from its shareholders or control parties); Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497 (1844) (holding that a corporation is a creature of the state that charters it and therefore deemed its citizen for diversity purposes even if shareholders are not); Greenberg v. Greenberg, 206 A.D.2d 963 (N.Y. App. Div. 1994) (stating a controlling shareholder may not simply take corporate assets for personal use); Berkey v. Third Avenue Railway Co., 155 N.E. 914 (N.Y. 1927) (holding that a shareholder may not be held liable for corporate debts unless corporation is mere agent of shareholder); Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966) (holding that even deliberate undercapitalization is not a basis for shareholder liability for corporate obligations). *But see* Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby), 134 S. Ct. 2751, 2765 n.15, 2766, 2774 (suggesting that corporation practices the religion of its indirect shareholders); Hale v. Henkel, 201 U.S. 43, 76 (1906) (analogizing corporate open records rules to invading a man's living room); Bank of U.S. v. Deveaux, 9 U.S. 61 (1809) (corporation entitled to assert diversity jurisdiction because it is a "mere name" for its shareholders). *See also* Joshua Macey, *What Corporate Veil?*, 117 MICH. L. REV. (2019); ADAM WINKLER, WE THE CORPORATIONS (2018) (agreeing that the Supreme Court has sometimes ignored corporate separation—a core of corporate law—in constitutional adjudication); Greenwood, *supra* note 2 (emphasizing that corporate law bars managers from acting according to views of shareholders or other corporate participants).

[20] *See, e.g.*, In re Walt Disney Co. Derivative Litigation, 907 A.2d 693, 746 (Del. 2005) (setting out the so-called "business judgment rule" of extreme judicial deference to corporate leaders).

creates and limits its ability to act in the world. It is law that distinguishes between a crowd, a partnership, and a corporation.

If the corporation is not just the people who make it up, or a person itself, what is it? That is pretty simple: corporate law creates a governance structure, empowering and specifying officials to act and make rules for the firm,[21] together with rules setting out how those officials are selected and replaced,[22] and the breadth and limits of their authority,[23] the scope of their fiduciary duties,[24] and extremely limited remedies for violations of those duties.[25] Similarly, it provides rules to determine which assets are credited to the entity (under the control of its internal rules) and how they may be spent or encumbered.[26]

These rules are recognizably political, if not particularly democratic.

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[21] *See, e.g.*, Revised Model Business Corporation Act (RMBCA) § 8.01 (2016) (setting out powers of board of directors); RMBCA §§ 8.40–8.42 (setting out powers and duties of officers).

[22] *See, e.g.*, RMBCA §§ 8.03, 8.05, 8.08 (stating that directors serve for a term unless removed by vote of shareholders at a duly called shareholder meeting). In contrast, officers, who are agents, serve at the pleasure of the board. *See also* RMBCA § 8.43(b) (stating board may remove officer at any time with or without cause).

[23] *See, e.g.*, RMBCA § 8.01(b) (stating that board acts as the corporation); RMBCA § 8.41 (permitting board to determine authority of officers, who are agents of the corporation who bind it according to ordinary agency law); Menard, Inc. v. Dage-MTI, In., 726 N.E.2d 1206 (Ind. 2000) (discussing limits of officer authority); McQuade v. Stoneham, 263 N.Y. 323 (1934) (holding that board may not waive its right to dismiss officers). Shareholders are neither agents nor principals, nor the corporation, and have no authority in their shareholder role to act as or for the corporation. *See e.g.*, Gashwiler v. Willis, 33 Cal. 11 (1867) (holding that shareholders have no power to sell corporation or appoint trustees to do so); Walkovsky v. Carlton, 223 N.E.2d 6 (N.Y. 1966) (holding that shareholder who treats corporation as shareholder's agent, loses the protection of separate corporate existence). However, the law permits individuals to act in more than one of these roles and they routinely do so. Thus, for example, the CEO (officer) of an American business corporation is commonly also a director and the Chairman of its Board and, in the last several decades, a major shareholder as well, even in large bureaucratic corporations. In U.S. non-profit corporations, the lead officer is typically is an ex-officio member of the board but not its chair; the UK requires this separation of the positions in business corporations as well. In U.S. municipal corporations, the CEO equivalent, the mayor, typically is not a member of the board equivalent, the City Council.

[24] *See, e.g.*, RMBCA § 8.30 (setting out standards of conduct for directors); RMBCA § 8.42 (setting out standards of conduct for officers). Non-officer employees owe the corporation the ordinary duties of agents to their principal. Shareholders, in contrast, owe no duty at all to the corporation or its participants, except in extraordinary circumstances. *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (establishing minimal fiduciary duties of a controlling shareholder towards minority shareholders, but not corporation or other corporate participants).

[25] RMBCA § 7.40 et seq. (discussing derivative litigation); RMBCA § 8.31 (placing limits on director liability).

[26] *See, e.g.*, RMBCA § 3.02 (setting out powers of corporation).

Corporate law specifies a legislature—the board of directors.[27] While a handful of decisions are reserved for the board, in practice boards delegate most of their authority to an executive they hire (and, at will, fire) who, in turn, hires, fires, and delegates to inferior officers. Those officers and employees have day-to-day control, and agency law specifies the degree to which they have power to bind the corporation in contract, property, tort, and criminal law. Standard American law, however, consistently provides that the board (or its delegates) may terminate their authority to act for or as the corporation at any time for any reason, even in violation of employment contracts.[28] All this looks quite similar to a standard parliamentary system in which the legislature delegates much of its power to a prime minister and subordinate bureaucracies, if without the usual democratic apparatus of a broad democratic franchise and competing parties.

In American business corporations, board members are elected for a fixed term by shareholders,[29] typically on the supremely anti-democratic basis of one-share one-vote,[30] without regard to whether shareholders are human beings or other legal entities.[31] Most shares in publicly traded corporations are held by other entities, not individuals.[32] Shares and their votes are typically freely bought and sold on anonymous markets, so the electorate is in effect always for sale. These voters also have veto power over a small number of corporate decisions that, after being approved by the board, must also be ratified by vote of the shares.[33] Other corporate participants do not have any vote for the board. However, non-business

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[27] *See, e.g.*, RMBCA § 8.01.

[28] *See, e.g.*, RMBCA § 8.43(b); McQuade v. Stoneham, 263 N.Y. 323 (1934) (holding that board may not waive its right to dismiss officers).

[29] *See, e.g.*, RMBCA § 7.01.

[30] *See, e.g.*, RMBCA § 7.21(a) (setting out the one-share, one-vote default rule and procedure for changing it.. It is not uncommon to change the voting to give some shares extra votes. In contrast, U.S. business corporations basically never adopt a democratic one-person, one-vote rule); *see also* Reynolds v. Sims, 377 U.S. 533, 555–58, 563–66 (1964) (holding that equal protection requires that each individual's vote have roughly equal weight: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."). *But see* Bush v. Gore, 531 U.S. 98 (2000) (refusing to allow accurate recounting of presidential ballots).

[31] *See, e.g.*, RMBCA § 7.21 (setting out default rule that each share is entitled to one vote unless held by the corporation itself).

[32] *See, e.g.*, Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INVESTMENTS (Apr. 25, 2017, 1:00 AM), https://perma.cc/3FY9-V9LW (stating almost four-fifths of shares of companies included in the Russell 3000 index are held by institutions).

[33] *See, e.g.*, RMBCA § 10.03 (stating amendments to corporate Articles require a vote of directors followed by approval by majority of voting shares); *see also* RMBCA § 11.04 (stating similar rule for mergers).

corporations such as churches, charities, co-ops, or eleemosynary institutions frequently have other electorates—sometimes only the board itself, sometimes members, variously defined, voting democratically, or based on some measure of institutional commitment or investment. Moreover, American municipal corporations (cities) are typically organized with the board (city council) and its executive (mayor) separately elected on a democratic basis by inhabitant citizens, or, alternatively, the executive appointed by the council.

Once we recognize that corporate law defines corporate governance, the problems of the "personhood" fallacy become obvious.

In state-based politics, we have long since rejected the claims of absolute monarchs to "be" the state. Rousseau's "general will" or the claims of various dictators or authoritarian parties to infallibly represent a unified "people" or "nation" have fared no better. Instead, a state, or a corporation, or any group, is necessarily an imperfect representative of the people involved. This is true even when the group is formed for a specific purpose, attracts only individuals with similar views, has internal democracy, and is relatively easy to leave. Leaders inevitably differ from their followers, let alone all those who would head in a different direction altogether.[34]

Business corporations take this problem to an extreme: our corporate law is specifically designed to lack any form of democracy, granting most corporate participants no vote at all. Moreover, the doctrine of fiduciary duty is often understood to negate any corporate interest beyond profit[35]—thus requiring managers to ignore most of the pressing issues of human communal existence.[36] As if that were not far enough from the basic principles of good government, the doctrine of employment at will ensures that top officials can quickly eliminate any dissenting or even questioning voices within the firm.[37] Thus, even if corporate leaders somehow stumbled on appropriate goals, they are likely to be crippled by failures of information

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[34] *See, e.g.*, ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 182 (Eden & Cedar Paul trans. 1911); ALBERT O. HIRSCHMAN, EXIT, VOICE & LOYALTY (1970).

[35] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (holding that Revlon's board was barred from considering the interests of its bondholders in selling the corporation—even though prior transactions meant that the bonds were held by former (and likely current) shareholders). *But see, e.g.*, Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1990) (reaffirming that the so-called *Revlon* rule applies only when the corporation's board has determined to sell or dissolve the company or such a transaction has become inevitable).

[36] *See* THE CORPORATION (Big Picture Media Corp. 2003) (stating that a human who acted in this way would be considered a sociopath).

[37] Dissident shareholders cannot be excluded as easily. *See generally* Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV. (July 2012), https://perma.cc/3AHT-H8G3 (questioning information capacity of shareholders).

and critical thinking. Like the generals of Tolstoy's *War and Peace*, they are doomed to use outdated or distorted information to make wrong decisions which will be misunderstood by their subordinates and rendered irrelevant by changing circumstances long before they reach the field.[38]

Liberal political theory is founded on the twin insights that power corrupts and that disagreement is inevitable. The former means that we must have viable systems for restraining and removing officials who abandon their fiduciary duties. Modern liberal political theory relies on several devices to this end: a balance or separation of powers, in which one institution is expected to watch over another while being watched over itself;[39] democratic elections with restrictions on incumbents using their incumbency to preserve their own power; and protections for critics to limit the extent to which decisionmakers, surrounded by yes-men, can fool themselves into believing in their own infallibility.

The latter, the inevitability of disagreement, led liberals to demand limits on the extent of communal decisions to leave a space for individuals to live their lives as they see fit even if others disagree.[40] If the original motivation was to avoid the wars of religion that plagued Europe, generalized by Hobbes into the war of all against all, modern liberals have expanded the notion of freedom to extend to a general commitment to supporting individuals in living fully committed lives even when fellow citizens have different commitments, as they always will. On this view, socially guaranteed transit, education, healthcare, retirement and minimum income, justice and law enforcement, and so on provide the background necessities and infrastructure essential to anyone seeking to live a modern, sophisticated life, whether conformist or not. Combined with the limits that law places on private power, these necessities make freedom possible.

While using law to restrict overbearing power, we attempt to protect each individual's ability to create communities that will live according to their own values, notwithstanding major disagreements on how to do so and to what extent. Thus, liberal societies use civil liberties such as freedom of religion, conscience, speech, and privacy to exclude from collective control a broad range of decisions about how individuals and groups create and

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[38] *See* LEO TOLSTOY, WAR AND PEACE 408 (Louise & Alymer Maude trans., Project Gutenberg 2009), https://perma.cc/M6LJ-K4WC.

[39] *See generally* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748, Thomas Nugent, trans. 1899), book XI, § 6, 151-6 (describing separation of powers as foundation of liberty).

[40] *See, e.g.*, U.S. CONST. amend. I.; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . ."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

structure families, practice our cultures or express individuality or group affiliation—whether through distinctive foods, entertainment, dress, religious practices, self-improvement, or even languages—or engage in business or personal projects that others see as folly. Similarly, the best justification of private property is that it creates a realm in which, to a greater or lesser degree, property holders can act according to their own values—or business plans—with only limited regard to what others view as reasonable.

The anti-censorship principle is an equally important part of the liberal toolkit.[41] We[42] acknowledge that most scientific and cultural progress is incremental, and therefore accept the claims of technocrats and intellectual authority, building in a deep conservative bias to most funding sources for intellectual and engineering enterprises.[43] Thus, for example, most universities most of the time allow the prior generation of experts to hire their planned successors. At the same time, we also seek to assure that new ideas and ways of doing things are not entirely suppressed, however foolish they may seem.[44] It may have seemed deeply implausible, based on existing

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[41] *See, e.g.*, *W. Va. State Bd. of Educ.*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Is it meaningful that the freedom that was a "fixed star" in *Barnette* was debased to "bedrock" in *Texas v. Johnson*?

[42] Obviously not all of us. This too is a matter of disagreement. *See e.g.*, Shawn Otto, *A Plan to Defend Against the War on Science*, SCI. AM. (Oct. 9, 2016), https://perma.cc/W9NW-UPG5; Stephen Lewandowsky & Klaus Oberauer, *Motivated Rejection of Science*, ASS'N FOR PSYCHOL. SCI. (2016), https://perma.cc/2YH7-KZTX. I assume, however, that the technocratic structure remains more or less intact; even those who would disregard the scientific method in their pet areas still assume that airplanes will fly, hurricane warnings are more or less accurate, and other people's vaccinations reduce disease. *See generally Perception of Science in America*, AM. ACAD. OF ARTS & SCI. (2018), https://perma.cc/L5G7-Q47Y.

[43] *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (2d ed. 1962) (emphasizing incremental nature of "normal science").

[44] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 10 (1859) ("But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error"). Mill vastly overestimates the power of controversy. Modern polemicists are well aware that repeating obviously false or immoral views in order to point out their error often simply consolidates their holders' confidence. Nonetheless, a distinguishing feature of modern anti-authoritarianism is a certain epistemological humility: we know that some views that seem obviously correct to us will turn out not to be right at all. Accordingly, we should be less willing than, say, St. Augustine, to promote truth by brutally suppressing error, even when it is possible to do so without war. That, of course, does not relieve us of the obligation of following moral commands as best we can understand them. *See, e.g.*, Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 ("As things

knowledge, that Theranos could have reliable blood testing based on miniscule quantities of blood, or that Tesla would have self-driving cars by 2020, but it is generally permissible to pursue these quixotic quests and even to raise money for them from relatively uninformed investors, providing that the fundraisers (unlike with Theranos) do not deceive.[45]

Accordingly, we generally bar censorship at the governmental level.[46] While the default rule is that censorship is entirely permissible within non-governmental institutions, we hope that competition assures that none of those institutions will be able to entirely suppress innovation or criticism. More importantly, when institutions are particularly important or influential, we often use devices such as tenure, academic and journalistic freedom, due process rights, and civil service to limit censorship within them. Similarly, even in this era of ever increasing restrictions on the free flow of debate, ideas, and innovation in the name of "intellectual property," nearly everyone continues to accept that most intellectual property must have a termination date after which it reverts to the public sphere. In each case, the boundaries of the individual and collective spheres are always controversial, but the requirement that the law protect both is not.

A. *Market Competition Is No Replacement for Good Corporate Governance*

Much of corporate law is directed towards similar good government ends, although it rarely uses the full range of standard liberal politics. Instead, corporations are typically organized as unitary, top-down, command and control structures, with those at the top wielding power with almost no answerability to those most affected by their decisions. The spaces for individual action independent of the collective are highly limited: especially during working hours, we are expected to follow the leader with deference that would be shocking for a political government to demand. Dissent is nearly always a firing offense. Often even unconventional dress or after-work activity that offends firm leaders (or that leaders think might

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now stand, everything is up for grabs. Nevertheless: Napalming babies is bad. Starving the poor is wicked. Buying and selling each other is depraved. Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot-and General Custer too-have earned salvation.").

[45] *See, e.g.*, JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP (2018) (describing Theranos affair); Faiz Siddiqui, *Tesla Floats Fully Self-Driving Cars as Soon as This Year. Many Are Worried About What That Will Unleash*, WASH. POST 4 (July 17, 2019), https://perma.cc/8DE8-5SN3 (describing Tesla's claims that it would provide "full self-driving" cars in 2019). *See generally* Reuters, *Tesla's Elon Musk Reaches Deal with SEC over Twitter Use*, THE GUARDIAN 6 (Apr. 26, 2019 06:49 PM EDT), https://perma.cc/4965-9NL2 (describing SEC concerns regarding whether Musk's statements were deceptive).

[46] U.S. CONST. amend. I. *See generally* Ginzburg v. United States, 383 U.S. 463, 498 (1996) (Stewart, J., dissenting) ("Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime.").

offend others) is also a basis for termination. Similarly, many corporations require activities that look disturbingly similar to authoritarian criticism-self-criticism sessions or top-down indoctrination and group-think.

Corporate law creates no right to criticism—the basis, as political theorists have long recognized,[47] for public opinion to restrain despots. Instead, incumbent officers have almost unrestrained power to fire subordinates who raise inconvenient questions, and as a practical matter do so often enough that criticizing the boss is unusual. Even board members who disagree with the CEO, nominally their subordinate, often are expected to resign if they do not convince the entire board. Similarly, state corporate law creates no equivalent to open records laws or other devices meant to allow outsiders to understand what government officials are doing (the federal securities acts do provide a partial equivalent). At least where the federal laws do not apply, incumbents are usually allowed to keep embarrassing secrets from public view.[48]

Indeed, the Supreme Court has found constitutional protection for this ability of incumbent officers to hide from public scrutiny, holding that "corporations" (meaning, of course, their officers) may keep secrets from others who might wish to challenge their decisions either in markets or politically. Thus, for example, in Marshall v. Barlow's Inc., the Court held that a corporation, via its general manager, could assert a Fourth Amendment right to prevent a warrantless OSHA inspection.[49] The opinion

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[47] *See, e.g.*, GERALD J. POSTEMA, UTILITY PUBLICITY, AND LAW: ESSAYS ON BENTHAM'S MORAL AND LEGAL PHILOSOPHY 271 (2019) (explaining that Bentham "insisted that publicity [and "the Public Opinion Tribunal"] is the only effective check on official power"); THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (stating that "the two greatest securities they can have for the faithful exercise of any delegated power [are], first, the restraints of public opinion, . . . and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it").

[48] *See e.g.*, Hale v. Henkel, 201 U.S. 43, 74 (1906) (establishing the principle that government may require business to create and provide records with less judicial oversight than would be required for personal records); RMBCA § 2.03 (explaining that under state corporate law, a corporation's articles of incorporation are typically filed with the Secretary of State and therefore public); RMBCA § 2.03 (listing required elements of Articles—which are quite uninformative); RMBCA § 16.02–16.04 (creating minimal inspection right of the corporate books for shareholders for good cause, but creating no duty for officers to disclose any corporate information whatsoever, however important, to non-shareholders); U.S. Securities and Exchange Commission, *Information About Pay Ratio Disclosure*, SEC, https://perma.cc/H77S-92KQ (last updated Sept. 21, 2017) (describing SEC's proxy disclosure rules, including the requirement that most corporations with publicly traded securities disclose the pay of their top officers and the ratio of that pay to median employee pay). There is no equivalent disclosure rule for closely held corporations.

[49] Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (holding that warrantless OSHA inspection violates corporation's Fourth Amendment privacy rights in its place of business).

does not consider whether OSHA reformed internal corporate governance procedures. Similarly, it elides the critical issue of whether a corporation is part of the "people" protected by the Fourth Amendment, instead referring to the corporate plaintiff as a "businessman" and focusing on whether places of business are within the Amendment's scope. Taking the corporation seriously as an organization makes the error obvious: the fear of overreaching power that motivates the Amendment does not apply where the issue is whether corporate officers are abusing their power over others by potentially dangerous misuses of corporate property. The Court's use of the "person" metaphor makes it easy to miss that the question presented was not a principled conflict between governmental power and personal privacy but rather government inspections limiting the arbitrary power of corporate officials in the name of good government transparency values. Seen in the latter frame, the conflict is between one set of officials and another—far more likely to require political compromise than to be amendable to judicially-imposed fiat. The Fourth Amendment does not constitutionalize contemporary American corporate law's disempowerment of employees.

Moreover, corporate law has almost no equivalent to democratic elections, restrictions on the spoils system or other restrictions on incumbent abuse of office to retain power.[50] Employees, customers, creditors, and surrounding communities dependent on jobs have no formal voice in the firm. While shareholders have the right to vote and to sue, ordinarily, a rational investor will sell rather than vote out managers it does not trust, while the business judgment rule assures that in all but the most egregious cases of self-dealing, courts will defer to incumbent managers.[51]

In similar disregard of ordinary liberal republican ideals, corporate law places almost no limit on incumbent officers' use of the powers of office—their control over corporate assets and authority—to maintain their positions in office, so long as they give lip service to the notion that conflicts are over policies rather than personalities.[52] For example, it would be

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[50] *But see* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (refusing to intervene to prevent gerrymandering, i.e., legislatures drawing electoral district lines that make it easier for incumbent candidates or parties to win). Nonetheless, democracy itself requires the general principle that incumbents are chosen by the electorate, not the other way around, and that free elections require restraints on incumbents' use of the power of office to promote their reelection.

[51] *See, e.g.*, In re Disney, 906 A.2d 27 (Del. 2006) (upholding seemingly excessive CEO compensation); Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989) (deferring to board's determination that corporate interest required defending "Time Culture" despite strong evidence of more venal concerns).

[52] Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 293 (1955) (holding that incumbents may spend corporate assets to defend their policy and seats); CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008) (holding that shareholders may not bind board to reimburse dissidents' election expenses, because that might violate board's fiduciary duty).

perfectly legal for a director seeking reelection to offer a large shareholder a position on the board or as an employee at the company; in democracies, this would usually be frowned upon as nepotism or influence peddling.

In the political sphere, the temptation to authoritarianism is always present, as we have been bitterly reminded in recent years. Yet, most of the time, most of us remain sure that regimes that demand lockstep conformity and deference to the powers that be will, in the end and probably much sooner, be unable to compete with ones that are based on freedom, free inquiry, and limits on the powers of incumbents to demand obeisance. We expect free countries to outcompete authoritarian ones. Our corporate law, then, is startlingly bereft. It is missing the basic devices we usually use to assure quality and effectiveness.

Instead, the primary device we use to restrain corporate managerial corruption is market competition: the right of consumers and suppliers to take their business elsewhere, of employees to quit, and of investors to refuse to buy or hold stocks and bonds, and most importantly, the right of other businesses to entice away current or potential corporate constituents.

If consumers or suppliers—whether or not currently affiliated with the firm—decline to do business with the firm, it may be unable to remain solvent. The power of market pressure is neither assured nor direct, of course. Consumer power is limited and erratic. Managers may misinterpret the message that markets are sending them, as domestic car manufacturers failed to perceive changing consumer needs and tastes during the first decades of the "Japanese Invasion." Or the firm may have sufficient monopoly or monopsony power to prevent ship-jumping from reaching material levels. Consumers have little ability to signal displeasure with Google or TWC-Spectrum internet access regardless of their views of the products. Or the firm may not have a direct relationship with its ultimate human consumers: Facebook, like the media it is supplanting, sells to advertisers, not the citizens who depend on its integrity and acuity; steel producers sell to car manufacturers and builders, not the drivers and occupants of those products; employer-based health insurance sells to employers, not insureds.

Stock investors convey their message to managers mainly by stock price, not votes: if the market as a whole concludes that managers are corrupt or incompetent, it will drive the stock price down. In the short run, this has virtually no consequences for the corporation as an institution, since solvent firms depend on sales of goods and services, not investor funds, to pay the bills.[53] However, top managers, as individuals, may feel differently: they will

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[53] *But see, e.g.*, Peter Eavis, *Tesla Seeks to Raise $2 Billion in Sale of Stock and Debt*, N.Y. TIMES (May 2, 2019), https://perma.cc/KQL8-JHPP ("If Tesla raises $2 billion, it can use the money as a buffer in case its operations continue to stumble and consume large amounts of cash this year. In recent months, Tesla has not sold enough cars to cover its operating expenses.").

suffer immediately if they have much of their net worth tied to the stock price or are evaluated based on stock performance, both of which have become common since the 1980s. Moreover, if the stock price drops sufficiently, a market player may find it attractive to buy a block of stock sufficient to control enough votes to either elect a new board of directors or encourage the existing board to restructure the corporation in some way.

However, when market participants hold diverse views, managers are likely to receive no message at all. In particular, investor views on any issue other than company profit ordinarily have no market impact. This follows from the structure of the finance markets. A significant proportion of stock market participants is required by law or market pressures to pursue profit to the near exclusion of any other value, just as many buyers and sellers in commodity markets are fiduciaries allowed to aim only for value in the narrowest sense. That means that if some stock market investors sell or refuse to buy a particular company's stock because they find its activities morally repulsive or ecologically unsustainable, others (interested in or compelled to pursue stock market profits) will replace them, and the stock price will be largely unchanged.

Politically motivated consumer boycotts may be similarly futile in many instances. To be sure, a well-organized boycott of a consumer-facing company with a readily replaceable product can be quite effective: Nike appears to have been quite concerned to keep its image from being associated with sweatshops. But often there will be a sufficiently large group of consumers (especially in business-to-business fields) that must pursue price to the exclusion of other values, or—as will usually be the case with human consumers—have neither the time nor the information to take into account aspects of corporate performance beyond the product and price before them. In these cases, the product markets, like the financial markets, make political, moral, and ethical disagreements invisible to managers.

The consequence is that competitive pressures are more likely to pressure corporations to act in anti-social ways than the opposite. Freeloading, in the form of avoiding vital social expenses that others will have to pay, cuts company costs and allows the firm to reduce prices. At least in the short run, this should increase expected investor profits and, therefore, stock prices—regardless of whether share managers or traders approve of this kind of behavior in their private lives. Thus, both product and financial markets are likely to reward rather than punish firms that make a practice of not paying taxes, evading safety regulations, dumping pollution for others to clean up, and moving messy or dangerous production to localities with weak laws or ineffective enforcement.

In contrast, competitive markets should be fairly effective in policing corruption and incompetence, at least to the extent that they are visible outside the firm. Incompetent or thieving managers usually should leave the company less able to produce decent products at reasonable prices than its

competitors. If investors or consumers can see that corporate efforts are going to enrich others, not themselves, they will seek better alternatives and, when possible, shift to them. Of course, this presumes competitive markets; if a corporation has a legal monopoly due to intellectual property law or a practical one due to economies of scale or network effects, consumers may be trapped. Similarly, if the entire managerial class adopts a similar approach, for example shifting corporate surplus from ordinary employees to top managers and shareholders, dissident consumers or investors will find no place to go. Even if our businesses could generate both a fairer or more sustainable economy and, by spreading the wealth around, more affluent customers leading to more growth, the corporate law system effectively reduces the voice of advocates for such policies.

While received wisdom often accepts competition as a reason why we need not worry about poorly managed firms, the parallel argument is rarely accepted in the public sector. John Locke's "tacit consent" and its Socratic predecessor is out of fashion; few of us still think that a citizen who fails to emigrate has conceded her right to criticize the laws. Tiebout notwithstanding, even at the local government level, choice of locale is no substitute for competent democratically answerable government concerned with the welfare of all.[54] Indeed, it is widely recognized that local competition often functions to promote segregation by race, class and family structure, while encouraging narrowly defined communities to push the costs of schools, sewage, transit, or mental health onto their neighbors.

In short, business corporations are governance mechanisms, usually setting the rules for top-down bureaucratically organized enterprises. Far from "people," they are closely analogous to state agencies. Like state agencies, we need them to live a modern life. Like state agencies, they are led by leaders who may be tempted to set personal interests above the public interests. Like any organization, they have internal dynamics that may lead even good faith actors to act in bad ways, pursuing institutional interests even when they conflict with more important values. And like state agencies, they are imperfectly restrained by forces of competition, democracy and regulation.

These are the issues of liberal politics. Like any governmental system, corporations can create an artificial appearance of unity. In reality, however, the people who compose them always disagree about ends and means, tactics, goals, and values. The central problem of corporate law is to create structures that encourage officers to make well-informed, competent decisions in the interest and with the consent of the people involved. But people will always disagree on ends and means, goals and values. So in a

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[54] Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that local democracy is redundant since people will sort themselves into locales that function as they wish).

decent society where we expect to live with others in dignity, corporate and political leaders alike must find ways to make decisions when collective decisions are necessary, while respecting our differences by avoiding them when they are not.

B. *Corporations as Quasi-Governments*

Our corporations are not "people," but organizations. As with any organization, we must constantly worry about how to ensure that they operate as we want them to, and not (as organizations always threaten to) according to an internal logic that may lead them contrary to human interests. Similarly, we ought to recognize that the interests and goals of their leaders will rarely be entirely congruent with the interests and goals of the institution, let alone the larger society, both because of the limited ability of any leader to understand institutional needs and because of the omnipresent specter of corruption.

Once we acknowledge that the basic problems of corporate governance are the same as the basic problems of any political governance, ordinary liberal political theory suggests that corporations generally should have no more claim to constitutional rights against our legislatures than any other governmental unit does. Instead, the issue is what rights individuals ought to have against the firm—including how and by whom those rights ought to be determined and enforced.

A liberal state seeks to protect individual rights for a variety of overlapping reasons. We protect the right to criticize first and foremost because criticism is necessary to prevent officials from yes-men and us from the poor decisions that result from flattery of courtiers afraid to point out the errors that even the best leaders make. We also need free debate to avoid corruption—officials who become entranced with power for its own sake or for its material and other rewards and therefore seek to entrench themselves in power rather than serve the public.

Conversely, perhaps the greatest achievement of liberal theory is moving beyond Plato, Augustine, and Rousseau, each of whom believed that a state ought to ensure that all its citizens think alike. A free society need not move in lockstep. Liberal societies seek instead to keep the peace and protect a variety of views, attitudes, and values. We simply agree to disagree in the many areas that we can safely leave to individuals without making collective decisions at all—ranging from how (and whether) we worship, to the many consumer choices best fulfilled by markets.

Liberalism recognizes that communal decisions about a religion for all—indeed, joint decisions about any matter of taste and style, culture, or language—are likely to be extremely controversial. Worse, since people often take such matters extremely seriously, imposing a uniform rule requires conflict and coercion. We can more easily live in peace and mutual respect by simply defining these as matters for individual determination.

Similarly, the liberal right of property fundamentally preserves a space (for property holders) in which property holders can act according to their own values, taste, judgment, or whims, without regard for the collective opinion (or the "reasonable person"). This space for idiosyncrasy and dissent reduces the importance of the collective decisions of politics, both reducing conflict and making more space for individual dignity.

Of course, this technique of agreeing to disagree has its limits. It is hard to live with people who do not share fundamental agreements on values such as the liberal concern for avoiding coercion, respecting other's freedoms, or paying for a fair share of the cost of maintaining the commons. Property rights of autonomy inevitably—usually sooner rather than later—conflict with other people's rights. My building can block your light, and autonomy principles cannot resolve the conflict. Markets cannot function without extensive coercive rules, ensuring, for example, that ordinary market agreements are not procured by fraud, coercion, or deception and that once made they are generally treated as obligatory. Other agreements—the sale of babies, for example—must be forbidden regardless of context.

Indeed, any form of autonomy must immediately be limited lest it deprive others of their autonomy or lead to a Hobbesian "war of all against all" for unlimited power and glory. Even on less weighty matters, we need to limit disagreement. Uniform currency, weights and measures, some degree of a common taught history, and common literary canon can ease market transactions and personal life alike. Conversely, it is more convenient, but rarely worth war, to avoid a Babel of mutually incomprehensible languages.

None of the standard justifications for individual rights apply cleanly or easily to business corporations. People work for, purchase from, or invest in corporations for limited and utilitarian reasons. There is no reason to expect that a corporate officer selected (by some necessarily crude and imperfect method) for competence in managing the business will even imperfectly reflect the disparate religious, cultural, or political views of various corporate constituents.

Thus, Hobby Lobby's leaders sought to coerce company employees to follow the leader's religion, not to free them to follow their own. Health insurance coverage for birth control and abortion allows each employee to follow her own conscience in deciding when and whether to bring a child into the world; Hobby Lobby's executives sought to make that decision for all the company's employees.

When I buy gas from Exxon, I am funding Exxon's leadership's war chest, but it is entirely false to assume that they represent me, or anyone else, when they use that money to promote climate denialism. Instead, if Exxon's board and executives are obeying corporate law, they are acting in what they believe to be the company's best interests, without regard to my views, their own views, or any expert's views, about what is best for the country,

humanity, or the greater ecosphere.

Leslie Moonves famously said of Donald Trump's campaign: "it may not be good for America, but it's damn good for CBS."[55] That is, if promoting a destructive politician is good for the network, as a conscientious executive Moonves thought it appropriate to set aside his views of what is good for the United States. Corporate law generally agrees.

To be sure, no court would require CBS to act in this way if the executives rejected Moonves' narrow view of corporate interest or concluded that a constitutional crisis could not possibly be good for the company. First, no affected person other than a shareholder has standing to bring a lawsuit challenging Moonves' decision or the opposite one. If shareholders had challenged the decision, they would have to do so on the ground that it was contrary to the corporate interest, not that it was contrary to the national interest or the views (correct or otherwise) of corporate participants. Moreover, a reviewing court would apply the business judgment rule to refuse to review Moonves' decision absent evidence of personal financial interest or gross negligence. In short, corporate law provides no vehicle for anyone to second-guess the executive view of what is "good for America" or "good for CBS."

Even if the rule is largely unenforceable, Moonves is barred by law from using corporate assets to promote his own politics. Corporate law is clear that corporate fiduciaries must act for the corporation, not on behalf of their own values—or the values of any corporate participant, constituent, or dependent.

But that understanding of corporate law means that respecting the corporation's autonomy does not necessarily respect the autonomy of any citizen (or non-citizen). Even if every participant in CBS shares Moonves' view of the interests of the United States and is sufficiently patriotic to believe that national interests are more important than corporate interests, corporate law commends Moonves' unpatriotic behavior.

Generally, respecting the decisions of individuals enhances human freedom, at least absent coercion or deception. In sharp contrast, respecting the CBS decision simply means making Moonves' decision final and his authority unanswerable. That reduces human freedom—even Moonves' own, if he actually set aside his own views of American interests, and certainly that of everyone else bound by his decision.[56]

More abstractly, seeing corporations as governance institutions makes clear that giving rights to the firm is rarely the same as giving rights to human beings.

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[55] Paul Bond, *Leslie Moonves on Donald Trump: "It May Not Be Good for America, but It's Damn Good for CBS,"* HOLLYWOOD REP. (Feb. 29, 2016, 11:26 AM), https://perma.cc/L9FQ-VXHS.

[56] *See generally,* Daniel J.H. Greenwood, *Fictional Shareholders: 'For Whom is the Corporation Managed,' Revisited,* 69 S. CAL. L. REV. 1021 (1996).

The Thirty Years War was ended, at Westphalia, by an agreement that each prince would be allowed to impose his religion on his subjects, and the different princes would not seek to force their neighboring princes to conform to a collective, or catholic, view. This was a victory for peace. But it was not a victory for freedom. Only princes won religious freedom. Everyone else remained subject to an establishment, coerced to follow the sovereign's religion.

Granting freedom of religion, or speech, to a corporation works much the same way. The CEO and board win the freedom to use corporate assets—which are not their own—free of interference from outsiders (or insiders dependent on outsiders). But those who create those assets, whether employees, customers, investors, or the fellow citizens who create the conditions for business success, win no freedom. Rather, employees now must practice religion, or speak on controversial matters, as directed by the boss. They, and the rest of us, are now required to subsidize the leadership's religion, lobbying, or politicking as a condition of doing business with the firm, much as the Westphalian solution forced subjects to either practice the prince's religion or emigrate. This is the opposite of the liberal practice of agreeing to disagree.

In the public sector, these principles are not controversial. Cities are usually incorporated and always legal persons in contract, property and tort law. Nonetheless, we do not allow cities freedom of religion—we would recognize that as an establishment of religion. Nor do we grant them freedom of speech—we would call that propaganda. We also do not allow public officeholders to assert property or privacy rights in their office—that is a core of the feudal system we rejected. It is illegal in almost all instances for an elected official to use the power of the office to influence the officer's own election. It is perfectly legal, if far from common, to bar governmental agencies from lobbying to increase their own budgets.

Again, accepting that corporations are basically private governments makes clear the issues that are unclear using Greenfield's "people" metaphor. Granting privacy and similar autonomy rights to people is a core liberal value. But granting such rights to corporations is as illiberal as granting those rights to state agencies, and for the same reasons. We routinely require state agencies to publish their internal proceedings, disclose documents on demand, hold meetings in public, and take other actions that would be obvious infringements on ordinary property and privacy rights if applied to individual householders. State and corporate agencies, unlike the individuals, are not ends in themselves; we should grant them rights only to the extent that the rights make us—not the agency—better off. It is a political judgment, not a matter of natural rights or human dignity, whether firms and agencies are likely to work better under the disinfectant of sunlight or when they need to be able to make backroom compromises away from the glare of publicity.

Similarly, no city and few government agencies have legally entrenched rights to exist and almost no one contends that they have pre-legal rights to life—before or after birth—that the law must respect. It is routine to redefine the boundaries of municipalities or restructure agencies, and the affected organization generally has no say at all, let alone autonomy or entrenched property rights with which to defend its status quo privileges. Indeed, our legislatures, quite correctly, and even executives, more questionably, regularly seize the property of such enterprises and redistribute it to other governmental units or other projects, according to the perceived needs of the hour. For example, President Trump even asserted the right to redirect funds appropriated for military projects, to anti-immigration/refugee operations along our borders. Many contended that this was a facial violation of the applicable appropriation acts or the Posse Comitatus Act, otherwise exceeded presidential authority, or simply was evil and unadvisable. It arguably violated the rights of the citizenry or their elected representatives to control the national budget. But no one contended it violated the Department of Defense's property or due process rights; such rights would violate the basic principles of national self-government. Entrenched property or autonomy rights for business corporations against the elected government is similarly illiberal.

Another of the great tasks of the modern era, never completely complete, has been eliminating property rights in public office. The *Ancien Régime* sold offices. We try not to do so. The modern view, in general, is that officeholders hold office at the sufferance of those they serve (or their representatives) and only so long as the latter remain satisfied with their performance. Even civil servants, granted job tenure to lessen the corruption of the spoils system, may be fired for cause, are expected to follow the norms of the bureaucracy rather than their personal interests or views, and are absolutely forbidden from treating the office as a personal possession. That is why we bar nepotism and requirements that hiring be based on objective criteria rather than personal connections, even though the resulting formality often makes getting the job done harder.

Corporate law, in contrast, follows the medieval norms. It is not only legal but ordinary practice for wealthy individuals (or executives of wealthy firms) to purchase enough stock to elect themselves and cronies to the board and then to use the board position to hire themselves, friends, and relatives as executives. Stock, and the rights to govern that come with it, can be passed to descendants or favorites.

On a view of the corporation as a "person," saleable office is not remarkable. Indeed, it is not even terribly visible; the "person" metaphor conceals internal governance with an illusion of unity. On a view of the corporation as an "association" of shareholders, saleable office may even seem a normal consequence of private agreement. Property metaphors also justify the medieval norms: if a corporation is property, then it is not

surprising that it (and its governance) can be bought and sold. But corporations, which as businesses are bureaucratic enterprises composed of people, are not the right sort of thing to be owned. We long ago concluded that people are not property and governors are not owners. In any event, shareholders of a publicly traded corporation have virtually none of the ordinary rights of ownership; they have, instead, the political right to vote for corporate officials.

Corporations are not people, property, or unorganized associations but critical parts of our privatized government. They make critical decisions governing us in our roles as employees and customers, literally directing us to act in certain ways and punishing us if we do not. Their leaders enjoy a form of comity, in which courts defer to managerial decisions in all but the most extreme cases, even when those decisions are poorly thought out, unjustified, and contrary to the will or interests of other corporate constituencies. Moreover, corporate managers' powers are not limited to corporate participants in any narrow sense: every one of us is affected when the managers of major energy or automobile companies use their market and political influence to lessen the probability that governments will find a solution to carbon-induced global climate change; when managers of patent and copyright-holding corporations successfully lobby for copyright rules that make life-saving pharmaceuticals sell for far more than marginal cost; or when managers trap vast swaths of twentieth century culture behind unbreachable fences.

The view of corporations as government-like makes clear the problem in a way that Professor Greenfield's preferred metaphor of personhood does not. Governments should represent their subjects, not exploit them. Yet the standard ideology of profit maximization treats corporate employees, customers, and—at least on finance-influenced views—investors as mere costs to be minimized in the name of efficiency. In a political context, we would immediately identify this as a form of colonialism, and wonder why a free people would use its law to create an institution devoted to exploiting them. Colonization is morally indefensible; self-colonization is a peculiar institution indeed.

To be sure, corporations often conclude that good working conditions or adequate pay for employees, good quality at reasonable prices for consumers, and appropriate compensation for investors are in the corporate interest. Nothing in corporate law or many variants of corporate ideology requires the firm to abuse its dependents, participants, and constituents.

But the standard view still makes clear that the good of these corporate subjects is not the goal—consumer, customer, investor and even public welfare are mere tools towards the true end: profit. Any overlap is contingent. Should it become clear that the best route to profit is to deceive customers, overwork or underpay consumers, or default on loans, the dominant ideology urges managers to do so.

The case law does not disagree: *RJR Nabisco*[57] upholds a plan to extract value from bondholders to benefit shareholders; *Revlon*[58] actually requires corporate managers to set aside the interests of bondholders, customers, the general public, and employees in order to maximize profits in the special context of a sale of the company, while myriads of other cases simply defer to corporate managers' own understandings of their obligations, so long as they at least offer lip service to the ultimate goal of profit.[59] The echoes of the White Man's Burden or the *Mission Civilatrice* are loud: corporate law treats us as its colonial subjects, to be exploited for the benefit of the metropole, and, of course, justifiable by the benefits that purportedly trickle down to the subjects.

On the political view, then, corporate law is fundamentally unjust. We need more internal democracy, basic due process rights, and spaces for private life not simply because they will reduce the likelihood of egregious failures and management-led fraud. Even more, we need them because governments, even corporate governments, exist for the good of the governed, not the governors. The only way to ensure that they continue to serve those they are meant to serve, is to transform subjects into citizens. Neither governments nor governed are property to be owned. Professor Greenfield shares the goals of liberalizing corporate government, but his metaphor of the firm as similar to a rights-bearing end-in-itself does not help to show why we need these changes. Democracy and due process are not particularly appropriate within a person; heart and head and little toe do not get equal votes.

C. *Boundary and Citizenship Issues*

Finally, the governance view emphasizes the other vitally important hidden issue of corporate law: for whom does the corporation exist and whom is it meant to serve.

In political theory, this is the question of citizenship and voting rights. Decent states operate for the benefit of citizens, who have voting rights. It is unfair and improper for a state to have a class of subjects who are not citizens, as exemplified in the U.S. by the principles of birthright citizenship and one person one vote. Similarly, it is wrong for it to exercise power over

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[57] Met. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989) (holding that the implied covenant of good faith and fair dealing did not protect bondholders from a deal that massively reduced the value of the bonds).

[58] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (holding that Revlon's board breached its duty by considering bondholder interests in the sale of the company—even though bondholders and shareholders appeared to be largely the same entities).

[59] *See, e.g.*, Paramount Communications, Inc. v. Time, Inc., Fed. Sec. L. Rep. (CCH) ¶ 94, 514 (Del. Ch. 1989) (allowing board to reject tender offer based on corporate plan to place magazine ahead of short-term profits), *aff'd*, 571 A.2d 1140 (Del. 1989).

foreigners (the anti-colonial principle). But governmental boundaries are never precisely congruent with the relevant communities, and the communities themselves are rarely well defined. Boundaries are always controversial and often determinative. As a result, while the basic claims of democratic theory are widely accepted, we have no clear theory of where boundaries should be drawn, as can be seen by even cursory consideration of the American history of gerrymandering, municipal boundary determination for purposes of school taxes and segregation, our anti-democratic Senate and Electoral College and regular battles over "federalism" and state vs. locality decision making that seem to have no principle other than which set of boundaries creates a majority most conducive to the proponents' preferred policy results.

Corporate law has a precisely parallel, but worse, problem, obfuscated by metaphors such as "the corporate person" which suggest that corporate boundaries are natural or unchanging. Current corporate law grants voting rights only to shareholders, regardless of the impact of corporate decisions on others. But incumbent officers have a great deal of control over who their shareholders are. They can, subject to formal limitations that only occasionally have real world bite, increase or shrink the shareholder body, combine the firm with others, or separate out pieces of it. Moreover, while corporate law makes corporate assets available only for corporate actions, corporate officers, again with only minimal restrictions, control both which assets and which actions will be labelled "corporate." For example, officers have virtually unlimited authority to label actors "contractors" and therefore not part of the corporation, even if the corporation retains extensive control or determinative influence over their behavior.

Recognizing that the business corporation is a government-like entity does not solve any of these boundary issues. But it helps to clarify their existence. Just as historical boundaries for cities and suburbs are often dysfunctional, so too will it often be the case that the activities of a firm impact, positively or negatively, people outside its boundaries—and, in any event, as in pre-modern polities, current law denies the basic rights of citizenship to virtually all the affected people inside the corporate boundaries.

D. *The Supreme Court vs. Corporate Law*

Professor Greenfield pointedly distinguishes his "personhood" theory from the notion, quite common in Supreme Court cases if nowhere else in corporate law, that a corporation should be understood as an association of persons. The political understanding also clarifies the errors in that simplistic view.

First, to the extent that business corporations are associations, they are quite peculiar associations. They have no members. The people who act for corporations, make their products, and depend on them for a living—

employees—are treated as costs rather than the point of the institution.

The Court often assumes that shareholders are the members or the owners of a firm, but it never does so consistently. Indeed, it could not. Corporate law does not make shareholders either members or owners. They lack the affiliations or connections to the institution members ordinarily have. Publicly traded shares are bought and sold in an anonymous market. New shareholders need not contribute anything to the firm nor participate in any way with its activities; indeed, the firm may not even know of their existence or identity. Nor do shareholders have the rights of control of property owners. Acting like an owner is incompatible with corporate norms. Thus, when a court determines that shareholders have treated corporate property as if it were their own, the consequence is that it deems the corporation to have no separate existence, piercing the corporate veil, eliminating the main aspect of corporate personality. Of course, in a publicly traded corporation, the situation is even more dramatic. If a GM shareholder were to demand a pro-rata share of GM cars, the shareholder would be escorted out of the showroom by men in blue, if not white, coats.

This is not to say that shareholders do not influence management. Managers seek to keep the stock market happy, because if the stock price drops enough, a competitor or entrepreneurial investor may buy enough shares (and votes) to threaten or even oust the incumbent managers. But this is not *shareholder* control. It is stock market control. Prices are set by all participants in a market, just as much by those who sell the stock or refuse to buy it as by those who own it.

In any event, most shares in our publicly traded corporations are held by institutions, not people. Sometimes one can look through the institutions and find people. Sometimes one cannot. An endowment fund for a university or hospital operates to promote the mission of the institution that sponsors it—but that mission cannot be reduced to the interests, let alone will, of any identifiable group of people. Education and research benefit us all, including the unborn and unconceived. Natural resource funds, like the Saudi, Norwegian, or Alaskan Funds, invest not only for existing people but on behalf of yet unborn citizens, or in the case of the Saudis, future generations of royal relatives. Those who do not exist have just as much say over the operation of these funds as those who do: managers are largely unconstrained by the will of either group and conversely, must consider the interests—as best they can understand them—of both.

Pension funds and mutual funds, in contrast, generally do have their own identifiable investors, many of whom are identifiable people. Still, the structure of most mutual funds gives mutual fund shareholders (even if they are human and not, e.g., trusts) little or no role in operating the funds; the funds never pass corporate votes through to their own investors; and funds have their own interests and legally imposed duties that may conflict with the opinions or interests of their constituents. Pension funds, similarly, are

often required by law to ignore the current interests of actual existing future beneficiaries (they must also consider the interests of hypothetical future beneficiaries who do not exist yet). Moreover, actual employees saving for retirement are likely to have a far greater financial interest in preserving their jobs than in maximizing the size of their pension. Similarly, actual prospective pensioners, or the taxpayers or customers who pay for their wages, may prefer not to profit from selling addictive cancer sticks or environmentally destructive products, or may have other commitments that can conflict with profit. However, pension funds are generally required by law to ignore these realities.[60]

Actual human investors will inevitably have values—patriotic and otherwise—that they believe are more important than profit in some circumstances. It would be economic suicide for a mutual fund to choose to put mitigation of the Great Extinction ahead of corporate profit, and likely would be illegal for an ERISA regulated pension to do so, yet it is highly likely that a majority of the actual humans involved would take a different position.

Moreover, in general the U.S. Constitution does not protect foreigners abroad. The Court assumes that corporations incorporated in the United States are associations of Americans. This is obviously counterfactual. Large American corporations have employees, customers, and investors all over the world. A significant portion of the stock traded on the NYSE has foreign ownership.[61] A footnote in *Citizens United* hinting that foreign owned stock might have different rights is the only discussion of this issue I am aware of in the U.S. Reports.

Corporations are not people but hierarchal power structures. Corporate leaders exercise power over other people, and current corporate law offers few assurances that they will do so in the interests of those they rule. Because the corporation is not a person but an organization, giving rights to the "corporation" usually means giving more power to the incumbent leaders: the power to use other people's money to promote particular political or regulatory positions, the power to use the threat of unemployment to impose religious practices on employees, the power to keep embarrassing secrets from those who might seek to create countervailing authorities within or outside the corporation, and the power to retain control over the property currently assigned to the corporation as against other claimants.

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[60] *See, e.g.*, Heather Gillers, *Calpers' Dilemma: Save the World or Make Money?*, WALL ST. J., https://perma.cc/CGS8-95K9 (last updated June 16, 2019) (describing pressure on pension fund managers to grow the fund in order to avoid having to finance pensions from taxes or company profit, regardless of values of pensioners or citizens).

[61] *See* Paul Krugman, *Trump's Secret Foreign Aid Program*, N.Y. TIMES (July 25, 2019), https://perma.cc/Q85Q-2PQ3 (estimating that about one-third of U.S. stock is owned by foreigners).

In general, few if any constitutional rights granted to a "corporation" are rights of the institution itself. Indeed, it is hard even to understand what such a concept would mean: the institution, a mere tool to our ends, has no obvious interests of its own. No one feels guilty for the damage done to the corporation (as opposed to its customers, employees, or host city) when it is shut down as obsolete.

"Corporate" constitutional rights are, instead, interventions by the Supreme Court in internal corporate struggles over corporate assets and power. Holding that the legislature may not require a corporation to disclose that its milk is made from cows treated with rbST empowers the corporation's managers and investors at the expense of its consumers. Permitting the organization to spend corporate money to lobby or contribute to political campaigns with no consideration of how it decides to do so empowers managers over other claimants who might prefer other uses of corporate funds.

Allowing a corporation to assert a due process right to avoid large punitive damage judgments empowers incumbent management to continue violating tort norms despite the desires of other corporate constituents—including tort victims—to have the firm act differently. Indeed, if those managers accept the shareholder-primacy view of fiduciary duties, they may even feel that this "right" mandates that they set aside their own views as well as the interests of corporate participants, the free market, and society itself in order to cause the corporation to commit arguably profitable torts. Corporate rights to due process are mainly roadblocks in the way of reformers who seek to assert control over incumbent corporate elites that manage corporations in ways that they prefer (or believe are mandated by current corporate law) rather than the ways that reformers want.

Another underexplored example of the Court's use of "corporate" rights to empower and disempower corporate constituencies is the *MITE* case, in which a plurality held that a state could not protect its in-state shareholders and employees by requiring a corporation doing business in the state but organized elsewhere to obey the forum state's hostile takeover regulations.[62] In practical terms, this means that corporate insiders may, by choosing where to incorporate the firm, choose the law governing their own power.

Moreover, since most major corporations choose to organize in Delaware, the *MITE* holding suggests that Delaware law governs corporate takeovers nationwide, even if the target firm has little economic activity in Delaware or is more economically significant in other states. The *MITE* rule, thus, is contrary both to standard (non-corporate) choice of law rules and the

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[62] Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (holding that the state "has no interest in regulating the internal affairs of foreign corporations" although facts make clear that the state's actual intent was to protect resident investors, employees, and other citizens directly or indirectly dependent on the corporation).

fundamental principles of territorial government and republican self-rule.

If Delaware has a constitutionally protected right to impose its corporate law on unwilling states, as the *MITE* plurality suggests, then voters of the other states have no ability to rule their state-wide economies. But the opinion fails to address this issue of self-government. Nor does it explain why the dormant commerce clause, meant to preserve the United States as a customs union, should be understood to constitutionalize a particular balance of power inside major American corporations among their incumbent managers, stock market investors, and employees and those dependent on them. Fortunately, the *MITE* case remains something of an oddity; most courts recognize that the internal affairs doctrine is a matter of state law.

In each of these instances, the issue is not corporate rights, despite the language of the cases. It is, instead, an ongoing struggle over control of critical economic institutions operated by fiduciaries with broad discretion and little responsibility to answer to others.

II. In Praise of Footnote 4

Thus far, I have argued that corporations are not persons, but organizations. Taking them seriously as human tools to organize and coordinate human beings and financial and physical resources to better serve human ends, it is clear that they are fundamentally similar to other forms of government. While we classify them as private or non-state for various purposes, business corporations are command and control hierarchal organizations far closer to government agencies than to individual human beings.

Abandoning the corporation as "person" metaphor makes clear that the more we need business corporations, and the more dependent we are on them for our wealth, happiness, and job satisfaction, the more we need to be suspicious of their power and potential to stray from their designated role. The standard liberal critique of the state—it is simultaneously the only guarantor of liberty and equality, and potentially the greatest threat to them—applies to these governance structures as well.

In particular, giving rights to the organization generally will reduce human freedom rather than increasing it. Corporate freedom of religion or speech is what we would call an establishment of religion or state propaganda in any other context: corporate officers dictate to their subordinates how to worship and what to say, or they spend corporate money to promote the viewpoint they prescribe to be the "corporation's" view, without any opt out for customers, employees, or financiers whose work or funds generated that money. Similarly, corporate privacy means, mainly, that corporate officers may conceal their activities from potential corporate critics.

These arguments are on the merits. But a more fundamental process

issue remains.

A. *The Process Argument for Judicial Deference*

Backwards-looking judicial interpretation is a supremely foolish way to regulate a dynamic economy. Whatever the content of corporate rights, however important they may be, they should be enacted (and subject to revision) by legislatures and implemented by regulatory agencies. Legislatures and regulators, for all their failings, at least are expected to aim for the public good in a forward looking way.

Our economy is dynamic and rapidly changing. In managing it, we face highly contested tradeoffs between, on the one hand, preserving expectations of incumbents unleashing economic growth through more egalitarian distributions of wealth. We must balance our immediate desires for cheap and plentiful goods against our longer term commitments to satisfying jobs. We must consider whether current market rules will lead to ecological disaster or whether only minor tweaks are necessary to avoid global climate change. We face repeated claims that new ways of structuring work and the work force will disrupt, for the better, all existing relations. In this controverted, controversial, and creatively destructive world, it is facially irrational to entrench the basic norms of corporate governance in a difficult-to-amend constitution. Similarly, there is no reason to think that we will get sensible economic and political decisions from judges with no economic training and little access to the critical political and moral debates involved. Old texts, whether carefully interpreted, willfully distorted, or used as mere inspiration for value-laden decisions stemming from other sources, are the wrong way to manage our economy.

In short, the Switch in Time was correct, on the procedure as well as the merits. The Constitution does not enact Mr. Herbert Spencer's Social Statics, Milton Friedman's market worship, or any other economic theory. Economic regulation belongs in the political branches, with minimal interference from the judiciary. And corporate law is quintessentially economic regulation.

I am not suggesting, of course, that corporations should have no legal rights. There is no necessary connection between legal rights generally and constitutional rights. Indeed, municipal corporations—cities—and other governmental corporations have long prospered, even though the general Supreme Court doctrine is that, as agencies of state government, they can assert no Federal rights against the state government that creates them or against city, state, or national voters. Thus, the Court sees few constitutional limits on a state deciding to dissolve a city or change its borders, to change its mode of government, to reduce or even eliminate home rule, or to require it to expose internal operations to public view. Indeed, it has placed state determinations of such boundaries even above constitutionally mandated

values of desegregation and voting rights.[63]

Similarly, government agencies, whether incorporated or not, have no right to free speech. A state may (and sometimes does, if infrequently) bar its agencies from taking specific positions or even from lobbying to change their own formative law. This is not generally seen as raising a First Amendment problem at all, and if it does, the restriction is upheld routinely on the ground that the state may control the speech of its creatures and agents,[64] or place conditions on funding.[65] On the contrary, lobbying or political speech by a governmental corporation itself automatically raises issues of government propaganda or the rights of dissident taxpayers, even if courts generally uphold such actions.[66] Similarly, a municipal corporation has no First Amendment right to exercise religion—the issue, rather, is when such exercise violates the Establishment Clause.[67]

Governmental corporations, in short, generally lack constitutional rights. Nonetheless, they function. Ordinary legal rights and the respect the political process usually accords to established mores are more than sufficient to protect the status quo.

Business corporations also need legal rights. And, similarly, business corporations have no more need than municipal corporations to have the Court aggressively entrench their rights in a Constitution that never mentions them. As Professor Greenfield quite correctly reminds us, corporate personality—the right of a corporation to enter into contracts, hold property, sue and be sued in its own name, and hold rights and responsibilities independent of the people who make it up or invest in it—is at the core of corporate law. Were we to abolish corporate personality, we would need to recreate something quite similar to continue to function as a

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[63] *See, e.g.*, Milliken v. Bradley, 418 US 717 (1974) (holding that ordinarily school desegregation orders apply only within a particular local jurisdiction, notwithstanding that such boundaries may perpetuate discrimination); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (finding claims of partisan gerrymandering to be non-justiciable, even if district lines may be "incompatible with democratic principles").

[64] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that the government may retaliate against an employee for criticizing allegedly improper official action without raising any free speech issue any time "public employees make statements pursuant to their official duties"). Employees of non-governmental organizations, of course, have no free speech rights against their employer under the State Action Doctrine. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (limiting constitutional protection to claims of state action).

[65] *See, e.g., LSC Restrictions and Other Funding Sources*, LEGAL SERVICES CORP., https://perma.cc/D26N-EQ73 (last visited Feb. 26, 2021).

[66] *But see*, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (holding that state employees, unlike taxpayers or corporate employees, customers or stockholders, do have a First Amendment right to refuse to finance unions, even if the union is mandated to represent them).

[67] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 695 (1984) (allowing municipal government to erect Christmas display if its celebration of this religious holiday is sufficiently "secular").

modern economy. Similarly, a corporation's right to hold property or enter into contracts would be meaningless and futile if those rights were not respected by courts, legislatures, and executives in the ordinary course.

But corporate law is not sacred law, given at Mt. Sinai and unchanging forever. On the contrary, the rights, privileges, and responsibilities of business corporations are under constant renegotiation, both within the narrow confines of corporate law proper and in the broader realm of economic regulation. We live in an era of rapid economic change, and we will need more change, more rapidly, if we are to survive the problems we have created for ourselves.

Just as one example, consider the rise of the "gig economy," in which corporations hire persons they call independent contractors rather than employees to perform core corporate functions. Traditional labor and agency law define independent contractors as outside the corporation—they are not entitled the rights of employees (including minimum wage and unemployment insurance) and have less ability to act as the corporation in contract and tort. Corporate boundaries, always somewhat fluid, have now become so porous that legal norms are in danger of collapsing: there is no there there.

Under current corporate law, corporate officers are free to define the corporation's boundaries narrowly for purposes of regulation, while expanding its influence over multiple continents. It is perfectly legal, for example, to shift production to the jurisdiction with the weakest environmental or labor protection and the easiest to evade enforcement. Similarly, corporate law invites corporate officials to outsource potentially dangerous operations to anonymous contractors that can easily disappear or reorganize in the event of (predictable) disaster, while maintaining complete control over the product and even production via contractual specification. Then, if a factory blows up, or is discovered to be dumping dangerous chemicals, it will turn out to be owned by an insolvent corporation—and while the production corporation will close down, it will sell its assets to another one that can resume production under the same terms and to the same specifications.

Thus, a multi-national, outsourced corporation can try to abdicate responsibility for torts, environmental depredation, safety violations, minimum wage and overtime, anti-discrimination norms, and tax collection on the ground that the legal organization is not responsible for actions of the sociological actor, or that the action is legal where taken. The logical result will be LoPucki's death of liability[68] taken to its limits: the death of our economy as wages are driven down to the point where demand is

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[68] Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1 (1996) (arguing that business increasingly finds it possible to function without title to assets and therefore without liability in tort or contract.

insufficient to sustain production. Indeed, if anti-pollution laws, already too weak, collapse entirely, it could even result in our literal death by climate change. If we are to avoid catastrophe, we will need to respond by new external regulations—but also by changing corporate law to make corporate officers less dedicated to finding ways to subvert the legal system, avoid regulation, and seek out the legal weak spots in a world that inevitably will have corrupt or weak governments somewhere.

Our Constitution is ancient, predating in all relevant respects the rise of the modern business corporation and our modern mixed economy based on those corporations. Not surprisingly, it does not use the word "corporation" or explicitly provide any guidance for how corporations should be governed. Modern corporate law, in contrast, dates only to the beginning of the twentieth century or, taking into account, as we should, securities law, the Depression, with major changes every decade since then. It would be strange to imagine that an Eighteenth Century document, even with its critical post-Civil War changes, would offer a guideline to how to govern these entities.

Judges are not trained to regulate economies or create governance systems for economic enterprises. Neither the study nor the practice of law makes them experts in how legal or market incentives work in the real world. They do not preside over bureaucracies that might be able to consider the broad implications of rules over many different areas of the law.

Most importantly, courts have a professional commitment to looking backwards. Their job is not to legislate or regulate. Instead, they are supposed to interpret. The Court's record offers no evidence that reality will overcome theory or that government by nine life-time appointees reading, more or less imaginatively, a pre-modern and vague Constitution will somehow reach sensible answers.

The Due Process Clause expresses a critical feature of any decent democracy—the commitment to equal justice. But the Court's holding that it protects corporations from "excessive" punitive damages awards exceeding ten times the proven actual damages in tort cases has no grounding in equality or the rule of law.[69] Instead, it is in effect a declaration that the people, acting through their elected representatives or the jury system, shall be powerless to use tort damages to create incentives to counteract corporate law incentives that lead corporate officers to take advantage of compulsory arbitration or limited class action suits to profit in anti-social ways. This is just Lochnerism revived. Due process no more requires that we ignore corporate anti-social behavior than it requires that bakers be permitted to work unlimited hours in health-threatening

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[69] State Farm Mut'l Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a punitive damages award, even if jury has found that it is necessary to deter corporate misconduct, may violate corporation's due process rights).

conditions.[70]

Similarly, the Court's protection of "corporate" speech is largely incumbent protection. The political analogy makes this clear. It is obvious that freedom is reduced, not increased, if we allow government officials an unlimited right to use all the resources of the government to protect their own personal positions, or to increase the authority of government, or to avoid regulation by countervailing powers. No one thinks that a governmental agency has an unrestricted "speech" right to lobby the state legislature for increased funds, greater authority, different boundaries, or limits on dissidents or opposition. To be sure, as a matter of prudence, it is usually sensible to allow a good deal of such activity. But we routinely bar officers from using the powers of their office to promote their own reelection. Good government requires limiting the ability of incumbents to change the rules in order to increase their own authority, so even when most tolerant of gerrymandering, the Court has never suggested that we are barred from seeking to prevent it. And often enough, legislatures bar officials and agencies from using corporate assets or agency time to lobby for more power and funds. Transit authorities are routinely barred from seeking to persuade the legislature to increase funding for mass transit, and even those who think this insane on the merits do not see it as violating fundamental freedoms of the transit agency; the Pentagon's massive lobbying operation is often cited as an example of corruption, not an essential freedom underpinning liberal democracy.

The same considerations apply to business corporations. Generally, it makes sense to give corporate officers a good deal of autonomy. But the decision about how much and when to limit it is prudential. The Constitution has no message about the correct level of autonomy that we should grant them. Judges claiming to find in the vague language of due process or equal protection limits on our ability to control our corporate governors are simply interfering in political struggles on the side of the powerful. This is deeply inappropriate.

A corporation speaks by its officers ordering subordinates to speak, or purchasing the efforts of contractors. For the subordinates or contractors, this is following orders, not freedom. The officers themselves, if they are following the dictates of corporate law, are no more free: corporate law requires them to advocate for the interests of the "corporation," even if those interests conflict with the officer's own political or ethical commitments. If, in contrast, they use corporate assets contrary to corporate interests, that is theft. The assets are not theirs and they are wrong to appropriate them, even if the courts are unlikely to enforce the anti-theft norm short of the most blatant self-enrichment.

Indeed, corporate law norms as usually understood equally condemn

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[70] Lochner v. New York, 198 U.S. 45 (1905).

officers who use corporate assets to lobby to increase their own authority within the firm, to protect their own position against dissidents, or to selflessly promote the national interest as patriots or even to avoid contributing to catastrophic climate change. Under current corporate law, their job, instead, is to promote the corporate interest as best they understand it, without regard for consequences to others. And if the corporation interest requires subverting the conditions of decent life in a republican democracy, corporate law tells them to do it. When the Court proclaims that we are barred from restricting corporate lobbying, politicking, campaign contributions, advertising of dangerous products, or price advertising that might interfere with efforts to make markets more responsive to values beyond cheapness—it is not protecting freedom but restraining it, eliminating tools for ensuring that corporations, and democracy itself, work for us rather than against us.

Similarly, businesses, like governments, need confidentiality under some circumstances. In others, secrecy may give them bargaining power that may or may not be in the social interest: private employment bargaining, for example, both protects the privacy of candidates and reduces candidate bargaining power by making it harder to discover whether an employer is seeking to pay less than market rate. In general, many sorts of regulation, from taxation to safety, require that regulators have access to information about the firm's records and bureaucratic functioning; in these cases, corporate privacy is simply a license to conceal corruption or violations of law.[71]

The Court has struggled to find a balance between these contrasting interests in the Constitution, holding early on that corporations have no right against self-incrimination, but do have rights against unreasonable search and seizures, although the standards of reasonableness, especially in heavily regulated industries or with respect to taxation, are quite different from those applicable to human citizens—or municipal corporations.[72]

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[71] *Compare* Miriam Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. (forthcoming 2021) (manuscript at 8), *with* Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 30–31 (2014) (discussing the money laundering regulations upheld in California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), which require banks to maintain and disclose information about their customers that might otherwise be seen as proprietary either to the bank or the customer). Baer raises the important issue, well beyond the scope of this Response, of whether individual defendants should have protection against corporate investigations, often at the behest of government regulators, into their actions as employees. For current purposes, the key is to note that the "person" metaphor hides the actual issue of the complicated relationships between the institution and the individuals who act as it and under its (always partial) control.

[72] *See, e.g.*, Hale v. Henkel, 201 U.S. 43 (1906) (holding that corporations have no rights against self-incrimination, but do have rights against unreasonable searches and seizures, though the standards for reasonableness are not the same as for searches of a citizen's home);

But the fundamental problem is not that the Court has failed to articulate a consistent test for corporate rights. It is, instead, that the tools of the Court are inappropriate to the task. Regulating the economy, as Footnote 4 proclaimed, must be left to the elected branches. Parsing ancient texts, or ignoring them to impose judicial values derived, like those of "practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist. . . [or] distill[ed] . . . from some academic scribbler of a few years back,"[73] is no more likely to lead to a healthy and decent political economy in the twenty-first century than in the first *Lochner* era.

The rights protected by the Constitution's Bill of Rights are the rights of individual citizens and inhabitants of the United States. Corporations are not citizens, individuals, or inhabitants. There is absolutely no reason to think that creating rights for a corporation will free those individuals, any more than increasing the power of state government always will. Every believer in limited government understands that essential as government is to protect us from private power and the war of all against all, it is equally essential to prevent government from having so much power that it becomes a threat rather than a protector. The same is true of corporate governance.

Finally, a last note. The Court has generally taken the position that the Constitution protects only people who are citizens of or within the boundaries of the United States. For example, the First Amendment does not protect foreigners who wish to speak in the United States or the Americans who wish to hear them. Indeed, it does not even bar explicit governmental censorship of foreign movies. Foreigners held by the United States government abroad have almost no rights under our Constitution, not even the most ancient right to a trial before punishment.[74]

Modern major corporations are multi-national. One third of the stock traded on the New York Stock Exchange is held by foreign individuals or entities. Every major corporation has operations, employees, and customers abroad. Many have top officers who are not Americans. Most keep significant assets abroad, often explicitly in order to avoid American taxes.

These entities are not the right sort of thing to have constitutional rights

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see also ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018) (discussing the history of corporate constitutional rights, emphasizing that the Court has created such rights, largely independent of any textual or historical basis, since the beginning of the Republic); Daniel J.H. Greenwood, *supra* note 2; Greenwood, *supra* note 3. *But see* Bell v. Maryland, 378 U.S. 226 (1964) (basing corporation's purported right to racially discriminate on an analogy to a man's right to choose with whom he associates in his own home).

[73] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383 (1936).

[74] *See generally* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367 (2003).

against us; they are more similar to the governmental agencies that we have rights against. But even if they were persons in the moral as well as legal sense, even if it made sense to think of them as individuals instead of bureaucracies, even if they were ends in themselves rather than tools to promote human happiness—in what sense are they Americans?

CONCLUSION

Municipal corporations and governmental agencies have few constitutional rights. We have rights against them. They may not practice religion; we may. They have no entrenched right to use municipal funds to propagandize us; it is up to our legislatures to balance the need for public education against the fear of propaganda. They have no right to maintain particular boundaries; our legislatures may change them at will. Their officers have no constitutional right to use municipal (corporate) assets to preserve their incumbency or lobby for increased funds; we may allow them to do so or we may adopt good governance rules to prevent it. They have no right to privacy; it is up to our elected officials to determine when the disinfectant of sunshine as a prevention for corruption outweighs the need for confidentiality to negotiate backroom deals.

Business corporations are governed by rules that are similar to those of municipal corporations and government agencies—except without the democratic answerability and the checks and balances of limited government.

They have similar, or in many cases, greater power to affect our lives: it is far easier to avoid dealing with the DMV on a regular basis or to move away from a badly governed town than it is to avoid Google or the cable company, or to change employers if you are the wrong age to seek new work, are geographically immobile due to family commitments, are lucky enough to have a vested pension, or have a pre-existing condition that makes even ACA insurance prohibitively expensive.

The metaphor of corporate individuality disguises this similarity. Corporations are, of course, legal persons for many purposes. But that's just legal jargon, short hand for the principle that in some areas of the law, they can sue and be sued, take actions, hold property, and be responsible independent of the people who make them up. There is no rule that legal personality is an on-off switch; it is quite common for a person or entity to be a recognized legal actor in one area of the law and not others. For example, boats are legal persons in admiralty law, children usually are not in contract law, and in traditional international law only a sovereign state could have personality. Similarly, there is no legal reason to extend the equal protection or due process principles of our Constitution to business corporations just because we allow them to make contracts.

The question of what rights to give business corporations, like the

question of what rights to give the DMV or the Corporation of the City of New York, is prudential and political, a subject for ongoing debate and conflict. There is no answer written in the sky or the Constitution for judges to discern, and they have no legitimate authority to legislate in the name of interpretation, let alone far-fetched claims of original intent with no basis in the text.

Our predecessors fought to end the feudal view of government office as property and official claims to all-encompassing power over those subject to them. It is time to bring that Eighteenth Century republicanism to corporate law. The first step is to recognize that business corporations, like municipal corporations, are instituted among people, deriving their just powers from the consent of the governed, to promote individual life, liberty, and pursuit of happiness and collectively to promote the general welfare and secure the blessings of liberty.

Corporations are not people. The Constitution as written gives them no rights at all, and we should reject the Supreme Court's strained, if long standing, invention of such rights. Significantly, the Supreme Court denied corporations the right against self-incrimination over a century ago in *Hale v. Henckel*. While it is clear that the opposite holding would have threatened much of the regulation that makes a modern economy possible and desirable, it is hard to see that the absence of constitutional protection has harmed business corporations; they are perfectly capable, perhaps overly capable, of defending themselves without judicial protection.

Rights are for people, not their governors; constitutional rights should reflect basic principles, not momentary needs of economic regulation or judicial efforts to comfort the powerful and afflict the afflicted. It is past time to return to the principles of Footnote 4 and remove the Supreme Court from the business of protecting business corporations and their controlling parties from legislative reform.

Corporations Are Persons, Too.

KENT GREENFIELD*

INTRODUCTION

Perhaps the greatest gift a writer can receive is a careful read and good faith consideration of one's work by intelligent and knowledgeable scholars. New England Law | Boston and the *New England Law Review* have honored me by facilitating the gift of such consideration of my book *Corporations Are People Too (And They Should Act Like It)*[1] by four scholars of immense intelligence and knowledge. I have benefitted from the critiques, suggestions, and perspectives of Daniel Greenwood, Aisha Saad, Natasha Varyani, and Adam Winkler.[2] Greenwood and Winkler have produced work over their distinguished careers that has influenced me and hundreds of other scholars; I have been fortunate to call them friends for upwards of two decades. Varyani was generous and insightful with her analysis and comments during the symposium on my book and in her essay published here; I look forward to watching her career flourish for decades to come. Saad is a scholar whose thoughtfulness and depth of knowledge indicate great promise. As her career unfolds, she will be a credit to the institutions fortunate enough to be associated with her.

This short response will be organized as follows. I will walk through each of the essays and offer some reactions, elaborations, and, where

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[1] Kent Greenfield, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018) [hereinafter Greenfield, People].

[2] *See* Daniel J. H. Greenwood, *Corporations Are Organizations and Footnote 4, Too*, 54 New Eng. L. Rev. 49 (2019); Aisha Saad, *Pitching the Big Tent of Corporate Citizenship: Reconciling Kent Greenfield's Humanist Corporate Personhood with an Enlightened Shareholder Primacy*, 54 New Eng. L. Rev. 9 (2019); Natasha Varyani, *A New Purpose: Shifting Foundations That May Reprioritize the Needs of Corporate Stakeholders and Social Movements*, 54 New Eng. L. Rev. 1 (2019); Adam Winkler, *Corporate Personhood and Constitutional Rights for Corporations*, 54 New Eng. L. Rev. 23 (2019).

necessary, defenses to my work. I will then offer some more closing thoughts, in which I will attempt to place my book and these analyses into the context of a broader political and legal moment.

I. Natasha Varyani

Varyani's essay offers a perceptive and efficient summary of my book. She offers some reasons to be hopeful that we find ourselves in a historical moment in which there is greater openness to the notion that the obligations of corporations should be updated and expanded. As she relates, I argue in my book that three specific shocks occurred in the years 2008–2010 that opened the political conversation to requiring more from corporations: the global financial crisis of 2008–09, the 2010 Deepwater Oil spill, and the *Citizens United* ruling in 2010. As I describe in more length in my book, the promise of that moment was hindered in part by the political left's response to *Citizens United.* Instead of taking the perspective that the ruling offered a moment to expand corporations' obligations of "citizenship," the most prominent response was to attempt to cabin corporations' involvement in public life and to force corporations to focus even more on economic results and returns to shareholders. The world turned upside down for a bit; ideological conservatives argued that corporations should be about more than mere profit, and ideological progressives wanted corporations to be isolated politically, culturally, and legally.[3]

My sense of the current political moment is that we are returning to a more "normal" state, in which corporate law reform is welcomed and pushed by progressives. In the 2020 presidential campaign cycle, prominent Democratic candidates Elizabeth Warren and Bernie Sanders included corporate law reform among their policy centerpieces. These included proposals for national chartering as well as structural changes that would place employee representatives on boards of directors.[4] In addition, scholars, activists, and thinkers have been crafting a set of policy proposals that can be put in place by a Democratic president and Congress in the coming years. These proposals include reforms of corporate law and structure.[5]

Varyani suggests two additional reasons to be optimistic. The first is that

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[3] *See* Greenfield, People, *supra* note 1, at 54–58.

[4] *See Empowering Workers Through Accountable Capitalism,* Warren Democrats, https://perma.cc/3JA7-PN4U (last visited Apr. 3, 2021) (proposing that employees elect 40% of the board of large companies); *Corporate Accountability and Democracy,* BERNIE SANDERS, https://perma.cc/4H8Q-S56Y (last visited Apr. 3, 2021) (proposing that employees elect 45% of the board of large companies).

[5] *See, e.g., Our Recommendations,* CLEAN SLATE FOR WORKER POWER, https://perma.cc/9QWS-JPV7 (last visited Apr. 3, 2021) ("We recommend that workers choose representatives to serve on corporate boards and that corporations have a legal duty to consider how corporate decisions will affect workers, not just executives and shareholders.").

a "new generation of consumers have a completely novel relationship with information."[6] By "consumers," I understand her to mean both consumers of corporations' end products and services as well as consumers of corporate securities. Varyani argues that corporations will be made more accountable because of the availability and timeliness of information. "Advances in technology" make information "instantly available," which empowers the public to "demand accountability from corporations."[7] Rather than waiting days or even months for information, which in the past made for languid responses to any malfeasance or irresponsibility, modern day consumers and investors are the beneficiaries of greater availability of information, "resulting in more transparency in every aspect of our commercial lives."[8] Businesses are therefore held accountable "for each individual action." This "constant review of corporate activity" has, according to Varyani, "forced a change in behavior" on the part of the business community.[9]

Her second point is that the growth in the analytic and persuasive power of behavioral economics "upends" the conventional, narrow view of shareholder value.[10] Human beings' choices are more robust, sophisticated, and nuanced than the traditional view of economic rationality makes out. Corporate law's view of economic value has been expanded—"'value' may not always be measured in shareholder profits."[11]

Varyani raises two excellent points. Let me address the second one first. I agree that behavioral economics has matured into a valuable tool for those of us who argue for corporate law reform.[12] We should certainly expand our understanding of value to include more than mere short-term shareholder profit. What's more, the insights of behavioral economics can assist in responding to the counter-arguments often pressed against an expansive view of value. Believers in shareholder primacy push the notion that a solitary and narrow definition of value is essential in order to give corporate decision makers a clear decision matrix and to offer the clearest and most efficient way to monitor their decisions and behavior. In other words, shareholder primacists argue that a narrow view of value is important to

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[6] Varyani, *supra* note 2, at 6.

[7] Varyani, *supra* note 2, at 6.

[8] Varyani, *supra* note 2, at 6.

[9] Varyani, *supra* note 2, at 6.

[10] Varyani, *supra* note 2, at 6.

[11] Varyani, *supra* note 2, at 6.

[12] *See, e.g.*, Kent Greenfield, THE END OF CONTRACTARIANISM? BEHAVIORAL ECONOMICS AND THE LAW OF CORPORATIONS, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 520–25, (Eyal Zamir & Doron Teichman, eds., 2014); Kent Greenfield & Peter Kostant, *An Experimental Test of Fairness Under Agency and Profit Maximization Constraints (with Notes on Implications for Corporate Governance)*, 71 GEO. WASH. L. REV. 983 (2003); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002).

constrain the agency costs of corporate hierarchical decision making.[13] But, behavioral insights help show the weakness of that argument. As I have written about before, a narrow set of obligations and a concomitant narrowness and homogeneity of decision making structures make "groupthink" and other defects in decision making more prevalent. More pluralistic decision making structures within corporations will help decision makers look more toward the long term and will improve the quality of decisions.[14]

This point relates to my response to Varyani's first argument about the speed and transparency of information. There is no doubt that information flow is instantaneous now, and corporations and other businesses need to be ever aware of what information is circulating about them and be nimble in their responses. There is also no doubt that it is easier than ever to learn about the practices and policies of any particular company, and that activists, consumers, and investors can more quickly pressure companies to act responsibly toward their stakeholders.

I am less sanguine, however, about the net benefit of these effects. The speed of information leads to the growth of high-frequency trading, which fuels short-termism on the part of management.[15] Companies that engage in long-term strategies and are attentive to a range of stakeholders may suffer short-term drops in share price, for a variety of reasons. For example, long-term investments may require capital in the present making it unavailable for dividends; investments in employees' human capital will have long-term benefits but will increase production costs in the short term. These short-term costs will be evident to market watchers. The same transparency that enables community activists to protest a company that utilizes slave labor in its supply chain also enables capital market speculators to sell off securities of companies insufficiently attentive to shareholder gain in the short term. Even well-meaning, long-term oriented capital market investors may have a difficult time discerning when short-term dips in share price are an indicator of mismanagement (a reason to sell) or merely the embodiment of the short-

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[13] *See* George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107, 1129 (2008) ("Creating a new duty to stakeholders would cut off the possibility of curbing CEO autocracy."); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 610 (2006) (stating that instructing directors to serve multiple constituencies would produce mixed and possibly unstable signals, thus undermining their monitoring role); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 149 (2009) ("Shareholders are the appropriate group to monitor the board and correct errors because they are uniquely sensitive to the principal signal indicating a deviation of the board from its duty to the corporation: the market price of the corporation's stock.").

[14] *See* GREENFIELD, PEOPLE, *supra* note 1, at 214–23.

[15] *See* GREENFIELD, PEOPLE, *supra* note 1, at 218–22 (discussing high frequency trading and short-termism).

term costs of management's long-term focus (a reason to buy).[16] The speed of information, I fear, makes life more difficult for companies that are managed for the long-term and in a way that is attentive to the interests of all stakeholders.

Of course, we are not going back to a reality in which information circulates slowly. I hope Varyani is correct to describe this as having net positive effects. But the jury is still out.

II. Aisha I. Saad

Saad uses her review of my book to map three competing views of the corporation: conservative, liberal, and progressive. The "conservative corporation" is one that is driven by traditional notions of shareholder primacy explained and analyzed in a contractarian framework. In this view, a corporation's social involvement and attentiveness to non-shareholder stakeholders must be merely a tactic to drive shareholder value. If not, it is "suspect."[17] Social involvement and philanthropy must be driven by "rational self-interest" aimed at "generating social legitimacy for the company."[18] "Corporate social responsibility" is cast as "part of a firm's long-term financial planning" and works best when it aligns with and bolsters the company's "competitive context."[19]

The liberal corporation "attempts to meet dual commitments" to shareholder value and the "public good."[20] Managers owe a fiduciary duty to shareholders but are also "conscious of the ways that [a corporation's] public legitimacy affords it a social license to operate." Liberal corporations may exhibit "enlightened shareholder primacy" that looks to maximize "the firm's long-term value" by being attentive to both shareholder returns and the long-term benefits to the company of being a good "citizen with a public inclination."[21]

Saad associates my work as helping to define the "progressive corporation," an "artificial creation of the state comprised of many participating stakeholders."[22] The progressive firm is measured by its ability to "maximize value for all of a company's stakeholders and not just its shareholders." Instead of a focus on the output of a corporation—measured by shareholder value in a conservative view or firm value in a liberal view—a progressive analysis "is concerned with questions of power,

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[16] *See generally* Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 635–36 (2011).

[17] Saad, *supra* note 2, at 12.

[18] Saad, *supra* note 2, at 13.

[19] Saad, *supra* note 2, at 13 (quoting Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. (Dec 2002)).

[20] Saad, *supra* note 2, at 13.

[21] Saad, *supra* note 2, at 13.

[22] Saad, *supra* note 2, at 14.

representation, and governance within the corporate entity and in corporate decision-making." Saad perceptively reveals that my view of corporate "personhood" is not that of the self-interested, rational actor assumed in the conservative view of the corporation. Rather, I advocate "for a particular type of personhood" that could be labeled "humanist."

In evaluating the current state of corporate governance law and practice, Saad argues that "increasing investor concern" with environmental, social, and governance factors (hereinafter "ESG") in decision-making has "perforated" the "hard lines separating a shareholder primacy model from stakeholder governance."[23] She identifies two "notable" trends in the investment markets that she says bring these markets into closer alignment with a progressive view of corporations. First, investors are demanding more ESG disclosures and using such information as the basis for "engagement strategies and portfolio allocations."[24] Second, "socially responsible investors" have gained market share and are "undermining traditional assumptions about the 'reasonable investor.'" These trends have the effect of normalizing the attention of management on matters that would have been seen in earlier eras as immaterial or even inconsistent with a narrow view of shareholder primacy. Saad goes on to suggest that these trends will tend to collapse the difference between the "liberal" and "progressive" schools of thought within corporate scholarship. If so, the common ground between those two camps will "make available more evidence that can support shareholder and consumer litigation."[25]

Saad's paper is a helpful reminder to those of us in the progressive camp to be open to political and scholarly alliances that can advance the cause of a more democratic, accountable, and responsible corporate governance framework. I have failed at times to recognize the potential of such alliances, allowing my worries about the narrowness of the "enlightened shareholder primacy" model to lead me toward skepticism and away from openness. I do believe that even enlightened shareholder primacy will diverge from the interest of other corporate stakeholders in the long term.[26] Shareholder interests and stakeholder interests are not the same, even with an extended time horizon. Disclosure is not a panacea, and markets (even fully informed ones) cannot do all the work that must be done. But if the goal is progress—and I am a progressive—Saad's reminder is a valuable one.

III. Adam Winkler

Winkler's book *We the Corporations: How American Businesses Won Their*

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[23] Saad, *supra* note 2, at 14–18.

[24] Saad, *supra* note 2, at 18.

[25] Saad, *supra* note 2, at 20.

[26] *See* GREENFIELD, PEOPLE, *supra* note 1, at 194–99 (discussing differences between shareholder interests and stakeholder interests).

Civil Rights is a brilliant contribution to our collective understanding of corporate constitutional rights.[27] *We the Corporations* was rightly recognized as one of the best nonfiction books of its publication year,[28] and Winkler's depths of research and narrative facility made the book an essential read for anyone interested in the history of corporate rights. His insight that we should understand the expansion of corporate rights as akin to a civil rights struggle (for better or for worse) is itself a significant scholarly advancement.

Winkler's essay in response to my book builds on accounts he began in *We the Corporations.* He describes the ways the Court has analyzed corporate rights through the decades, whether by analogizing corporations as associations of shareholders, the property of shareholders, or a placeholder for shareholder interests and rights.[29] While not uniformly so, the Court has often seen protecting corporate rights as necessary to protect shareholders.[30] As Winkler points out, the Court often assumes the unity of interest between shareholders and the corporation, failing even to notice the fact that this unity is highly contested within corporate law. Moreover, the Court fails to notice that this unity (or lack thereof) can be outcome determinative in constitutional law cases.

Take as an example the 2018 *Masterpiece Cakeshop* case.[31] A bakery in Colorado refused to sell a wedding cake to a same-sex couple, which was illegal under state anti-discrimination law. The bakery defended against the state's legal action by saying that it had a First Amendment right to refuse to sell the cake. The bakery said the cake was speech and to force it to sell to a couple celebrating a union with which the bakery disagreed was akin to coercing school children to recite the Pledge of Allegiance.[32] In addition, the bakery raised a religious claim, arguing that to force it to sell the cake was a violation of the bakery's freedom of religious exercise.

The case raised fascinating questions arising under both the free speech clause and the free exercise clause. Is making and selling a wedding cake speech? Is it unconstitutional coercion under either speech or religious protections when anti-discrimination statutes require businesses to engage

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[27] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

[28] Winkler's book was a finalist for both the National Book Award, *The 2018 National Book Awards Finalists Announced*, NAT'L BOOK FOUND. (Oct. 2018), https://perma.cc/LZ4E-EM7B, and the National Book Critics Circle Award for Nonfiction, *2018 National Book Critics Circle Award*, NAT'L BOOK CRITICS CIRCLE, https://perma.cc/VA8T-CNVY (last visited Apr. 3, 2021).

[29] Winkler, *supra* note 2, at 101–03, 108, 110, 116, 118, 126.

[30] The first corporate rights case, Bank of the United States v. Deveaux, 9 U.S. 61 (1809), allowed corporations to invoke diversity jurisdiction under Article III, § 2, which grants such jurisdiction to "citizens." The Court ruled that corporations deserved such rights because the shareholders were "essentially, the parties in such a case." *Deveaux*, 9 U.S. at 87–88; *see* Winkler, *supra* note 2, at 108 (discussing *Deveaux*).

[31] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[32] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

in transactions they would prefer to avoid? Can businesses raise association claims when they are required to interact with a subset of customers they would prefer to exclude?

Embedded in all of these questions is the preliminary one that the Court largely ignored.[33] As Winkler points out, and as colleagues and I argued in an amicus brief filed in that case on behalf of corporate law professors,[34] the entire case depends on the presumption that the bakery can assert the speech and religious claims of its principal shareholder. In *Masterpiece*, it was the main shareholder and principal baker, a man by the name of Jack Phillips, who had the constitutional speech and religious interests allegedly burdened by the operation of the state anti-discrimination statute. And for his interests to be projected onto the corporation required the Court to ignore the distinction between shareholder and corporation. Indeed, such a unity is the *opposite* of corporate personhood, not its embodiment. As we argued in our brief to the Court:

> The constitutional claims of petitioner Masterpiece Cakeshop, Ltd., "a Colorado corporation," . . . depend on assumptions running contrary to longstanding and fundamental principles of corporate law, namely the separation of shareholders from the corporate entity. The constitutional interests asserted here by Petitioners are not the interests of the corporation, but rather the interests of one of the corporation's shareholders, Jack Phillips, who demands that the Court project his religious beliefs and political views onto the company.[35]

Jack Phillips chose to use the corporate form for the bakery to separate himself and his personal assets from the business. He wanted the business to be its own legal person, with its own legal rights and obligations. But when his constitutional interests were allegedly restricted by way of a state regulation not of him but of the business, he asserted that for purposes of the First Amendment the Court could ignore the corporate personality of the bakery and assume that he and the business were the same. But corporate law assumes—is indeed based on—the differences between the corporation and its shareholders. In the best line I have ever written in a brief, Phillips "cannot have [his] cake and eat it too."[36]

Winkler agrees with this assessment of *Masterpiece* and of other cases, arguing persuasively that a focus on corporate personhood—that is,

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[33] The exception being a line of questioning by Justice Sonia Sotomayor, on rebuttal. *See* Tr. of Oral Arg. at 96, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, https://perma.cc/3YV3-XAW9 (U.S. Dec. 5, 2017) (No. 16-111) (Sotomayor: "Here the seller of the cakes is not Mr. Phillips, it's Masterpiece Corporation. Does it -- in your arguments, who controls the expression here, the corporation or its shareholders?").

[34] Brief of Amici Curiae Corporate Law Professors at 1, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, https://perma.cc/A93A-CCB5 (Oct. 30, 2017) (No. 16-111).

[35] *Id.*

[36] *Id.* at 11.

corporate separateness from shareholders—will reduce the number of valid constitutional claims that can be brought by corporate claimants. "When the Court has embraced corporate personhood—saying that corporations are legal persons who stand separate and apart from their members—the result has often been to limit or restrict the rights of corporations."[37] The number will not be zero—like me, Winkler seems to believe corporations should be able to bring some constitutional claims some of the time. But Winkler's expertise in both corporate governance and constitutional law leads him to recognize that assumptions about corporations that are contested within corporate law should not be imported unquestioningly into constitutional law. On this he and I wholeheartedly agree.

IV. Daniel J.H. Greenwood

Greenwood has long been one of the most penetrating critics of the conventional view of corporations and their governance. Our views are aligned in many ways, and he has persuaded me of a number of his arguments through the years. I cite him persistently and assign his work to my students. Because of the alignment of much of our views and the similarity of names, our work is sometimes confused as that of the other. (I am certainly less offended than he has a right to be when that occurs.)

In his current essay *Corporations Are Organizations and Footnote 4, Too*, Greenwood is powerful in his critique of the current state of corporate governance and influence in the United States.[38] I agree with much of that critique.

Because of the level of our agreement, our disagreements are illuminating. And we disagree about a central issue in my book: the best metaphor for the corporate entity, and the implications for whether corporations can be claimants of constitutional rights. Greenwood takes issue with my title and my defense of some constitutional rights for corporations, instead arguing that the most instructive metaphor for the corporation is a public organization such as a city or town. Instead of holders of rights, Greenwood argues, corporations should be holders of constitutional obligations. They are much more akin to public actors than private ones, and they should have no greater rights to assert, for example, constitutional free speech interests than a local government can assert those same interests against a government hierarchically superior to it. Because of the nature of corporate governance in the United States, to bestow constitutional rights on corporations is to empower those corporations to oppress and marginalize their employees, the communities where they operate, and other stakeholders. This is the opposite of what constitutional rights should be used for, he argues. When corporations assert constitutional

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[37] Winkler, *supra* note 2, at 42.

[38] Greenwood, *supra* note 2, at 51-52.

protections for their "lobbying, politicking, campaign contributions," and other activities they are not "protecting freedom but restraining it, eliminating tools for ensuring that corporations, and democracy itself, work for us rather than against us."[39]

The intellectual history of corporate law in the United States is a triptych of a journey through various metaphors.[40] Corporations are property, owned by shareholders. They are trusts. Or they are associations, teams, contracts, persons, or government entities.

I think it is fair to say that most scholars who use metaphors to make arguments about corporations do so with the metaphor as the conclusion rather than the premise. Those of us who study the corporation understand it as a unique legal tool used: (1) to gather capital, labor, and other inputs; (2) to marshal them to create goods or services for a profit; while (3) insulating its various investors from personal liability for the activities and decisions of the corporation. Like the ancient Buddhist parable of the elephant being described by the blind men, different aspects of the corporation appear like other things depending on what you focus on. But few of us use the metaphors as the crucible of the argument. In my book, for example, I do not argue that corporations are best seen as people (or persons) and therefore they should have rights. Instead, I make the argument that corporations should have (some) rights (some of the time), and thus can be thought of as legal persons (some of the time).

Greenwood's preferred metaphor of corporation as government is also a conclusion rather than a premise. Corporations should not be claimants of rights but holders of obligations. The rights they receive should come by way of legislative grace; the obligations they hold should come by way of structural, rules-of-the-game mandates. They are thus not persons who can assert rights claims but government entities that must respect claims of rights.

It does not really matter, then, whether my book uses the term "people" or "persons" to describe corporations.[41] The terms are rhetorical tools used to describe my conclusion that it is proper for corporations to be able to assert some constitutional rights. Nor does it matter in responding to Greenwood's argument that descriptively corporations are not in fact government entities. What matters is whether these entities should be able to claim constitutional rights.

And notice here that I do not need to answer Greenwood by arguing

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[39] Greenwood, *supra* note 2, at 89.

[40] *See, e.g.*, Margaret Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy, in* CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak, eds., 2017); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 779 (2002); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1999).

[41] *See* Greenwood, *supra* note 2, at 52 (distinguishing "persons" from "people").

that corporate constitutional rights are coextensive to the rights held by natural person citizens. I understand Greenwood to argue that corporations should not be able to claim any constitutional right at all, in any context. He might retreat to an argument that corporations do indeed depend on some rights, but that those rights should be the product of legislative grace. But that is not what a right is; rights are prior and superior to legislative grace or lack thereof. This is an honest and real disagreement.

To answer Greenwood, I do not have to argue that the current constitutional framework vis-à-vis corporations is the best. My book does not defend the status quo, and I do not wish to do so. I merely have to argue that the best constitutional understanding is not one that gives zero rights to corporate entities.

The central project of my book is to describe why I believe corporations should indeed receive some rights. Remember that rights are limits on government power.[42] As I say in the book, "A right is simply a way to describe a limitation on government behavior."[43] Those who oppose rights—whether for natural persons, associations of persons, or corporate entities—are in effect arguing for an increase in government power. To argue that corporations should have no rights is to argue that government power over corporations should have no constitutional check. "If corporations have no rights, then governmental power in connection with corporations is at its maximum. That power can be abused, and corporate personhood is a necessary bulwark."[44]

As I argue in the book, the notion that corporate entities have no constitutional protections is extremely difficult to maintain. Corporate assets can be seized arbitrarily by local sheriffs? Let's hope not. President Trump could have ordered the New York Times to cease and desist from publishing an editorial about his Russian ties? Let's hope not. A state can regulate companies whose shareholders are Black differently from companies whose shareholders are White? Let's hope not. Corporations can be denied a jury trial or other procedural due process protections? Let's hope not.

It does not seem that Greenwood would deny corporate rights to non-profit corporate entities. The non-profit corporation I helped create almost twenty years ago, the Forum for Academic and Institutional Rights, sued the Pentagon over issues of LGBTQ rights. We lost in the Supreme Court, but on the merits and not because the corporation had no standing to bring a constitutional claim.[45] The Boy Scouts are a corporate entity,[46] as are Planned

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[42] *See* Varyani, *supra* note 2, at 3 (noting my argument that "if there exists an opposite of a constitutional right . . . it is governmental power").

[43] GREENFIELD, PEOPLE, *supra* note 1, at 65.

[44] GREENFIELD, PEOPLE, *supra* note 1, at 66.

[45] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006); GREENFIELD, PEOPLE, *supra* note 1, at 70.

[46] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

Parenthood[47] and the NAACP.[48] So is Boston College, my employer. Some of these are traditional associations; some are not. But I do not hear Greenwood saying that the Constitution does not protect those entities.

So for Greenwood's argument to work, he cannot depend on the notion that no corporations have rights. Instead he has to persuade us that non-profit corporations can have rights but for-profit corporations should not. That is, he has to persuade us that government power should be constrained vis-à-vis Boston College but not against the Boston Globe. That is a very difficult argument to make. There may be reasons why the nature of a specific corporation should affect the constitutional calculus; as I say in the book, one key question in determining which rights attach and which rights do not is what the purpose of the entity is. But the putative lack of constitutional rights cannot be based on the corporate nature of the entity, that it is not a natural human being, that it is not a true association, or that it is a creature of the state. All of those characteristics can be true of Planned Parenthood, Boston College, or the Southern Poverty Law Center.

Instead, Greenwood must argue that those corporations organized to pursue profit do not deserve constitutional protection because of one of three reasons. First, he could say that for-profit corporations do not need such rights, even if non-profits do. Second, he could say it is inconsistent with the purpose and text of the constitution to give profit-making corporations constitutional standing. Or third, he could say that giving them rights gives them too much power.

Notice that these are the three main themes of my book's analysis. I propose that "the answer to that question [of which constitutional rights corporations can claim] turns on both the purpose of the corporate form and the nature of the right claimed."[49] I say that "[a] first cut on the constitutional analysis should begin with the presumption that corporations should receive the rights necessarily incidental to serving [their] economic purpose."[50] And "we need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations."[51] And as to the theme of corporate power, I propose that the best way to address the anti-democratic nature of corporations is to change corporate governance law to make corporations themselves more democratic.

As for the constitutional analysis, I do not believe that either the nature of for-profit entities or the purpose of the Constitution itself requires that the bundle of corporate constitutional rights be a null set. I think it is quite easy, in fact, to argue that the nature of corporations requires them to receive rights that are necessary for them to fulfill their role as economic engines—

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[47] *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845 (1992).

[48] *See* NAACP v. Alabama, 357 U.S. 449, 451 (1958).

[49] GREENFIELD, PEOPLE, *supra* note 1, at 19.

[50] GREENFIELD, PEOPLE, *supra* note 1, at 62.

[51] GREENFIELD, PEOPLE, *supra* note 1, at 103.

rights such as procedural due process protections or rights to be free of uncompensated takings. I also believe it is straightforward and persuasive to say that some rights should apply to corporations because of the nature of the right. For example, the Fourth Amendment's limits on warrantless and unreasonable searches constrain the arbitrary power of police departments. It is important that police officers are so constrained whether it is a house or a business they seek to enter and search.

There is a set of rights that are more difficult to analyze, including substantive due process rights, equal protection rights, religious freedom rights, and free speech rights. In the book, I step through these rights and propose a way to think about them in the corporate context. My analysis leads to different outcomes and a narrower set of protections than those that flow from current doctrine. For example, I believe that restrictions on campaign expenditures should be upheld under First Amendment doctrine, and I think the arguments in favor of upholding restrictions on corporate money are even more persuasive than those in favor of upholding restrictions on individual spending.[52]

But my arguments do *not* result in a null set of rights claims even among central areas of constitutional law such as free speech, due process, religion, and equal protection. I need not rehash my analysis here. I will hasten to point out again, however, that to argue that for-profit corporations cannot claim *any* such rights is exceedingly difficult to maintain. For example, under the three most prominent theories of free speech protection, good arguments exist as to why corporate entities should be able to claim at least some free speech protections. That is, whether you believe the First Amendment is best explained by a marketplace of ideas theory, the public discourse theory, or the autonomy theory, there are reasons to protect corporate speech at least some of the time. The first two theories prioritize and protect the content of ideas, regardless of source. The last theory focuses on the primacy of the autonomy of human speakers, and under that theory corporations are not valued as speakers because they are not actual humans. But the autonomy theory also protects human *hearers*, since humans self-define not only by speaking but by experiencing the communication of others, including corporate speakers. So even in the autonomy theory, there is reason to offer some protections to corporate speakers because of the value of that speech to human hearers. Thus, a carve-out of corporate speakers as completely beyond the reach of free speech protections does not work easily with any of the theories. I spent an entire chapter of my book on this.[53]

In practice, too, the rights of for-profit corporations are important. The New York Times is a for-profit corporate entity. Americans owe the New York Times and other journalistic outlets a gigantic debt of gratitude for

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[52] *See* GREENFIELD, PEOPLE, *supra* note 1, at 168–70.

[53] *See generally* GREENFIELD, PEOPLE, *supra* note 1, at ch. 5.

being sentinels and truth-tellers during the four years of incompetence, corruption, lawlessness, cruelty, and bigotry of the Trump administration. It is not an overstatement to say that democracy itself depended on the constitutional rights of for-profit entities over those four years.[54] The promise and project of the First Amendment is, at least in part, to protect against government tyranny by allowing for dissent and resistance. Corporate voices were an essential part of dissent and resistance during the Trump years. I am not claiming that all such corporate voices were positive forces, nor am I claiming that all corporate voices among the resistance participated for altruistic rather than selfish purposes. But to answer Greenwood, my claim can be more modest: that some corporate voices, some of the time, have in fact created the very kind of public good that the First Amendment facilitates, protects, and nurtures.

It is not an answer to the New York Times example to say, as some have,[55] that newspapers are protected by the First Amendment's press clause rather than the speech clause. The Supreme Court has not made distinctions between the protections arising from the two clauses, and the line-drawing necessary to make such distinctions would be exceedingly difficult. (When General Electric was the parent of NBC, or when Westinghouse was the parent of CBS, were they protected by the press clause? Is a blogger protected? Someone who posts on Facebook?)

But more fundamentally for our purposes, Greenwood's arguments against corporate rights do not pick and choose among the rights corporations can claim and which they cannot. That is *my* project. Greenwood's is to deny all corporate rights, whether they arise under the speech clause, the press clause, the takings clause, or the due process clause. And in my view, a denial of all rights to corporate entities is inconsistent with the purpose of corporations—to provide an engine for economic creation—and the purpose of constitutional rights—to limit the arbitrary power of government.

I agree with Greenwood that the dangers of corporate power and influence are real. I also agree that current constitutional doctrine around corporate speech generally, and corporate political spending more specifically, is significantly flawed. But these doctrinal defects do not require that we denude corporations of any and all rights. We just need a Supreme Court that is knowledgeable of the ways corporations really work and aware of the dangers corporate powers pose to our democracy. And we need corporate governance reform to structure and regulate corporations to act as if they have multiple obligations to a variety of stakeholders. "The best way

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[54] *See* Varyani, *supra* note 2, at 4 (stating if newspapers "had not been allowed to assert the constitutional rights related to personhood, then government intervention would have led to a result . . . that set the entire democratic framework of the United States on a different course").

[55] *See, e.g., The People's Rights Amendment Protects Freedom of the Press*, FREE SPEECH FOR PEOPLE, https://perma.cc/L4EQ-638L (last visited Apr. 3, 2021).

to constrain corporations is to require them to sign onto a more robust social contract and govern themselves more pluralistically—mechanisms designed to mimic the traits of human personhood within the corporate form."[56]

CONCLUSION

One cannot discuss corporate law and corporate rights removed from the historical and political context. For example, as I write in my book, it is no surprise that the *Lochner* era in constitutional law coincided with the *Dodge v. Ford* era in corporate law.[57] In an era of social darwinism, libertarianism, and robber barons, it was natural to see corporations and businesses as private entities, organized for the benefit of their shareholder-owners. They could not be conscripted to provide the public good of safe and dignified employment (*Lochner*) nor could their resources be marshaled to benefit employees and communities at the expense of the wealthy (*Dodge*). Similarly, when the Great Depression revealed the dangers of unbridled and unregulated markets, constitutional law expanded the ability of government to regulate business[58] and corporate law increasingly showed deference to more magnanimous corporate policies and practices.[59]

We are now in a moment of historical turmoil, and it is impossible to discuss the rights and obligations of corporations without reference to that. As Americans, we have suffered through four years of a lawless, corrupt, cruel, and bigoted presidency. Even though Trump lost the presidency, it remains unclear whether the nation has truly repudiated that presidency. If not, corporate law and policy will be the least of our worries. If so, there is reason to be hopeful that reforms of corporate governance and an expansion of the social contract of corporations will be important parts of coming political and legal changes. In such an era, the Trump presidency will be seen as the last gasp of an outdated political framework that prioritized existing hierarchies of privilege and domination. A new era can take hold that empowers working-class people, dismantles racist and sexist systems of oppression, protects public health, nurtures democracy, and builds an economy that works for all Americans and not just the richest of the rich.

In such an era, the perspectives, intelligence, and wisdom of scholars such as Daniel Greenwood, Aisha Saad, Natasha Varyani, and Adam Winkler will be invaluable. I will be honored to join them in an effort to build a better, fairer, and more vibrant America.

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[56] GREENFIELD, PEOPLE *supra* note 1, at 27.

[57] GREENFIELD, PEOPLE, *supra* note 1, at 31–38.

[58] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390–94 (1937).

[59] *See, e.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 584–85, 589–90 (N.J. 1953).

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Massachusetts Workers Left in the Dark After the SJC's Recent Decision in *Camargo's Case*

Pietro Conte[*]

INTRODUCTION

The recent decision in *Ives Camargo's Case* from the Massachusetts Supreme Judicial Court (SJC) is yet another example of the issue of employee misclassification, particularly in the field of workers' compensation, which continues to plague the legal field. This recent decision makes it evident that change must be made, as the need for uniformity in employment classification statutes is greater than ever. Workers' compensation was designed "to make sure that workers are protected by insurance if they are injured on the job or contract a work-related illness," but it also protects employers from unlimited exposure to liability for workplace illnesses or injuries.[1] Workers' compensation insurance pays workers for reasonable and necessary medical treatment related to the injury or illness, as well as lost wages.[2] Furthermore, workers' compensation benefits pay partial compensation for "lost wages after the first five calendar days of total or partial disability."[3]

Given the importance of these benefits for workers throughout the Commonwealth of Massachusetts, and nationwide, it is crucial that employees have a sense of predictability when it comes to their classification as either an employee or an independent contractor, so that they may understand the rights they are entitled to if injured on the job. For example, in Massachusetts, some workers are deemed employees for the purposes of

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[*] J.D., New England Law | Boston (2020); B.A., Boston College, 2017. I would like to thank my family and close friends for their continued love and support of me, not just in writing this Case Comment, but also throughout the entirety of my time in law school. I dedicate this piece to my father, Judge Alfredo T. Conte of the Rhode Island Workers' Compensation Court.

[1] Massachusetts Dept. of Indus. Accidents, *Massachusetts Workers' Compensation Guide for Injured Workers*, MASS.GOV, https://perma.cc/423A-W4T6 (last visited May 14, 2021).

[2] *Id.*

[3] *Id.*

minimum wage or overtime pay, but not for the purpose of workers' compensation.[4] Because of these inconsistencies, "workers struggle to understand and assert their rights," causing more confusion than ever in the classification of employees.[5]

This Case Comment will analyze the recent decision in *Camargo's Case*, in which the SJC declined to adopt the claimant's proposed standard for determining employment status in the context of workers' compensation. Part I of this Comment will examine the relevant statutes and cases throughout Massachusetts that govern worker classification, both in workers' compensation and in other areas of employment benefits. Part I will also give a brief description of the recent developments in the news that relate to the issue of worker misclassification, both in Massachusetts and across the country. Part II will provide an in-depth analysis of the SJC's recent decision in *Camargo's Case*. Part III of this Comment will analyze the benefits that the claimant's proposed standard provides, and will advocate for a clearer and more uniform standard. Part IV of this Comment will analyze changes the SJC could have made to the standard it chose to follow.

I. Background

A. *Relevant Massachusetts Statutes*

1. Mass. Gen. Laws ch. 152, § 1(4), the Workers' Compensation Statute

Mass. Gen. Laws ch. 152 ("Massachusetts Workers' Compensation Statute") broadly governs the area of workers' compensation throughout the Commonwealth of Massachusetts.[6] A person must be classified as an employee under Mass. Gen. Laws ch. 152, §1(4) to receive workers' compensation benefits from his employer.[7] According to Mass. Gen. Laws ch. 152, § 1(4), an employee is defined as a "person in the service of another under any contract of hire, express or implied, oral or written . . . ."[8] While numerous exceptions apply to this basic definition, the exceptions are rarely applicable.[9]

Most determinations as to whether or not a worker in Massachusetts is an employee or an independent contractor result from an application of the twelve-factor *MacTavish-Whitman* test, discussed later in this Comment.[10]

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[4] Ives Camargo's Case, 479 Mass. 492, 504 (2018).

[5] *Id.*

[6] *See* MASS. GEN. LAWS ANN. ch. 152, § 1 (West 2011).

[7] *Id.* § 1(4).

[8] *Id.*

[9] *See id.* § 1.

[10] *See infra* Part I(B)(1).

Ultimately, classification as an employee or independent contractor becomes important in the context of Mass. Gen. Laws ch. 152, § 26, which discusses injuries arising out of and in the course of employment.[11] Section 26 states that only an employee, and not an independent contractor, is entitled to compensation for a personal injury "arising out of and in the course of his employment."[12] Thus, only a worker classified as an employee is entitled to workers compensation benefits under Mass. Gen. Laws ch. 152, § 26, assuming he is injured in the course of his employment; a worker who is ultimately classified as an independent contractor is not entitled to this compensation.[13]

2. Mass. Gen. Laws ch. 149, § 148(B), the Independent Contractor Statute

Massachusetts does not have one single uniform test to classify workers.[14] Mass. Gen. Laws ch. 149, § 148(B) ("Massachusetts Independent Contractor Statute") sets out a three-prong test, known as the "ABC" test, to determine whether a worker is an independent contractor or employee.[15] The Massachusetts Independent Contractor Statute states:

> (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless: (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 (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.[16]

The three-prong ABC test is used primarily to guarantee workers minimum wage, overtime pay, and other benefits associated with being classified as an employee. It is not currently used in the context of classifying workers for the purpose of workers' compensation benefits.[17]

Whether the ABC test set out in the Massachusetts Independent Contractor Statute applies in the context of workers' compensation benefits

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[11] *See* MASS. GEN. LAWS ANN. ch. 152, § 26.

[12] *Id.*

[13] *See id.*

[14] *See* MASS. GEN. LAWS ANN. ch. 149, § 148(B)(a) (West 2004); *see also* Whitman's Case, 80 Mass. App. Ct. 348, 353 (2011) (describing the twelve-factor test used for determining employee status in the context of workers' compensation).

[15] MASS. GEN. LAWS ANN. ch. 149, § 148(B)(a).

[16] *Id.*

[17] Ives Camargo's Case, 479 Mass. 492, 504 (2018).

was the subject of dispute in the *Ives Camargo's Case*.[18] This issue is particularly important because the section of the Massachusetts Independent Contractor Statute that outlines the ABC test specifically states the test applies to Mass. Gen. Laws ch. 149, which generally governs labor disputes, but does not explicitly apply to Mass. Gen. Laws ch. 152, the Workers' Compensation Statute in Massachusetts.[19] However, the Massachusetts Independent Contractor Statute does reference the Workers' Compensation Statute in passing.[20] For example, Mass. Gen. Laws ch. 149, §148(B)(d) states:

> Whoever fails to properly classify an individual as an employee according to this section and in so doing *violates chapter 152* shall be punished as provided in section 14 of said *chapter 152* and shall be subject to all of the civil remedies, including disbarment, provided in section 27C of this chapter.[21]

This reference in the Massachusetts Independent Contractor Statute becomes relevant in determining its applicability to the Massachusetts Workers' Compensation Statute.[22]

B. *Relevant Precedent*

1. *Whitman's Case*

Whitman's Case[23] is one of the many cases in which courts use a twelve-factor common law test to determine the classification of workers for the purposes of workers' compensation within the Commonwealth.[24] The Court in *Whitman's Case* ruled that the plaintiff was to be considered an independent contractor for the purposes of workers' compensation, reasoning that the plaintiff's "skill and freedom from over-the-shoulder supervision" in "the performance of his work" made it such that the worker should not be classified as an employee, but rather, as an independent contractor.[25] The Court stated that the administrative law judge below used the proper criteria for determining the plaintiff's status.[26] The Court cited *MacTavish v. O'Connor Lumber Co.*, which listed the twelve factors it believed

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[18] *See id.* at 492.

[19] MASS. GEN. LAWS ANN. ch. 149, § 148(B)(a).

[20] *See id.*

[21] *Id.* (emphasis added).

[22] *See Camargo's Case*, 479 Mass. at 492 (discussing the issue of whether or not the Massachusetts Independent Contractor Statute applies in the context of workers' compensation).

[23] *See* Whitman's Case, 80 Mass. App. Ct. 348, 353 (2011).

[24] *Id.*

[25] *Id.*

[26] *Id.*

to be applicable in determining whether a worker is an employee or independent contractor.[27] The Court stated:

> The administrative law judge applied the following twelve criteria: (1) the extent of control exercised by the employer over the details of the work; (2) whether the worker was engaged in a distinct occupation or business; (3) whether, in the locality, the type of work usually proceeded under the direction of an employer or by an unsupervised specialist; (4) the skill required for the occupation; (5) whether the employer or the worker supplied the tools and place of work; (6) the length of time of the working relationship; (7) the method of payment; (8) whether the work was part of the regular business of the employer; (9) whether the parties believed that they were creating an employment relationship; (10) whether the alleged employer constituted a business; (11) the tax treatment applied to payment; and (12) the presence of the right to terminate the relationship without liability, as opposed to the worker's right to complete the project for which he was hired.[28]

These twelve factors are now referred to as the "*MacTavish-Whitman*" factors, and are used throughout the Commonwealth to determine a worker's employment status for the purpose of the Massachusetts Workers' Compensation Statute.[29]

2. *Connolly's Case* and *Somers v. Converged Access*

Connolly's Case is relevant in part because it states that an employee's claims of disability requires that the evidentiary burden be on the employee in the context of workers' compensation.[30] The burden of proof issue becomes particularly important when it comes to worker misclassification because the presumption that a claimant is an employee disappears in the context of workers' compensation.[31] However, in the context of minimum wage and overtime laws, "an individual who performs services is presumed to be an employee unless the employer can prove that he or she is in fact an independent contractor."[32]

Furthermore, in *Somers v. Converged Access*, no longer is the onus on the prospective employee to satisfy the burden of proof. Rather, the employer, in the context of minimum wage and overtime laws, must prove by a

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[27] *Id.*

[28] *Id. See generally* MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992) (describing the twelve factors used to determine employee status in the context of workers' compensation).

[29] *See* Whitman's Case, 80 Mass. App. Ct. 348, 353 (2011).

[30] Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996).

[31] Ives Camargo's Case, 479 Mass. 492, 503 (2018).

[32] *Id.*

preponderance of the evidence that the worker should be deemed an independent contractor rather than an employee.[33] The Court in *Somers* declared that an employer can only meet its burden in the context of minimum wage and overtime laws by satisfying the three-prong test set out in the Massachusetts Independent Contractor Statute.[34]

3. *Terry v. Sapphire Gentlemen's Club*

It is not uncommon for states to employ multiple tests for determining a worker's status as either an employee or an independent contractor.[35] *Terry v. Sapphire Gentlemen's Club*[36] specifically lays out the different purposes for the different tests.[37] There, the Supreme Court of Nevada stated:

> [T]he underlying purpose of . . . workers' compensation laws—to wit, to limit "private controversy and litigation between employer and employee" and to give workers the right to compensation regardless of fault—is distinct from that of the statutory minimum wage scheme, which seeks to safeguard the "health and welfare of persons required to earn their livings by their own endeavors."[38]

The Court noted that Nevada and other states utilize these different tests for employee classification so as to be conscious of effectuating the different goals of each area of law.[39] In so deciding, the Court reasoned while these different goals should "not be entirely discounted," it must be recognized that these different statutes and tests were enacted with different goals in mind.[40]

C. *Worker Misclassification in Other Jurisdictions Throughout the Country*

Worker misclassification, and confusion by workers and employers alike about their rights and duties, is a problem not limited to

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[33] *See* Somers v. Converged Access, Inc., 454 Mass. 582, 589 (2009).

[34] *See id.*; *see also* MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2004).

[35] *See Camargo's Case*, 479 Mass. at 501.

[36] *See generally* Terry v. Sapphire Gentlemen's Club, 336 P.3d 951 (Nev. 2014) (describing the different goals of minimum wage laws and workers' compensation laws).

[37] *See generally id.* (describing the unique goals of workers' compensation laws).

[38] *Id.* at 957 (internal citations omitted) (quoting Pershing Quicksilver Co. v. Thiers, 152 P.2d 432, 436 (1944)).

[39] *Id.*

[40] *Id.* (quoting Commonwealth v. Stuber, 822 A.2d 870, 872–73 (2003)).

Massachusetts.[41] California, New Jersey, and Illinois, among other states, have begun to adopt new tests for worker classification aimed at easing the burden on workers and businesses.[42] Recently, for example, the Supreme Court of California adopted a new "ABC" test, similar to that within the Massachusetts Independent Contractor Statute.[43] The California ABC test requires an employer to show evidence sufficient to meet the three specified criteria before classifying a worker as an independent contractor rather than an employee.[44] In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, the Court ruled that Dynamex improperly classified its workers as independent contractors rather than employees.[45] Many predict that this decision will lead to changes not only in California, but nationwide.[46]

California's adoption of the ABC test for classifying workers is on the rise, and it is crucial in the fight by workers to secure the rights they deserve that accompany proper classification.[47] For now, the new ABC test adopted in California is only applied in the context of minimum wage laws and other regulations regarding basic working conditions, but not to workers' compensation.[48] As such, California, like Massachusetts, has left open the possibility of a business classifying an employee in different ways for different purposes.[49]

Recent developments in battles over worker misclassification have led

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[41] *See generally* Ken Goodwin, *How Recent Changes in the Independent Contractors Law Can Impact Workers Comp in California*, FORBES (May 30, 2018, 9:00 AM), https://perma.cc/4FZZ-QTAJ (describing recent changes in California's worker classification laws, including the adoption of the ABC test).

[42] *Id.*

[43] *Id. See generally* Termination of Employment Bulletin, *California: State Supreme Court Adopts New Test for Whether Workers Are Employees or Independent Contractors*, 34 No. 6. TERM. OF EMP'T BULLETIN NL 8, June 2018.

[44] Mike Kappel, *The End of an Era? How the ABC Test Could Affect Your Use of Independent Contractors*, FORBES (Aug. 8, 2018, 9:10 AM), https://perma.cc/TN69-QKCX; *see* MASS. GEN. LAWS ANN. ch. 149, § 148(B)(a) (West 2004) (describing the three criteria necessary to be considered an independent contractor).

[45] Kappel, *supra* note 44.

[46] Kappel, *supra* note 44. *See generally* Daniel Wiessner, *GrubHub Case Could Be Barometer for New Rules on Independent Contractors*, REUTERS (May 6, 2018, 7:12 AM), https://perma.cc/MC8S-9Q39; Ins. Journal, *Suit: Uber Saved $500M a Year by Misclassifying California Drivers as Independent Contractors*, INS. JOURNAL (Sept. 12, 2018), https://perma.cc/5CH9-W736.

[47] Kappel, *supra* note 44.

[48] Maura Dolan & Andrew Khouri, *California's Top Court Makes It More Difficult for Employers to Classify Workers as Independent Contractors*, L.A. TIMES (Apr. 30, 2018, 7:15 PM), https://perma.cc/N765-3HKN.

[49] *Id.*

to changes nationwide.[50] Massachusetts is no stranger to the battle of worker misclassification, as workers and businesses quarrel over classifications as independent contractors rather than employees.[51] Most recently, this came in the form of a Massachusetts Supreme Judicial Court decision regarding Ives Camargo, and her status as either an employee or an independent contractor.[52] The issue presented in her case was which of these standards to apply to determine her status as an employee or independent contractor.[53] According to Audrey Richardson, an Attorney for Greater Boston Legal Services, the case was "a question of what standard applies across the board and whether the standard is clear and easily understood by workers and employers and insurers alike."[54] Attorney Richardson was not the only one calling for a more uniform standard.[55] Ralph Gants, former Chief Justice of the Massachusetts Supreme Judicial Court, stated that the laws regarding the classification of workers results in "confusion and uncertainty." [56] However, Chief Justice Gants decided this was a question best left to the Legislature.[57] Unfortunately for the Massachusetts worker, there are still multiple standards for determining whether one is an employee or an independent contractor, depending on the context and the issue at hand.[58]

II. Court's Opinion

A. *Factual Background of* Ives Camargo's Case

Since 2001, Ives Camargo ("Camargo") has worked as a newspaper delivery agent for Publishers Circulation Fulfillment, Inc. ("PCF").[59] PCF is known for providing home delivery services for newspaper publishers, through the use of delivery agents such as Camargo.[60] PCF does not publish its own newspapers, but rather, is a "middleman to deliver published newspapers." [61] The contract signed by PCF and Camargo identified

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[50] *See generally* Daniel L. Schwartz & Anna Matsuo, *New Jersey Joins a String of States Cracking Down on Employee Misclassification*, MONDAQ (July 5, 2018), https://perma.cc/TTH5-GLYP.

[51] *See* Ives Camargo's Case, 479 Mass. 492, 493 (2018).

[52] Shira Schoenberg, *Massachusetts High Court Case Considers Workers' Compensation for Newspaper Deliverers*, MASSLIVE (last updated Jan. 30, 2019), https://perma.cc/W85N-36NJ.

[53] *Id.*

[54] *Id.*

[55] *See* Shira Schoenberg, *SJC Justices Urge Lawmakers to Update Independent Contractor Law*, MASSLIVE (last updated Jan. 30, 2019), https://perma.cc/HU77-3Y85.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Ives Camargo's Case, 479 Mass. 492, 493 (2018).

[60] *Id.*

[61] *Id.*

Camargo as an independent contractor, rather than an employee.[62]

As a part of Camargo's contract, PCF provided Camargo with delivery routes and a list of customers.[63] However, Camargo was able to make her deliveries at any time and in any order, so long as they were completed by 6 A.M. on weekdays and 8 A.M. on weekends.[64] PCF also required that the newspapers be delivered dry and undamaged. [65] Because of this requirement, PCF offered its agents the option to purchase bags to wrap the newspapers. [66] Camargo chose to exercise this option, but she was not required to do so. [67] She was even permitted to hire assistants and subcontract her deliveries, which she did choose to do on occasion.[68]

Per her contract with PCF, Camargo was not excluded from working as a delivery agent for other businesses.[69] For twelve years, Camargo used her own vehicle to make her deliveries.[70] She also purchased and collected independent contractor work insurance, in addition to filing her taxes as an independent contractor.[71] Camargo was paid for each newspaper delivered, as well as a weekly stipend that was paid when she chose to redeliver newspapers to customers who failed to receive their scheduled delivery.[72]

On September 26, 2010, Camargo was injured while loading newspapers from PCF into her vehicle using a hand carriage.[73] Camargo suffered injuries to her right knee and right hand.[74] She reported the injuries, but did not receive medical treatment.[75] On January 7, 2011, Camargo slipped on ice while delivering newspapers and injured her right leg.[76] As a result of her second injury, Camargo was hospitalized and underwent surgery on her right knee and right hand.[77]

Camargo was fired in the summer of 2012 and filed an initial claim for

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Camargo's Case*, 479 Mass. at 493.

66 *Id.* at 494.

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.* at 493.

71 *Camargo's Case*, 479 Mass. at 494.

72 *Id.* at 493.

73 *Id.* at 494.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Camargo's Case*, 479 Mass. at 494.

workers' compensation benefits in 2012.[78] The administrative judge initially issued an order directing the insurer to pay Camargo temporary total incapacity benefits.[79] Following a hearing, the administrative judge determined that Camargo was an independent contractor, and as such, was not entitled to workers' compensation benefits.[80] The reviewing Board affirmed this decision, leading to Camargo's appeal.[81]

B. *The Massachusetts Independent Contractor Statute Does Not Apply to the Massachusetts Workers' Compensation Statute*

The threshold question the Court faced in *Camargo's Case* was whether or not the three-prong test set out in the Massachusetts Independent Contractor Statute applied in the context of workers' compensation benefits claims.[82] Camargo claimed this three-prong test did in fact apply because the Massachusetts Independent Contractor Statute specifically references the Massachusetts Workers' Compensation Statute.[83] Camargo argued that this three-prong test should be used in favor of the definition of employee found in the Massachusetts Workers' Compensation Statute, coupled with the *MacTavish-Whitman* factors.[84]

In order to resolve this issue of statutory interpretation, the Court stated it would consider "the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished . . . ."[85] The Court first looked at the plain and unambiguous language provided by the Legislature in § (a) of the Massachusetts Independent Contractor Statute.[86] This language showed an intent to limit the applicability of this statute to Mass. Gen. Laws chs. 149 and 151, but to not extend it to the Massachusetts Workers' Compensation Statute, Mass. Gen. Laws ch. 152.[87] The Court reasoned that the reference does not "supplant the *MacTavish-Whitman* analysis, but merely notes that when the facts of a given case demonstrate a misclassification of a worker as an independent contractor under § 148B, the penalties of Mass. Gen. Laws. ch. 152, § 14(3) are

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78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 497.

83 *Camargo's Case*, 479 Mass. at 497.

84 *Id.*

85 *Id.*

86 *Id.* at 498.

87 *Id.*

applicable."[88]

Ultimately, the Court stated that the three-prong test Camargo advocated for does not apply to whether an individual is eligible for workers' compensation benefits.[89] The Court only ruled that a violation of the Massachusetts Independent Contractor Statute triggered only heightened penalties when a worker was also misclassified under the Workers' Compensation Statute.[90] The opinion went on to state that the lack of uniformity reflected differences in the particular areas of law.[91] The majority recognized the possibility of a uniform standard, but believed that this was a question solely for the Legislature.[92] Ultimately, the Court concluded that these "isolated cross-references" in the statutes alone did not provide enough evidence of the use of a uniform standard.[93]

C. *Ives Camargo Is an Independent Contractor Under the Twelve-Factor* MacTavish-Whitman *Test*

After declining to adopt the claimant's proposed standard for determining whether or not an individual is entitled to workers' compensation benefits, the Court stated that the examination of the twelve *MacTavish-Whitman* factors was a question of fact to be decided by the Department of Industrial Accidents Board.[94] The Court was adamant that the decision of the Board "would not be set aside if it is justified by the evidence, unless, of course, it is tainted by some error of law."[95] And, since the claimant was unable to provide any error of law with respect to the application of the *MacTavish-Whitman* factors, the Court ruled that there was not a sufficient basis to overturn the Board's decision.[96]

The Court went on to specifically state that the evidence supported the finding that the claimant was an independent contractor.[97] The ability for Camargo to expand her business to deliver newspapers and other items for other companies, as well as her choice to hire substitutes to complete some of her jobs, demonstrated her status as an independent contractor.[98] Furthermore, Camargo purchased her own independent contractor work

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88 *Id.*

89 *Camargo's Case*, 479 Mass. at 499.

90 *Id.*

91 *Id.* at 500.

92 *See id.* at 501.

93 *Id.* at 500.

94 *Id.* at 501.

95 *Camargo's Case*, 479 Mass. at 501.

96 *Id.* at 502.

97 *Id.*

98 *Id.*

insurance, filed taxes as an independent contractor, and supplied "all [the] necessary instruments to complete her job at PCF."[99] Based on this evidence, the Court believed that the reviewing Board of the Department of Industrial Accidents in Massachusetts had a sufficient evidentiary basis to deem Camargo an independent contractor for the purposes of her claim for workers' compensation benefits.[100]

ANALYSIS

III. The Massachusetts Legislature Should Uniformly Apply the "ABC" Test in All Labor Disputes to Eradicate Worker Misclassification

A. *Lack of Uniformity Results in Harm to Massachusetts Workers*

Misclassification of employees as independent contractors is a growing problem across the country.[101] As a result of misclassification, workers are deprived of numerous employment benefits, including workers' compensation.[102] Despite Massachusetts having one of the most progressive statutes in terms of penalties for misclassification of employees, very few claims are brought by the Attorney General on behalf of these misclassified employees.[103] For example, between 2005 and 2007, fewer than a dozen misclassification cases were brought in Massachusetts, even though there were an estimated 250,000 workers who were misclassified from 2001 to 2003.[104] However, in recent years, these numbers have increased as the Commonwealth has worked harder to combat misclassification of workers.[105]

Under the current statutory scheme, many employers seek to use independent contractors "for the purposes of keeping employment costs low."[106] As a result, companies nationwide have avoided paying workers' compensation benefits at the peril of the worker.[107] Employers are instead

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[99] *Id.*

[100] *Id.*

[101] *See, e.g.*, Ins. Journal, *Mass. Medical Transportation Business Cited $460K for Wage Law Violations*, INS. JOURNAL (Sept. 25, 2018), https://perma.cc/3MCA-EB8S; Ins. Journal, *supra* note 46; Wiessner, *supra* note 46.

[102] *See generally* Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111 (2009) (explaining the harm resulting from worker misclassification).

[103] Buscaglia, *supra* note 102, at 134.

[104] Buscaglia, *supra* note 102, at 134.

[105] *See* Ins. Journal, *supra* note 101.

[106] Jenna Amato Morgan, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 130 (2009).

[107] *See* Ins. Journal, *supra* note 101.

willing to risk being penalized for misclassifying workers as independent contractors rather than employees.[108] And, because the worker has the ultimate burden of proof in showing that he or she is in fact an employee rather than an independent contractor, employers have an even greater incentive to misclassify employees.[109]

Not all worker misclassification is intentional, however.[110] Some misclassification is due to good faith misapplication of the complex and numerous laws that govern employee classification, which often leaving businesses just as confused as their workers.[111] Like businesses, courts also have difficulty applying worker classification laws and often are given unfettered discretion when it comes to the issue of worker classification.[112] Often times, workers are then left in a twilight zone with respect to their ability to receive workers' compensation.[113]

B. *Benefits of the "ABC" Test*

Because such confusion invariably arises in the classification of workers, a uniform test is necessary.[114] Because of the need for uniformity and clarity, the "ABC" test, outlined within Mass. Gen. Laws ch. 149, § 148B, the Massachusetts Independent Contractor Statute, is the ideal test to adopt for the purposes of workers' compensation because of its clarity.[115]

The ABC test sets out three criteria for determining a worker's status, compared to the twelve factors outlined in the *MacTavish-Whitman* test, which is currently used by Massachusetts courts in the context of workers' compensation.[116] The ABC test, which is currently used solely in the context of unemployment benefits and minimum wage laws, first requires a showing that the worker is "free from control and direction in connection with the performance of the service, both under [their] contract for the

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[108] *See* Morgan, *supra* note 106, at 130.

[109] Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996); *see also* John Deross, Jr., Note, *Misclassification of Employees as Independent Contractors in Indiana: A State Legislative Solution*, 50 IND. L. REV. 673, 682 (2017); Howard Nations & Joanne Ray, *Resolving Independent Contractor and Borrowed Servant Issues Under Texas Workers' Compensation Law*, 19 S. TEX. L. REV. 445, 445 (1978) (explaining that the claimant has the burden of proving he was an employee of a subscribing employer at the time he was injured).

[110] Deross, Jr., *supra* note 109, at 682.

[111] Deross, Jr., *supra* note 109, at 682.

[112] David B. Hall, *Workmen's Compensation Coverage on an Independent Contractor-Determinative of Employee Status Under the Alabama Workmen's Compensation Act*, 22 CUMB. L. REV. 787, 793 (1991).

[113] Hall, *supra* note 112, at 793.

[114] Buscaglia, *supra* note 102, at 130.

[115] *See* MASS GEN. LAWS ANN. ch. 149, § 148(B)(a) (West 2004).

[116] *Id.*

performance of service and in fact."[117] The key determination in being free from control is not whether the employer actually did exercise control in their work, but rather, whether or not the employer had the right to do so.[118]

Under the second prong of the ABC test, a worker is considered an independent contractor only if "the service is performed outside the usual course of the business of the employer."[119] Essentially, what must be determined under the second prong is whether or not the employee performs services that are considered an extension of the employer's place of business.[120] If so, the worker will likely be considered an employee.[121]

Finally, the third prong of the ABC test determines that a worker is an independent contractor if there is a showing that "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."[122] Under the third prong, workers must hold themselves out to some community of potential customers as independent tradesmen involved in a particular craft.[123]

C. Ives Camargo's Case *Supports Uniform Implementation of the ABC Test in Massachusetts*

The Supreme Judicial Court was incorrect in refusing to apply the ABC test in *Ives Camargo's Case*.[124] If the Court had applied the ABC test, the result would have been much different because the Court would have agreed with Camargo's argument and classified her as an employee, rather than an independent contractor.[125] PCF, Camargo's employer, did not exercise a significant amount of control over Camargo, but they certainly had the right to do so, as evidenced by their ability to determine when her deliveries were to be made and their requirement that all newspapers be delivered dry and undamaged.[126]

Under the second prong of the ABC test, Camargo had sufficient evidence to show that the service she performed was an extension of the

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[117] *Id.*; *see* Christopher J. Cotnoir, Comment, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test,"* 46 ME. L. REV. 325, 335 (1994).

[118] Cotnoir, *supra* note 117, at 336.

[119] Deborah G. Kohl, *Who Are Covered Employees?*, WORKERS' COMP. PRACTICE MA-CLE § 1.3 (2018).

[120] Cotnoir, *supra* note 117, at 336.

[121] Cotnoir, *supra* note 117, at 336.

[122] MASS GEN. LAWS ANN. ch. 149, § 148(B)(a).

[123] Cotnoir, *supra* note 117, at 336.

[124] *See* Ives Camargo's Case, 479 Mass. 492, 497 (2018).

[125] *See id.*

[126] *See id.* at 493.

employer's business.[127] Most importantly, PCF was found by the Court to be a "middleman" between newspaper publishers and delivery agents, such as Camargo.[128] Based on the language used by the Court, Camargo had sufficient evidence to prove that the services she performed were "an extension of the employer's business" under the second prong of the ABC test.[129]

Furthermore, under the third prong of the ABC test, Camargo had sufficient evidence to prove that she did not hold herself out as an independent tradesperson in the craft of delivering newspapers, as required by the ABC test, because Camargo worked solely for PCF in this capacity for the past twelve years.[130] Therefore, based on the three prongs of the ABC test, Camargo would thus be classified as an employee, rather than an independent contractor.[131]

The *MacTavish-Whitman* twelve-factor test, currently used by the courts of this Commonwealth, relies heavily on the employer's right to control.[132] Alternatively, the ABC test is able to simplify the *MacTavish-Whitman* test, while still keeping the right to control aspect of the test that the common law holds as essential.[133] The ABC test creates straightforward prongs that remove the need to weigh the excessive, complicated twelve factors in the *MacTavish-Whitman* test.[134] Instead, this straightforward test provides only three set criteria for determining whether a worker is an independent contractor or employee.[135] If all three criteria are not met, then the worker is classified as an employee and not an independent contractor.[136]

Ultimately, an examination of *Camargo's Case* under the ABC test only further proves that the employee versus independent contractor distinction creates persistent and bothersome problems throughout Massachusetts, as Camargo is an employee under the ABC test but an independent contractor under the *MacTavish-Whitman* test.[137] The current common law criteria for the employee versus independent contractor distinction, the *MacTavish-Whitman* test, is overly-complicated and leads to inconsistent definitions of

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127 *See id.*

128 *Id.*

129 *See* Cotnoir, *supra* note 117, at 336.

130 *See Camargo's Case*, 479 Mass. at 493.

131 *See* MASS. GEN. LAWS ANN. ch. 149, § 148(B)(a) (West 2004).

132 Kohl, *supra* note 119, at § 1.3.

133 Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 64 (2015).

134 *See* Buscaglia, *supra* note 102, at 129.

135 *See* Buscaglia, *supra* note 102, at 129.

136 Buscaglia, *supra* note 102, at 129.

137 29 MASS. PRAC. 3D *Workers' Comp.* § 8.1 (2017).

what constitutes an independent contractor.[138] As such, Massachusetts should implement a uniform application of the ABC test to eliminate inconsistent results.

D. *Clarity from the ABC Test*

Use of the ABC test in Massachusetts has thus far allowed for greater clarity in worker classification in the realm of unemployment benefits and minimum wage laws, as it has reduced the balancing of factors to only three straightforward prongs.[139] Workers' compensation benefits are predicated on the notion that legislatures have chosen to relieve the public of the economic burden presented by injured employees.[140] The ABC test is better suited to effectuate the principal goals of workers' compensation benefits because this test presumes a worker to be an employee unless all three prongs of the test are met.[141] Therefore, the ABC test furthers, rather than circumvents, the beneficial purpose of aiding the injured worker that workers' compensation law is predicated upon.[142] Unfortunately though, *Connolly's Case* makes it clear that the worker, not the employer, bears the burden of proving he or she is entitled to the workers' compensation benefits, despite the business being more properly suited to deal with these costs.[143]

The need for predictability in this area also favors the use of the ABC test. "Because a worker's statute is so important for workmen's compensation purposes, the parties need to know and be able to rely upon what their status will be before injury and potential litigation occurs."[144] Given this need for predictability, the Court in *Camargo's Case* should have seized the opportunity to define a uniform standard, such as the ABC test, across the board for the purposes of worker classification. Unfortunately, the SJC decided not to do so, and thus, workers in the Commonwealth are left in the dark with regard to their right to these crucial benefits.[145] Until a uniform statute is created, the *MacTavish-Whitman* common law standard

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[138] *See* Buscaglia, *supra* note 102, at 126; *see also* Ives Camargo's Case, 479 Mass. 492, 502 (2018).

[139] Buscaglia, *supra* note 102, at 128.

[140] Scott R. Swier & Molly E. Slaughter, *The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers' Compensation Purposes: An Examination and Suggested Analytical Framework*, 43 S.D. L. REV. 56, 66 (1998).

[141] *See* David W. McBride, *New Guidance From DOL Addresses Misclassification of Employees*, 26 NO. 6 MASS. EMP. L. LETTER 5 (Sept. 2015).

[142] *See* Nations & Ray, *supra* note 109, at 456.

[143] Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996) (explaining that the claimant has the burden of proving employee status); *see* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

[144] Hall, *supra* note 112, at 787.

[145] *See* Ives Camargo's Case, 479 Mass. 492, 493 (2018).

will continue to "produce[] results notably at odds with the humanitarian purposes" of the Workers' Compensation Statute.[146]

IV. If the Court Is Unwilling to Provide a Uniform Test, Alterations Must Be Made to the *MacTavish-Whitman* Test for the Benefit of Clarity and Predictability

A. *Confusion Under the Common Law* MacTavish-Whitman *Test*

If the Massachusetts Supreme Judicial Court is adamant that the adoption of a uniform standard is a question solely for the Legislature, then alterations must be made to the current common law *MacTavish-Whitman* test to deal with the confusion and uncertainty that Chief Justice Gants elaborated on in his concurrence in *Camargo's Case*.[147] The essence of the *MacTavish-Whitman* test is the right of control.[148] Under this test, the claimant must "at every moment and with respect to every detail, be bound to obedience and subject to direction and control" by the employer.[149] The notion that the employer's right to control is of the highest probative value goes against the purpose of workers' compensation, which is to impose strict liability on a business and promote aid for the injured worker.[150] Imposing such a stringent right to control requirement goes against the humanitarian purposes of workers' compensation law and puts the injured worker at a disadvantage.[151]

However, the right to control aspect of the test is not the true source of confusion and uncertainty regarding the *MacTavish-Whitman* test.[152] The confusion and uncertainty result from the fact that this test entails balancing *twelve* different factors, while other states generally use no more than ten.[153] The *MacTavish-Whitman* test balances the following twelve factors:

> (1) the extent of control exercised by the employer over the details of the work; (2) whether the worker was engaged in a distinct occupation or business; (3) whether, in the locality, the type of work usually proceeded under the direction of an employer or by an unsupervised specialist; (4) the skill required for the occupation; (5) whether the employer or the worker supplied the tools and place of work; (6) the length of time of the working

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146 *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

147 *See* Schoenberg, *supra* note 55 (explaining the confusion that results from the recent decision in Ives Camargo's Case); *see also Camargo's Case*, 479 Mass. at 493.

148 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

149 *Id.*

150 *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.2; *see also* Nations & Ray, *supra* note 109, at 456.

151 *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

152 *See* 103 AM. JUR. 3D *Proof of Facts* § 6 (2018) (emphasis added).

153 *See id.* (emphasis added).

> relationship; (7) the method of payment; (8) whether the work was part of the regular business of the employer; (9) whether the parties believed that they were creating an employment relationship; (10) whether the alleged employer constituted a business; (11) the tax treatment applied to payment; and (12) the presence of the right to terminate the relationship without liability, as opposed to the worker's right to complete the project for which he was hired.[154]

While at one time it may have been understandable to cling to the precedent of the *MacTavish-Whitman* test, this is no longer the case.[155] The time has come for Massachusetts, in one way or another, to make alterations to the test for employee status in the area of workers' compensation law in order to effectuate the true purpose of this area of law.[156] Until the *MacTavish-Whitman* test is either altered by the courts, or discarded altogether, widespread inconsistency will persist.[157]

B. *Common Law Tests in Other Jurisdictions*

Because of the confusing and extensive nature of the *MacTavish-Whitman* common law test, it would make sense for Massachusetts to alter its test to provide for one single uniform test, similar to that of other states, in order to prevent confusion and unpredictability.[158] The extensive nature of the *MacTavish-Whitman* test is a major cause of the confusion that permeates the area of worker classification, and the Commonwealth should consider shortening the test so as to avoid such confusion and uncertainty.[159]

For example, New York uses a four-factor control test to determine employee status for the purposes of workers' compensation.[160] New York's common law control test relies on the following four factors: (1) right to control; (2) method of payment; (3) extent the entity furnishes equipment; and (4) the entity's right to discharge.[161] Furthermore, other states such as Alabama use a similar four-factor control test to determine employee status

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[154] *See* Whitman's Case, 80 Mass. App. Ct. 348, 353 (2011) (describing the twelve factors used to determine employee status in the context of workers' compensation); *see also* MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992).

[155] Nations & Ray, *supra* note 109, at 456.

[156] Nations & Ray, *supra* note 109, at 456.

[157] 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

[158] *See* Ives Camargo's Case, 479 Mass. 492, 502 (2018).

[159] *See id.*

[160] Bran Noonan, *The Campaign Against Employee Misclassification*, 82 N.Y. ST. B. ASS'N J. 42, 47 (Oct. 2010). *See generally* Comm'r of the State Ins. Fund v. Lindenhurst Green & White Corp., 101 A.D.2d 730, 731 (N.Y. App. Div. 1984) (describing the New York common law control test).

[161] Noonan, *supra* note 160, at 47.

for the purposes of workers' compensation.[162] Under Alabama common law, the right to control test requires the balancing of the following four factors: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire.[163] These are just two examples of efficient and predictable common law worker classification tests from other jurisdictions.[164]

If the Legislature is unwilling to enact one uniform test, such as the ABC test, to govern worker classification in all labor disputes, the courts should alter the common law test to reflect that of Alabama and New York.[165] This would address the inconsistencies that result from the current *MacTavish-Whitman* analysis.[166] Under the current standard, at the very least factors ten (whether the alleged employer constituted a business) and eleven (the tax treatment applied to payment) can be eliminated, given the fact that most other states as well as the Restatement (Second) of Agency do not even consider these as factors in the issue of employee status.[167]

C. *Possible Alterations to the Current* MacTavish-Whitman *Common Law Test*

Ultimately, if the Court is unwilling to adopt a straightforward three-prong criteria, such as the ABC test, then it should adopt a common law test similar to Alabama and New York, which would limit the worker classification test to four factors and cut down on confusion.[168] Because the right to control is determined to be such an essential aspect in determining employee status, it makes the most sense for the Commonwealth to use that as its first, and most important, factor in any new or altered common law test.[169] After the first factor of right to control, the courts should look at the method and manner of payment by the employer to the worker to determine employee status.[170] Payment by the employer can be important evidence of a worker being an independent contractor.[171] However, the manner and

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[162] Hall, *supra* note 112, at 791. *See generally* Ala-Miss Enterprises v. Beasley, 446 So. 2d 662, 664 (Ala. Civ. App. 1984); American Tennis Courts v. Hinton, 378 So. 2d 235 (Ala. Civ. App. 1979) (describing the Alabama right to control test for the purposes of workers' compensation benefits).

[163] Hall, *supra* note 112, at 791.

[164] *See* Noonan, *supra* note 160, at 47; Hall, *supra* note 112, at 791.

[165] *See* Noonan, *supra* note 160, at 47; Hall, *supra* note 112, at 791.

[166] *See* Ives Camargo's Case, 479 Mass. 492, 502 (2018).

[167] *See* 103 AM. JUR. 3D *Proof of Facts*, *supra* note 152, § 6.

[168] *See Camargo's Case*, 479 Mass. at 502.

[169] 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.1.

[170] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.3.

[171] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.3.

method of payment is not a conclusive factor in employee status.[172]

Another important factor in determining a worker's status for the purpose of workers' compensation benefits is the furnishing of equipment.[173] Ownership of equipment by a worker can indicate independent contractor status, but use of one's own equipment is not fatal to a worker's claim for benefits.[174] A fourth factor the court should consider in a new or altered common law test is whether or not the claimant operates a distinct business.[175] Whether or not the worker has held him or herself out to the public as conducting a distinct business is important because one with a separate business would not act as an employee.[176]

Finally, as a fifth factor, the court should consider the right to discharge in determining a worker's status.[177] The right to discharge is strong evidence of a business's ability to control a worker in all of the details of his or her work.[178] An independent contractor generally cannot be discharged as an independent contractor because one usually has a right to finish a job that he or she has contracted for, so as to entitle him or her to payment.[179] Ultimately, the court should adopt a more concise common law test—which is more consistent with those of other states—to classify workers for the purpose of workers' compensation benefits.[180] Such implementation would facilitate uniform decision making and resolve the current issue of unpredictability and inconsistency in classifying workers' statuses.[181]

D. *Inconsistencies Between the Public's Belief and the Court's Rulings*

Delivery agents, such as Ives Camargo, present a unique situation in the sense that most people consider a delivery agent to be an employee and not a person engaged in a distinct business.[182] "If a paper is not delivered or the service is unsatisfactory, the subscriber will call the paper and not the carrier."[183] It is illogical "that a carrier should be considered analogous to a

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[172] 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.3.

[173] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.4.

[174] *See*29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.3.

[175] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.5.

[176] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.5.

[177] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.6.

[178] *See* 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.6.

[179] 29 MASS. PRAC. 3D *Workers' Comp.*, *supra* note 137, § 8.6.

[180] *See* Ives Camargo's Case, 479 Mass. 492, 505 (2018).

[181] *See* Buscaglia, *supra* note 102, at 130.

[182] Fred F. Bradley, *Newspaper Carrier-Servant or Independent Contractor*, 46 KY. L.J. 596, 601 (1958) (explaining the notion that most people would not consider a newspaper delivery agent to be an independent contractor instead of an employee).

[183] Bradley, *supra* note 182, at 601.

person engaged in an occupation which is considered independent in the opinion of most people, such as a painter, a plumber, or a roofing repairman."[184] The skill required for a newspaper delivery person is not a highly-specialized skill and has long been an unskilled job usually performed as part-time work by young teens.[185] However, even though most would agree that a newspaper delivery agent should be considered an employee for the purpose of workers' compensation, and would be considered an employee under the ABC test, Camargo nonetheless was found to be an independent contractor and was deprived of the benefits of workers' compensation.[186]

As a result of these inconsistencies, the Commonwealth should be proactive in its decisions and establish new worker classification criteria that are clear, precise, and concrete, such that no worker is left "in a twilight zone with respect to workmen's compensation."[187] In a judicial system predicated upon stare decisis and the importance of predictability from precedents, the common law test used for employee status in workers' compensation has done nothing but aid the injured worker.[188] If the SJC refuses to adopt the ABC test for the purposes of workers' compensation, in addition to the current use of the test for unemployment benefits, it must at the very least make the changes to the *MacTavish-Whitman* test that are necessary to offer the Massachusetts worker some sense of predictability and clarity.

CONCLUSION

While Chief Justice Gants may have believed the law surrounding worker classification is an issue for the legislature to decide, ultimately, it is the Massachusetts worker who will continue to suffer the most from the confusion and uncertainty that results from courts using multiple tests, depending upon the context of the dispute, to determine a worker's status as an employee or an independent contractor.[189] And while it makes the most sense for the Massachusetts Supreme Judicial Court to adopt the ABC test as a uniform test, regardless of the context of the dispute, at the very least, alterations to the current *MacTavish-Whitman* common law test must be made to ensure that worker misclassification, and the confusion surrounding a worker's employee status, is minimal.[190] Without a clear, uniform standard that workers and businesses alike can utilize,

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184 Bradley, *supra* note 182, at 601.

185 Bradley, *supra* note 182, at 601.

186 *See* Ives Camargo's Case, 479 Mass. 492, 502 (2018); Bradley, *supra* note 182, at 601.

187 *See* Hall, *supra* note 112, at 793.

188 *See* Nations & Ray, *supra* note 109, at 456.

189 *See* Schoenberg, *supra* note 55.

190 *See supra* Part III(B); *supra* Part IV(C).

discrepancies will persist between workers' expectations of benefits and the benefits actually received.[191]

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191 *See supra* Part IV(D).

When Flexibility Sacrifices Security: An Analysis of Amazon's Flex Program

Mary Martin[*]

INTRODUCTION

How does the package that you ordered via Amazon Prime with one day free shipping actually get to your doorstep?[1] Although this delivery phenomenon occurs in dozens of cities, "government agencies and customers alike are nearly oblivious" to the intricacies of Amazon's delivery model.[2] A look under the hood reveals the existence of "Flex drivers," which are a vital aspect of Amazon's "last-mile" deliveries—"the final journey from a local facility to the customer"—and a huge part of Amazon's efforts to achieve its promise of shockingly quick delivery to its customers.[3] The Flex program is a result of Amazon trying to accomplish complete logistical autonomy to the extent it no longer needs to rely on third party delivery services, such as FedEx and UPS.[4] The reorganization of Amazon's delivery operations, however, comes at a cost to this newly tapped work force and could quite possibly come at a great cost to Amazon

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1 *See* Bryan Menegus, *Amazon's Last Mile*, GIZMODO (Nov. 16, 2017, 11:23 AM), https://perma.cc/2HJQ-VK4A (explaining that these packages are delivered by "plainclothes contractors with few labor protections, driving their own cars, competing for shifts on the company's own Uber-like platform").

2 *Id.*

3 *Id.*; Bloomberg News, *What It's Really Like to Gig for Amazon Flex*, DIGITAL COMMERCE 360 (Nov. 1, 2018), https://perma.cc/9MP6-TB5F [hereinafter *What It's Really Like*] (stating same-day delivery is based on the use of Flex drivers and relied on more heavily during certain seasons like Christmas).

4 Sean Maharaj, *Opinion: Amazon Innovations Force Supply Chain Change*, TRANSPORT TOPICS (Feb. 19, 2019, 3:45 PM EST), https://perma.cc/VRY7-HU65.

itself.[5]

Amazon, like many companies in the ever expanding gig economy, is attempting to grow its business using a workforce that it classifies as independent contractors. As a result, it is able to "essentially push many of the costs—and the liabilities—of delivering a package onto its drivers."[6] Because of their independent contractor classification, Flex drivers and other gig workers may not avail themselves of the protections of America's labor laws.[7] This business model has "sparked intense litigation in the United States," with a focus on whether the gig economy should classify its workers as employees or independent contractors.[8] In regards to Amazon, this issue could not be more ripe, as there are at least two pending cases against Amazon brought by classes of Flex drivers alleging misclassification.[9]

Part I of this Note will discuss the quickly growing gig economy, types of worker classifications in Massachusetts, and the consequences of different classification categories. Additionally, Part I will explain how the Amazon Flex program works and how it fits into the gig economy. Part II of this Note highlights the importance of accurately classifying gig-economy workers to ensure their employment rights are protected and to clarify for employers what responsibilities they owe to this growing field of workers. Part III of this Note argues that, under Massachusetts law, Amazon misclassifies its Flex drivers as independent contractors and thereby deprives drivers of the benefits associated with their employment. As such, Amazon and similar companies should correct this error by reviewing and modifying its current

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[5] *See* Chris Villani, *Amazon Driver Wage Suit Sent Back to Mass. State Court*, LAW360 (Aug. 28, 2018, 2:36 PM EDT), https://perma.cc/2PEP-BFDA (quoting Flex drivers' legal counsel saying "[w]e think [worker misclassification] is a big problem and we are looking forward to being able to press these claims in Massachusetts state court").

[6] Gaby Del Valle, *Amazon Is Cutting Costs with Its Own Delivery Service—but Its Drivers Don't Receive Benefits*, VOX (Dec. 27, 2018, 1:43 PM EST), https://perma.cc/MJ9K-SCXR; *see* Villani, *supra* note 5.

[7] *See* Somers v. Converged Access, Inc., 454 Mass. 582, 592 (2009) ("A legislative purpose behind the independent contractor statute is to protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors."); Julien M. Mundele, *Not Everything That Glitters Is Gold, Misclassification of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 270 (2015) ("Employee misclassification causes individuals to lose out on employment benefits, such as health insurance, sick days, overtime, occupational safety laws, discrimination safeguard and retirement benefits.").

[8] Miriam A. Cherry, *Are Uber and Transportation Network Companies the Future of Transportation (Law) and Employment (Law)?*, 4 TEX. A&M L. REV. 173, 185 (2017); *see, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2014) (noting it has become clear that gig economy workers do not fit neatly into either statutory category of workers).

[9] Order & Mem. on Pl.'s Mot. to Remand, Waithaka v. Amazon.com, Inc., 363 F. Supp. 3d 210, 211 (D. Mass. Mar. 5, 2019) [hereinafter *Remand Denied*]; Rittmann v. Amazon.com Inc., No. C16-1554-JCC, 2017 WL 1079926, at *1 (W.D. Wash. Mar. 22, 2017).

agreements to protect itself from liability. Finally, this Note highlights the ambiguity in the independent contractor versus employee dichotomy resulting from its application to the gig economy and calls on either the Massachusetts Legislature to clarify the field for employers or for the Massachusetts Judiciary to start enforcing the laws more consistently and comprehensively.

I. Background

A. *The Gig Economy: From the Beginning*

"Uber, the world's largest taxi company, owns no vehicles. Facebook, the world's most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world's largest accommodation provider, owns no real estate. Something interesting is happening."[10] Louis Hyman, a labor historian at Cornell and author of *Temp: How American Work, American Business, and the American Dream Became Temporary*, suggests that something interesting has gradually occurred between the 1960s and today in the reorganization of labor forces.[11] Hyman asserts that in the 1960s when companies saw stagnant profits, they decided "cutting costs was easier than increasing revenues" and began outsourcing specific jobs that could be done off-site and with little training.[12] Large companies that produce well-known products and services previously would have directly employed the workers that did the housekeeping, the unloading and loading at the docks, and the packing of the factory boxes.[13] These previous "employers" shed their direct employment of workers, and, as a result, reduced their costs and evaded the many responsibilities the law places on employers.[14] From another viewpoint, many commenters credit the reorganization of the workplace to advancements in technology, such as the rise of smart phones.[15] A combination of both fields of thought leads to

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[10] Rob Preston, *Digital Disruption: It's Not What You Think*, FORBES (Apr. 20, 2015, 7:00 AM), https://perma.cc/V5PP-RKQH.

[11] LOUIS HYMAN, TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY 7–9 (2018).

[12] Jennifer Szalai, *How the 'Temp' Economy Became the New Normal*, N.Y. TIMES (Aug. 22, 2018), https://perma.cc/3H4R-9WEP; *see* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 4 (2014) (explaining the new organization of the work place allows companies to "change a wage-setting problem into a contracting decision," resulting in the stagnation of worker wages for the jobs that used to be down by company employees).

[13] *See* WEIL, *supra* note 12, at 2 (connecting this practice of outsourcing to large companies like Marriot, Time Warner, Bank of America, and Walmart).

[14] *See* WEIL, *supra* note 12.

[15] *See* James Sherk, *The Rise of the "Gig" Economy: Good for Workers and Consumers*, THE HERITAGE FOUND. (Oct. 7, 2016), https://perma.cc/Y2X7-54J9.

the fact that, through several decades of cultural shifts and advancements in technology, a "new world of work" has emerged: the gig economy.[16]

Currently, 66% of large companies are using freelancers and other gig workers to lower labor costs.[17] Companies like Uber, Lyft, Etsy, Amazon Mechanical Turk, and Freelancer see themselves as "conduit companies" that work to facilitate the connection between gig workers and consumers.[18] Given increased access to internet and the evolution of mobile phone technology, companies have been able to link the supply and demand ends of this emerging economy easier than ever before and expand the "scale, scope, and pervasiveness" of available services.[19] These expansions of the gig economy can be thoroughly explained by way of example with Uber, one of the most well-known and pervasive utilizers of gig workers.[20] Uber's business model has been labeled "disruptive, pioneering, and inevitable," such that it is "so revolutionary that legions of imitators have copied it."[21] Uber's business model created an on-demand virtual platform for services across almost all industries that mobile phone users can access with just the click of a button—if there is an industry, there is an Uber.[22] This on-demand concept that has been adopted by many emerging startup companies has the short-hand analogy of "Uber for X."[23] For example, there is an on-demand platform for services in the following industries: transportation, dog sitting,

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[16] *See* Meghna Chakrabarti, *The Origin Story of the Gig Economy*, WBUR (Aug. 20, 2018), https://perma.cc/G2LC-PTND (explaining that the U.S. has seen several work reorganization periods, such as after World War II and the Great Depression when people wanted stability and more security); Amulya Parmar, *4 Reasons to Invest in the Gig Economy*, BUSINESS (Aug. 10, 2019), https://perma.cc/L4RX-NVYT ("The first industrial revolution introduced the steam engine. The second harnessed the power of coal, and the third was brought about by the internet.").

[17] Abdullahi Muhammed, *4 Reasons Why the Gig Economy Will Only Keep Growing in Numbers*, FORBES (June 28, 2018, 7:26 AM), https://perma.cc/4ZAA-3ZYF.

[18] Caleb Holloway, *Keeping Freedom in Freelance: It's Time for Gig Firms and Gig Workers to Update Their Relationship Status*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 298, 312–13 (2016).

[19] Joseph W. McHugh, *Looking Through the (Mis)classifieds: Why Taskrabbit is Better Suited than Uber and Lyft to Succeed Against a Worker Misclassification Claim*, 66 CLEV. ST. L. REV. 649, 652 (2018).

[20] *See* Erin Griffith, *The Problem with 'Uber for X,'* FORTUNE (Aug. 11, 2015), https://perma.cc/7YAU-MRVL. *Compare* Nicole Fallon, *The Growth of the Gig Economy: A Look at American Freelancers*, BUS. NEWS DAILY (Nov. 10, 2017), https://perma.cc/L8Q3-MC84 (stating in 2005, the U.S. Bureau of Labor Statistics' estimated that "contingent workers" accounted for about 10% of U.S. employment), *with* TJ McCue, *57 Million U.S. Workers Are Part of the Gig Economy*, FORBES (Aug. 31, 2018), https://perma.cc/8YUF-GXMG (stating, in 2018, 36% of U.S. workers were in the gig economy, which is approximately fifty-seven million people).

[21] Griffith, *supra* note 20.

[22] *See infra* notes 23–24.

[23] *See* Griffith, *supra* note 20.

fast food and grocery delivery, booze, and so on.[24]

In overly simplified terms, the "gig economy" can be described as an emerging new brand of workforce that encompasses a group of people that choose not to work in the "relatively stable confines of organizational life," but instead, elect to make a living doing part time work, side hustles, and short term jobs—"gigs."[25] Many people find themselves picking up freelance gig jobs in cases where they need more flexibility in their work schedule, when they are in between traditional nine-to-five jobs, when the "trappings of traditional employment have become undesirable to them," or when the government shuts down and furloughed workers are forced to look elsewhere for a temporary paycheck. [26] Regardless of a gig worker's reasoning, the gig economy offers entrepreneurial opportunity to those who are willing to work on an ad hoc basis.[27] With this ad hoc work schedule comes, for most gig workers, the classification of "independent contractor."[28]

B. *The Independent Contractor Versus Employee Dichotomy*

1. The Difference—Specifically in Massachusetts

Every employer in America must classify its workers as either employees or independent contractors.[29] By definition, an employee "works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."[30] On the other hand, an independent contractor can be thought of as one who is "entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."[31] Unfortunately for employers and workers alike, there is

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[24] *See, e.g.*, UBER TECHNOLOGIES, INC., https://perma.cc/P9E3-ECQB (last visited Mar. 26, 2021) ("Move the way you want."); GRUBHUB, https://perma.cc/37HW-76WT (last visited Mar. 26, 2021) ("Order food delivery you'll love"); DRIZLY, https://perma.cc/HGT7-XCD3 (last visited Mar. 26, 2021) ("Beer, wine and liquor delivered in under 60 minutes.").

[25] Gianpiero Petriglieri et al., *Thriving in the Gig Economy*, HARV. BUS. REVIEW (March 2018), https://perma.cc/S8S8-FQE2; *see* Neil Howe, *The Gig Economy Is Alive and Growing* (Nov. 3, 2015), https://perma.cc/9TDH-KNU8 (explaining that "gig workers," or "contingent workers," include "individuals who maintain work arrangements without traditional employers or regular, full-time schedules").

[26] *See* Holloway, *supra* note 18, at 299; Alyssa Newcomb, *Government Shutdown: Furloughed Federal Workers Are Turning to Uber to Earn a Paycheck, CEO Says*, FORTUNE (Jan. 24, 2019, 10:05 PM EST), https://perma.cc/ZY24-DAPV.

[27] Holloway, *supra* note 18, at 299.

[28] Holloway, *supra* note 18, at 299.

[29] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 138 (2015).

[30] *Employee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[31] *Independent Contractor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

no bright line rule that differentiates between an independent contractor and an employee.[32] In fact, the difference is quite elusive.[33]

Purposefully or not, it is nonetheless difficult for employers to comply with worker classification due to differences in relevant definitions at all levels—from state to state, federal to state level, and even agency to agency within a state.[34] To clarify this issue, many states are creating common law classification tests and enacting legislation pertaining to specific industries.[35] However, merely modifying statutory definitions may not do the trick.[36] Along with a simplification of the current statutes and tests should come consistent application across relevant laws.[37]

For example, in 2004, Massachusetts enacted "one of the most—if not the most—restrictive" independent contractor statutes, which created a framework under which most workers will be treated as employees.[38] Worker advocates have deemed this type of statute the "most objective and the most difficult for employers to manipulate."[39] The theory behind the statute is that the new test will greatly increase the number of workers entitled to the benefits and rights of employment by decreasing the number

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[32] *See* Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 327 (2011).

[33] *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 65–67 (2015) ("Without clear communication of which workers are and are not independent contractors, businesses struggle to comply with the law . . . .").

[34] Renee Inomata, *Perils of Misclassification of Workers as Independent Contractors*, *in* INSIDE THE MINDS: COMPLYING WITH EMPLOYMENT REGULATIONS (2012), *available at* 2012 WL 3279180 (explaining how varying definitions make it possible for an employer to correctly classify an employee on the federal tax purposes, but incorrectly for state law purposes); *see Massachusetts Law About Independent Contractors*, MASS.GOV, https://perma.cc/XV7C-Z3YY (last updated May 29, 2018) (explaining definitions may vary in a state's own statutes, like in Massachusetts where "the definition of 'employee' is different in the worker's compensation statute . . . than in the independent contractor statute . . . .").

[35] *See* Deknatel & Hoff-Downing, *supra* note 33, at 54 (stating between 2004 and 2012, twenty-two states modified their statutory definitions of independent contractors or transformed penalties for the misclassification of employees, or did both); Mundele, *supra* note 7, at 253–54.

[36] Deknatel & Hoff-Downing, *supra* note 33, at 65.

[37] Deknatel & Hoff-Downing, *supra* note 33, at 65.

[38] Amelia J. Holstrom, *Massachusetts Independent Contractor Statute Still Going Strong After FAAAA Preemption Attack*, SKOLER ABBOT (Jan. 12, 2017), https://perma.cc/YA7B-52CW; *see* MASS. GEN. LAWS ch. 149, § 148B (2021).

[39] Catherine K. Ruckelshaus & Sarah Leberstein, *NELP Summary of Independent Contractor Reforms New State and Federal Activity November 2011*, NELP, https://perma.cc/T862-EQSP (last visited Mar. 26, 2021).

of people who fit into the independent contractor statute.[40] The state also increased the potential penalties for misclassifying workers by creating higher civil penalties for repeat offenders as well as criminal liability.[41]

The statute, commonly referred to as the "ABC" test, features a simplified version of the common law "right to control" factors and creates a rebuttable presumption that a worker is an employee.[42] In order to rebut this presumption and prove a worker is in fact an independent contractor, the employer must prove: (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;" (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."[43] The first element's inquiry turns on whether the "worker's activities and duties [were] actually . . . carried out with minimal instruction," which would entail a worker completing a job "using his or her own approach with little direction and dictat[ing] the hours that he or she will work on the job."[44] In considering the second prong, Massachusetts courts have acknowledged that a business' self-proclaimed definition is a strong indication of its usual course of business.[45] In addition, courts will consider "whether the service the individual is performing is necessary to the business of the employing unit or merely incidental."[46] Finally, the third

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[40] Holstrom, *supra* note 38; *see also* Sebago v. Bos. Cab Dispatch, Inc., 471 Mass. 321, 327 (2015) (emphasizing the purpose of the statute is "to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment . . . . ").

[41] Mundele, *supra* note 7, at 265; *see also* MASS.GOV, *Independent Contractors*, https://perma.cc/RC28-VK2D ("Employers who misclassify employees as independent contractors may face criminal enforcement or civil penalties.") (last visited Mar. 26, 2021).

[42] *See* MASS.GOV, *supra* note 41 ("In Massachusetts, most people who work or provide services are considered employees under the law."); *see also* MASS. GEN. LAWS ch. 149, § 148B; Deknatel & Hoff-Downing, *supra* note 33, at 65 (explaining "[w]orker advocates have called ABC the 'most objective' test and 'the most difficult for employers to manipulate'").

[43] MASS. GEN. LAWS ch. 149, § 148B; *see also* Hannah Esquenazi, *Who Can "Seize the Day?": Analyzing Who Is an "Employee" for Purposes of Unionization and Collective Bargaining Through the Lens of the "Newsie" Strike of 1899*, 59 B.C. L. REV. 2551, 2593 n.220 (2018).

[44] *Sebago*, 471 Mass. at 332.

[45] *Id.* at 333 (stating the Attorney General suggested interpretations of the Illinois independent contractor statute are instructive of the distinction between necessary and incidental services).

[46] *Id.*; *see also* Dynamex Operations W. v. Superior Court, 416 P.3d 903, 956 n.23 (Cal. 2018) (concluding the "Massachusetts version" of prong B "provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders," because of contemporary work practices, in which many employees telecommute

prong inquires into whether "the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services."[47] Notably, however, in 2016 the U.S. Court of Appeals for the First Circuit and the Massachusetts Supreme Judicial Court (SJC) held that the second prong was preempted for motor carriers under the Federal Aviation and Administration Authorization Act of 1994 (FAAA).[48] Preemption of the second prong means that "careful and proactive motor carriers involved in the transportation of property may no longer have to satisfy the most challenging component of the Independent Contractor Statute."[49] Nevertheless, in finding that the three prongs were severable, the Courts determined that, regardless of preemption of the second prong, an employer must satisfy the other two prongs to avoid misclassification liability.[50]

2. Why Does Categorization Matter?

"Where legal rights and protections are concerned, the difference between employees and independent contractors in American labor and employment law is monumental."[51] By distinguishing an employment relationship from a strictly contractual one, an employer decides how federal and state labor laws will apply to her and her employees.[52] For instance, under the Federal Insurance Contributions Act (FICA), employers are required to withhold portions of an employee's compensation in order

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or work from their homes); Carey v. Gatehouse Media Mass. I, Inc., 92 Mass. App. Ct. 801, 808 (2018) (recognizing "a service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business").

[47] *Sebago*, 471 Mass. 321 at 336.

[48] *See* Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429, 438 (1st Cir. 2016); Chambers v. RDI Logistics, Inc., 476 Mass. 95, 102–03 (2016); Michael J. Mazurczak, *Can Federal Law Trump State Independent Contractor Statute? SJC Says Yes and No*, MELICK & PORTER, LLP (June 1, 2017), https://perma.cc/A5AH-GE98 (explaining Congress' goal of deregulating the trucking industry by including a preemption clause, which overrode the patchwork of state laws that undercut "competitive market forces in transportation rates, routes, and services").

[49] Barry J. Miller & Anthony S. Califano, *A Lighter Load for Motor Carriers: The Massachusetts Independent Contractor Statute and Federal Preemption*, MASS. BAR ASS'N. (Mar. 2017), https://perma.cc/Y9UK-SPM4.

[50] *See id.*; Robert M. Shea, *Massachusetts High Court Rules Prong Two of Independent Contractor Test Is Severable for FAAAA Preemption Purposes*, OGLETREE DEAKINS (Jan. 5, 2017), https://perma.cc/U48A-4RRZ.

[51] Jost, *supra* note 32, at 313.

[52] *See generally Understanding Employment Taxes*, IRS, https://perma.cc/6SAV-CEJ7 (last updated Dec. 4, 2020) ("Employers must deposit and report employment taxes.").

to pay into Social Security and Medicare.[53] Because independent contractors are generally considered to be self-employed, individuals and companies that hire independent contractors are not required to withhold these various taxes.[54] Another example is the application of the Fair Labor Standards Act (FLSA), which only applies in employment relationships.[55] FLSA establishes guaranteed benefits and protection for employees in the private and public sector including: minimum wage, overtime pay, record-keeping, and youth employment standards. [56] The categorization even affects a company's possible legal liability for a worker's torts.[57] While an employer is generally liable for an employee's torts committed within the scope of her employment, unlike an employee, "an independent contractor who commits a wrong while carrying out the work usually does not create liability for the one who did the hiring."[58]

Because companies are able to shift the financial and legal burden of actually employing workers through a combination of strategic worker classification and elusive state laws, businesses are able "to succeed at deliberately misclassifying workers." [59] Businesses that successfully misclassify their employees as independent contractors, even when the workers meet the definition of employees, avoid many employer responsibilities including "payment of minimum wages and overtime; provision of benefits, workers compensation insurance, and unemployment benefits; and protections under discrimination and safety laws, all of which add significant costs to the operation of a business."[60] Although employee misclassification itself is not unlawful, it is often discovered and

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[53] *Id.*

[54] *Independent Contractor (Self-Employed) or Employee?*, IRS, https://perma.cc/8PQZ-94ZS (last updated Mar. 17, 2021).

[55] *See* 29 U.S.C.A. §§ 201–19 (1938); *Misclassification of Employees as Independent Contractors*, DOL, https://perma.cc/5QX6-3H53 (last visited Mar. 26, 2021) [hereinafter *Misclassification of Employees*].

[56] *See* 29 U.S.C.A. §§ 201–19; *Misclassification of Employees*, *supra* note 55.

[57] *See* FRANCIS M. BURDICK, THE LAW OF TORTS: A CONCISE TREATISE ON CIVIL LIABILITY AT COMMON LAW AND UNDER MODERN STATUTES FOR ACTIONABLE WRONGS TO PERSON AND PROPERTY 154–55, 157 (3d ed. 1913).

[58] *Independent Contractor*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Burlington Indust., Inc. v. Ellerth, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.").

[59] Deknatel & Hoff-Downing, *supra* note 33, at 53, 65.

[60] Inomata, *supra* note 34, at 1; *see also* Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018) https://perma.cc/9JNY-BYWV ("Industry executives have estimated that classifying drivers and other gig workers as employees tends to cost 20 to 30 percent more than classifying them as contractors."); Richard Frankel, *The Federal Arbitration Act and Independent Contractors*, CARDOZO L. REV. DE•NOVO 101, 101 (2018), https://perma.cc/7E92-7LWJ.

reprimanded through investigations of labor and tax law violations.[61] The Department of Labor is responsible for detecting misclassification through investigating claims of labor law violations—"particularly complaints involving nonpayment of overtime or minimum wages."[62] To be clear, because the misclassifying company is not supplying legally mandated and critical benefits to their employees, misclassified workers simply do not get guarantees such as "minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces."[63] Other parties that are negatively affected include local and state governments—who see lower tax revenues and lowers funds in state unemployment insurance and workers' compensation pools.[64] In addition, while businesses that practice misclassification get an unfair advantage by dodging expenses and taxes, businesses that "play by the rules" are unfairly disadvantaged.[65]

3. The Benefits of Independent Contract Worker Status

Despite the apparent negativity beaming from the section above, for many gig economy workers, the benefits of being classified as an independent contractor outweigh the lack of employment benefits they may have received at a more traditional career.[66] For instance, gig workers are

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[61] *See* Inomata, *supra* note 34, at 3 ("Misclassification alone does not impose any penalties, but a misclassification paired with a violation of another law (such as the Massachusetts wage laws . . . the minimum wage, overtime, and payroll records laws) . . . the workers compensation law . . . and the payroll tax requirements . . . could result in penalties as dictated by those respective laws."); *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, U.S. GOV. ACCOUNTABILITY OFFICE (Aug. 2009), https://perma.cc/8TQY-DE8S [hereinafter *Improved Coordination*].

[62] *Improved Coordination*, *supra* note 61, at 2, 15; *see also* Inomata, *supra* note 34, at 3.

[63] *Misclassification of Employees*, *supra* note 55; Deknatel & Hoff-Downing, *supra* note 33, at 55 ("Misclassified workers are deprived of workplace protections and remedies to workplace harms like discrimination and wage theft."); *see generally* WEIL, *supra* note 12 (describing how the trend away from traditional employer-employee relationships has negatively impacted workers).

[64] *See Misclassification of Employees*, *supra* note 55. *See generally* Deknatel & Hoff-Downing, *supra* note 33, at 55 (2015) (claiming state and local governments are "divested millions of dollars in lost payments to unemployment insurance funds, payroll taxes, and workers' compensation funds"); David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*," HBR (Jul. 5, 2017), https://perma.cc/8AUC-PVQH (explaining a misclassified independent contractor does not contribute to unemployment insurance or workers compensation, which results in reduced funding to those social insurance systems).

[65] *See* Deknatel & Hoff-Downing, *supra* note 33, at 55. *See generally* Weil, *supra* note 64.

[66] *See* Adam C. Uzialko, *A Mixed Bag: Navigating the Ups and Downs of the Gig Economy*, BUS. NEWS DAILY (Jul. 13, 2017), https://perma.cc/7JUZ-P6DT ("Gig work comes with a set of pros and cons . . . workers benefit by gaining more latitude over their schedule and the type of work they do. . . .").

better able to control the type of work they do and their schedules.[67] As Amazon promotes on its website, this line of work gives people the "maximum freedom, an ideal work-life balance, and the chance to pursue [their] passions."[68] For instance, the plaintiff in *Lawson v. Grubhub, Inc.*[69]—a case where a Grubhub driver claimed that Grubhub misclassified him as an independent contractor—worked for several gig economy companies including Lyft, Uber, Postmates, Caviar, and Grubhub "because the flexible scheduling allowed him to pursue his acting career."[70]

C. *Amazon's "Flex" Delivery Model: An "Uber for Packages"*

"Flex is to package delivery what Uber is to taxis: A fleet of contractors who obtain work through a massive company but are not technically considered employees of said company."[71] From the get-go, Amazon's Flex driver website appeals to the senses of those who are looking for a non-traditional job by telling them they can "[b]e [their] own boss, set [their] own schedule, and have more time to pursue [their] goals and dreams. Join [Amazon] and put the power of Amazon behind you."[72] So how does one become a flex driver and what is the average day of a driver like? Several people—people who actually work for Amazon and undercover journalists—have created news articles, blog posts, and YouTube videos focused on explaining "what it is really like to gig for Amazon Flex."[73]

In joining Amazon as a Flex driver, there is no interview process—at least not in the traditional sense.[74] Applicants begin by downloading the Amazon Flex app and creating an account on the app.[75] Then, prospective drivers submit to a background check.[76] Next, applicants must watch and be

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[67] *See* Quora, *What Are the Pros and Cons of the Gig Economy?*, FORBES (Jan. 8, 2019, 12:22 PM EST), https://perma.cc/H4VV-WHTE.

[68] *Id.*; *see Amazon Flex*, AMAZON, https://perma.cc/D6AU-5EB3 (last visited Mar. 26, 2021) [hereinafter *Amazon Flex*].

[69] 302 F. Supp. 3d 1071, 1073 (N.D. Cal. 2018).

[70] *Id.*

[71] Valle, *supra* note 6.

[72] *Amazon Flex*, *supra* note 68.

[73] *See, e.g.*, *What It's Really Like*, *supra* note 3; Alana Semuels, *I Delivered Packages for Amazon and It Was a Nightmare*, THE ATLANTIC (Jun. 25, 2018), https://perma.cc/4NAU-QEM4; Taylor Soper, *Amazon Flex: What It's Like Delivering Packages for Amazon* (Dec. 25, 2017), https://perma.cc/9WFC-B9Z3; Dave Clark, *Amazon Flex App Demonstration* (Sept. 29, 2015), https://perma.cc/DYM4-48NL.

[74] *See What It's Really Like*, *supra* note 3 (explaining the process of signing up to be a Flex driver).

[75] *See* Clark, *supra* note 73; Harry Campbell, *Amazon Flex—What It's Like to Deliver Packages for Amazon*, THE RIDESHARE GUY (Sept. 1, 2020), https://perma.cc/V9GN-NB76.

[76] *See* Clark, *supra* note 73; Campbell, *supra* note 75.

tested on nineteen instructional videos that explain how to actually do the job and what to do in certain situations—for example, if a driver is given an incorrect address or damaged package.[77]

After signing up and passing the video test, applicants may have to wait approximately two weeks before they receive an email from Amazon letting them know that they are approved as a driver.[78] The next step for the new driver is getting work— "a whole other challenge."[79] Unlike Uber and other on-demand services (where drivers can log on and get to work right away), Amazon asks Flex drivers to use the app in selecting the time they would like to start their shift and the length of that shift.[80] Before selecting the job, drivers can see the projected amount of money they will make on this delivery—subject to variation between two numbers, based on if the driver gets a tip.[81] Once the driver selects the delivery slot, she must drive to the Amazon delivery station to pick up the "work," meaning the packages to be delivered.[82] The driver then uses the app on the phone to scan the bar codes on the packages.[83] After the packages are scanned and the driver is ready to make her first delivery, the app gives her turn by turn directions to the delivery destination.[84] The app also gives any specific instructions from the customer on how they would like the delivery completed.[85] The driver will then scan the package(s) again, and complete a series of drop off questions like "who are you giving the package to?"[86] After that, the driver is off to her next delivery.[87]

II. The Problem Being Addressed: Amazon's Evolving Delivery Model Has the Potential to Affect the Gig Economy

A. *The Way Amazon Chooses to Label Its Delivery Drivers Determines How These Types of Workers Are Treated Under the Law*

Flex drivers, as independent contractors, are not entitled to the legally mandated employment benefits explained above and are forced to shoulder the many expenses that accompany package delivery—resulting in

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[77] *What It's Really Like*, *supra* note 3.

[78] *See What It's Really Like*, *supra* note 3; *see also* Campbell, *supra* note 75 ("My application was approved in two days, and I began to receive offers on the Flex app on my phone.").

[79] *What It's Really Like*, *supra* note 3.

[80] *What It's Really Like*, *supra* note 3.

[81] Clark, *supra* note 73.

[82] Clark, *supra* note 73.

[83] Clark, *supra* note 73.

[84] Clark, *supra* note 73.

[85] Clark, *supra* note 73.

[86] Clark, *supra* note 73.

[87] Clark, *supra* note 73.

unfavorable practical effects for the drivers.[88] For comparison, consider employees of the United Parcel Service, Inc. (UPS), who make on average thirty-six dollars an hour and have expenses such as gas and tolls covered.[89] Further, the American Postal Workers Union asserts that "employees make about $75,000 a year, well over the median U.S. income."[90] Also, consider FedEx employees, who, prior to 2020, were automatically enrolled in the company's pension plan early in their employment and who, following the company's closure of its pension program, now benefit from a 401(k) plan.[91] In addition, FedEx carries auto insurance that covers its couriers and, as "part of [its] commitment to [its] people," FedEx also offers employees health insurance.[92]

Contrast FedEx and UPS workers with Amazon Flex drivers who, as a result of their classification, receive "no health insurance or pension, and are not guaranteed a certain number of hours or shifts a week."[93] Flex drivers do not receive "basic labor protections like minimum wage and overtime pay, and they don't get unemployment benefits if they suddenly can't work anymore."[94] Even when drivers are often required to work beyond their allotted time shift, because of a missed delivery or incorrect address entrance, they will not be entitled to overtime pay.[95] This frequently results in drivers making less than minimum wage when accounting for the full gamut of expenses associated with the job, including "vehicle depreciation, insurance, maintenance, mobile phone fees, and fuel and tolls."[96] In addition, drivers can expect "to spend more than an hour going back and forth to the warehouse picking up boxes or returning undelivered ones"—

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[88] Chris Opfer, *Amazon Flex Draws Uber-Like Driver Complaints*, BLOOMBERG LAW (Jan. 19, 2017), https://perma.cc/B5D9-V3DJ ("Most of these Flex drivers have no idea—they do not realize that they're making considerably less and working considerably more than what Amazon quotes in the app.").

[89] *What It's Really Like*, *supra* note 3; *see also Ups Driver Salaries*, GLASSDOOR, https://perma.cc/YQU8-F5D3 (last visited Mar. 26, 2021) (stating the average salary of a UPS delivery driving is $82,540).

[90] *What It's Really Like*, *supra* note 3.

[91] Elizabeth Bauer, *Understanding the FedEx Pension Closure*, FORBES (Nov. 18, 2019, 11:08 PM EST), https://perma.cc/53MT-PN9Y.

[92] *FedEx Ground Package Handlers*, FEDEX GROUND, https://perma.cc/VE5T-368J (last visited Mar. 26, 2021); *Verification of Insurance*, FEDEX, https://perma.cc/GP59-YYEW (last visited Mar. 26, 2021).

[93] Semuels, *supra* note 73.

[94] Semuels, *supra* note 73.

[95] *See* Opfer, *supra* note 88.

[96] *See* Opfer, *supra* note 88; *What It's Really Like*, *supra* note 3 ("[I]t's outrageous that a company like Amazon requires these contractors to sit, unpaid, to watch detailed videos on how to make deliveries, on how to scan packages at every step of the process, but does not give some simple guidance on how to account for expenses.").

time they are not paid for.[97] And the final nail in the coffin: Flex drivers are required to maintain their own auto insurance.[98]

B. *Arbitration Agreements in Most Gig Economy Contracts Limit Judicial Involvement*

"Even if Uber and [the Amazon Flex program] are eventually forced to change their business model . . . that moment could be far off" due to companies' uses of arbitration agreements.[99] Put simply, an arbitration agreement can be embedded in an employment contract and can require the company and worker to resolve employment-related disputes through individual arbitration or waive class and collective proceedings.[100] Such agreements are regularly enforceable under the Federal Arbitration Act.[101] "Arbitration clauses in employment contracts are not a recent innovation, but they have become quite common," rising from use in only 2% of non-unionized employee contracts in 1992 to 54% today.[102] While in describing "a vivid illustration of the declining power of workers in the U.S. political system," the United States Supreme Court held that class action waivers in arbitration agreements are enforceable.[103] With this decision, "employers may safely conclude that properly drafted arbitration agreements will be enforced."[104] There could, however, be a glimmer of hope for workers trying

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[97] *What It's Really Like*, *supra* note 3 ("Most of these Flex drivers have no idea—they do not realize that they're making considerably less and working considerably more than what Amazon quotes in the app.").

[98] *Frequently Asked Questions About Amazon Flex*, AMAZON, https://perma.cc/M22G-NZSH (last visited Mar. 26, 2021).

[99] Rittmann v. Amazon.com Inc., No. C16-1554-JCC, 2017 WL 1079926, at *1 (W.D. Wash. Mar. 22, 2017) (stating Amazon includes arbitration agreements in the Amazon Flex Independent Contractor Terms of Service); Scheiber, *supra* note 60.

[100] *See Rittmann*, 2017 WL 1079926 at *1; Adam Liptak, *Supreme Court Upholds Workplace Arbitration Contracts Barring Class Actions*, N.Y. TIMES (May 21, 2018), https://perma.cc/7V8A-TR4T; Menegus, *supra* note 1 (Including arbitration clauses in independent contractor agreements is "common practice for comparable gigs, affecting some 25 million contracts.").

[101] *See Rittmann*, 2017 WL 1079926 at *1.

[102] Liptak, *supra* note 100 ("Some 23 percent of employees not represented by unions, [Justice Ginsburg] wrote, are subject to employment contracts that require class-action waivers.").

[103] *Federal Arbitration Act and National Labor Relations Act-Arbitration and Collective Actions-Collective Arbitration Waivers*-Epic Systems Corp. v. Lewis, 132 HARV. L. REV. 427, 427 (2018); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018).

[104] Bennette Pine & Wendy Chiapaikeo, *Supreme Court Upholds Employers' Mandatory Arbitration Agreements Barring Class Actions*, CCBJ (June 18, 2018), https://perma.cc/LJ43-KFXC; *see also* Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 314 (D. Mass. 2016) (granting the defendant's motion to dismiss and compel arbitration in a class action suit alleging wrongful classification of drivers as independent contractors rather than employees in violation of the Massachusetts Wage Act, brought in federal court).

to avoid the enforcement of arbitration clauses as a result of the Supreme Court's recent decision in *New Prime Inc. v. Oliveira*.[105] There, the Court held that a court should decide for itself whether the FAA's exclusion for contracts of employment of certain transportation workers applies before ordering arbitration.[106] This exclusion removes both employer-employee contracts and contracts involving independent contractors from the Act's coverage, and therefore a presiding court would lack authority under the Act to order arbitration.[107]

ANALYSIS

III. Amazon Flex Drivers, If Examined by the Massachusetts Courts, Would Likely Be Considered "Misclassified" as Independent Contractors Instead of Employees

A. *For Comparison, Newspaper Delivery Drivers Are Employees, Not Independent Contractors*

In 2018, in *Carey v. Gatehouse*,[108] the Massachusetts Appeals Court held that newspaper delivery drivers were employees of the publisher, rather than independent contractors.[109] The employer in this case, GateHouse, "publishes and distributes a variety of daily and weekly newspapers within Massachusetts."[110] To distribute its product to residential and business customers, GateHouse utilizes individual carriers, whom it classifies as independent contractors.[111] The plaintiff, David King, worked as a carrier for GateHouse for two years and used his own automobile to deliver up to 250 copies of newspapers, six days per week.[112] After GateHouse terminated King's contract, King sued GateHouse, alleging he was misclassified as an

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105 New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019).

106 *Id.* at 537.

107 *Id.* (holding truck drivers who are employed as independent contractors cannot be forced into private arbitration); *see also* Mark Stern, *The Supreme Court Just Handed a Big, Unanimous Decision to Workers. Wait, What?*, SLATE (Jan. 15, 2019), https://perma.cc/DGR2-Z79T (stating, "This [*Oliveira*] decision is a remarkable win for labor rights from a court that typically favors corporate interests over working people. And it will allow hundreds of thousands of contractors to vindicate their rights in court, collectively, rather than in costly and unjust arbitration.").

108 Carey v. Gatehouse Media Mass. I, Inc., 92 Mass. App. Ct. 801 (2018).

109 *Id.* at 802.

110 *Id.* at 802–03.

111 *Id.* at 803.

112 *Id.*

independent contractor rather than an employee.[113] King successfully obtained class certification of a class consisting of all individuals who had signed a written contract and delivered newspapers during the relevant time period.[114]

The *Carey* Court came to its conclusion based solely on the determination that GateHouse could not pass the second prong of the ABC test—requiring GateHouse prove that King performed newspaper delivery services "outside the usual course of the business" of GateHouse.[115] The Court first focused its inquiry on how GateHouse described its own business.[116] GateHouse labeled itself as a newspaper publisher that made its newspaper immediately available to customers through physical delivery services.[117] The Court found that "an integral part of 'publishing' a daily newspaper is making it immediately available to customers, as without hasty delivery the news would become largely obsolete."[118] Therefore, the drivers performed services in the usual course of GateHouse's business.[119] The Court next considered "whether the service [King was] performing [was] necessary to the business of the employing unit or merely incidental."[120] The Court found GateHouse's business to be "directly dependent on the success of the drivers' endeavors," as the drivers performed services on behalf of GateHouse, not merely for their own account.[121] Other important facts emphasized by the Court were that GateHouse secures and deals with customers directly; drivers get a portion of the revenue while GateHouse gets the remainder; customers may provide specific delivery instructions, and customers can file complaints about deliveries, which GateHouse maintains records of.[122]

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[113] *Id.* (detailing King's other allegations including that GateHouse had deducted unauthorized charges and fees from its payments to him, failed to pay him a minimum wage, and violated his rights under the tip-sharing statute).

[114] *Carey*, 92 Mass. App. Ct. at 803.

[115] *Id.* at 805.

[116] *Id.* at 805–06.

[117] *Id.*

[118] *Id.* at 806 (detailing GateHouse's operations which require carriers to make deliveries by 5 p.m. on weekdays and by 8 a.m. on Saturdays, and that the newspapers be in a dry, readable condition).

[119] *Id.* at 807.

[120] *Carey*, 92 Mass. App. Ct. at 807.

[121] *Id.* at 808 (differentiating GateHouse delivery drivers from taxicab drivers who paid flat fees to lease taxicabs. After leasing the cab, the owners were not concerned with the drivers' success, as the revenue of the leasing company was not directly dependent on the success, since the taxi drivers were working for themselves, rather than rendering services on behalf of the leasing company).

[122] *Id.* at 810.

GateHouse attempted to analogize its business model to that of consumer-electronics manufacturers and online retailers by asserting that "delivery services used by those businesses, such as private delivery companies or the United States Postal Service, cannot be considered those businesses' employees, and thus that newspaper delivery drivers cannot be considered GateHouse employees."[123] The Court disregarded this argument, however, because GateHouse failed to offer any "evidence as to those other businesses' actual operations, including their relationships, if any, with delivery drivers, or the centrality of immediate delivery to the nature of the products they offer."[124] The Court further noted that "retail sales and associated services are in a period of rapid transition," and this decision made no comment on the employment status of workers in any of the industries.[125] In addition, an important aspect of worker status determination not analyzed in *Carey*—only because GateHouse failed to raise the defense in its answer or pretrial motion—was that the second prong of the "ABC test" was preempted, as to certain delivery drivers, by a section of the FAAAA concerning motor carriers' transportation of property.[126]

B. *Amazon Flex Drivers Are Employees, Not Independent Contractors*

1. Procedural Mountains to Climb

At the outset, it is important to address a seemingly facially insurmountable procedural issue Flex drivers face in attempting to seek judicial relief: arbitration clauses.[127] Every Flex driver contract includes an arbitration agreement, which waives a driver's rights to a class action lawsuit against Amazon.[128] Although the agreement also gives a driver the ability to opt-out of the arbitration clause within two weeks of signing, few drivers do.[129] Notwithstanding this procedural hurdle, there are currently two certified classes of Flex drivers seeking relief for misclassification—one

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[123] *Id.*

[124] *Id.*

[125] *Id.* at 811.

[126] *Carey*, 92 Mass. App. Ct. at 804; *see also* Schwann v. Fedex Ground Package Sys. In., 813 F.3d 429, 436 (1st Cir. 2016); Mass. Delivery Assn. v. Healey, 821 F.3d 187, 193 (1st Cir. 2016).

[127] Menegus, *supra* note 1.

[128] Menegus, *supra* note 1.

[129] Telephone Interview with Shannon Liss-Riordan, Counsel for Amazon Flex Drivers, Lichten & Liss-Riordan, P.C. (Mar. 5, 2019) ("Companies use these opt-out provisions so that they can try to argue that the arbitration clause was not mandatory, but . . . no one really opts out of arbitration. A handful of people do, but most people . . . [do not] realize why they should do it."); *see also* Menegus, *supra* note 1.

in Massachusetts and the other in Washington. [130] Both classes are represented by well-known class action labor and employment law attorney, Shannon Liss-Riordan, and await argument on the worker classification issue.[131] The proceedings in the Washington case were stayed, awaiting the Supreme Court's decision in *New Prime Inc. v. Oliveira*.[132] In light of the Oliveira decision, the federal court in Washington lifted the stay and requested that both parties brief the Court as to whether the FAA's exclusion for transportation workers applies to Flex drivers.[133] Attorney Liss-Riordan asserts that the focus of this issue is whether the goods being delivered are part of interstate commerce.[134] She explained that while drivers in other cases (specifically in the food delivery arena) have fallen outside of the transportation driver exception because they performed local, intrastate deliveries, she is confident the exception will apply to Flex drivers as they are delivering actual products that often originate from out of state.[135] The Court's decision on this issue will determine whether the Court lacks authority to order arbitration.[136] On the other side of the country, possibly as a strategy to consolidate all cases against it in federal courts and evade Massachusetts' strict application of the ABC test, Amazon successfully removed the case to federal court.[137] As a result, this case may get transferred

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130 *See* Rittmann v. Amazon.com, Inc., No. C16-1554-JCC, 2017 WL 1079926, at *1 (W.D. Wash. Mar. 22, 2017); Waithaka v. Amazon.com, Inc., No. 17-40141-TSH, 2018 WL 4092074 (D. Mass. Aug. 28, 2018) [hereinafter *Remand Granted*].

131 *See Rittmann*, 2017 WL 1079926 at *1 (determining that of the tens of thousands of putative class members, all but approximately 165 drivers agreed to individual arbitration as set forth in the Amazon Flex agreement); *Remand Granted, supra* note 130, at 2; *Attorneys: Shannon Liss-Riordan*, LICHTEN & LISS-RIORDAN, P.C., https://perma.cc/S3FJ-97T3 (last visited Mar. 26, 2021) ("[Liss-Riordan] is currently representing workers in a number of cases against self-proclaimed 'gig economy' companies that save on labor costs by misclassifying employees as independent contractors.").

132 139 S. Ct. 532, 537 (2019).

133 Minute Order, Rittmann v. Amazon.com, Inc., 2:16-cv-01554 (W.D. Wash. Mar. 29, 2019); *see also Oliveira*, 139 S. Ct. at 537.

134 Telephone Interview with Shannon Liss-Riordan, *supra* note 129.

135 Telephone Interview with Shannon Liss-Riordan, *supra* note 129 (stating further that, as a precaution, she has been filing individual arbitration cases for drivers, in the event that arbitration is enforced).

136 *Oliveira*, 139 S. Ct. at 544 (holding truck drivers who are employed as independent contractors cannot be forced into private arbitration); *see also* Stern, *supra* note 107.

137 *Remand Granted, supra* note 130, at 3 (ordering the case be remanded back to state court); *see Remand Denied, supra* note 9 at 2 (denying the plaintiff's motion to remand back to state court because "between October 2017 and September 2018, the number of . . . Amazon Flex program [members] had tripled," and consequently, Amazon demonstrated that these increases rose the amount in controversy over the removal requirement); *see also* Villani, *supra* note 5 (quoting counsel for the flex drivers, "[w]e thought Amazon was trying to get the smaller Massachusetts case into federal court so it could consolidate them and put that one on ice also . . . .").

to be combined with the Seattle case.[138]

Another obstacle facing Flex drivers is the possibility that the second prong of the ABC test—the most difficult prong for employers to meet—might be preempted by the FAAAA.[139] Preemption would occur if a court found Amazon to be a delivery company or Flex drivers to be motor carriers.[140] It is likely a court could find either, as Flex drivers are individuals "engaged in the transportation of goods," and Flex drivers necessarily perform services within "the usual course of the business" of Amazon, which now labels itself as a delivery company.[141] A court would likely hold that requiring Amazon to "use employees rather than independent contractors to deliver those services" would cause Amazon to change the manner in which it provides its service and result in raised costs for the company (*e.g.*, requiring that employers pay employees minimum wage).[142] Nevertheless, because no Massachusetts court has decided whether the FAAAA applies to Amazon Flex drivers, the second prong will still be analyzed here. Parenthetically, in reference to the two cases pending in federal court, it is unclear whether the second prong will be preempted as there is a split in the circuits.[143]

2. The ABC Test Applied to Flex Drivers: Prong "A"

To overcome the presumption that Flex drivers are employees, Amazon must first prove that the drivers are "free from control and direction in connection with the performance of the service, both under [their] contract for the performance of service and in fact."[144] Due to the amount of "control and micromanagement Amazon seems to exhibit over its Flex workers," it appears unlikely it would be able to meet prong one of the ABC test.[145] From

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138 Email from Shannon Liss-Riordan to Author, Counsel for Amazon Flex Drivers, Lichten & Liss-Riordan, P.C. (Mar. 6, 2019, 02:17 PM EST) (copy on file with author).

139 *See* Shea, *supra* note 50 (stating the Court's decision to preempt the second prong is significant, "as prong two made the test impossible for motor carriers to meet").

140 *See* Shea, *supra* note 50.

141 Chambers v. RDI Logistics, Inc., 476 Mass. 95, 102 (2016) ("A delivery driver for a motor carrier necessarily will be performing services within 'the usual course of the business of the employer' whenever a court concludes that delivery services are part of its usual course of business."); *see* Airport and Airway Improvement Act, Pub. L. No. 103-305, § 601(a), 108 STAT. 1569, 1605 (1994) (stating the FAAA Act preempts state regulation in the arena of intrastate transportation, therefore, although most Flex drivers only deliver within state boundaries they will still fall under the purviews of the FAAAA).

142 *Chambers*, 476 Mass. at 102.

143 Telephone Interview with Shannon Liss-Riordan, *supra* note 129 (stating that her partner successfully argued the issue in New Jersey, California, and Illinois).

144 MASS. GEN. LAWS. ch. 149, § 148B (2021); *see also* Esquenazi, *supra* note 43, at 2593 n.220.

145 Adi Kamdar, *Gig News: More Details Emerge About Amazon Flex*, ON LABOR (Nov. 17, 2017), https://perma.cc/5HRV-X9JW.

the moment a Flex driver drives to the station to pick up the packages to be delivered, he is controlled by Amazon's rules and standard, and subject to the direction and supervision of the station managers and Flex App.[146] For example, every time a package is moved (from the initial pick up to the final drop off) the driver must scan the bar codes on the packages.[147] While making the delivery, the app gives the driver turn by turn directions to the delivery destination.[148] The app also gives any specific instructions from the customers and then requires the driver to describe the details of the delivery.[149] In no way are Flex drivers free from supervision "as to the means and methods that are to be utilized in the performance of the work."[150] Amazon would likely argue, however, that Flex drivers are in fact free from supervision and control in that the drivers can select when to work and even whether to work on any given day.[151] Furthermore, Amazon would highlight that the Flex drivers decide "how they want to work, what they want to drive or pedal, and what they take to make deliveries."[152]

3. The ABC Test Applied to Flex Drivers: Prong "B"

In order to conquer the almost impossible second prong of the ABC test, Amazon would have to prove that the drivers are performing services outside the usual course of Amazon's business.[153] Remarkably, for the first time since its creation, Amazon implied that it considers itself to be involved in the transportation and logistics services—namely, delivery services—by telling the world it considers other companies in this service area to be

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[146] *See* Brigham's Case, 348 Mass. 140, 140–42 (1964) ("If in the performance of his work an individual is at all times bound to obedience and subject to direction and supervision as to details, he is an employee; but if he is only responsible for the accomplishment of an agreed result in an agreed manner, he is an independent contractor."); *see also* Clark, *supra* note 73; Telephone Interview with Shannon Liss-Riordan, *supra* note 129 (asserting Amazon has an extremely detailed system that tracks drivers' locations and how many packages they deliver, and uses metrics to determine how well drivers are performing, which could lead to a drivers termination). *Contra* Athol Daily News v. Bd. of Review of Div. of Emp't & Training, 439 Mass. 171, 178 (2003) (finding defendant met prong one by proving that once its carriers received their newspapers from the company, the carriers were entirely free from its supervision in performing the services for which they were engaged).

[147] Clark, *supra* note 73.

[148] Clark, *supra* note 73.

[149] Clark, *supra* note 73.

[150] *Athol Daily News*, 439 Mass. at 177 (quoting Maniscalco v. Director of the Div. of Employment Sec., 327 Mass. 211, 212 (1951)).

[151] Opfer, *supra* note 88.

[152] Opfer, *supra* note 88.

[153] MASS. GEN. LAWS ch. 149, § 148B (2021); *see also* Esquenazi, *supra* note 43, at 2593 n.220.

competitors.[154] In its annual filing with the U.S. Securities and Exchange Commission for 2018, Amazon described its competition stating, "we have many competitors in different industries, including physical, e-commerce, and omnichannel retail . . . *and transportation and logistics services* . . . ."[155] As in *Carey*, Amazon's promotion of same-day delivery is "likely to be found to be integrated to Amazon's overall products or services that it's providing to customers," as the customers that receive this service pay for Amazon Prime.[156] Further, a Massachusetts court would likely determine the delivery services completed by Flex drivers are completely necessary to the success of Amazon's business, as Amazon is actively attempting to "cut out third-party shipping operations like FedEx and UPS."[157] In this effort, Amazon relies heavily on Flex drivers to handle "last mile" delivery service.[158] As in *Carey*, Amazon is "directly dependent on the success of the drivers' endeavors."[159] By utilizing Flex drivers, Amazon is able to keep delivery costs low, while maintaining its promise of fast shipping to its Prime members and luring more people to join Amazon Prime.[160] Undoubtedly, Amazon Prime, which includes Sunday delivery, same-day delivery, and even one-hour delivery, has become a part of Amazon's brand.[161] As Amazon CEO Jeff Bezos said himself, the Prime membership is "such a good value, you'd be irresponsible not to be a member."[162] Accordingly, because Flex drivers perform this hasty delivery service on behalf of Amazon and not themselves, Amazon's business is "directly dependent on the success of

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154 *See* Sebago v. Boston Cab Dispatch Inc., 471 Mass. 321, 333 (stating "[w]e have recognized that a purported employer's own definition of its business is indicative of the usual course of that business"); *Amazon.com, Inc. Form 10-K for the Fiscal Year Ended December 31, 2018*, Form 10-K, No. 20549 (S.E.C. 2019) [hereinafter *Articles*]; Eugene Kim, *Amazon Makes Clear It's Now Competing with Shippers Such As FedEx and UPS in Its Annual Filing*, CNBC (Feb. 5, 2019, 1:18 PM EST), https://perma.cc/M256-RFW6.

155 *Articles*, *supra* note 154; *see also* Kim, *supra* note 154 (emphasis added).

156 Menegus, *supra* note 1.

157 Opfer, *supra* note 88.

158 *See* Opfer, *supra* note 88; Maharaj, *supra* note 4 (explaining Amazon is looking to vertically integrate operations wherever possible and creating a network of independent contractors to "handle last-mile delivery").

159 Carey v. Gatehouse Media Massachusetts I, Inc., 92 Mass. App. Ct. 808, 808 (2018).

160 *How Americans Are Shopping Online: 2018*, SMALLBUSINESS.COM (Jun. 11, 2018), https://perma.cc/6J8H-MSKV ("75% of Americans have purchased something online . . . [a]nd by 'online shoppers,' most shoppers mean Amazon.com.").

161 David Goldman, *Jeff Bezos: Amazon Prime Is So Good 'You'd Be Irresponsible' Not to Join*, CNNBUSINESS (Apr. 6, 2016, 12:43 PM ET), https://perma.cc/PS7X-GJ33.

162 *Id.* (stating in 2016 there there were thirty million Prime-eligible items on Amazon, meaning that they could be shipped to subscribers within two days—for free).

the drivers' endeavors."[163]

4. The ABC Test Applied to Flex Drivers: Prong "C"

Amazon is unlikely able to meet the third and final prong, in which it would need to prove that Flex drivers are "customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[164] Requiring that a Flex driver's delivery business could not survive the termination of its agreement with Amazon be a dispositive factor would be "far too stringent."[165]

Instead, the court will consider whether a Flex driver is "capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services." [166] Fundamentally, the court will ask, is a Flex driver "wearing the hat of an employee of the employing company, or is he wearing the hat of his own independent enterprise?" [167] In *Coverall N. Am., Inc.*, the Massachusetts Supreme Judicial Court held that a worker for a commercial janitorial cleaning franchise was an employee under the third prong.[168] The Court explained that, although the worker was capable of hiring her own employees and could solicit business directly, she was "very much reliant upon [the company] for the maintenance of her business."[169] The Court listed the salient facts that the company negotiated payment directly with clients (the worker was not involved in this process whatsoever); the worker was supervised while she performed her services; and the worker was told to complete tasks that she complained could not be completed in the number of hours allocated (causing her to work in excess of the number of hours she scheduled).[170]

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[163] *See Carey*, 92 Mass. App. Ct. at 808 (quoting Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 333–34 (2015)) (analogizing newspaper delivery drivers to limousine drivers in that, "although they did share a percentage of the commissions, [limousine drivers] were performing services for O'Hare–Midway (driving customers booked by the limousine service) and not for themselves").

[164] *See* MASS. GEN. LAWS ch. 149, § 148B (2021); Esquenazi, *supra* note 43, at 2593 n.220.

[165] *See* Athol Daily News v. Bd. of Review of Div. of Emp't & Training, 439 Mass. 171, 180 (2003).

[166] *See Sebago*, 471 Mass. at 336 (quoting *Athol Daily News*, 439 Mass. at 181).

[167] *See Athol Daily News*, 439 Mass. at 181 (quoting Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Emp't & Training, 56 Mass. App. Ct. 473, 778 (2002)).

[168] *See* Coverall N. Am., Inc. v. Comm'r of Div. of Unemployment Assistance, 447 Mass. 852, 859 (2006).

[169] *Id.* at 858.

[170] *Id.* at 859.

In the case of Amazon Flex drivers, as in *Coverall*, the Court is likely to find that the Flex drivers are "very much reliant" upon Amazon for the maintenance of their package delivery business.[171] Amazon Flex drivers, while "trained" in how to interact with customers, are in no way involved with the customer's payment for the product or delivery services.[172] Further, the Flex app gives Amazon direct supervision—over the driver's location and handling of the packages—from the moment he picks up the packages.[173] A driver's involvement with the app includes scanning the packages at pick up; being automatically directed to the first stop (via a route determined by Amazon's algorithms); being automatically notified when the driver reach the delivery stop; scanning the package again; and then making a record of the delivery details.[174] Finally, numerous Flex drivers recount experiences in which they were required to deliver packages past their scheduled shifts, for which they were not awarded overtime.[175] Notably, although a Flex driver could get another gig economy delivery job—say, with GrubHub—the Court has rejected such a test based on "capability."[176] On the contrary, however, Amazon would likely argue that Flex drivers do not "heavily rely" upon Amazon to keep their businesses running because Flex drivers do not expect a continuing relationship with Amazon and can work for multiple employers at once.[177]

IV. Amazon Should Employ Certain Safeguards in Order to Clearly Define the Worker's Employee Status and Avoid Litigation

"[T]he potential risks of worker misclassification could arise under

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171 *See* Schwann v. FedEx Ground Package Sys., 2017 WL 4169425, at *5 (D. Mass. Sept. 20, 2017); Telephone Interview with Shannon Liss-Riordan, *supra* note 129 (stating that Flex drivers are wearing the hat of Amazon when delivering packages because they are not deciding how many people to hire, or how many packages to deliver and where for each shift).

172 Semuels, *supra* note 73.

173 *See supra* text accompanying notes 78–83.

174 Soper, *supra* note 73.

175 Chris Morran, *More Amazon Drivers Accuse Company of Not Paying Required Overtime Wages*, CONSUMERIST (Nov. 2, 2016 10:51 AM EST), https://perma.cc/QBV4-D3L6 ("We never got paid overtime . . . We'd get the list of addresses and packages from Amazon and we were under pressure to get all our packages delivered that day no matter how long it took.").

176 Coverall N. Am., Inc. v. Comm'r of Div. of Unemployment Assistance, 447 Mass. 852, 858 (2006).

177 *See* Soper, *supra* note 73 ("Amazon Flex isn't the right fit if you're looking for full-time work, but if you have some free time and don't mind driving your own car . . . it's worth a look."); Opfer, *supra* note 88 ("Some choose to work sparingly, while others find the work sufficiently lucrative and enjoyable that they make the business decision to sign up for delivery blocks more frequently."); Fallon, *supra* note 20 ("Nearly half of those surveyed [freelancers] work 30 to 50 hours per week, and more than 80 percent focus on one to three jobs at once.").

myriad state and federal laws." [178] This potential risk is growing exponentially, as more workers enter the gig economy.[179] Litigation and settlement negotiations between gig economy companies and gig workers are occurring across the country in vast numbers and are resulting in big payouts.[180] For example, in 2016, almost 400,000 Uber drivers in California and Massachusetts reached a $100 million settlement with the company, yet the judge still deemed this large amount of money insufficient in the compensation it provided the claimants.[181] In 2017, Lyft, another rideshare company, settled with a class of 95,000 possibly misclassified drivers for $27 million.[182] Instead of re-classifying its drivers, the company agreed to "clarify its internal policies and provide additional rights for its independent contractor workforce, including limitations on when Lyft may deactivate drivers and an opportunity to be heard in an arbitration paid for by Lyft to challenge the basis for deactivation."[183] In order to avoid further litigation and enormous settlement offers, Amazon may want to consider re-classifying its workers or fine tuning its Flex agreements.[184]

By using independent contractors, rather than employees, to make its last mile deliveries, Amazon is able to profit off cheap(er) labor.[185] However, if a Massachusetts court were to find that Flex drivers satisfy the ABC test to be considered employees, Amazon and similar companies' programs could be "forced to either offer their workers more freedom—by allowing them to

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178 Erika Skougard, *What Companies Should Know in the Wake of California's New Worker Classification Ruling*, COVINGTON (May 16, 2018), https://perma.cc/UC6V-WMAJ (stating California's highest court recently pronounced a new worker classification standard that is simpler and will make it more difficult for businesses to classify workers as independent contractors).

179 Nancy Cremins, *The On-Demand Economy Continues to Grow, but Legal Consequences Abound for Employers and Employees in the U.S. and Abroad*, 62 BOS. B.J., Winter 2018, at 26 ("Given that the settlements did not require these companies to re-classify their independent contractors as employees, they may find themselves facing further litigation on this subject.").

180 *See infra* text accompanying notes 181–84.

181 *See* Chris Isidore, *Judge Rejects $100 Million Settlement Between Uber and Drivers*, CNNMONEY (Aug. 19, 2016, 9:29 AM ET), https://perma.cc/ER4G-PSTR.

182 *See* Marisa Kendall, *Lyft off the Hook in Driver Case, 3 Years and $27 Million Later*, MERCURY NEWS (Mar. 16, 2017, 2:50 PM), https://perma.cc/4KBM-3KDC.

183 Cremins, *supra* note 179, at 26.

184 *See* Cremins, *supra* note 179, at 26; Telephone Interview with Shannon Liss-Riordan, *supra* note 129 ("My hope is that the litigation and the attention it has [received] is creating a deterrence effect for companies.").

185 *See* Hayley Peterson, *Missing Wages, Grueling Shifts, and Bottles of Urine: The Disturbing Accounts of Amazon Delivery Drivers May Reveal the True Human Cost of 'Free' Shipping*, BUS. INSIDER (Sep. 11, 2018), https://perma.cc/BLS6-7DNN; *Amazon Logistics*, AMAZON, https://perma.cc/AFL3-XY5X (last visited Mar. 26, 2021).

set their own prices and other terms—or convert them into employees."[186] Obviously this would significantly increase Amazon's costs of operations.[187] The foremost issue that a company would face in its reclassification of workers is that it would add an additional 20–30% to a company's costs.[188] Though not easy or cheap, large companies "flush with venture capital money" may be best equipped to make this switch.[189] "The trend seems to show that companies make the switch most successfully when they have enough money to do so or when they do it early enough to adapt their business model around the change."[190] Assuming that Amazon would not want to eat the additional cost of reclassification, as it continues to grow, "it may soon have to come to terms that its Flex practices aren't sustainable, may not make business sense, and are quite possibly illegal."[191]

If Amazon continues using Flex drivers and labeling them as independent contractors, it would behoove Amazon to review and modify all written independent contractor agreements to make sure they correctly describe the relationship and the parties' respective obligations.[192] Of course, this strategy risks litigation resulting in stiff penalties, treble damages, and the payment of attorneys' fees and costs.[193] As a safeguard, Amazon could take steps to limit potential exposure by making sure no independent contractor works more than forty hours per week or delivers packages after his shift has ended so as to avoid potential overtime liability.[194] Amazon may also consider paying unemployment compensation contributions and workers' compensation premiums on behalf of its independent contractors, thus limiting legal exposure in these areas.[195] Finally, Amazon might look to the efforts of "a handful of businesses and nonprofits," who are working to make and keep freelancing an attractive job opportunity.[196] For example, the

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186 Lydia DePillis, *California Ruling Puts Pressure on Uber, Lyft and Other Gig Economy Employers*, CNNMONEY (May 3, 2018, 1:22 PM ET), https://perma.cc/57K2-4AJW.

187 *See* Scheiber, *supra* note 60 ("Industry executives have estimated that classifying drivers and other gig workers as employees tends to cost 20 to 30 percent more than classifying them as contractors.").

188 Kamdar, *supra* note 145.

189 Kamdar, *supra* note 145.

190 Kamdar, *supra* note 145.

191 Kamdar, *supra* note 145.

192 *See* Shea, *supra* note 50.

193 Shea, *supra* note 50.

194 *See* Shea, *supra* note 50.

195 *See* Shea, *supra* note 50.

196 *See* DePillis, *supra* note 186; *see also* Cremins, *supra* note 179, at 26 (asserting "given that the settlements did not require these companies to re-classify their independent contractors as employees, they may find themselves facing further litigation on this subject," and suggesting these efforts might keep the gig-worker employment litigation at bay).

founder of the New York-based Freelancers Union, which started offering health insurance plans for independent contractors, launched a short-term disability insurance product that will cover up to half of an independent worker's typical income in the event of a serious injury or illness.[197] In addition, "online labor platforms including Uber, Postmates, and Wonolo have partnered with benefits startups like Stride Health, Zego, and Bunker to help workers find insurance."[198] Notably, however, fear of these benefits leading the workers to be classified as employees keeps companies from providing any further benefits.[199]

Notwithstanding the enumerated suggestions above, in an effort to gain complete control over its delivery logistics and avoid the misclassification issue, it is predicted that Amazon will decrease its reliance on Flex drivers and increase the amount of deliveries it makes through Delivery Service Partners (DSPs).[200] In short, through the DSP program, entrepreneurs can be their own boss—"staffing and operating a fleet of delivery trucks for the e-commerce giant"—by initially investing at least $10,000 with Amazon.[201] DSP drivers "will wear Amazon-branded uniforms and the vans will sport Amazon Prime logos," but the entrepreneurs themselves will own the business and contract with Amazon to complete deliveries.[202] A notable catch, however, is that Amazon will not allow vans with Amazon branding to be used to service competitors.[203] It is assumed that "DSPs will get the volume first because they are cheaper from a cost-per-package perspective," and the Flex Program will "[get] the scraps."[204] This shift in delegation of delivery capacity does not wholly avoid the issue, however, as the Massachusetts independent contractor test will be applied to individuals performing services through their own business entities, including

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197 *See* DePillis, *supra* note 186.

198 *See* DePillis, *supra* note 186 (discussing how a court categorizing a company's workers as employees could end up costing the company a lot more because of the broader suite of benefits to which employees are entitled).

199 *See* DePillis, *supra* note 186.

200 *See* Peterson, *supra* note 185.

201 Ali Montag, *Amazon Says This Business Opportunity Could Make You up to $300K a Year—Here's How to Get into the Program*, CNBC (Sep. 6, 2018, 11:49 AM EDT), https://perma.cc/7STW-NDXS ("Since it was announced June 28, tens of thousands of people have applied to the program and Amazon has put in an order for 20,000 Mercedes-Benz vans.").

202 *Id.* (explaining in order to help entrepreneurs reach the low start-up cost, Amazon provides access to third-party deals on costs like "leasing the vans, getting insurance and buying mobile devices with data plans").

203 *Id.*

204 Hayley Peterson, *'Flex Is Dead': Drivers Claim Amazon Flex Delivery Jobs Are Disappearing*, INSIDER (Jan. 25, 2019, 1:16 PM) https://perma.cc/KP4W-YT4D.

corporations—meaning the ABC test would also apply to DSPs. [205]

V. Either State Legislatures Must Clarify the Dichotomy Between Independent Contractors and Employees—Possibly by Creating a New Class of Worker—or Courts Must Start Enforcing the Laws as Currently Written

While commentators have their own opinions on the origination, benefits, and drawbacks of this new brand of workforce, one certainty is that the gig economy is here to stay. [206] Consequently, David Weil, former Administrator of the Wage and Hour Division of the U.S. Department of Labor under the Obama Administration, contends that, although business is taking place in a field of new technologies and the expectations of both employers and customers is changing, "we should [not] forget or dismiss the underlying reason for our workplace laws going back to the turn of the last century."[207] Weil insists that the purpose behind labor laws was to combat the imbalance in bargaining power, which is almost always skewed in favor of the employer, and to protect the worker—a commitment that must remain.[208] "In reality workers in the gig economy occupy a space between [the legal categories of] independent contractors and employees."[209] Labor laws that governed the traditional employer-employee relationship, based on a principal and agent relationship, are no longer suitable for the modern day gig worker.[210] Current labor laws were created during the reign of the industrial model for production, which depended on "long-term employees as a means to ensure quality and productivity." [211] Whereas effective, updated legislation by today's standards must tolerate flexibility—an

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[205] Shea, *supra* note 50; Benesch Attorneys at Law, *Flash No. 59 Massachusetts "ABC" Test Court Decision: Fresh Application on Old Spin,* BENESCHLAW (Jan. 2017) at 1, 2, https://perma.cc/M6E8-8YMW (stating courts have found that "the statute's reference to individuals does not preclude individuals providing services through a corporate entity from asserting a misclassification claim if the worker was forced to incorporate so the 'employer' could misclassify the worker as an independent contractor").

[206] Parmar, *supra* note 16.

[207] Weil, *supra* note 64.

[208] *See* Weil, *supra* note 64; Fisher Phillips, *New ABC Test for Independent Contractors Sends California Employers Reeling,* LEXOLOGY (July 2, 2018), https://perma.cc/236E-58AS ("In the end, the intent of public policy in protecting workers is a central consideration in determining employee versus independent contractor status.").

[209] William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement,* 69 LAB. L.J. (2018).

[210] *Id.*

[211] *Id.*

essential aspect of the gig economy.[212] Many courts have enlisted state legislatures in the task, albeit daunting, of creating more effective state legislation with an eye towards worker protection.[213]

Contrarily, many commentators warn against a blanket reclassification of independent contractors as employees that is likely to occur by the application of the ABC test.[214] Such reclassification would force companies to "take significant control of gig workers' schedules—undermining the value of the gig economy to the workers currently in it."[215] The near impossible test already negatively affects gig economy businesses that "are not financially equipped to support the costs associated with employees."[216] To avoid this issue, one legal scholar advocates for the creation of a new worker classification that encompasses gig workers.[217] This scholar, focusing on the collective action of gig workers, calls for an amendment to the National Labor Relations Act, so that it would apply to this new classification.[218] Consequently, gig workers would be able to unionize, which would "rebalance the power between management and labor" and help workers regain employment protections in the new gig economy.[219] Other scholars suggest the creation of a new category—the "Dependent Contractor"—which would include "freelancers who receive the majority of their income from a specific company," and require that "the company must

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[212] *See* Ashley L. Crank, O'Connor v. Uber Technologies, Inc.*: The Dispute Lingers—Are Workers in the On-Demand Economy Employees or Independent Contractors?*, 39 AM. J. TRIAL ADVOC. 609, 630–31 (2016).

[213] *See* Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018) ("With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy.").

[214] *See, e.g.*, Sherk, *supra* note 15.

[215] *See, e.g.*, Sherk, *supra* note 15.

[216] Crank, *supra* note 212, at 631; *see Information on Legislation Filed to Address the Independent Contrator Issue & What You Can Do to Support It*, INDEPENDENT CONTRACTOR, https://perma.cc/5FSD-GPP6 (last visited Apr. 2, 2021) (asserting the ABC Test "makes it next to impossible to be an independent contractor or a freelancer in this state . . . companies that are not based in Massachusetts, are no longer hiring Massachusetts-based freelance [workers]"). *See generally* Russell Hollrah & Patrick Hollrah, *The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee,"* 26 J.L. & POL'Y 439, 486 (2018).

[217] Tronsor, *supra* note 209 ("Creating a new worker classification . . . would be a first step . . . .").

[218] Tronsor, *supra* note 209 (explaining all gig workers face similar struggles that will bring them together in support of each other, which will result in the strengthening of unions to be a "social, political, and economic force to be reckoned with in the 21st century").

[219] Tronsor, *supra* note 209 ("Simply put, creating a bargaining unit comprises putting together employees with similar jobs who would likely have similar interests in the workplace. If an employer and a union cannot agree on what the bargaining unit or units should be, then the Board is given the power to define the bargaining unit.").

provide benefits and follow certain regulations."[220]

The "Dependent Contractor" philosophy, however, is antithetical to the opinion of Attorney Liss-Riordan, who asserts that there already exists an appropriate category for gig workers and "it is called employee."[221] She contends that the Legislature has clarified this issue, and "it just needs to be enforced."[222] Further, she maintains that the argument for the creation of a new classification is advanced by large companies trying to deflect from the fact that they are violating the law right now. Liss-Riordan insists that the creation of new category would allow these large corporations to get away with violations.[223] The Flex driver counsel poses the question, "why do we need to change the laws . . . so Amazon can make more money off of the backs of its drivers who have to pay for their own vehicles in order to do Amazon's deliveries?"[224]

Interestingly, many leaders at digital platforms in Silicon Valley, as well as company executives, venture capital companies, and workers, have a view that, in the gig economy, there is a presumption that workers are independent contractors rather than employees—directly contradicting the views of the ABC test.[225] However, these leaders are ignoring the practical effects of their viewpoint.[226] Amazon's financial responsibilities have been shifted onto the Flex drivers—an outcome which would never happen if the drivers were performing within the four walls of Amazon.[227] Notably, there is a general view that "certain things are more important than corporate profit."[228] Accordingly, allowing companies to avoid certain employer responsibilities by misclassifying their employees abolishes the long-standing goal of protecting the disenfranchised working class from corporate greed.[229] On a final note, as Louis Hyman asserts, "we need to fight for, and make sure that, even if our jobs are flexible and autonomous, that

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220 Emilia Istrate & Jonathan Harris, *The Future of Work: The Rise of the Gig Economy*, NACO (Nov. 2017), https://perma.cc/3AFF-7EH6.

221 Telephone Interview with Shannon Liss-Riordan, *supra* note 129.

222 Telephone Interview with Shannon Liss-Riordan, *supra* note 129 (explaining if courts enforce the laws more consistently and comprehensively, then the playing field will be leveled for those companies that are complying with the law and other companies will no longer have a competitive edge via noncompliance).

223 Telephone Interview with Shannon Liss-Riordan, *supra* note 129.

224 Telephone Interview with Shannon Liss-Riordan, *supra* note 129.

225 Weil, *supra* note 64.

226 Weil, *supra* note 64 (explaining the effects of worker misclassification).

227 Weil, *supra* note 64.

228 Ben Z. Steinberger, *Redefining "Employee" in the Gig Economy: Shielding Workers from the Uber Model*, 23 FORDHAM J. CORP. & FIN. L. 577, 590 (2018) (listing minimum wage and safe working conditions as qualities our society places above corporate profit).

229 *Id.*

there is still a measure of security in our lives."[230]

CONCLUSION

By utilizing independent contractors through its Flex Program, Amazon is able to expand its business at unprecedented speed, all while keeping costs low. This business model, however, comes at a cost to the delivery drivers who are likely misclassified as independent contractors, rather than employees, and therefore lose out on state-mandated employee benefits like minimum wage and overtime pay. Based on prior judicial decisions in Massachusetts, it is likely that Massachusetts courts would classify Amazon Flex drivers as employees using the ABC test. This result would cost Amazon, as a court may order it to pay damages, including back pay and possibly treble or punitive damages. Furthermore, companies utilizing the gig economy workforce would be wise to employ safeguards that clearly define workers' statuses. Finally, either the Legislature should strongly consider enacting laws that clarify the dichotomy between the independent contractor and employee—or even create an entirely new statutory class of workers—or courts must consistently and comprehensively enforce the law as currently written.

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[230] *See* Chakrabarti, *supra* note 16.

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The First Step Act and the Brutal Timidity of Criminal Law Reform

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INTRODUCTION

As President Donald Trump signed the First Step Act[1] into law on December 21, 2018,[2] a group of my friends, all veteran criminal justice advocates, threw out alternative names for the legislation: the "Last Step Act," the "Baby Step Act," the "Stutter Step Act." The dark mood even at a time of victory reflected a learned reality: criminal justice reform, even when desperately needed, moves at the pace of a line at the DMV.

Almost unique among political issues, there currently exists a true bipartisan coalition in support of systemic and meaningful criminal law reform—a group so strikingly diverse that it has contained almost unimaginable combinations: both George Soros's Open Society Foundations[3] and Koch Industries,[4] for example, and both Senator Mike Lee[5] and Senator Bernie Sanders.[6] Even President Donald Trump, who had historically shown no affinity for reforming a retributive justice system,[7]

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[1] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[2] *Trump Signs First Step Act*, WASH. POST (Dec. 21, 2018, 3:21 PM EDT), https://perma.cc/6MBY-LQ27.

[3] Leonard Noisette, *Time to Get Serious About Criminal Justice Reform*, OPEN SOC'Y FOUND. (Apr. 30, 2015), https://perma.cc/KZ2W-6R4A.

[4] *Mark Holden: Collaboration on Criminal Justice Reform Works*, 3BL MEDIA (May 30, 2019, 8:00 AM), https://perma.cc/X8D5-VLXW.

[5] Megan Keller, *Mike Lee: Mandatory Sentencing Forces You to Ask, 'Does This Punishment Fit the Crime?'*, THE HILL (Nov. 27, 2018, 10:19 AM EST), https://perma.cc/FD4T-3Y7X.

[6] Shaun King, *How Bernie Sanders Evolved on Criminal Justice Reform*, THE INTERCEPT (June 14, 2018, 11:16 a.m.), https://perma.cc/XZ4R-SB66.

[7] *See generally* Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), https://perma.cc/J59G-F72C (explaining how Trump took out newspaper advertisements to promote the death penalty just after five young black men were convicted, but the young men were later exonerated).

used his State of the Union speech in 2019 to introduce clemency recipient Alice Johnson and declare that "Alice's story underscores the disparities and unfairness that can exist in criminal sentencing and the need to remedy this total injustice."[8]

It would seem that criminal law reform should be racing along at a breakneck pace, given these unusual alliances and the opportunities given the new Biden administration. News flash: it is not, either at the federal or state level.[9] Here, I will try to describe the reasons for that languid pace and assess the impact of what President Lincoln called (in referring to military progress) "the slows."[10]

Part I below will describe this lethargic pace of reform. It lies in stark contrast with the flashy dynamic that created the need for such reform: those swift surges in retributive impulses in which tough-on-crime measures pile one on top of the other. The harsh treatment for crack cocaine offenses, which ramped up quickly in the mid-1980s and has been very slowly undone for 30-some years, is the model for this tragic pattern. The attention to crack, however, masks a broad movement across criminal law in the same direction, spanning federal and state systems, and reflecting similar results. In addition to crack, I will take a look here at the bizarre and seemingly intractable placement of marijuana in Schedule I of the federal code and then turn to state examples of legislative lethargy in the face of clear injustice.

Part II, in turn, will look at three interconnected reasons for this case of "the slows." Most obviously, it is a political problem enmeshed in the gears of our democracy. The political incentives of increasing penalties usually outweigh the political payoff for reform, though that may be changing. The consistent and powerful influence of prosecutors in developing policy is part of the problem, and these political questions are tangled up (as so often is true in the United States) with issues of race. Second, an uncoordinated and unfocused group of advocates (of which I am one) has, like Baptists in America,[11] formed dozens of strands rather than one strong rope. Finally, there is the persistent lure of incrementalism, which presents small victories to be celebrated while leaving gaping canyons of injustice unbridged.

Finally, Part III will suggest a path to accelerate the process, by addressing each problem in turn. First, reformers must find a way to coordinate efforts rather than competing for resources and attention. I suggest the funding and formation of a meta-organization that can at least provide some focus and coordination to the dozens of disconnected

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[8] Avery Anapol, *Alice Marie Johnson, Granted Clemency by Trump, Moved to Tears at SOTU*, THE HILL (Feb. 5, 2019, 9:54 PM EST), https://perma.cc/F259-2ETG.

[9] *See generally* John F. Pfaff, *Locked Up*, THE BAFFLER, July 2019, https://perma.cc/F924-23QW.

[10] *E.g.*, Kirk Stange, *Does Your Law Firm Have a Case of "The Slows?"*, JD SUPRA (Mar. 19, 2018), https://perma.cc/4PY7-Z5GK.

[11] *See generally* BILL J. LEONARD, BAPTISTS IN AMERICA 13–30 (2005).

advocacy groups searching for relevance. Politics is difficult, of course, but there are signs of hope emerging even now. Still, there needs to be a higher and more consistent profile for criminal justice reform, so that the rewards of supporting reform at least equal the political benefits of being "tough on crime." At the same time, racial appeals need to be called out as such, and there must be an affirmative restructure of the policy apparatus to dilute the unique power of prosecutors to reify the status quo. Perhaps most importantly, reform proposals need to be marked by boldness, particularly in those narrow windows of time when change is most possible.

I. The Languid Pace of Reform

Despite consistent and principled criticism from across the political spectrum, incarceration rates in the United States have not responded in kind. Between 2007 and 2017, imprisonment went down, but only by 10%.[12] (We are still sorting out the effects of the COVID pandemic on incarceration). Of that decline, only a fraction can be attributed to state or national policy and legislative changes at the state and federal level, since some of the decline is likely to have been caused by more reasonable charging and sentencing practices by local prosecutors and judges as they adjust to these same influences.

Crack cocaine is the exemplar for "the slows," even as it stands alone as a focus of recent reforms in the federal system. Marijuana law has moved on a different trajectory; many states have legalized it while the federal system clings systemically to a 1980s mindset, as what many perceive as the least serious narcotic remains categorized in the most serious category among the federal narcotic schedules. Meanwhile, in the states, experiences have diverged even as they generally reflect the slow pace of change.

A. *Crack*

Even when there is a broad and deep consensus on the negative effects of a sentencing measure, reform moves glacially. Crack cocaine, of course, is the template for this dynamic. Federal crack sentences went through the roof beginning in 1986, driven by a mindless 100-to-1 ratio between powder and crack cocaine weight thresholds.[13] The support for that change was strikingly bipartisan, as the Democratic-majority House of Representatives passed the bill by a vote of 378–16.[14]

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[12] Pete Williams, *U.S. Incarceration Rate Drops 10 Percent Over Decade to Hit Lowest Level in 20 Years*, NBC NEWS (Apr. 25, 2019, 9:01 AM EDT), https://perma.cc/Z5SE-QFHF.

[13] *See* Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (establishing mandatory minimum sentences based on the 100-to-1 ratio); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (U.S. SENTENCING COMM'N 1987) (incorporating the ratio into the then-mandatory federal sentencing guidelines).

[14] NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 133

The 1986 crack law was just one of several developments building on one another in the 1980s to lay the groundwork for retributivism and over-incarceration in the federal system.[15] It is, in retrospect, shocking to see the brief period in which so much harm was done. In 1984 alone, Congress managed to create a sentencing commission to formulate mandatory guidelines,[16] re-instate the federal death penalty,[17] eliminate parole prospectively,[18] *and* amend the bail laws by creating broad presumptions of detention in drug trafficking and other cases.[19] Then, 1986 brought the mandatory minimums of the Anti-Drug Abuse Act,[20] and 1987 saw the arrival of the new, and remarkably harsh, mandatory sentencing guidelines.[21] Finally, Congress piled on even more, passing the Anti-Drug Abuse Act of 1988, which (among other provisions) applied the mandatory minimums in drug cases to co-conspirators.[22]

These federal retributive and prison-stuffing measures passed quickly and overwhelmingly. Many states rapidly followed suit, in what Frank Zimring called "copycat state legislation" resulting in skyrocketing rates of incarceration within both the federal system and in the states.[23] The growth of incarceration came quickly and built on itself, on political opportunism, and on alarmist media accounts focused on the "crack epidemic" and other crime.[24] The new regime landed with a terrifying sound for those who had ears to hear—but too few did.[25]

Even setting aside the racial dynamics for a moment,[26] the crack-powder

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(2014) (quoting Barney Frank (D-Mass.), one of the few dissenters in the House, who astutely observed that the legislation was like crack itself, in that it was "going to give people a short-term high, but is going to be dangerous in the long run and expensive to boot").

[15] *See Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM ET), https://perma.cc/RVU8-C2ZU.

[16] Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1 (1984).

[17] *See id.* § 3559.

[18] *See generally id.* (tying the end of parole with the forthcoming institution of mandatory guidelines on Nov. 1, 1987).

[19] *See generally* The Bail Reform Act of 1984, 18 U.S.C. § 3141–3150 (2019); United States v. Salerno, 481 U.S. 739 (1987) (ruling against the constitutional claims that the Act was unconstitutional because the presumption of detention appeared to run afoul to the presumption of innocence under due process).

[20] Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[21] *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987).

[22] Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[23] Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 332 (2005).

[24] *See id.* at 329–30.

[25] One of those who failed to think through the consequences of these laws was me—I served as a federal prosecutor in Detroit from 1995–2000 and enforced these statutes in narcotics and other cases.

[26] *See generally U.S. Sentencing Commission Hearing, 2/25/02: Powder Cocaine, Crack Cocaine, and*

disparity never made any sense. Crack is made out of powder cocaine (by cooking it up with water and baking soda),[27] usually by a street-level dealer or a similar low-level player.[28] In other words, it is powder cocaine that is brought into the United States, distributed through the country, wholesaled within a city, and then distributed into neighborhoods. It is only at the lowest rungs of the ladder that crack even *exists*. Thus, the crack-powder disparity was prioritizing the incapacitation of those people who were least important to the whole, the least culpable, and the most easily replaced (and, as it turned out, the least white).[29]

Within a few years, warning bells began to sound. United States District Court Judge J. Lawrence Irving quit the bench in 1990, citing the harsh new drug laws.[30] A Reagan appointee, Irving said he "just can't do it anymore."[31] In 1992, Professor Daniel Freed of Yale, whose writings influenced the creation of sentencing changes of the mid-1980s,[32] decried the "unvarnished cruelty" of mandatory minimum drug sentences.[33] Recognizing the racial outcomes they had created, in 1995 the United States Sentencing Commission[34] itself voted to entirely eliminate the ratio between crack and powder, but the move was thwarted by Congress and what the New York Times properly referred to as "a timid President Clinton."[35]

By that point, in 1995, everyone knew or should have known how wrong crack sentences were. In preparation for its own vote on equalizing crack and powder ratios, the Sentencing Commission produced a staff report

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Race, 14 FED. SENT'G REP. 204, 204–10 (2002) (noting the testimony of Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, who placed the racial injustice of the crack debacle at the forefront of his testimony).

[27] *Crack Cocaine Fast Facts*, NAT'L DRUG INTELLIGENCE CTR., https://perma.cc/4F49-N7FV (last visited June 3, 2021).

[28] *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288 (1995).

[29] *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 74 (2019) (discussing that in 2013, 83% of the people charged with trafficking crack were Black, but only 5.8% were white—in that same year, in contrast, black defendants comprised only 31.5% of the less-harshly-punished powder cocaine caseload).

[30] *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES (Sept. 30, 1990), https://perma.cc/TTD2-8Q2R.

[31] *Id.*

[32] Neil A. Lewis, *Daniel J. Freed Dies at 82; Shaped Sentencing in U.S.*, N.Y. TIMES (Jan. 22, 2010), https://perma.cc/3GEW-6NLZ.

[33] Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1752 (1992).

[34] In discussing the push for reform, I focus on the Sentencing Commission. While other actors certainly played a role (including advocates, courts, and some members of the legislature) it was the Sentencing Commission that most clearly illustrates the arc of reform across the time period examined.

[35] *Cocaine Sentencing, Still Unjust*, N.Y. TIMES (Nov. 5, 1995), https://perma.cc/Z6N7-DZW9.

examining the assumptions that underlay the original legislation. Among other things, the report set out a central dysfunction that powered the whole mess, concluding that "[d]espite the unprecedented level of public attention focused on crack cocaine, a substantial gap continues to exist between the anecdotal experiences that often prompt a call for action and the empirical knowledge on which to base sound policy."[36] In other words, the legislation was based on stories, not data. The report also exploded the myth of racial neutrality, revealing that Blacks and Hispanics accounted for 95.4% of crack convictions, while over half of crack users were white.[37]

Some may debate whether or not there was clear racist intent at the time the 100-to-1 ratio was implemented.[38] At any rate, by the time that unjustifiable racial disparities were thoroughly quantified, it is hard to imagine a reason other than bias for why the problem was not immediately corrected by those with the power to do so. That correction did not happen.

The Sentencing Commission, even after the failure of its equalization proposal in 1995, stayed on task in seeking a change that Congress would accept. In 1997, they tried again with the same conclusion, reiterating the 1995 report with a more modest reform proposal.[39] In 2002, the Commission released another report on crack sentencing, with both more pointed factual conclusions and more modest policy proposals.[40] This time, the Commission specifically found that the then-current penalties exaggerated the relative harmfulness of crack,[41] that those penalties were too broad and usually were applied to lower-level offenders,[42] that they were disproportional to those applied to other offenses,[43] and that the ratio's severity "mostly impacts minorities."[44] The 2002 report acknowledged that the data was in—and that the facts did not support the 100-to-1 ratio.[45]

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[36] U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY vi (1995), https://perma.cc/L75S-5P3A.

[37] *Id.* at xi.

[38] *See generally* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 164 (2017) (evaluating Congress's role and concluding: "[b]ecause the hundred-to-one ratio had so little to justify it, and because African Americans were more likely to be involved in the crack trade, the law's harsher treatment of crack defendants became one of the most grotesque examples of racial discrimination in the criminal justice system").

[39] *See generally* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), https://perma.cc/ZV3Q-4YF2.

[40] *See generally* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002), https://perma.cc/FYA4-SUDP.

[41] *See id.* at 93.

[42] *See id.* at 97.

[43] *See id.* at 100.

[44] *See id.* at 102.

[45] *See id.* at 102, 107 (suggesting that the crack threshold be raised by a factor of five, creating a 20-to-1 ratio).

Still, nothing happened. We knew for certain that the 100-to-1 ratio was racist. We knew it rested on disproven "facts," such as the myth of crack-fueled "child predators."[46] We knew it did not meet the mandate of proportionality. And yet, nothing happened.

In 2007, the Sentencing Commission tried again to convince Congress through a lengthy report,[47] this time in combination with a small reform of its own that survived challenge by the legislature. That modest change dialed down the offense level for crack offenses by two,[48] a change that did allow for lower sentences under the guidelines while not deviating too drastically from the mandatory minimums that remained in the statutes. Finally, after two decades, there was a crack in the 100-to-1 ratio wall.

That crack widened in 2010, when Congress passed (and President Obama eagerly signed) the Fair Sentencing Act, which altered the weight thresholds for mandatory minimums applying to crack and powder to 18-to-1.[49] This was a big change, but the good news was mitigated by two strange facts. First, instead of equalizing crack and powder sentences, an unusual new ratio was employed. The odd ratio of 18-to-1 was reportedly a compromise worked out between Senators Dick Durban and Jeff Sessions.[50] The second unfortunate anomaly was that the reform was not made retroactive[51]—that is, it did not apply to those already sentenced, meaning that those already in prison would continue to suffer under a measure that had been rejected as too harsh.

The second anomaly—the failure to make this important change retroactive to those already sentenced—was not fixed until President Donald Trump signed the First Step Act in December of 2018.[52] Thus, it took over eight years, six years of the Obama administration and two under Trump, to make this right. The other anomaly, the failure to equalize the sentencing of crack and powder cocaine, remains in both the statute and the sentencing guidelines as of July, 2021.

And so, finally, some measure of reform was accomplished in relation to crack after literally decades of everyone knowing that the status quo was wrong. But here is the kicker: crack is the *success story* of criminal justice reform (at least in the federal system)—it is the best that we have done.

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[46] *See generally* U.S. SENTENCING COMM'N, *supra* note 39.

[47] *See generally* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), https://perma.cc/FM5T-5JR3.

[48] *Id.* at 9.

[49] Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

[50] Gary Fields & Beth Reinhard, *Jeff Sessions, Civil-Rights Groups Find Some Common Ground on Crack Sentencing*, WALL ST. J. (Dec. 7, 2016, 1:57 PM ET), https://perma.cc/2AUC-PNNU.

[51] *See Frequently Asked Questions: 2011 Retroactive Crack Cocaine Guideline Amendment*, U.S. SENT'G COMMISSION, https://perma.cc/U3CW-M4RB (last visited June 3, 2021).

[52] *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

Outside of the changes relating to crack, there has been virtually no systemic reform at the federal level, and too little at the state level.

B. *Marijuana as a Schedule I Narcotic*

In 1970, Congress tried to create order in narcotics control by organizing problematic[53] drugs into five progressively less harmful "schedules" that were defined by three key metrics:[54] whether or not the substance has an accepted medical use, potential for abuse, and safety of use under medical supervision if there is an accepted medical use.[55] Thus, drugs with a supposed "high potential for abuse,"[56] with "no currently accepted medical use"[57] and "a lack of accepted safety for use . . . under medical supervision"[58] are categorized in Schedule I.[59] Conversely, Schedule V includes drugs that have a "low potential for abuse," relative to those in other schedules,[60] a "currently accepted medical use,"[61] and "limited physical dependence or psychological dependence" relative to other drugs.

As one might expect, Schedule I includes "hard drugs" such as mescaline and heroin.[62] Schedule II, in turn, includes cocaine (which has an accepted medical use).[63] Schedule III contains what are perceived to be less serious drugs like codeine and amphetamine.[64]

Inexplicably, in 1970 Congress put marijuana[65] right in the middle of Schedule I,[66] labeling it a threat equal to heroin and limiting its use to

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[53] I avoid describing the drugs in these schedules as "illegal," as most of them are legal under certain circumstances, such as when prescribed or in authorized research.

[54] *See generally* Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[55] 21 U.S.C. § 812(b) (2018) (codifying Comprehensive Drug Abuse Prevention and Control Act of 1970).

[56] *Id.* § 812(b)(1)(A).

[57] *Id.* § 812(b)(1)(B).

[58] *Id.* § 812(b)(1)(C).

[59] *Id.* § 812(b)(1).

[60] *Id.* § 812(b)(5)(A).

[61] 21 U.S.C. § 812(b)(5)(B).

[62] *Id.* § 812 Schedule I(a)–(c) (2018).

[63] *Id.* § 812 Schedule II (2018); *see Position Statement: Medical Use of Cocaine*, AM. ACAD. OF OTOLARYNGOLOGY–HEAD AND NECK SURGERY (Apr. 21, 2021), https://perma.cc/X2DY-TLEW (stating that cocaine is used medically as an anesthetic).

[64] 21 U.S.C. § 812 Schedule III(a)(1), (d)(1).

[65] *See* David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 184–85 (2018) (explaining that the motivation for this regulation was in part driven by racism and the stereotyping by those who assumed marijuana was a drug used by minorities). *See generally* 26 U.S.C. § 4741 (repealed 1971) (listing marihuana as a taxable commodity).

[66] 21 U.S.C. § 812 Schedule I(c)(10).

research purposes under strict regulation.[67] Here was another instance of a mountainous error, contrary to all logic,[68] that embedded itself within the law despite decades of efforts to supplant it.

From the start, there was push-back against the bizarre placement of marijuana in Schedule I. Contemporaneous with the development of the schedules, President Richard Nixon asked for a report on marijuana from the National Institute of Mental Health. The expert report he got hardly supported the equalization of heroin and marijuana; rather, it recommended that marijuana be decriminalized and was titled "Marijuana: Symbol of Misunderstanding."[69] Both Congress and President Richard Nixon ignored this logic and did nothing, setting a template for all of his successors to date.[70]

In 1972, an advocacy group petitioned for rescheduling of marijuana, which could be accomplished administratively by the Attorney General.[71] The National Organization for the Reform of Marijuana Laws (NORML) asked that marijuana either be shifted to Schedule V or dropped from the listings altogether.[72] That also went nowhere. Similar administrative reviews spurred by petitions in 1986 and 2002 met similar fates, despite growing evidence that undermined the rationale for keeping marijuana in Schedule I.[73]

While the federal government sat on its hands, state governments began to act on their own. Leading the way, in 1996 California legalized marijuana for medical purposes through a ballot initiative and was soon followed by five other states (Alaska, Arizona, Nevada, Oregon, and Washington) in 1998.[74] The way in which the people spoke in those states—declaring explicitly that marijuana did have medical uses—drove a stake through the heart of the stated rationale for placing marijuana in Schedule I. In the ensuing years, of course, the acceptance of medical marijuana reached the overwhelming majority of Americans. As of 2019, only four states (Idaho, Kansas, Nebraska, and South Dakota) barred all forms of marijuana and its active ingredient under state law,[75] while eleven states and the District of

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[67] *See id.* § 823.

[68] *See* National Org. for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 134 (D.D.C. 1980) (adding more confusion to the senselessness of the classification is the bare fact that two commonly used legal substances, alcohol and nicotine, meet each of the criteria for Schedule I yet were not included—this point was raised by advocacy groups early on, and ignored).

[69] Katner, *supra* note 65, at 188.

[70] *See* United States v. LaFroscia, 354 F. Supp. 1338, 1340–41 (S.D.N.Y. 1973).

[71] *See* 21 U.S.C. § 811(a) (2015).

[72] National Org. for the Reform of Marijuana Laws v. DEA, 559 F.2d 735, 742 (D.C. Cir. 1977).

[73] Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005); Katner, *supra* note 65, at 190.

[74] James Brooke, *The 1998 Elections: The States—Drug Policy; 5 States Vote Medical Use of Marijuana*, N.Y. TIMES (Nov. 5, 1998), https://perma.cc/PE7K-7AH2.

[75] *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES, https://perma.cc/E3WZ-

Columbia had legalized marijuana for non-medical recreational use.[76]

The administration of Barack Obama strained to deal with this state-level shift in the law. While the Department of Justice declared in 2013 that it would enforce federal marijuana laws in conflict with state law only in certain conditions,[77] it did nothing to move marijuana out of Schedule I.

The failure of the Obama administration to make this obvious move is especially perplexing. Keeping marijuana on the top schedule had broad impacts, not the least of which was that it hindered research into the effectiveness of the medical marijuana that was flowing through the state systems.[78] Even with a President and Attorney General who held themselves out as progressives and had the power to change the scheduling without the involvement of Congress, nothing happened—the Controlled Substance Act and its nonsensical categorization of marijuana remained in place eight presidents after it was enacted.[79]

In what seems like a cruel jest, Obama-era Attorney General Eric Holder asserted just *after* he left that office that he supported moving marijuana out of Schedule I, saying, "You know, we treat marijuana in the same way that we treat heroin now, and that clearly is not appropriate. So, at a minimum, I think Congress needs to do that."[80] As Holder must have known, the law made re-scheduling his job, not Congress's.[81] As with crack sentencing, the scheduling of marijuana is a problem everyone knows about but no one wants to fix.

C. *State Initiatives*

Even as the federal system struggled to right the most basic wrongs, similar movements were proceeding in the states. While some of the state reforms have been significant, they are limited in significant ways that reflect the difficulty of reversing the harsh-on-crime policy ratchet.

8HFC (last updated May 17, 2021).

[76] *Id.* (listing Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington—since 2019 other additional states have passed adult use measures).

[77] *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Attorneys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), https://perma.cc/9CF3-FS38.

[78] Ariana Eunjung Cha, *Marijuana Research Hampered by Access from Government and Politics, Scientists Say*, WASH. POST (Mar. 21, 2014), https://perma.cc/C7W2-XN7U.

[79] Bill Piper, *There's Something Missing from Our Drug Laws: Science*, WASH. POST (Apr. 28, 2016, 12:09 PM EDT), https://perma.cc/USU7-2JUN; *see* John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why It's Unlikely Anytime Soon*, BROOKINGS INSTITUTION (Feb. 13, 2015), https://perma.cc/9M8D-T2LJ.

[80] Francis X. Clines, *The Might-Have-Beens of Marijuana*, N.Y. TIMES (Feb. 24, 2016, 5:17 PM), https://perma.cc/U578-LPQZ.

[81] 21 U.S.C. § 811(a) (2015).

In the end, state-wide measures may prove to be less significant than the national movement to elect progressive District and County Attorneys,[82] a project that wisely does an end-run around the lethargy of legislatures in enacting reform by going straight to the broad discretion in the hands of prosecutors. The quick and significant success of this initiative is to be applauded, but it also establishes a stark contrast with the slow pace of policy change at the state and national level. It is fair to say that these local actions are at least in part a product of our broader failures and the frustration this produces.

A look at three states offers a glimpse into the variety of changes. In terms of sheer numbers, reforms in California have probably been most significant, while Florida has done little, even though the need for reform has been made evident. Alaska, meanwhile, passed extensive reforms but quickly backtracked in the face of a perceived rise in crime.

1. California

California has been a relative success story, as a series of reform measures (combined with other factors) has reduced incarceration from about 171,000 in 2006[83] to around 115,000 people locked up at the start of 2019.[84] The changes in California were propelled by a number of forces, with finances being a primary incentive. At its peak in 2006, a system designed to house about 85,000 people was stuffed with about double that number,[85] meaning that the state had to either spend a lot of money building prisons or reduce the prison population. When he took office in 2004, Governor Arnold Schwarzenegger immediately faced a crisis, forcing him to release prisoners even as he opened a new prison.[86]

A second driving force came later in that decade, in the form of a federal mandate. In 2009, a three-judge panel, later affirmed by the Supreme Court,[87] decried California's prison overcrowding and required a reduction of at least 40,000 prisoners.[88] California had no choice but to act.

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[82] Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://perma.cc/5HMH-3DEA.

[83] *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 908 (E.D. Cal. 2009) (estimating peak population at about 170,000); Susan Turner, *Moving California Corrections from an Offense to Risk-Based System*, 8 U.C. IRVINE L. REV. 97, 99–100 (2018) (stating the overcrowding of California's prisons was spurred by a turn towards determinate sentencing in 1977, which restricted judicial discretion and mandated longer sentences).

[84] Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), https://perma.cc/3E9M-X92Z.

[85] Sacramento Bee & Propublica, *A Brief History of California's Epic Journey Toward Prison Reform*, PAC. STANDARD (May 29, 2019), https://perma.cc/YX6X-RJ5H.

[86] *See id.*

[87] Brown v. Plata, 563 U.S. 493, 502 (2011).

[88] *See id.* at 501.

Beyond Schwarzenegger's reflexive reactions, a series of reforms have made a lasting difference. These have included a 2011 law that shifted many inmates from state prisons to county jails[89] (thus putting a financial burden on the political unit—the county—that makes charging decisions)[90] and the implementation of Proposition 47 in 2014, which reduced some property and drug crimes from felonies to misdemeanors.[91]

The reforms have not been without problems. For example, the shift of prisoners to county jails has exacerbated problems in the jails,[92] and coincided with a 46% rise in killings within the jails by inmates.[93] And predictably, there has been a backlash to the reforms coalescing around a proposition already approved for the 2020 election,[94] classifying more crimes as "violent," and limiting early release on parole.[95]

It is telling that despite consistent effort, California has only gotten close to meeting the 2009 court mandate in large part by shifting prisoners—and their problems—to local jails. Even within success stories, the difficulty of speedy reform leaves its marks in freedom and blood.

2. Florida

Where California has implemented some measure of reform, efforts in Florida have largely failed, with the result that Florida now has a prison population that is close to that of California despite having about half the number of residents.[96] Florida's state prisons currently hold about 99,000 people,[97] which represents (in stark contrast to California) a sharp *increase*

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[89] *See* Jennifer Medina, *California Begins Moving Prison Inmates*, N.Y. TIMES (Oct. 8, 2011), https://perma.cc/99DW-496G.

[90] Notably, the shifting of bodies from prisons to jails in itself should not be considered a reduction in incarceration even as it does reduce the population of state prisons.

[91] *See* Clifton B. Parker, *California's Early Release of Prisoners Proving Effective So Far, Stanford Experts Say*, STAN. NEWS (Nov. 2, 2015), https://perma.cc/SY9W-JS3K ("In 2014, however, state voters approved Prop. 47, which converted six nonviolent offenses related to drug and property offenses from felonies to misdemeanors, which makes early release possible.").

[92] *See generally* Abbie Vansickle & Manuel Villa, *California's Jails Are So Bad Some Inmates Beg to Go to Prison Instead*, L.A. TIMES (May 23, 2019, 3 AM PT), https://perma.cc/3CVC-NEX9.

[93] Jason Pohl & Ryan Gabrielson, *'Hellbent' on Killing: Homicides Surge in Overwhelmed California Jails*, SACRAMENTO BEE (June 13, 2019, 5:00 AM), https://perma.cc/LA94-MESC.

[94] *See generally* Becca Habegger, *Has Criminal Justice Reform Gone Too Far? One California Lawmaker Thinks So*, ABC10, https://perma.cc/763H-APCG (last updated Feb. 21, 2019, 3:47 AM PST).

[95] *Id.*

[96] *See 2018 National and State Population Estimates*, U.S. CENSUS BUREAU, 2018-02: Table 2 (Dec. 19, 2018), https://perma.cc/4VQS-Y5UW.

[97] Dan Sweeney, *Why Is the Prison Population So High in Florida? You Asked, We Answer*, S. FLA. SUN SENTINEL (June 10, 2019), https://perma.cc/LN8N-GU3R (stating Florida's incarcerated population was about 176,000 in 2018 including state prison, local jail, federal prison, youthful offenders, and people involuntarily committed under the Baker Act).

from 2006.[98] While Florida faces some of the same challenges of cost that California did, it has implemented few significant reforms.[99]

A political fight in 2019 offers insight into Florida's failure. In April of 2019, Florida Senate Bill 642 was passed by the full Senate Appropriations Committee.[100] The bill had bipartisan support and promised a raft of reforms: raising the felony theft threshold (from $300 to $750), allowing good time release in non-violent cases after 65% of a sentence is served instead of 85%, and permitting judicial review of juvenile transfers to adult court.[101] Taken together, these changes (particularly the early-release provision) could have made a significant dent in Florida's prison population.

Unfortunately, though, a familiar political dynamic kicked in. Two law enforcement groups, the Florida Sheriffs Association and the Florida Prosecuting Attorneys Association, pushed back.[102] Their claim was that the changes would be unfair to victims and that the reforms would increase crime at a time when crime was declining. As the Sheriffs Association put it, "Allowing criminals to serve only a fraction of their sentence sends the clear message that criminals are more important than victims and that victims' rights do not matter. A major reason we enjoy a low crime rate today is because criminals are serving the time deserved and not getting a 'get out of jail free' card."[103]

The law enforcement lobbying worked. While the legislature did pass a crime bill that was signed by the governor,[104] it was stripped of the major reform pieces.[105] Most significantly, the provisions allowing for early release and tamping down mandatory minimums were gone.[106] With them went the hope for a significant decrease in Florida's prison population.[107]

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[98] *See* Peter Wagner, *State Prison Population in Florida,* PRISON POL'Y INITIATIVE, https://perma.cc/UQ4U-Q7LB (last visited June 4, 2021).

[99] *E.g.*, Shawn Mulcahy, *Advocates Call 'Horse Meat' on Criminal Justice Reform*, WUSF PUB. MEDIA (June 27, 2019, 3:43 PM EDT), https://perma.cc/4RMQ-GMNQ.

[100] *Senate Bill 642 Is on Track to Provide a Real First Step Toward Criminal Justice Reform in Florida,* ACLU FLA. (Apr. 18, 2019), https://perma.cc/DF5D-HLAR.

[101] *Id.*

[102] *See* Sun Sentinel Editorial Bd., *Florida Misses Big Opportunity on Criminal Justice Reform | Editorial*, S. FLA. SUN SENTINEL (May 8, 2019, 3:49 PM), https://perma.cc/Z3R4-GRWB.

[103] Mark Hunter, *Florida Sheriffs Association Statement on Florida First Step Act—SB 642*, FLA. SHERIFFS ASS'N (Apr. 16, 2019), https://perma.cc/TF4Y-U3J8.

[104] Ryan Nicol, *Criminal Justice Reform Package Signed into Law*, FLA. POL. (June 29, 2019), https://perma.cc/5VQC-EHH3.

[105] FN106: *See* Emily L. Mahoney, *Legislature OKs Criminal Justice Reforms but No Change to Mandatory-Minimum Sentencing*, MIAMI HERALD (May 3, 2019, 3:27 PM), https://perma.cc/9BJ2-8F8W.

[106] *Id.*

[107] *See* Times-Union Editorial Bd., *Wednesday Editorial: Reform Florida's Prisons Now*, FLA. TIMES-UNION JACKSONVILLE (July 17, 2019, 2:01 AM), https://perma.cc/2S4H-YCGY (noting the need for reform goes beyond simply reducing prison populations because Florida "has the

3. Alaska

While California embraced significant reforms and Florida rejected them, Alaska made changes rooted in data and social science and then, in the face of backlash, revoked them.

In Alaska, of course, we are dealing with much smaller numbers than California or Florida. Even with a moderate increase since 2006,[108] the state prison population there is about 4,300,[109] and Alaska is slightly below the national average for incarceration rates.[110]

Even with those relatively small numbers, a concern for costs and fairness drove bipartisan support for Senate Bill 91 (SB 91), which was signed into law in July of 2016.[111] Like other proposed reforms, SB 91 was styled as a "justice reinvestment act," which intended to use data to target lesser imprisonment for some offenders and then use the savings from averted prison costs to reduce recidivism.[112] The resulting legislation relied on studies from groups including the Pew Research Center and created four broad changes in Alaska's criminal practice: (1) pretrial practices were changed to incorporate data-driven outcomes; (2) sentencing practices were altered to focus long sentences away from low-level nonviolent offenders; (3) re-entry, parole, and probation practices were reformed to enhance the chances of success for returning citizens; and (4) oversight and accountability features were added to the system as a whole.[113]

Almost immediately, the new laws were tied to a reported uptick in crime. At a forum in Anchorage, a murder victim's mother said that the new law made things "worse," and a former prosecutor in the legislature promised to pursue changes.[114]

In response to these outcries, the governor called for a special session to consider amendments, and just months after SB 91 was implemented it was amended by a new law, SB 54.[115] That law addressed a number of particular

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worst prison system in the nation. It's filled with violence, riddled with scandals and incredibly ineffective in rehabilitating prisoners").

[108] Joshua Aiken, *Alaska's Prison Population*, PRISON POL'Y INITIATIVE, https://perma.cc/8HX9-JQRE (last visited June 4, 2021).

[109] *Alaska Profile*, PRISON POL'Y INITIATIVE, https://perma.cc/B9BZ-KG5M (last visited June 4, 2021).

[110] *Id.*

[111] Brad A. Myrstol & Pamela Cravez, *Crime Rates and Alaska Criminal Justice Reform*, 34 ALASKA JUST. FORUM, No. 2, Fall 2017, at 1, https://perma.cc/8BTV-RLQX.

[112] Michael A. Rosengart, Note, *Justice Reinvestment in Alaska: The Past, Present, and Future of SB 91*, 34 ALASKA L. REV. 237, 238 (2017).

[113] 2016 Alaska Sess. Laws ch. 36; *see* Rosengart, *supra* note 112, at 239.

[114] Zachariah Hughes, *Residents Rail Against SB91 at Rare Anchorage Meeting*, ALASKA PUB. MEDIA (Oct. 9, 2017), https://perma.cc/KXW2-FANE.

[115] S. 54, 30th Leg., 1st Sess. (Alaska 2017); 2017 Alaska Sess. Laws ch. 1.

concerns by allowing jail time for non-aggravated Class C felonies, raising allowable sentences for theft, enhancing the ability to charge sex traffickers, re-criminalizing the violation of conditions of release, and mandating periods of probation for sex offenders.[116]

There were signs that the new law was working. By early 2019, for example, a report showed that more people were successfully completing probation and parole.[117] Significantly, it also seemed that crime overall was going down in the urbanized Anchorage area.[118] Nonetheless, concerns with a surging opioid crisis and increase in some types of crime fueled a cry for repeal. Not surprisingly, figures from within law enforcement and corrections were prominent in the repeal movement. Former Correctional Superintendent Dan Carothers, for example, wrote that because of the reforms there had been a striking increase in Juneau's rate of "vehicle theft, burglarized homes, property damage, theft and assault. These crimes have increased tremendously as a result of Senate Bill 91."[119] More significantly, Attorney General Jahna Lindemuth claimed that by the autumn of 2017, the new bill had resulted in over 7,000 crimes going unprosecuted.[120]

In 2018, Mike Dunleavy ran for governor and promised a full repeal of SB 91's reforms.[121] On July 8, 2019, the newly-elected Governor Dunleavy first announced a "war on criminals"[122] and then made good on his promise to get rid of the reforms, signing the repeal of SB 91[123] in a ceremony held in an airplane hangar.[124] At the time of the repeal, no plan was in place to account for the costs of imprisoning more people due to the repeal. Despite showing signs of success, criminal law reform in Alaska was gone almost before it arrived.

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[116] *Frequently Asked Questions: SB54*, ST. OF ALASKA DEP'T OF LAW (Sept. 26, 2017), https://perma.cc/CR8Z-JURW.

[117] Rebecca Palsha, *Is SB91 Working? A New Report Says It's Helping*, KTUU (Nov. 1, 2018, 7:54 PM EDT), https://perma.cc/HG6D-4Y66.

[118] Tim Bradner, *PROGRESS: Crime Is Going Down and Vilified SB 91 Deserves Some of the Credit*, ANCHORAGE PRESS (Mar. 15, 2019), https://perma.cc/UPB4-JUMN.

[119] Dan Carothers, *Repeal SB 91 Completely*, JUNEAU EMPIRE (July 31, 2018, 1:04 PM), https://perma.cc/T6FK-NEBE.

[120] *ACLU of Alaska Responds to Sen. Costello's Call to Repeal SB 91*, ACLU ALASKA (Sept. 22, 2017, 9:45 AM), https://perma.cc/8TXK-FHKA.

[121] Zachary A. Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. Its New Governor Just Unraveled Them*, THE APPEAL (July 11, 2019), https://perma.cc/SQ3Q-FM27.

[122] James Brooks, *Dunleavy Opens His 'War on Criminals' with Push for Repeal of SB 91*, ANCHORAGE DAILY NEWS (Jan. 23, 2019), https://perma.cc/RSF5-99HB.

[123] *Senate Repeals and Replaces SB 91*, ANCHORAGE PRESS (May 14, 2019), https://perma.cc/2QDA-4YVN.

[124] James Brooks, *Gov. Dunleavy Signs Legislation to Repeal, Replace the Crime-Reform Measure SB 91*, ANCHORAGE DAILY NEWS (July 8, 2019), https://perma.cc/4BTM-NM7B.

II. Causes: Why We Have "The Slows"

Why are we so slow to correct clear injustices?

There certainly is no single cause of our languid reforms, and no proven way to measure and quantify those causes. Some inputs, though, are likely involved, and I discuss three of them here. First, the nature of the contemporary two-party political system in the United States probably has something to do with it. Too often, politicians are rewarded for playing to fear, and there is no easier go-to for fearmongering than crime. Within that context, race cannot be ignored as a historical and continuing tool of fear-mongers. The stay-the-course influence of prosecutors also plays a primary role in both state and federal political systems, working to stymie reforms that would take away their power. Second, even as the group of advocates for criminal justice has grown, they have become fractured and atomized, limiting their effectiveness. Finally, there is a certain allure to an incrementalism that allows us to claim victories despite the slow pace of change. Some might argue that it is the most likely path to success in the end, and that incremental changes necessarily take time to implement and even more time before the benefits are realized. However, incrementalism masks its price and exaggerates success by frequently creating cause for celebration, and the banquets and awards obscure the darker reality of a largely unchanged system.

A. *Politics and the "One-Way Ratchet"*

1. The Nature of Politics in Our Time

In the United States, policy is filtered through politics, and that aspect of democracy has proven to be a brake on reform. It is not the basic mechanizations of democracy that are at fault, of course—the ability of people to choose their representatives can serve to create or solve problems equally—but a distorted dialogue that is fueled by fear and at times has been employed by members of both parties. A corporate mainstream news media, click-bait social media, and fearmongering politicians have turned the mechanics of democracy against the better angels of our policy debates, all of which is exacerbated by the absence from the debate of those most impacted by these policy decisions: people in prison.

i. *The Political Effects of Incarceration*

"You know, Mark," one skeptic of my work once told me, "the crack-dealer demographic is a very small voting bloc." It was a bad joke, but it hits at a core truth: those most directly affected by over-incarceration are the people in our society least able to affect policy through democratic means

because those in prison are almost always denied the ability to vote.[125] In fact, there is no other policy area where American citizens targeted by a government policy are so directly prohibited from addressing that policy through the ballot box. This makes criminal justice unique.[126] In the debate over social security, for example, activists can marshal the voting power of millions of social security recipients.[127] No such ability exists for those who argue against over-sentencing.[128]

ii. *The Media*

Two fundamental and immutable truths drive media coverage—both in the mainstream and in social media—towards exaggerating the effects of crime. First, news media covers what does happen (that is, crime occurring) rather than what does not happen (crime not occurring). Second, all media sources are fundamentally outlets for storytelling, and that favors anecdotes over data.

On the first dynamic, it is simply within the nature of the press that they will report on events rather than non-events. 'Crack epidemic strikes' or 'opioid crisis consumes community' is a headline, while 'no drug crisis, really,' will not be as interesting. A good example of this involves methamphetamine. For years, informal meth labs plagued much of America, and the problem was widely reported, often with a focus on the very real dangers of the labs themselves.[129] The labs were full of toxic chemicals, which endangered current and future occupants.[130] The labs often exploded.[131] And the human cost of obtaining materials (often by theft) and

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[125] *See* German Lopez, *Bernie Sanders Wants to Expand Voting Rights by Letting People in Prison Vote*, VOX (Apr. 8, 2019, 12:20 PM EDT), https://perma.cc/5HLA-KPAR (stating that Vermont and Maine currently allow incarcerated citizens to vote).

[126] *See generally* Dana Liebelson, *In Prison, and Fighting to Vote*, THE ATLANTIC (Sept. 6, 2019), https://perma.cc/Q3QS-CVHX (discussing how there are groups that are working to give prisoners the ability to vote); *supra* Part I(C) (discussing how reform is needed in state laws).

[127] *E.g.*, Phillip Moeller, *Threats to Medicare, Social Security in the Spotlight Ahead of Midterm Elections*, PBS (Sept. 26, 2018, 5:39 PM EDT), https://perma.cc/ST4R-4A8F.

[128] *See Ending Mass Incarceration*, VERA INST. OF JUST., https://perma.cc/MMB2-GJL4 (last visited June 4, 2021); Kevin Keenan & Karina Schroeder, *Jurisdictions Should Embrace Voting Rights for All Americans—Including Those Who Are Incarcerated*, VERA INST. OF JUST. (Nov. 2, 2018), https://perma.cc/X4ZP-W533 (acknowledging that formerly incarcerated people can be an important voting bloc in some communities and have taken a leading role in pushing for reform).

[129] *Timeline*, FRONTLINE PBS, https://perma.cc/GG7P-CQYJ (last visited June 4, 2021) (displaying a timeline of the history and spread of meth).

[130] *See, e.g.*, Josh Anderson, *Meth-Contaminated Home Sickens Family*, N.Y. TIMES (July 13, 2009), https://perma.cc/DKG2-VGYY (showing a series of photo essays); Marilyn Berlin Snell, *Welcome to Meth Country*, SIERRA CLUB MAG., Jan./Feb. 2001, https://perma.cc/3CXM-TWJ9.

[131] *See* Caryn Rousseau, *Meth Lab Injuries Burden Hospitals*, L.A. TIMES (May 18, 2003, 12 AM PT), https://perma.cc/JDY2-SX7S.

running the labs—even apart from the meth use itself—was a big problem, particularly in rural areas. One report from 2002 described a teenage boy who burned down his grandmother's house, two men who climbed over a razor-wire fence into a rail yard to steal a tanker car of ammonia gas, and a father who walked away from his small children, leaving them crawling around in a house full of acidic chemicals strong enough to burn through the floor joists.[132]

But then something worked. Around 2010, many states started restricting access to pseudoephedrine, a key ingredient in home-made methamphetamine, following up on a federal directive in 2006 that required limits on over-the-counter pseudoephedrine sales. For example, Mississippi began requiring a prescription for the drug, and July through February meth-lab seizures dropped from 607 to 203 in one year.[133] Eventually, market forces led cheap imported meth to almost entirely eclipse the home labs, meaning that while the scourge of meth *use* was still with us, the myriad and oft-trumpeted problems of meth-*making* in local communities were largely solved.[134] You probably did not know that—and the reason is that the administrative solution to mom-and-pop meth labs was not widely reported as it happened. Meth labs blowing up are news. Solving the problem through an administrative measure that required no incarceration is not.

A second intrinsic aspect of journalism and social media also skews against reform. The storytelling nature of the media is fundamental to its success, and the seductive nature of narrative has drawn journalism to both good and dangerous places.[135] Broad data—say, the rate of violent crime over time—may be more relevant to policy and perception, but the story of a murder or a bloody weekend in Chicago is going to draw in more readers. That means that most of our stories about crime are going to be anecdotes: the story of a single incident, rather than a reflection on broader trends.

There are problems within the way those anecdotes are told, as well, since the sensationalist aspects are simply more interesting.[136] Rachel Barkow describes this dynamic well:

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[132] Timothy Egan, *Meth Building Its Hell's Kitchen in Rural America*, N.Y. TIMES (Feb. 6, 2002), https://perma.cc/W98T-YGA7.

[133] Abby Goodnough, *States Battling Meth Makers Look to Limit Ingredients*, N.Y. TIMES (Mar. 28, 2011), https://perma.cc/HH8W-HNQC.

[134] *See* Frances Robles, *Meth, the Forgotten Killer, is Back. And It's Everywhere.*, N.Y. TIMES (Feb. 13, 2018), https://perma.cc/335C-8AN9.

[135] *See* Jeff Jarvis, *The Spiegel Scandal and the Seduction of Storytelling*, MEDIUM (Dec. 24, 2018), https://perma.cc/B9WN-4FW6 (noting that a number of scandals have involved false narratives concocted by reporters).

[136] *See id.* The timeline for offender and victim is often differently described. The victim's story often includes what happened before the event (i.e., "a teacher for 13 years") and is likely to happen after the event ("fears returning to work"), but except for criminal history the offender's story in the media is limited to the few moments of the offense.

> Rarely does a news story explore the costs and benefits of criminal justice policies, the underlying demographic statistics of offenders or victims, or the individual background of those who broke the law. Instead, the stories tend to focus on the emotional horror of specific violent crimes that may not represent overall trends.[137]

While some larger institutional media sources have begun using graphics that allow for a much broader and better use of data in stories about crime,[138] local outlets do not often have the same capabilities, leaving crime to be defined in the minds of the public one incident at a time. Because public perceptions of crime are thus largely based on anecdotes, public beliefs often do not align with broader truths and data—what sinks in are the compelling images and stories delivered one-by-one by the media.

As a result, Americans often are not sure what is true, and one of the most striking disconnects between public belief and reality involves understanding crime rates. The Pew Research Center found that the majority of Americans surveyed believed that crime in the United States got worse between 2008 and 2016: 57% thought it had gotten worse, while only 15% thought it had gotten better.[139] Among those who supported Trump in the 2016 election, the results were even more stark, as 78% thought crime was worse and only 5% thought it was better.[140] Truth ran the other way, of course; in that same time period violent crime had fallen 19% and property crime dropped 23%, continuing a downward trend that began in the mid-1990s.

Surprisingly, the impact of media stories and images can be even more important in forming negative impressions than actual lived experiences. As Rachel Barkow has pointed out, there is no statistically significant relationship between punitive beliefs and having been a victim of crime, but there *is* a significant relationship between those beliefs and watching a lot of crime stories on television.[141] In other words, real-life experiences do not strongly affect the way we feel about criminal justice, but the media's interpretation of what is going on—often in communities other than our own—does affect our policy outlooks.

One example of this dynamic was a primary driver of the excessive crack sentences that federal law demanded for far too long. Like any story of narcotics use, crack was used by addicts and non-addicts alike, and not

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[137] *See* BARKOW, *supra* note 29, at 109.

[138] *E.g.*, Kimbriell Kelly & Steven Rich, *For Unsolved Cases Lasting a Year, Finding the Killer Becomes Nearly Impossible*, WASH. POST (Dec. 28, 2018, 2:00 PM UTC), https://perma.cc/42XU-YJCF.

[139] John Gramlich, *Voters' Perceptions of Crime Continue to Conflict with Reality*, PEW RES. CTR. (Nov. 16, 2016), https://perma.cc/DV8X-VGCU.

[140] *Id.*

[141] BARKOW, *supra* note 29, at 108.

everyone who used crack ended up a tragedy.[142] Moreover, as even the United States Sentencing Commission came to realize, crack's active ingredient was simply powder cocaine.[143] Yet, media depictions of crack used charged language and racially-loaded images to describe crack dealers: "thugs,"[144] "crack whores,"[145] and "super-predators."[146] The result was predictable: people concluded that the evil of crack supported the most draconian of sentences, slowing rational reform.

iii. *The Allure of Fear-Mongering and Simplicity in Politics*

The alarmist tendencies of the media are only magnified when politicians like Donald Trump cherry-pick crime stories to create fear in the hopes of electoral success. For example, during the 2016 presidential campaign Donald Trump emphasized shootings in Chicago as that city suffered a temporary and isolated spike in that type of crime.[147] Although Trump asserted that he wanted to "help" Chicago, his audience clearly was not the residents of that city; rather, he was appealing to the suburban and rural conservatives who would define Chicago as a kind of pathological cesspool created by liberals.[148]

Certainly, Trump did not create the tactic of fear-mongering over crime (though his ability to do so at a time of record-low crime is relatively unique). President George H.W. Bush was particularly fond of this technique, as demonstrated by a bizarre display in 1989. Planning for a televised speech, Bush had federal agents manufacture a crack sale across the street from the White House, and then waved the resulting baggie of crack at the cameras as he warned of the dire portents of the crack "epidemic."[149]

Hand-in-hand with the effectiveness of fear-mongering goes another

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[142] *See generally* CARL HART, HIGH PRICE: A NEUROSCIENTIST'S JOURNEY OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY (2013) (highlighting a fascinating study of the actual effects of crack).

[143] *See* U.S. SENTENCING COMM'N, *supra* note 40, at 16–17, 19.

[144] Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects Are Felt in the Real World*, THE GUARDIAN (Aug. 12, 2015, 12:15 PM EDT), https://perma.cc/H3AY-HHHS; *see* Charles F. Coleman, Jr., *'Thug' is the New N-Word*, EBONY MAG., (May 27, 2015), https://perma.cc/EVX6-YRMN. *See generally* CRAIG REINARMAN & HARRY G. LEVINE, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 1–17 (1997).

[145] Nakia D. Hansen, *Whitney Houston and the Problem with the 'Crack Whore' Term*, PARLOUR (Feb. 18, 2012), https://perma.cc/9MHV-BF32.

[146] Kirsten West Savali, *For the Record: 'Superpredators' Is Absolutely a Racist Term*, THE ROOT (Sept. 30, 2016, 12:42 PM), https://perma.cc/9KRJ-VDP7.

[147] Safia Samee Ali, *In Discussing Chicago's Violence, Trump Generalizes About Race*, NBC NEWS (October 12, 2016, 7:43 AM EDT), https://perma.cc/3C5Q-CNN5.

[148] *See id.*

[149] Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs,"* 15 UDC/DCSL L. REV. 59, 61–62 (2011).

political truth: that voters are perceived as responding to simple messages (i.e., "let's get tough on crime with long sentences") rather than complicated ones, and reform platforms require quite a bit of explaining. William Stuntz described this dynamic: "For legislators, pleasing voters might mean producing rules the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements."[150] And that sort of thing, of course, is tough-on-crime measures like mandatory minimums and long sentences.[151] It is easy to see how this simplicity versus complexity dynamic played out in the Alaska reforms: complicated reforms rooted in academic studies and data lost out to bullet points about crime and criminals.[152]

As with the media, politicians use episodes of crime to promote success by their own metrics: instead of ratings, they worry about elections.[153] The incentives of their fields are sadly directive against reform.

2. Race and Racism

The pronouncements of politicians described in the preceding section often contain at least an implicit racial appeal: one must assume that it was not lost on Donald Trump that the perpetrators of the gun violence in Chicago would be perceived by his followers as young black males. And just as it is racism that allows too many elected officials to reflexively ratchet up incarceration and keep it there,[154] the same underlying impulse—that it is the threat of black men that requires mass incarceration—serves as a brake on reversing the trend.

What we do know is that black Americans are no more likely to use or sell illegal drugs than whites[155] but are disproportionately arrested and convicted for narcotics crimes.[156] Beyond the simple moral wrong in that kind of differential racial outcome, the fact that drug defendants are so often black also allows racial appeals to work—that is, the prevalence of blacks among the selected group of named and shamed "criminals" reifies the skewed racial views of whites, who conclude incorrectly that black people are more prone to crime.

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[150] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001).

[151] *Id.* (making the point that politicians often campaign on sentencing issues, but rarely on the definition of crimes, which are much more nuanced questions).

[152] *Supra* Part I(C)(3).

[153] Laura Bradley, *Donald Trump's All-Consuming Obsession with TV Ratings: A History*, VANITY FAIR (Jan. 20, 2017), https://perma.cc/45S8-LF3A; David Eads, *Too Many Politicians Misuse and Abuse Crime Data*, N.Y. TIMES (Aug. 10, 2018), https://perma.cc/YG5D-FC43.

[154] *See* BARKOW, *supra* note 29, at 108.

[155] MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 164–76 (2011).

[156] THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 58 tbl. 2-2 (Jeremy Travis, Bruce Western & Steve Redburn eds. 2014), https://perma.cc/F79Q-WG79.

Moreover, when white citizens are led to perceive that drug crimes are largely committed by non-whites, they likely conclude that the human costs (imprisonment and other punishments) of the War on Drugs will be borne by people unlike them, and that this is rational. To put it more bluntly, the idea that narcotics are a "black" problem inures other citizens to the broader interests of justice and the need for reform, since the pain exacted by the current system will be extracted from an "other."

3. The Persistent Power of Prosecutors

A few years ago, Rachel Barkow and I raised a hypothetical: imagine that a newly-elected president makes a stunning announcement on the first day of her term—that she is turning criminal law matters over to the Federal Defenders' Office based on the extensive knowledge that the Defenders have in the field.[157] Her primary advisor on criminal justice issues would be the Chief Defender in Washington D.C., and experts from the Defenders' offices would speak for the administration before the Sentencing Commission and Congress. Pending legislation or guideline amendments would be supported only if the Defenders were on board, and they would also be put in charge of federal prisons, forensic labs, and the clemency process.[158]

People would think that the President had gone bonkers. After all, the Defenders have an inherent conflict in all of those duties, since their institutional role is to represent one side of the criminal law equation. There would be no way to root out the bias inherent in that job.

And yet, our reality is a mirror image of that hypothetical: all of those roles (and more) are fulfilled solely by the Department of Justice in our current system.[159] In both the state and federal systems, prosecutors have a unique and outsized role in determining policy, and that often means that they are the ones who stymie reforms in order to maintain their own power—which is institutionalized within the status quo—and to ensure that the tools they use to avoid the risks and effort of trial are not eroded.

i. *Prosecutors in the Federal System*

Career prosecutors in the Department of Justice (DOJ) have traditionally had a functional veto on reforms. Even in an administration that was devoted to addressing endemic problems within criminal justice, this has been true. Of course, there only has been one administration in recent memory that has even expressed such an interest—that of Barack Obama.[160]

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[157] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 395 (2017).

[158] *Id.*

[159] *Id.* at 396.

[160] *Obama at Howard*, THE ATLANTIC (Sept. 29, 2007), https://perma.cc/XYH9-5D56 (detailing statements from then-candidate Obama that it was "time to seek a new dawn of justice in

On the White House website, the Obama administration laid out a compelling case for reform, asserting that "meaningful sentencing reform, steps to reduce repeat offenders, and support for law enforcement are crucial to improving public safety, reducing runaway incarceration costs, and making our criminal justice system more fair."[161] Obama's commitment seemed to be more than symbolic. When he visited those incarcerated in an Oklahoma federal prison, he seemed genuinely chastened by what he saw and reflected "there but for the grace of God."[162] He took a group of clemency recipients to lunch at Busboys and Poets,[163] a Washington D.C. restaurant, which presents itself as a hub for social change.[164] He even crafted a pro-reform law review article for the Harvard Law Review at the end of his second term.[165]

However, Obama was largely steered away from significant reform by the DOJ. He created a clemency initiative, but left implementation in the hands of the DOJ, which stymied the potential of the project.[166] He vociferously supported the idea of sentencing reform, but advocates from the DOJ consistently opposed or tamped down reform proposals before Congress or the Sentencing Commission.[167] The law allowed for a broad use of compassionate release for elderly and infirm prisoners, but the Bureau of Prisons—a division of the DOJ—almost never used it.[168]

Even when the will for reform is strong in the executive, there is a building full of prosecutors ready and able to mute that desire.

ii. *Prosecutors in State Systems*

Though Attorneys General can have some sway on reform issues, states lack a centralized prosecution hub like the Department of Justice; instead, prosecution is taken up in most states by District or County Attorneys who run for office.[169] These local prosecutors, though, often oppose reform both

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America," and that he would "brave the politics" necessary to fix the system).

[161] *Criminal Justice Reform*, WHITE HOUSE BRIEFING ROOM, https://perma.cc/HVP7-PB3D (last visited June 4, 2021).

[162] Peter Baker, *Obama, in Oklahoma, Takes Reform Message to the Prison Cell Block*, N.Y. TIMES (July 16, 2015), https://perma.cc/SWK7-44H7.

[163] Jordan Fabian, *Obama Takes Former Prisoners Out to Lunch*, THE HILL (Mar. 30, 2016, 1:05 PM EDT), https://perma.cc/6WA7-4PHN.

[164] *See id.*

[165] Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

[166] Barkow, *supra* note 157, at 425–40.

[167] Barkow, *supra* note 157, at 406–24.

[168] Barkow, *supra* note 157, at 441–48.

[169] Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199 (2012) (detailing how in 1931, a national commission recommended that states centralize prosecution in the hands of the state attorney general, but this advice was

when they run for office and when they interact with the legislature.[170]

Local prosecutors have particular reasons for opposing reform. One is to be consistent and reaffirm the "tough-on-crime" personas that they too often rely on to be elected and re-elected.[171] Another is to maintain and extend the power that they have, and reform often would limit their ability to charge people and seek long sentences—that is, reform frequently comes in the form of restraints on the discretion of prosecutors.[172]

Notably, this critique of state prosecutors as a force against reform must account for the growing number of elected prosecutors who came to office expressly as reformers.[173] It is no longer fair to assume that an elected prosecutor is an opponent of reform. The progressive prosecutor movement is new enough that it is too early to measure its effect beyond new policies within each new prosecutor's own jurisdiction (though certainly those internal reforms are important), but over time the impact may be significant.

It would be a mistake, too, to only consider the role of elected prosecutors—that is, the heads of the offices—in resisting reform. After surveying a broad array of line prosecutors (the employees who work for the elected prosecutor and take on individual cases), Ronald Wright and Kay Levine cautioned that these line attorneys—particularly those who view prosecution as the only "correct" vehicle to address offenses—might oppose calls for heightened scrutiny and reform.[174] Because they are ultimately the ones who implement policy, these line prosecutors also have the ability to subvert reform propagated at a higher level. Some progressive prosecutors seem to expressly acknowledge this dynamic. For example, Sarah Fair George, the Chittenden County Attorney in Vermont, directed her line prosecutors to visit a prison, citing their "nonchalant" attitude about sending people there.[175] George's move reflects a reality for progressive prosecutors: at least some of their advocacy for reform needs to be directed to the people working for them.

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uniformly rejected).

[170] BARKOW, *supra* note 29, at 51.

[171] Stuntz, *supra* note 150, at 534. This interest converges with that of legislators.

[172] *See generally* 21 U.S.C. § 851 (1970) (showing that the enhancements on federal drug charges, which are a frequent target of reformers, are employed at the discretion of prosecutors).

[173] Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), https://perma.cc/TZF8-KHV5.

[174] Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1709–10 (2018).

[175] Daniel Nichanian, *Prosecutor Sends Staff to Prison, in a Bid to Counter Their Reflex to Incarcerate*, THE APPEAL (Aug. 14, 2019), https://perma.cc/5WZR-DAXA.

B. *The Challenges of Advocacy*

1. The Fragmented World of Advocates

In other realms of advocacy, people know who the leaders are. In support of gun rights, it is (for now)[176] the National Rifle Association (NRA).[177] In the field of protection of older Americans, it is the American Association of Retired Persons (now known just as AARP).[178] Trade groups have combined lobbying groups like the Auto Alliance.[179] Even within the realm of criminal law (as already discussed here) the DOJ acts as an advocate.[180] The benefits of clear leadership in a field of advocacy are plain: such behemoths can leverage a wealth of experience, established relationships, and money to either pursue or retard change.

Within the area of criminal justice reform, there is no such behemoth. Instead, there is a broad diversity of non-profits, which compete for talent, financial support, pro bono help from law firms, and access to power.[181] As a result, it is rare that advocates are well-aligned in their goals and methods, and there is significant overlap of effort by unaffiliated groups. In the face of effective, unified opposition by prosecutors, it should not be surprising that reform groups struggle to get traction.

Certainly, there are long-established groups in the field of criminal justice reform. The issue is that there are so many of them, each working on their own. Families Against Mandatory Minimums,[182] the National Association of Criminal Defense Lawyers,[183] the Brennan Center,[184] the

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[176] *See generally* Jill Filipovic, *The NRA Has a Problem—But It's Not the One Making Headlines*, CNN (Apr. 30, 2019, 11:47 PM EDT), https://perma.cc/Y4QX-8D3F.

[177] Brennan Weiss & Sky Gould, *5 Charts That Show How Powerful the NRA Is*, BUS. INSIDER (Feb. 20, 2018, 5:00 PM), https://perma.cc/A4UA-PGQL.

[178] Tim Carney, *Wealthy AARP: One of the Country's Most Powerful Lobbies*, HUM. EVENTS (Mar. 25, 2010), https://perma.cc/82TC-VRMJ.

[179] *See generally About Us*, ALLIANCE FOR AUTO INNOVATION, https://perma.cc/M7XR-66PM (last visited June 4, 2021).

[180] *Supra* Part II(A)(3)(i).

[181] *See Criminal Justice Reform*, NAMASTE FOUND., https://perma.cc/UGJ6-G4CF (last visited June 4, 2021); *Partner Organizations & Groups*, JUST. POL'Y INST., https://perma.cc/ET3D-DQJQ (last visited June 4, 2021); *Prison Reform Organizations*, CTR. FOR PRISON REFORM, https://perma.cc/NNS5-7S4R (last visited June 4, 2021).

[182] *Our Mission*, FAMS. AGAINST MANDATORY MINIMUMS, https://perma.cc/F635-E4Y4 (last visited June 4, 2021).

[183] *Mission and Vision*, NAT'L ASS'N OF CRIM. DEF. LAW., https://perma.cc/5FJJ-NZ7H (last visited June 4, 2021).

[184] *130 Top Police Chiefs and Prosecutors Urge End to Mass Incarceration*, BRENNAN CTR. FOR JUST. (Oct. 21, 2015), https://perma.cc/VQ66-CLWC.

ACLU Drug Law Reform Project,[185] the NAACP,[186] CAN-DO Clemency,[187] and others have been doing good and important work for decades. Recently they have been joined by newer but well-funded and influential groups including Dream Corps. Justice,[188] Right on Crime,[189] and Freedom Partners.[190]

Beneath the larger institutional groups (at least in size), one finds a handful of corporate officers,[191] a larger group of freelancing academics,[192] and a multitude of tiny-to-small advocacy groups that usually serve as the alter-ego for a single advocate or a small group of advocates.[193] This last group has largely been created by two projects specifically designed to train and spin off advocates. One such project is the Soros Justice Fellows, a project of the Open Society Foundations.[194] Another is the "Leading with Conviction" program created by Just Leadership USA, which trains

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[185] *About the ACLU Criminal Law Reform Project*, ACLU, https://perma.cc/JJH3-J4EQ (last visited June 4, 2021).

[186] *Race & Justice*, NAACP, https://perma.cc/2AMM-26FR (last visited June 4, 2021).

[187] *See CAN-DO's Founder—Amy Ralston Povah*, CAN-DO (Oct. 8, 2014), https://perma.cc/3QGR-QZ93 (explaining that CAN-DO was founded by Amy Povah, who was granted clemency by President Clinton); *see also* Mary Elizabeth Williams, *Is There Real Hope for Prison Reform? Nonviolent Offenders and the "Kim Kardashian Moment,"* SALON (June 29, 2018, 7:00 AM EDT), https://perma.cc/6KNR-FXDH.

[188] *Who We Are*, DREAM CORPS JUST., https://perma.cc/8ZHA-TMH3 (last visited June 4, 2021).

[189] *About Right on Crime*, RIGHT ON CRIME, https://perma.cc/L7E5-CVRN (last visited June 4, 2021).

[190] *Koch-Backed Criminal Justice Reform Bill to Reach Senate* NPR (Dec. 16, 2018, 5:37 PM ET), https://perma.cc/824H-RWG8.

[191] *See And Justice for All*, KOCH INDUS., https://perma.cc/VV8W-AKP7 (last visited June 4, 2021) (emphasizing the work of Mark Holden, General Counsel of Koch Industries).

[192] *See Criminal Justice*, NYU LAW, https://perma.cc/A3W2-TQMU (last visited June 4, 2021) (recognizing criminal justice advocates Rachel Barkow and Bryan Stevenson); *Douglas Aaron Berman*, SCHOLARS STRATEGY NETWORK, https://perma.cc/Y8SQ-ZF6S (last visited June 4, 2021) (recognizing criminal justice advocate Douglas A. Berman); Sharon Grigsby, *Non-Violent Drug Sentencing Has Left Thousands of People Buried Alive in Prison*, SMU (Feb. 23, 2018), https://perma.cc/QEH7-G5DU (recognizing criminal justice advocate Brittany K. Barnett); *Michelle Alexander*, N.Y. TIMES, https://perma.cc/2KTB-58L6 (last visited June 4, 2021) (listing the articles of criminal justice advocate Michelle Alexander); *Paul J. Larkin Jr.*, THE HERITAGE FOUND., https://perma.cc/4Y9D-2NZ3 (last visited June 4, 2021) (recognizing criminal justice advocate Paul J. Larkin); *Prisons and Justice Initiative: Faculty Advisory Board*, GEO. U., https://perma.cc/3YWJ-KS5P (last visited June 4, 2021) (recognizing the faculty advisory board for Initiative, including Paul Butler and Shon Hopwood).

[193] *See About Us*, CRACK OPEN THE DOOR, https://perma.cc/T9U4-SCKK (last visited June 4, 2021) (noting that the most effective advocates were formerly incarcerated); *Cannabis Is Not a Crime*, THE WELDON PROJECT, https://perma.cc/58GS-HH8D (last visited June 4, 2021).

[194] *Soros Justice Fellowships*, OPEN SOC'Y FOUND., https://perma.cc/7SRC-MJGF (last visited June 4, 2021).

formerly incarcerated people to become criminal justice advocates.[195]

In a rare attempt to at least connect these disparate bodies, longtime advocate Nkechi Taifa created and continues to lead the Justice Roundtable, a gathering for over 100 of these disparate groups, allowing representatives to compare notes and keep up with recent developments.[196]

It matters, too, that these groups are in an existential competition with one another for limited funding sources. While some level of cooperation is common among these advocates,[197] broad coordination of efforts is more rare, and the duplication of projects is inevitable.

Leading funders have guided the emergence of criminal law advocacy as a field with hundreds of leaders but perhaps not as many followers. The allure of leadership has only been enhanced as celebrities such as Kim Kardashian have joined the fight,[198] creating an illusion of glamour and fame around the task of seeking reform.[199] That illusion masks a reality well-known to veteran reformers: that the work is mostly done in unpaid obscurity, with the sting of defeat a much more common feeling than any kind of glory.

2. The Problem of Crime Control

A continuing challenge for this loose but large band of advocates is to remain sensitive to the voices and interests of crime victims and the interests of crime control. This is not because crime victims are necessarily the enemies of reform—in fact, a significant number of crime victims support reforms, even those that would shorten sentences,[200] and some crime victims have taken a leadership role in reform efforts.[201]

The larger challenge is that unless crime control and victims are taken seriously, allegations that reformers value incarcerated people over crime victims and public safety will hit home. Certainly, many groups have been conscientious about emphasizing the legitimate ability to reduce

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[195] *Leading With Conviction*, JUST LEADERSHIP USA, https://perma.cc/MP8L-ZZ3F (last visited June 4, 2021).

[196] *See Nkechi Taifa to Leave Open Society Foundations, Start Own Firm*, WASH. INFORMER (Oct. 17, 2018), https://perma.cc/N5D4-3DBD (noting that Taifa launched Justice Roundtable, a coalition of more than 100 groups, shortly after joining Open Society).

[197] *See, e.g.*, *Working Groups*, JUST. ROUNDTABLE, https://perma.cc/5T2N-4NQS (last visited June 4, 2021).

[198] *See* Helena Andrews-Dyer, *Kim Kardashian Is Still Fighting for Criminal Justice Reform*, WASH. POST (Jan. 31, 2019, 2:12 PM EST), https://perma.cc/M6W7-PWMB.

[199] Hayley Prokos, *Kim Kardashian Wears $72,000 outfit to White House to Discuss Criminal Justice Reform*, NEWSWEEK (June 14, 2019, 5:34 PM EDT), https://perma.cc/CA4Y-MZYA.

[200] Leigh Courtney & Elizabeth Pelletier, *What Do Victims Want from Criminal Justice Reform?*, URB. INST. (Aug. 5, 2016), https://perma.cc/DQB5-8FHZ.

[201] *Victims' Voices for Reform*, PEW CHARITABLE TR. (Aug. 2015), https://perma.cc/CR4E-RC4A.

incarceration and crime at the same time.[202]

If advocates fail to take into account crime control and victims, their appeals will be particularly vulnerable in the face of an uptick in the crime rate.

C. *The Attractiveness of Incrementalism*

Advocates for reform face a conundrum. They can seek broad systemic changes, which are a low-percentage shot but pay off big if they succeed, or they can focus their efforts on smaller, incremental changes that offer a better chance for victories along the way. A problem with incrementalism, of course, is that inevitably some injustices remain on the table for years or decades even as things get nominally better. For example, consider the incremental approach to the reform of crack laws:[203] first came court rulings that allowed for some discretion by judges to ignore the harsh guidelines.[204] Next came the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine but did not eliminate it or make the changes in the law retroactive.[205] Then, nearly ten years later, the First Step Act finally made those changes retroactive, but did not close the disparity.[206] The cost of this incremental approach to fixing an obvious problem was years of unnecessary incarceration for thousands of people. But, of course, it also allowed for the release of thousands of people from prison,[207] each with their own story of redemption.[208] As Families Against Mandatory Minimums founder Julie Stewart put it in describing her group's support of the Fair Sentencing Act, "Since 1995, when Congress killed the reform of the crack sentencing guidelines, nearly 75,000 people have received federal crack cocaine sentences. We will not allow another 75,000 to be sentenced at the current unjustifiable levels . . . I won't let the perfect

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[202] *E.g.*, *Our Mission*, LAW ENFORCEMENT LEADERS, https://perma.cc/WBW9-XELS (last visited June 5, 2021) (describing how the Law Enforcement Leaders to Reduce Crime and Incarceration, a group of current and former police officers and prosecutors, puts these dual goals at the center of their mission).

[203] *See supra* Part I(A).

[204] *E.g.*, Spears v. United States, 555 U.S. 261, 264 (2009); Kimbrough v. United States, 552 U.S. 85, 110 (2007).

[205] Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2372 (2010).

[206] First Step Act, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

[207] Mola Lenghi, *More Than 3,000 Prisoners Released Under First Step Act*, CBS (July 19, 2019, 6:44 PM), https://perma.cc/C5TZ-V3EB.

[208] *See, e.g.*, Matthew Charles, *I Was Released Under the First Step Act. Here Is What Congress Should Do Next*, WASH. POST (Feb. 1, 2019, 11:19 AM EST), https://perma.cc/972V-YSW6 (noting that some of those stories received more attention than others, and Matthew Charles, who had been released by error then re-incarcerated before being released under the First Step Act and whose story was well-chronicled, used this platform to tell his own story).

be the enemy of the good."[209]

In discussing a pragmatic approach to change in criminal justice, Georgetown Professor Shon Hopwood described the best of the kind of incrementalism that finally brought some level of reform to the crack laws and sentencing guidelines:

> It moves gradually. It trades in compromise. It demands less while crusaders demand more. Still, it has its place in progressive reform in America. If it starts with the feasible, it does so in the hope that the ideal may someday be realized, at least in some measure. If it is modest, it does so with the knowledge that by aiming lower it increases the chances of hitting its target. Pragmatism is not always a panacea but, then again, neither is it a path to nowhere.[210]

One advantage of incrementalism is that it creates victories, however small. That provides the opportunity for non-profit advocacy groups to take credit and celebrate each advance,[211] something that is crucial to fund-raising—after all, there is much more appeal to donors when it is clear that progress is being made. Though hidden, this mechanism is critical to the survival of many advocacy groups. Unfortunately, this creates a tension between ambition for the cause and ambition for the financial success of an individual advocacy group. The financial incentive towards small victories pulls away from the desire for big ones—a tension that is only magnified by the competition between the atomized groups in the field.

There is another factor that promotes a limited ambition when it comes to the reduction of America's prison population: the distinction between violent and non-violent offenders.[212] It is much more politically palatable to seek reduced sentences for non-violent offenders,[213] but to achieve ambitious goals such as cutting the prison population in half we would have to reach into the pool of those convicted of violent offenses to realize success.[214]

Because of the nature of federal jurisdiction, relatively few federal

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[209] Douglas A. Berman, *The Many (Opaque) Echoes of Compromise Crack Sentencing Reform*, 23 FED. SENT'G REP. 167, 168 (2011).

[210] Shon Hopwood, Book Review, *Caught: The Prison State and the Lockdown of American Politics*, 66 J. LEGAL EDUC. 445, 454 (2017).

[211] *See* Van Jones & Jessica Jackson, *Why We're Celebrating a Three-Month-Old Law*, CNN, https://perma.cc/3DSK-46UF (last updated Apr. 21, 2019, 3:34 PM EDT) (explaining that Jones and Jackson were co-founders of the advocacy group #Cut50, now known as Dream Corps Justice).

[212] *See generally* Eli Hager, *When "Violent Offenders" Commit Non-Violent Crimes*, THE MARSHALL PROJECT (Apr. 3, 2019, 6:00 AM), https://perma.cc/H39K-G445 (explaining the definition of "violent" and "non-violent" crimes and that they are subject to vigorous debate).

[213] Jordan Maglich, *DOJ's New Clemency Program Targets Nonviolent Drug Offenders*, FED. LAW., Sept. 2015, at 4, https://perma.cc/J9L7-9CV8 (explaining that the Obama clemency initiative was expressly directed at "non-violent" offenders).

[214] *See* John Pfaff, *What Democrats Get Wrong About Prison Reform*, POLITICO (Aug. 14, 2019), https://perma.cc/9K9T-GBLQ.

prisoners are there for violent offenses.[215] The federal system, though, is only a small (but significant) fraction of the incarceration system in the United States.[216] In the state systems, where most of the action is, 55% of those locked up are there on charges of violent crime.[217] That means that if we are to reach the commonly-proposed goal of cutting incarceration by 50%,[218] we are going to have to consider cutting sentences for those who have committed violent crimes. That does not seem to be something that even progressive Democrats have much of a taste for right now,[219] and even the editorial board of the relatively liberal Washington Post opposed a D.C. proposal to lower sentences for some young violent offenders.[220]

Incrementalism is, right now, the only model of achieved success that we have in the field of criminal law reform. It is not a surprise that it is embraced by advocates and policy-makers.[221] However, incrementalism has played a large role in the slowness of change as politicians are offered a convenient stopping point for reform. There are discrete costs to that choice, measured in the human lives that suffer as justice is delayed.

III. Accelerating the Process

If over-sentencing in the United States is wrong (and it is), then there is an imperative to fix that grave mistake immediately. The cost of not doing so is nothing less than life and freedom, two of the things that Americans hold most dear. Incremental successes do impact lives, but they also leave behind too many for it to be a principled process.

First, we must do a better job as advocates. We should sometimes be willing to be followers and seek out a unifying message. This will require a new role for one or more of the big funders in the area: turning away from creating dozens of new organizations, and turning towards coordinating and growing the ones that we have. In so doing, we need to strengthen our message by including plans to keep crime low and respect the victims of

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[215] *See generally Table 12: Offenders Receiving Sentencing Options in Each Primary Offense Category*, U.S. SENTENCING COMM'N, https://perma.cc/T4LN-QHLM (last visited June 5, 2021) (describing that in 2017 the federal system processed through sentencing over 20,000 drug cases and over 6,000 fraud cases, but only 72 murders, 62 manslaughters, and 783 assaults).

[216] *See generally* German Lopez, *The First Step Act, Congress's Criminal Justice Reform Bill, Explained*, VOX, https://perma.cc/64EW-CQSK (last updated Dec. 11, 2018, 11:54 AM EST).

[217] *See* John Pfaff, *Five Myths About Prisons*, WASH. POST (May 17, 2019, 6:23 AM EDT), https://perma.cc/2ND2-ATZ8.

[218] *See Who We Are*, *supra* note 188 (describing one of the most prominent of these groups: Dream Corps Justice, formerly #cut50).

[219] *See* Pfaff, *supra* note 214.

[220] *See* Editorial Bd., *For Some of D.C.'s Most Violent Criminals, a Get-Out-of-Jail-Soon Card*, WASH. POST (Aug. 18, 2019, 5:50 PM EDT), https://perma.cc/BXW6-TRBG.

[221] In fairness, I should recognize that my own advocacy efforts are fairly described as incrementalist.

crime.

Second, our agenda needs to confront the political barriers that have slowed reform by creating a higher profile for the issue, calling out racist appeals, and by seeking to dilute the power of prosecutors in the policy.

Finally, we must be bold in what we ask for, particularly in those rare times that the stars align and striking change is politically possible. Reducing incarceration is a laudable goal, but achieving real long-term change will require not only changing sentencing laws, but the structure of our policy process and the way that we define crimes. It is a lot to take on, but it is also right and good.

A. *Becoming More Effective Advocates*

1. Unity and Purpose

The criminal justice movement doesn't lack leaders so much as it lacks followers. Leaders—that is, those who have started an organization, set an agenda, and need to raise money—are already there in abundance.[222] The field does not need another organization with another leader and another set of similar goals. Instead, existing advocates and organizations need to consolidate, coordinate, and cooperate. Emerging advocates need to be encouraged to join and support existing groups rather than starting their own competing project.

One way to move towards this goal would involve creating a meta-organization that could direct resources, talent, and connections to existing organizations and help to coordinate their activities. It is unrealistic (and possibly wrongheaded) to think that such a meta-organization would or should control or usurp the independence of existing groups, but a step towards some kind of coordination would be welcome.

Fortunately, two men have the ability to do this: Charles Koch[223] and George Soros. Despite very different political philosophies, Koch[224] and Soros[225] have both been very active in funding and promoting criminal justice reform, and have had some funding or training role in the establishment and success of many of the advocacy groups in the field.[226]

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[222] *See supra* Part II(B)(1).

[223] Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), https://perma.cc/4FLU-7QVK (noting Charles is the surviving member of the Koch brothers, as his brother David died on August 23, 2019.).

[224] *See* Phillip Elliot, *The Koch Brothers are Pushing for Criminal Justice Changes*, TIME (Jan. 29, 2018, 5:09 PM EST), https://perma.cc/833S-X9NX; Vikrant Reddy, *Criminal Justice Reform in 60 Seconds*, CHARLES KOCH INST. (Nov. 7, 2015), https://perma.cc/HP5E-RNM2.

[225] *See* Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM EDT), https://perma.cc/DRB2-CV7A.

[226] *See* Michael Hirsch, *Charles Koch, Liberal Crusader? He's One of the Left's Biggest Bogeymen. Now He's Teaming Up with George Soros*, POLITICO MAG., Mar./Apr. 2015, https://perma.cc/L48B-

And guess what? Koch and Soros have recently begun working together in a different political realm, opposing military interventions.[227]

The pitch to Koch and Soros is simple: Fund a standing organization to lead this fight. Then funnel money to individual groups through that standing organization and begin to coordinate goals and activities. It will free those groups from constant fund-raising and competition with one another and allow for efficiency and effectiveness at a national level.[228] Over time, too, specialization will evolve among the groups both in the goals they address and the constituents they serve. The governing board of the meta-organization can have representatives from these constituent organizations, and the larger body can create active roles for academics and individuals who are deeply invested in this fight including (importantly) those who have been incarcerated themselves.

A thousand bees can be more dangerous than one bear, but only if those bees have coordination and focus. The goal of criminal justice reform is worthy enough and the advocates tenacious enough to become a swarm attacking injustice with common purpose and direction.

2. Taking Crime and Harm Seriously

To accelerate reform, it will be necessary to take the costs of crime seriously. The political pushback against reform, at its best and most valuable, comes from those who argue in the interests of crime victims and those who may be victimized. Their concerns for public safety must be taken seriously. To do that, we must offer something more than just lower sentences, but other ways to control crime, even (and perhaps especially) when crime rates are low. This can and should include proven plans to lower recidivism, including the promotion of education within prisons. It also can and should address root causes of crime, including poverty, as well. But beyond those important points, it must either assign a different role to law enforcement or argue for a reduced role for the police.

For example, in the narcotics field, there are options for addressing drug use other than broad legalization and a war on drugs, the two poles that are sometimes presented as our only options. One would be to attack the cash flow of the illegal narcotics trade rather than the labor of that industry, by forfeiting cash flow as it heads back to the source point of the trafficking.[229]

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[227] Joshua Keating, *Why It Makes Sense That Soros and Koch Are Uniting to Fund a New Anti-War Think Tank*, SLATE (July 3, 2019, 12:42 PM), https://perma.cc/P3VM-3972.

[228] *See supra* Part II(B)(1) (explaining the experience of Nkechi Taifa and her Justice Roundtable, which has come closest to coordinating the many branches of advocacy and to which such an organization would be wise to look).

[229] Mark Osler, *Asset Forfeiture in a New Market-Reality Narcotics Policy*, 52 HARV. J. ON LEGIS. 221, 228 (2015).

Such a tactic would make the business fail, driving up prices of illegal narcotics as supply shrank (at least temporarily).[230]

Listening to crime victims is important but challenging.[231] The striking overlap between crime victims and offenders—they are often simply the same person at different times[232]—complicates the simple narrative that victims want long sentences. Advocates are wise to engage with crime victims in the community[233] rather than strident advocacy groups that focus on pursuing retribution. Listening to victims often means seeking them out.

B. *Confronting Politics*

1. A Higher Profile

Sadly, criminal justice is most often in the public eye when crime rates are high. In 1982, for example, Richard Neely credibly claimed in *The Atlantic* that "[t]hrough at least the past decade, no public problem has worried Americans more persistently than crime. When people are asked in opinion surveys to list the problems that concern them most, the threat of crime typically comes at or near the top of the list."[234] With the threat of crime down—way down—since that time,[235] the very issue of criminal justice also dropped far down the list of issues that the public cares about. In 2021, Gallup found that only 2% of Americans identified crime as "the most important problem facing the nation today."[236]

Clearly, we care most about things we perceive to be threatening our own interests.[237] When crime is not prevalent, it drops from the public discourse because it does not relate directly to our lives. So, predictably, criminal justice policy is rarely, if ever, mentioned in televised debates

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[230] *Id.* at 223–24.

[231] *See* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 410–11 (1999) (explaining that even simple tools like victim impact statements can be problematized).

[232] Caitlin Delong & Jessica Reichert, *The Victim-Offender Overlap: Examining the Relationship Between Victimization and Offending*, ILL. CRIM. JUST. INFO. AUTH. (Jan. 9, 2019), https://perma.cc/8A7L-F57H.

[233] Robert Rooks, *Point of View: Important Solutions on Criminal Justice Reform, and a Turning Point for Florida*, PALM BEACH POST (July 10, 2019, 7:31 AM), https://perma.cc/2KE4-GPP7.

[234] Richard Neely, *The Politics of Crime*, THE ATLANTIC, Aug. 1982.

[235] John Gramlich, *What the Data Says (And Doesn't Say) About Crime in the United States*, PEW RES. CTR. (Nov. 20, 2020), https://perma.cc/LRB2-FPCD.

[236] *Most Important Problem*, GALLUP, https://perma.cc/AUN7-CQQZ (showing that the problem of "drugs," which was listed separately, was only the "most important problem" for less than 0.5% of Americanst) (last visited June 4, 2021).

[237] *See* Julia Carrie Wong, *Trump Referred to Immigration 'Invasion' in 2,000 Facebook Ads, Analysis Reveals*, THE GUARDIAN (Aug. 5, 2019, 17:58 EDT), https://perma.cc/A9QJ-WXTX (describing that the same Gallup poll in 2019 found the most important issue to be immigration—which President Trump had promoted as a threat to American Safety and economic well-being).

leading up to elections.[238]

The cost of this is significant. If candidates do not have to discuss criminal law when seeking election, it is unlikely they will pay it much attention once in office—after all, it was never on the agenda. Moreover, by failing to insist that the topic be addressed, we forfeit the ability to know candidates' positions on crucial issues. For example, clemency—a power employed entirely within the president's discretion[239]—usually only gets into the news when a president uses the pardon power in favor of someone terrible, such as Marc Rich[240] or Sheriff Joe Arpaio.[241] Yet, no president in memory has been asked how he would use the pardon power prior to taking office. That means that there was no statement of principle, no promise of responsibility, before that mighty tool came into the president's grasp. That failure is on us, because collectively we have failed to ask about this policy issue when we have the opportunity.

To remedy this, advocates must demand that candidates stake out positions on important criminal justice issues, lobby media outlets to question those candidates about criminal law, and press our own questions when we have the chance. It is crucial that advocates take their messages to those who will have the power to enact change at the time they are most likely to listen—when they are campaigning. Yes, that may mean going to Iowa,[242] but to avoid this kind of engagement is to court irrelevance.

2. Naming and Shaming Racist Appeals

In 1988, George H.W. Bush was elected president over Democrat Michael Dukakis either because of or despite a racist appeal that became a legend. A group affiliated with his campaign, the National Security Political Action Committee, created an ad titled "Weekend Pass" that featured Willie Horton, an inmate who received a weekend furlough while Dukakis was governor of Massachusetts and used that opportunity to commit rape.[243] Though the Bush campaign did not produce the ad itself, Bush campaign chairman Lee Atwater had said that "if we can make Willie Horton a

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[238] *See* Mark Dent, *Abortion, Reparations, Israel: Topics to Watch for During the Second Democratic Debate*, FORTUNE (July 30, 2019, 9:44 AM EST), https://perma.cc/GSH7-UL6C (demonstrating that discussions of the debate reflect this absence of focus on criminal law).

[239] U.S. CONST. art. II, § 2, cl. 1.

[240] Douglas Martin, *Marc Rich, Financier and Famous Fugitive, Dies at 78*, N.Y. TIMES (June 26, 2013), https://perma.cc/T8G8-N6QL.

[241] Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://perma.cc/8FG4-JRJX.

[242] *See* Mark Osler, *Holding Fourth on Fireworks and Presidential Timber*, WACO TRIB.-HERALD (July 13, 2019), https://perma.cc/X3BB-67JC (conveying that, in fact, going to Iowa during primary season is a fascinating endeavor).

[243] Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://perma.cc/2KDH-2589.

household name, we will win the election."[244] The advertisement itself depicts a mug shot of Horton, a black man, as it describes the crimes he committed while on furlough.[245]

The Willie Horton ad is viewed as a template for "dog-whistle" racist appeals that don't explicitly mention race, but which set out an enthymeme sending a clear message to followers with racist and racialized ideas.[246] This technique allowed Bush to deny the racial nature of the appeal while plainly creating the desired effect in the population.[247] The dog-whistle approach isn't relegated to history.[248] In the 2016 presidential election, it was employed to great effect by President Trump, and some assert that he now has moved beyond such shaded messaging into straight-up racism.[249]

President Trump's more controversial comments have not always been directed at criminal law policies, though sometimes they have: in announcing that he would run for president, Trump famously said that, "When Mexico sends its people, they're not sending their best . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[250] And with a raft of progressive opponents seeking to oppose him, it is easy to imagine the temptation is great to go back to dog-whistle techniques, or worse.

When that happens (or if a Democratic candidate does the same), it must be clearly labeled as a racist appeal. Advocates, journalists, all of us have the responsibility of calling out such dangerous, divisive, and immoral appeals.

3. Diluting Prosecutor's Influence on Policy

Few of us are good at admitting we were wrong.[251] Prosecutors are

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[244] *Id.*

[245] Nat'l Security PAC, *Willie Horton 1988 Attack Ad*, YOUTUBE (uploaded by llehman84 on Nov. 4, 2008), https://perma.cc/MJ8H-YCZU.

[246] Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM EST), https://perma.cc/T8RL-PTT9.

[247] *Id.* (describing one part of a broader campaign involving Horton employed by Bush). *See generally* Paul Waldman, *How George H.W. Bush Exploited Racism to Win the Oval Office*, WASH. POST (Dec. 3, 2018, 4:24 PM EST), https://perma.cc/RB8Q-9TX9.

[248] *See* Carl M. Cannon, *Debunking the Willie Horton Ad Controversy*, REAL CLEAR POL. (Dec. 9, 2018), https://perma.cc/P69B-AX2L (explaining that not everyone agrees that the Willie Horton ad was racist).

[249] Paul Krugman, *Racism Comes Out of the Closet*, N.Y. TIMES (July 15, 2019), https://perma.cc/6X73-5YW2.

[250] Ian Schwartz, *Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers and Rapists Are Crossing Border*, REAL CLEAR POL. (June 16, 2015), https://perma.cc/7BJC-57XG.

[251] *See* Susan Krauss Whitbourne, *The Mindset That Makes It Hard to Admit You're Wrong*, PSYCHOL. TODAY (Mar. 21, 2017), https://perma.cc/FFD7-47RN.

particularly bad at it;[252] criminal justice reforms almost always contain an implied but inherent criticism of what prosecutors have done. Too often prosecutors react to reform efforts by staunchly defending the power they have accumulated.[253]

That defensiveness should not surprise us. After all, the sentences we seek to alter are the ones that prosecutors "won" as they stood ten feet away from the person being sentenced. The emotional investment in that exercise is huge; after all, the cost of having been wrong is the knowledge that one has unfairly imprisoned (or, in death penalty states, killed) a fellow citizen.

The influence of prosecutors operates differently in the federal and state systems. In the federal system, the Department of Justice serves as literally the only formal advisors to the President and Congress on criminal justice matters.[254] In the states, the influence of prosecutors runs with the deference they are shown by legislators on policy matters.[255]

i. *The Department of Justice*

Maintaining the top officials of the nation's prosecutorial office as the only advisors to the president on criminal justice reform is ludicrous—the conflict is obvious.[256] Two fixes to the problem are easily available, and can be created by the president through executive order. The first would be to create a single advisor position, similar to the role that the United States Trade Representative plays as an advisor outside of the Department of Commerce,[257] or the National Security Advisor fulfills outside of the national intelligence agencies.[258] Notably, at least one Democratic candidate for president in 2020—former prosecutor Senator Amy Klobuchar—embraced this idea.[259]

A second route would be to create a Presidential Criminal Justice Advisory Commission rather than relying on a single advisor.[260] This

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[252] Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://perma.cc/W6ME-JVV8; Ed Brayton, *Why Prosecutors Rarely Admit Mistakes*, PATHEOS, (Feb. 7, 2013), https://perma.cc/28JT-ZURQ.

[253] John Pfaff, *The Perverse Power of the Prosecutor*, DEMOCRACY (Feb. 22, 2018, 5:53 PM), https://perma.cc/6XVG-BYT4.

[254] Barkow, *supra* note 157, at 396.

[255] *See* Julia Shumway, *Prosecutors' Honor Questioned as Criminal Justice Measures Die*, ARIZ. CAP. TIMES (June 14, 2019), https://perma.cc/4RFQ-9LLM.

[256] *Supra* Part II(A)(3)(i).

[257] *Mission of the USTR*, OFF. OF U.S. TRADE REPRESENTATIVE, https://perma.cc/SW3Q-NAWK (last visited June 5, 2021).

[258] *See* Steven J. Hadley, *The Role and Importance of the National Security Advisor*, TEXAS A&M (Apr. 26, 2016), https://perma.cc/N3SP-C4WH.

[259] Amy Klobuchar, *On Criminal Justice Reform, It's Time for a Second Step*, CNN (Apr. 5, 2019, 11:58 AM EDT), https://perma.cc/QJ4Y-KAFA.

[260] Barkow, *supra* note 157, at 459.

broader organization would lack the sharp focus a single advisor can muster, but has the advantage of including a diversity of viewpoints, and could include people with varying expertise, including those from particularly successful state systems.[261]

With either model, it would also allow for a new beginning and capabilities, including establishment of a data hub for metrics such as successful re-entry in support of a mission to promote public safety in the least costly way.[262] At the very least, the DOJ's chokehold on reform would finally be broken.

ii. *Elected Prosecutors and Lawmaking in the States*

In the states, the role of prosecutors in policy formation is more diffuse and obscured than the DOJ's role within the federal government.[263]

Certainly, the election of progressive prosecutors is the most effective way to address the influence of prosecutors on policy; that effectively reverses the anti-reform dynamic.[264] Even if they lose, progressive *candidates* for the office of elected prosecutor are likely to drive the discussion in the right direction and force establishment figures to recognize the problems with over-incarceration, cost, and cash bail, among other issues.[265]

In some states, too, it might be especially effective for faith groups to push for reform and directly press for less retributionist views from elected prosecutors. Some of the most conservative parts of the United States are also the areas where Christians most predominate. Certainly, the commonality of a faith centered on the life of someone who was unfairly tried, denied clemency, and executed (and who taught that "when I was in jail you visited me")[266] is an effective starting point in influencing Christian district attorneys and legislators alike.[267]

C. *Boldness in the Ask*

Finally, we must be bold in what we ask for, particularly in those periods in which reform seems most possible. Between 2009 and 2011, the first two years of the Obama administration, there was a tremendous and lost

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[261] *See* Barkow, *supra* note 157, at 459.

[262] *See* Barkow, *supra* note 157, at 460.

[263] *Supra* Part II(A)(3)(ii).

[264] *See* Del Quentin Wilbur, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019, 4:00 AM), https://perma.cc/W8QN-LYQC.

[265] Amir Khafagy, *How Tiffany Cabán Lost the Vote but Won the Fight in Queens*, JACOBIN (Aug. 15, 2019), https://perma.cc/7NR9-E488.

[266] *Matthew* 25:36.

[267] MARK OSLER, PROSECUTING JESUS: FINDING CHRIST BY PUTTING HIM ON TRIAL (2016) (My own work on the death penalty has been rooted in this idea, as I went to the most conservative Christian audiences I could find with an anti-death penalty message).

opportunity.[268] Despite a motivated president (Obama) and Democratic majorities in both houses of Congress, the only significant advance in the field of criminal law through legislation was the tepid (yet important) Fair Sentencing Act, that reduced some crack sentences prospectively.[269] Other legislative priorities—most prominently, the Affordable Care Act—took priority while time slipped away.[270] We should have insisted on more.

We must also be more savvy about what we ask for. Too often, advocates seek the most obvious thing—for example, a reduction in the number of incarcerated people through sentencing reform. While that is important, seeking that kind of legislation is not the only thing we should be pursuing. To enact long-term change, we must also challenge decision structures and move to re-examine the very definitions of crimes.

The necessity to create structural change was well-illustrated by the Obama clemency effort. While that effort paired many petitioners with lawyers and managed to commute the sentences of about 1,715 incarcerated people,[271] Obama never changed the unwieldy clemency review process that had hampered any fair use of the pardon power for decades,[272] and the process he did use was hampered by infighting.[273] In other words, instead of replacing a broken-down old machine, they simply cranked it harder. As one might expect, that worked, to a degree, for a while. But any legacy effect—a better process that would reduce incarceration over time—was forfeited by the failure to address structure.

Important structural changes (in addition to the clemency fix Obama did not make) could affect both the structure of advocates and the structure of government; these would include creation of an advocacy meta-organization by top funders and the addition of a non-DOJ criminal justice advisor to the White House. When we change structures, we mold outcomes both seen and unseen.

Good and great work is being done in the field of criminal law. The First Step Act has improved thousands of lives, saved taxpayer money, and offers a bipartisan template for success. But if that is all we hope for, we are leaving far too much on the table when the stakes are measured in lives and freedom. This is not a time for brutal timidity, and it never was.

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[268] Doug Berman, *Obama Hasn't Reformed Criminal Justice—Could Romney Do Better?*, DAILY BEAST (Apr. 13, 2012, 12:00 AM ET), https://perma.cc/WYC8-WMFV.

[269] *See supra* Part I(A).

[270] Elaine Kamarck, *The Fragile Legacy of Barack Obama*, BROOKINGS INST. (Apr. 6, 2018), https://perma.cc/SRC6-N5WQ.

[271] Office of Pardon Attorney, *Obama Administration Clemency Initiative*, U.S. DEP'T OF JUST., https://perma.cc/NCN9-Q59Z (last visited June 5, 2021).

[272] Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 465, 470–84 (2017).

[273] John Fritze & Gregory Korte, *Obama Clemency Program for Drug Offenders Snared by Infighting, Auditors Find*, USA TODAY (Aug. 1, 2018, 3:20 PM ET), https://perma.cc/7RUB-FC6R.

Consensus, Compassion, and Compromise?: The First Step Act and Aging Out of Crime

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INTRODUCTION

The First Step Act (Act) represents an ambitious, bipartisan compromise to commence much-needed, genuine federal sentencing reform by attempting to reduce the prison footprint. However, as its name suggests, it is, in practice, simply one meager stride in what requires a marathon to affect true change. This is particularly evident when considering its two-fold approach to reduction in the sentences of elderly offenders. Since 2013, compassionate release has stood as the exclusive process available for qualifying elderly offenders to be released early from prison. While the Act broadens access to compassionate release, it fails to do so liberally. As before, the Bureau of Prisons (BOP) persists in creating and conserving implementation guidelines that render compassionate release policies virtually impotent. The Act also resurrects the Second Chance Act of 2007 by authorizing aged-based early releases for inmates who are sixty years old and have served at least two-thirds of their sentence. While this revival appears appealing, it, too, fails to result in cognizable evolution. This is so because BOP has again apprehended the system by refusing to include good time credits in release eligibility calculations. In many ways, BOP's unceasing resistance to reform has impeded the Act's potential.

In his article, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, Professor Mark Osler documents many of "the slows" or reasons why criminal justice reform retains a slow, crawling pace. He lists the political pressure that politicians face when casting themselves as "tough on crime" as one reason why reform, despite well-documented research and support, is not advocated for more vigorously and consistently by politicians. Professor Osler also suggests that a more coordinated and consolidated effort by reformists would result in markedly improved

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outcomes. He is correct on both fronts, but there is more to the story.

As a general matter, this country has created laws and policies that express extreme moral condemnation of criminal offenders. Our approach to punishment expresses, rather soundly, clear repugnance of those who have been found guilty of a crime. Before true reform can occur, we must commence the indispensable process of reprogramming our collective view of criminal offenders. Once we begin viewing them as human beings, worthy of dignity and respect, fairer and more humane punishment methods will, in turn, follow.

I. The Truth about Criminal Justice Reform

In his article, Professor Osler asks, "Why are we so slow to correct clear injustices?"[1] He identifies politics, racism, prosecutorial encroachment, and incrementalism as possibly justifying "the slows," or the lack of urgency in crafting novel and impactful criminal justice reforms. He correctly specifies that criminal justice reform is the only U.S. policy arena where the affected are rendered voiceless.[2] He writes, "those most directly affected by over-incarceration are the people in our society least able to affect policy through democratic means because those in prison are almost always denied the ability to vote."[3] He also hearkens to bygone eras' media coverage of the crack epidemic, laments the sensationalist nature of media coverage, and reminds us of the media's power and influence. In his words, "real-life experiences do not strongly affect the way we feel about criminal justice, but the media's interpretation of what is going on—often in communities other than our own—does affect our policy outlooks."[4] Further, he confronts America's original sin by denouncing our race problem and the myth that "the threat of black men . . . requires mass incarceration."[5] Finally, he labels prosecutors as incessantly impeding any reform process. While all of this is true, it still fails to adequately explain the slows. The slows are fueled by something far deeper.

A. *Dignity*

The underlying explanation for "the slows" is that both U.S. society and the criminal justice system overwhelmingly view incarcerated people as less human, and, therefore, undignified.[6] The U.S. criminal justice system

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[1] Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW. ENG. L. REV. 161, 176 (2021).

[2] *Id.*

[3] *Id.* at 176–77.

[4] *Id.* at 179.

[5] *Id.* at 181.

[6] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2010); Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly*

dehumanizes criminal offenders in a manner that is radically dissimilar to similarly situated countries. Professor James Q. Whitman writes, "[t]he relationship between punisher and punished is indeed one of the core, definitional, relationships of inequality in human society, and one of the core, definitional relationships of disrespect."[7] He further characterizes the "intoxication of degradation"[8] as unleashing the worst in the punisher as he attempts to put the prisoner "in his place."[9] Other scholars confirm that U.S. criminal punishment constitutes a series of "degradation ceremonies"[10] that affirm an offender's moral deficiency and "reflects . . . [his] low status."[11] According to Professor Howard Garfinkel, degradation ceremonies are fueled by society's urgent desire to publicly denounce moral indignation. The result is the "ritual destruction of the person being denounced."[12] This is because the "psychology of punishment" is "a psychology of degradation," and "[w]hen human beings punish, they tend, in the very act of punishment, to create a relationship of inequality."[13] Criminal punishment, particularly incarceration, is socially and morally degrading because it permanently extinguishes offenders' social standing and overall acceptance as fully, equally human. We justify our poor treatment of criminal offenders as deserved because they are simply not as "good" as the rest of us. In the words of Professor James Q. Whitman:

> Criminal punishment does not only visit measured retribution on blameworthy offenders. Nor does it only deter. Nor does it only express considered condemnation. It . . . also expresses contempt. We do indeed harbor a strong natural tendency to perceive offenders as "dangerous and vile," and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like

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Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 244 (2000) (stating that "compassion shown the elderly by family, friends, and caregivers is replaced by the indifferent correction officer"); Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 954 (2018).

[7] James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM L. REV. 85, 106 (2003).

[8] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 22–23 (2003).

[9] *Id.*

[10] Howard Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).

[11] Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 547 (2004) (providing that a degradation ceremony is any communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types); *see* Garfinkel, *supra* note 10, at 420.

[12] Garfinkel, *supra* note 10, at 421.

[13] Whitman, *supra* note 7, at 106.

cockroaches.[14]

Scholars describe criminal justice as "culture-bearing" because it reveals how society truly views those who inhabit it.[15] Our oppressive treatment of offenders in the criminal justice system exposes precisely what we, as a society, think of them. Professor Joshua Kleinfeld writes:

> American punishment treats an offender who has committed a serious crime or engaged in a pattern of repeat offenses as having exposed the truth about who he is—about his enduring character. The criminal system thus crosses the line separating actor from act, and the crime or series of crimes is taken to justify, not just imposing hard treatment on the offender, but banishing him from social life.[16]

Collateral consequences and the stigma that attaches upon even being accused of a crime indicate who we believe offenders and alleged offenders to be—not worthy of inclusion in our pristine communities. According to Professor Kleinfeld, "[i]mplicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed rather than ordinary people who have committed crimes."[17] Professor Jamila Jefferson-Jones describes stigma as a "'socially inferior attribute' that marks the carrier as one who deviates from prevailing social norms," and "taints the carrier as one possessing weak character,"[18] rendering them somehow less human than those who have never been convicted. Stigmatized offenders are "not quite human," which allows society to exercise varieties of discrimination, "through which we effectively . . . reduce [the offender's] life chances."[19] The truth is that, in practice, the aforementioned stain extends not just to those accused of or engaged in serious or repeat offenses but to all offenders. This stigma is an unavoidable consequence of contact with the criminal justice system. Professor Markus Dubber agrees that "it is not only [the] punishment that degrades. It is the ascription of the label 'offender' that degrades . . . the level of degradation thus increases as the suspect becomes a defendant becomes a convict becomes an inmate."[20]

Scholars note that "human dignity has come to be accepted as a core value of [human rights] jurisprudence"[21] and that an approach focused on

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[14] Whitman, *supra* note 7, at 98.

[15] Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 940 (2016).

[16] *Id.* at 948.

[17] *Id.* at 941.

[18] Jamila Jefferson-Jones, *A Good Name: Applying Regulatory Takings Analysis to Reputational Damage Caused by Criminal History*, 116 W. VA. L. REV. 497, 505 (2013).

[19] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

[20] Dubber, *supra* note 11, at 547.

[21] Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 519 (2010).

dignity would seek to "restore the individuals . . . to their prior status," instead of "degrad[ing] and marginaliz[ing] them."[22] Similarly, it provides rules to determine which assets are credited to the entity (under the control of its internal rules) and how they may be spent or encumbered. The human rights model of dignity insists that we "provide robust protections for the dignity of individuals who are incarcerated."[23] Scholars, however, describe the U.S. conception of dignity as "narrow" and specifically rely, almost solely, on Eighth Amendment principles. Professor Michael Pinard pronounces that "the United States asks whether a certain measure, practice, or deprivation violates the personal dignity interests protected by the Constitution, rather than asking whether the overall legislative scheme is consistent with a robust belief in human dignity generally."[24] As a consequence, then, "the concept of dignity is an end point that cannot be passed; it is invoked only in response to the most egregious laws or government conduct."[25] He further notes that in other similarly situated countries, dignity is "the starting point for interpretation, from which rights flow."[26] This constricted vision allows us to label offenders as undignified and stigmatize them. While all prisoners endure degradation, it is especially evident in the case of elderly offenders.

B. *The Indignity of Prison Life*

The prison environment is "crimogenic," stripping inmates of their basic humanity, "[w]hether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape . . . ."[27] Among other indignities, inmates experience unreliable medical care, use of excessive force by prison guards, lack of basic sanitation, extreme temperatures, unhealthy food, and a multitude of other experiences that pose risks to prisoner health, safety, and general well-being.[28] Lack of

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[22] *Id.* at 526–27.

[23] *Id.* at 519.

[24] *Id.* at 521.

[25] *Id.*

[26] Pinard, *supra* note 21, at 521.

[27] United States v. Blake, 89 F. Supp. 2d 328, 344 (E.D.N.Y. 2000); *see* Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 87–89 (2014) (stating how in federal prison, lengthy sentences have not decreased recidivism); Richard A. Viguerie, *A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), https://perma.cc/2KL7-3RY5 (stating how in the state system, over 40 percent of offenders return to prison within three years of release, and this number is close to 60 percent in some states).

[28] Jefferson-Bullock, supra note 27, at 84. *See generally* Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153 (2013); Alan Blinder, *In U.S. Jails, a Constitutional Clash Over Air-Conditioning*, N.Y. TIMES (Aug. 15, 2016), https://perma.cc/9686-RCPY; *Cruel, Inhuman, and Degrading*

funding for critical rehabilitation programs render day-to-day life uninspired, as inmates often "simply idly pass the time all day long."[29] Together, these conditions strip inmates of their dignity, regardless of age. For elderly prisoners, however, indignities are far more pronounced.

The overall prison environment is not suited to accommodate aged prisoners. Prisons' physical designs are not fit for the aged, often lacking in facilities critical for safe movement of the elderly and disabled.[30] Further, elderly prisoners experience a higher risk of victimization if housed with much younger, more robust inmates and often fall victim to their whims.[31] Additionally, due to substandard medical and dental care, inadequate diet, frequent engagement in risky behaviors, and other social factors, aged inmates suffer mental and physical deterioration at a shockingly increased rate compared to that of unincarcerated people of the same age.[32] Medical professionals proclaim that "[a] prisoner aged fifty may be classified by society as middle-aged; he may, in fact, already be an elderly person if many of his years have been spent in the prison system."[33] As a result, studies demonstrate that eighty-two percent of elderly inmates suffer chronic illness, requiring consistent care.[34] Despite a clear need for geriatric medical care, prison facilities lack medical staff and services necessary for such care. Further, scarce educational, recreational, and rehabilitative resources are seldom designed to meet the specific needs of older people.[35] Finally, elderly prisoners are often unable to participate in daily inmate life, including basic prisoner work duty, and many must rely on inmate companions, should they be available, to assist in daily living activities.[36]

Conditions, ACLU, https://perma.cc/9BS8-2A7F (last visited June 21, 2021); Michele Deitch & Michael B. Mushlin, *What's Going On in Our Prisons?*, N.Y. TIMES (Jan. 4, 2016), https://perma.cc/T33Y-THRK; Martin Garbus, *Cruel and Unusual Punishment in Jails and Prisons*, L.A. TIMES (Sept. 29, 2014, 5:52 PM PT), https://perma.cc/7V8P-JEGF.

[29] Jefferson-Bullock, *supra* note 27, at 88; *see, e.g.*, *Rehabilitation Programs Can Cut Prisons Cost, Report Says*, ORANGE COUNTY REG. (July 1, 2007, 3:00 AM), https://perma.cc/4BQM-2W8N; *see also, e.g.*, Michael Rothfield, *Cuts Dim Inmates' Hope for New Lives*, L.A. TIMES (Oct. 17, 2009, 12:00 AM PT), https://perma.cc/WB3D-PH8N; Mike Ward, *State Jails Struggle with Lack of Treatment, Rehab Programs*, STATESMAN (Dec. 30, 2012, 12:01 AM), https://perma.cc/6YKS-MYF9.

[30] *See* Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROBATION, June 1994, at 47, 47–48.

[31] *See generally Old Behind Bars: The Aging Prison Population in the United States*, HUM. RTS. WATCH (Jan. 27, 2012), https://perma.cc/QH4X-2HCN [hereinafter *Old Behind Bars*].

[32] *See* Nancy Neveloff Dubler, *The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails*, 26 J.L. MED. & ETHICS 149, 150 (1998); Jean Mikle, *Health Care Costs for Older Inmates Skyrocket*, USA TODAY (Mar. 31, 2013, 12:01 AM PT), https://perma.cc/7KQR-24RC.

[33] Dubler, *supra* note 32, at 150.

[34] *See* Dubler, *supra* note 32, at 150–51.

[35] *See* Dubler, *supra* note 32, at 152.

[36] *See* Kevin Johnson & H. Darr Beiser, *Aging Prisoners' Costs Put Systems Nationwide in a Bind*, USA TODAY (July 10, 2013 6:51 PM ET), https://perma.cc/G7HT-UGNR (describing how

Sadly, prisoner end-of-life care is compromised as well. In previous works, I have written of the indignities suffered by terminally ill prisoners in prison hospitals and hospices, arguing that prison end-of-life care is unconstitutionally inadequate because the objectives of medical care and correction are incongruous.[37] The goal of prison is to punish, while the aim of medical care is to "diagnose, comfort, and cure."[38] The incompatibility of these two purposes is even more obvious at the end of a prisoner-patient's life when the "prisoner-patient's access to health care is controlled completely by prison guards and is 'limited by whether a guard chooses to allow the inmate to seek treatment.'"[39] As a result, end-of-life care fails to "resolve concerns about the dignity of dying in the harsh environment of prison."[40] Plans for a good death, surrounded by loved ones, are thwarted by inflexible visiting hours, unwelcoming visiting venues, and less qualified doctors.[41] This is, perhaps, the epitome of indignity.

> This was never, however, the purpose of prison in the United States. In previous works, I have written that the American prison system was initially born of the rehabilitative model, and that "[t]he concept of rehabilitation [has] decisively determined Western society's preference for incarceration as a mode of punishment."[42] Further, I offer that: Historically, prisons and jails were institutions where offenders could separate from society to reflect on their misdeeds and contemplate return following an improved moral condition. Oddly, the principal purpose of punishment radically changed while the punishment distribution tool remained unaffected. [Sentencing Reform Act or "SRA"] reforms abandoned rehabilitation, thereby promoting retribution and deterrence to punishment purpose prominence. However, this shift in punishment purpose was not accompanied by any contemplated or realized shift in punishment method. The new [Federal] Sentencing Guidelines strongly favored custody over probation for most offenses. Reformers concluded that prisons lacked the capacity to rehabilitate, yet failed to fully consider whether prisons were capable of successfully deterring crime or

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approximately 250,000 state and federal prisoners may be classified as elderly. Warden Burl Cain of the Louisiana State Penitentiary notes that of 1,000 prison field workers, only 600–700 are physically able to complete assigned tasks due to age-related physical decline. One third of Louisiana State Penitentiary inmates are over the age of fifty, and each cost over $100,000 to incarcerate).

[37] *See* Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 540 (2015).

[38] *Id.*; *see* Dubler, *supra* note 32, at 150.

[39] Jefferons-Bullock, *supra* note 37, at 541.

[40] *Old Behind Bars*, *supra* note 31.

[41] Jefferson-Bullock, *supra* note 37, at 547.

[42] Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 389 (2016) (quoting Edwin L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 350 (2001)).

properly punishing moral blameworthiness.[43]

At its origin, prison was never intended to degrade.

One purpose of the Act is to restore a measure of dignity to offenders. The Act seeks to reduce the prison footprint responsibly in part by facilitating the release from prison of lower risk offenders and transferring greater numbers of prisoners to home confinement.[44] Relying on the aging out of crime theory, the Act hopes to release groups of qualified elderly offenders. The Act, however, does not do much to advance its stated goals. Because it is the product of a system that dehumanizes criminal offenders, the Act is not a major step for criminal justice reform. The treatment of elderly offenders in the Act and its practical applications further demonstrate the dehumanizing stigma that continues to slow down the process of criminal justice reform.

II. Compassionate Release and the First Step Act

Compassionate release theory is grounded in human dignity by declaring that an inmate's altered and unfortunate circumstance may demand early release from incarceration.[45] Compassionate release authorizes judges to review criminal sentences post-sentencing to determine whether, under sufficiently extraordinary and compelling circumstances, they remain appropriate.[46] Compassionate release relies upon both legal and moral justifications. Its legal justification asserts that impending death, sickness, extreme family responsibilities, and age have canceled a prisoner's debt to society, such that release, prior to the completion of the prisoner's sentence, is warranted.[47] Its moral rationale declares that dying prisoners are worthy of a dignified death, indispensable to the fabric of their families as sole caregivers, and/or worthy of experiencing their final living days unconfined by prison walls. In the case of elderly offenders, compassionate release is driven by more than compassion.[48] Research indicates that unsustainable costs and underwhelming public safety benefits support a broadened view of compassionate release of elderly offenders. Congress attempted to account for this by adding novel features to the compassionate release process in the Act but failed to do so. While it is an aspirational first attempt, the Act leaves much to be desired. This is so because the BOP

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[43] *Id.* at 360.

[44] *See* H.R. REP. NO. 115-699, at 15–17 (2018).

[45] Jefferson-Bullock, *supra* note 37, at 523.

[46] *See* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?*, 3 WIDENER J. PUB. L. 799, 820 (1994).

[47] *See id.* at 829.

[48] Brie A. Williams, Alex Rothman & Cyrus Ahalt, *For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies*, HEALTH AFF. (Feb. 6, 2017), https://perma.cc/96SJ-USS9.

remains the strict, less-than-compassionate gatekeeper.

The Act alters the compassionate release policy in two significant ways: (1) by allowing prisoners the autonomy to request compassionate releases instead of relying on their prison warden to do so on their behalf; and (2) by providing prisoners with the option to appeal directly to courts.[49] A prisoner must still submit a compassionate release request to BOP, but may proceed to court if the warden fails to respond to the request within thirty days or if BOP, after its fourth and final stage of review, denies the prisoner's request.[50] While these amendments represent a marked, progressive shift, they are not without severe limitations.

Under the Act, well-deserved allowances are made for the terminally ill, but similar concessions are not granted to the elderly.[51] Certainly, elderly offenders may avail themselves of the novel self-submitted petition and court-appeal provisions, just as any other prisoner may. However, the guiding criteria remains the same. The underlying governing Sentencing Guideline, 1B1.13, is unchanged, and any reduction in sentence must still be consistent with applicable policy statements issued by the Sentencing Commission. Unlike preconditions for terminally ill offenders, then, eligibility requirements for elderly offenders seeking compassionate releases linger undisturbed. An elderly offender convicted of a violent offense must still be seventy years old, must still have served thirty years of his or her sentence, and must still not be deemed a danger to society by BOP.[52] Further, the "extraordinary and compelling circumstance" criteria remains unmodified as well.[53] For an elderly offender's altered circumstance to be deemed "extraordinary and compelling," that offender must still be at least sixty-five years old, must be experiencing an age-related serious decline in physical or mental health, and must still have served ten years or 75% of his or her sentence.[54] These are the identical, limiting guidelines that BOP has relied upon since the enactment of the aforementioned 2013 program "revisions." As before, elderly offenders receive no discernible relief from

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[49] *First Step Act - Frequently Asked Questions*, FED. BUREAU OF PRISONS, https://perma.cc/DTW5-LVS5 (last visited June 21, 2021).

[50] Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.-C.L. L. REV. (Oct. 23, 2019), https://perma.cc/X7P8-GZD5.

[51] *See id.*

[52] *Program Statement: Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 (c)(1)(a) and 4205(g)*, FED. BUREAU OF PRISONS 4, n.1 (Mar. 25, 2015), https://perma.cc/DGP2-F9Z4.

[53] *Id.* at 1.

[54] AMENDMENTS TO THE U.S. SENTENCING GUIDELINES § 1B1.13, 2 (U.S. SENTENCING COMM'N 2016), https://perma.cc/J8RC-U9PW. *But see* 18 U.S.C. § 3582 (c), (d) (2018) (listing criteria for modification of imprisonment for those whose offenses occurred after November 1, 1987, as being at least seventy years old and having served at least thirty years in prison or being diagnosed with a terminal disease).

federal compassionate release policies. Though § 403(b) is entitled, "Increasing the Use and Transparency of Compassionate Release,"[55] the Act does nothing to fulfill its titular claims.

BOP continues its stranglehold on release policies by misaligning with broad Sentencing Guidelines. Enormous disparities persist between controlling Sentencing Guidelines and BOP's Program Statement, rendering statutory changes unsettled. BOP's Program Statement insists that elderly inmates with medical conditions requesting release meet five specific criteria: (1) be sixty-five years old or older; (2) suffer from a chronic or serious medical condition related to age; (3) experience deteriorating physical or mental health that substantially diminishes their ability to function in prison; (4) have exhausted conventional treatments; and (5) have served at least fifty percent of their sentence. Sentencing Guidelines, however, treat these same prisoners completely differently. Sentencing Guidelines require that elderly inmates with medical conditions requesting release must: (1) be sixty-five years or older; (2) experience serious physical or mental health deterioration due to age; and (3) have served the lesser of ten years or seventy-five percent of their sentence.[56] In its role as jailer, BOP has constructed a release policy that is more exclusive in both application and practice than that of the Sentencing Commission. BOP's authority in this arena is baffling, especially since Congress' goal in releasing low-risk offenders is clear and the Sentencing Commission has publicly stated that it believes BOP's authority should be limited to determining whether inmates meet eligibility criteria only and that release decisions should be made solely by judges. In refusing to comply with Congress and Sentencing Commission directives, BOP manifests the culturally-enmeshed attitude that prisoners, even low-risk offenders, are not worthy of early release. BOP's steadfast refusal demonstrates the undignified position held by all prisoners. This is further evident in the practical application of the Act's reauthorization of the Second Chance Act of 2007.

III. Early Release to Home Confinement and the First Step Act

Likewise, in practice, § 403 of the First Step Act is extraordinarily restrictive. Section 403 reauthorizes and broadly expands the Second Chance Act of 2007, a federal prisoner reentry initiative, to provide for an increased number of elderly offenders to finish more of their sentences through home confinement. Under the Act, an elderly offender is now eligible for release to serve his or her remaining term of imprisonment in home detention if he or she has reached sixty years of age and has served two-thirds of his or her sentence. Though Congress clearly instructs that one purpose of the Act is

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[55] H.R. REP. NO. 115-699, at 16 (2018).

[56] *Compassionate Release and the First Step Act: Then and Now,* FAMM 2–3, https://perma.cc/S655-46FM (last visited June 21, 2021).

to reduce the prison footprint by releasing low-risk offenders, BOP chooses to defy congressional directives by refusing to include good time credits in the release eligibility formula. Several provisions of the Act plainly indicate congressional intent to reduce the prison footprint while simultaneously ensuring community safety through appropriate, cost-effective punishments. For example, § 402 provides that "[t]he Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph."[57] Notably, Congress chose the word "shall" in drafting the Act, indicating a mandatory directive to BOP.[58] Further, § 403 adds "eligible terminally ill offenders" as eligible for release to home detention, thereby expanding the category of possible candidates.[59] In its plain terms, § 101 creates a risk and needs assessment system, creates evidence-based recidivism reduction programs, crafts program incentives to welcome participation, and encourages accelerated prison and pre-release custody release.[60] Section 101 provides that "[a] prisoner shall earn 10 days of time credits for every 30 days of successful participation" and "shall earn an additional 5 days of time credits for every successful participation in evidence-based recidivism reduction programming" if certain criteria are met.[61] Finally, § 102 defines, in clear language, pre-release custody categories, eligibility, types, and effectively broadens its use.[62] The unambiguous language of the Act and its legislative history demonstrate that Congress intended to increase eligibility for release to home confinement and other alternatives to federal prison.

In determining inmate eligibility under the original 2007 version of this provision, BOP determined that good time credits should not be included in eligibility calculations. Today, BOP continues to resist decarceration by employing the identical narrow practice that favors confinement. In so doing, BOP disregards both congressional intent and statutory language of the Act. BOP's position inappropriately and functionally deprives elderly inmates of the grant of good time credit that they receive upon reporting to prison. It bears noting that federal good time credit differs greatly from credit for time served. Good time credit in the federal system is granted *upon* reporting to prison and becomes part of a prisoner's term of sentence. Although this portion of the Act is specifically aimed at easing prisons' burdens on low-risk offenders, such as certain elderly offenders, BOP continues to deny release to eligible elderly prisoners by failing to calculate

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[57] H.R. REP. NO. 115–699, at 15.

[58] *Id.*

[59] *Id.* at 15–16.

[60] *Id.* at 2–9.

[61] *Id.* at 4, 52.

[62] *Id.* at 10–12, 28–29.

good time credit in release eligibility determinations.

CONCLUSION

While lawmakers achieved a bipartisan compromise to accomplish a small step in federal sentencing reform through the passage of the First Step Act, Congress' vision of release for scores of low-risk offenders remains unrealized. Through intentional strides, this can be remedied. True reform, however, requires a deliberate and intentional cultural shift. To remedy "the slows," we must remember that offenders, by their very humanness, are deserving of dignity.

Before the Cell Door Shuts: Justice Reform Efforts Should Focus on Steps Besides Sentencing

BARBARA MCQUADE*

INTRODUCTION

Mark Osler writes that criminal justice reform efforts have been hampered by what he calls "the slows."[1] He explains that despite bipartisan support, which resulted in the First Step Act of 2018,[2] criminal justice reform remains elusive. He then offers some insightful suggestions for how to increase the pace.

Professor Osler focuses primarily on reducing the length of sentences and releasing inmates early. While he offers plausible theories for the lethargic pace of change in sentencing reform, one additional theory for the slow pace is that sentencing is the wrong place to focus. By the time someone gets to sentencing, a crime has been committed, a victim has been harmed, and a suspect has been arrested and convicted at trial or by guilty plea. A better place to focus may be earlier in the process, before harms to society have occurred and offenders have spent time in prison. While reducing the prison population alone is a laudable goal in a nation that values liberty, reform should be done for other reasons as well: to make communities safer, to improve the participation of citizens in society, to keep families together, and to reduce costs so that funds can be reallocated to better uses.

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[1] Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020).

[2] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (reducing the length of certain mandatory minimum sentences, among other reforms).

Cost alone is a factor that makes criminal justice reform attractive to members of both political parties. According to the Bureau of Justice Statistics, we spend $81 billion per year on corrections in America,[3] as the inmate population has grown from about 300,000 prisoners in 1980 to close to 1,400,000 prisoners in 2019[4]

If we instead invested in education, social services, infrastructure, and additional police officers, the commission of crimes would likely go down. In the long term, such efforts would be more effective than simply reducing and commuting sentences, and likely would enjoy more public support. Consequently, such efforts might also avoid "the slows."

This Article examines criminal justice reform beyond the sentencing context. Part I will focus on prevention initiatives relating to drug and mental health treatment. Part II will focus on diversion programs. Finally, Part III will focus on prisoner reentry, which is itself a prevention strategy.

I. Prevention

When I worked as a prosecutor, I observed that a significant number of crimes are driven by drug addiction and mental illness. While addiction to drugs or mental illness does not excuse most crimes, many individuals suffering from these problems need treatment rather than punishment. Punishment is designed to protect the public, deter crime, promote respect for the rule of law, and rehabilitate offenders.[5] Other than rehabilitation, these goals do not match up well with an offender who is driven to commit his crime by a drug addiction or mental illness. As a result, imprisonment may be less just and less effective in such cases. Instead, treatment programs are more effective for helping offenders to rejoin society as productive members.

A. *Drug Treatment*

Large-scale drug trafficking often goes hand-in-hand with violence. Strong drug laws are needed to protect communities from the harmful effects of illegal drugs and the gunfire that can accompany turf battles and drug deals gone bad. But in some instances, drug addiction causes people to commit crimes to obtain cash to feed their addiction. The connection between substance abuse and crime has been documented, with 52% of violent offenders reporting that they were under the influence of alcohol or other substances when they committed crimes, and 39% of property

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[3] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://perma.cc/5Z5H-QTRD.

[4] *Fact Sheet: Trends in U.S. Corrections*, THE SENT'G PROJECT 1, https://perma.cc/83VR-R8VC (last updated May 2021).

[5] *See* 18 U.S.C. § 3553(a) (2018).

offenders reporting the same.[6] For individuals whose crimes are driven by drug addiction, we would be wise to consider treatment as a more effective alternative to incarceration. Not only would treatment give offenders a second chance, but it would also be more effective in reducing recidivism by solving the underlying problem that led to the criminal behavior.

One form of treatment is medication-assisted treatment, or MAT. MAT has been successful in helping opioid addicts overcome their dependencies. MAT is the use of medications approved by the Food and Drug Administration, such as methadone or buprenorphine, in combination with counseling and behavioral therapies[7] to relieve withdrawal symptoms that cause chemical imbalances in recovering addicts. MAT programs have been used to help opioid users overcome addiction by providing a safe level of medication to overcome the physical urge to abuse an opioid.[8] According to the FDA, MAT "is effective in the treatment of opioid use disorders (OUD) and can help some people to sustain recovery."[9]

For offenders whose crimes were fueled by a desire to support their addictions, MAT may be a useful strategy to reduce their drug dependencies and motives to commit further crimes. Making MAT or other kinds of drug treatment a condition of probation or supervision for offenders can help them to overcome their addictions and their desires to commit crimes.

We can wind the clock back even further by preventing drug abuse among the population at large. Drug takeback programs, public education about the addictive properties of opioids and other drugs, and limits on the amount of drugs that doctors can prescribe can all help prevent addiction that can lead to crime. The success of such efforts may be difficult to measure, but they would likely make a significant impact on crime and the prison population.

B. *Mental Health Treatment*

People with mental illness often end up in the criminal justice system. According to a Brennan Center report, "America's largest psychiatric facilities are not hospitals, but jails and prisons."[10] Mentally ill offenders are

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[6] Adrianna McIntyre, *Treatment for Substance Use Disorders May Pay for Itself Through Reduced Crime Rates*, THE INCIDENTAL ECONOMIST (Oct. 6, 2014), https://perma.cc/GPG3-F8FG.

[7] Substance Abuse and Mental Health Serv. Admin., *Medication-Assisted Treatment (MAT)*, SAMHSA, https://perma.cc/GJ75-VGBU (last updated Jan. 4, 2021).

[8] Substance Abuse and Mental Health Serv. Admin., *MAT Medication, Counseling, and Related Conditions*, SAMHSA, https://perma.cc/A3BA-XEYT (last updated Aug. 19, 2020).

[9] *Information About Medication-Assisted Treatment (MAT)*, FDA, https://perma.cc/JV5S-LBC6 (last updated Feb. 14, 2019).

[10] Fair and Just Prosecution et al., *21 Principles for the 21st Century Prosecutor*, BRENNAN CENTER FOR JUST. 7 (Dec. 3, 2018), https://perma.cc/4JYR-PMNJ.

less likely to make bail and more likely to face longer sentences.[11] While at least 50% of U.S. prisoners have some mental health issues, 10% to 25% suffer from serious mental illnesses, compared to about 5% in the general population.[12]

Like individuals addicted to drugs, people with mental illness are not well-suited for prison. The need to punish and deter them is minimized by their relative lack of true culpability for their crimes. And incarceration is unlikely to provide them with the mental health treatment that is needed to prevent recidivism.

Instead of prosecution and incarceration, some proposed solutions for dealing with offenders with mental illness include providing community-based mental health services,[13] so that people can get the mental health diagnoses and treatment they need before engaging in criminal behavior. Police officers should also receive sufficient training to equip them to de-escalate situations involving individuals with mental illness, so that officers can reduce the likelihood of arrest or use of force.[14] Before charging decisions are made, prosecutors should conduct mental health assessments in appropriate cases to determine whether the offender and society would be better off with mental health treatment rather than with criminal prosecution.[15] Rather than incarcerating individuals with mental illness, we can offer better rehabilitation to offenders through treatment.

II. Diversion Programs

Another way to reduce the number of people who are going to prison is to offer diversion programs. Drug courts, veterans' courts, and other so-called "problem-solving courts" are becoming more and more popular. In these specialty courts, offenders are offered opportunities to have their prosecutions deferred if they agree to comply with certain conditions, such as drug treatment, alcohol treatment, or cognitive behavioral therapy.

One example of a successful diversion strategy is the drug court program in Michigan. Offenders with addictions who participate in the program agree to treatment, drug testing, and intensive supervision. They appear at frequent hearings before designated judges who take a "carrot and stick" approach by providing incentives for success, such as early termination, and sanctions for violations, such as short periods in jail. By receiving assistance coupled with accountability, offenders have been able

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[11] *Id.*

[12] Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCHOL., Oct. 2014, at 56, https://perma.cc/AM6R-VSU5.

[13] *See* Fair and Just Prosecution, *supra* note 10, at 4, 7.

[14] *See* Fair and Just Prosecution, *supra* note 10, at 4, 7.

[15] Fair and Just Prosecution, *supra* note 10, at 7.

to overcome their addictions and avoid becoming repeat offenders. The success of the program has been measured in its reduced recidivism rate for offenders who have completed it. The rate at which participants in Michigan's drug courts re-offend after two years is 6.8%, compared to 30.9% for offenders prosecuted in the traditional criminal justice system.[16] After four years, the recidivist rate for drug court graduates was 17.6%, compared to 51.2% for other offenders.[17]

These problem-solving courts are often resource-intensive, but the investment in helping offenders overcome addiction or obtain treatment for mental health pays dividends in the long term by keeping people out of prison and preventing recidivism.

III. Reentry

One other strategy that can reduce the prison population is prisoner reentry programs. While helping citizens successfully reenter society after serving a prison sentence is an initiative that occurs after the sentencing stage, it is an effective prevention strategy as well because it reduces the likelihood that they will commit new crimes. Recidivism accounts for a large portion of crime, as about two-thirds of all offenders are arrested for new crimes within three years.[18] A 2018 Bureau of Justice Statistics study showed that recidivism was even worse than previously thought.[19] While 68% of prisoners were arrested within three years of release, 83% of prisoners were arrested within nine years of release.[20] Reentry programs designed to help returning citizens succeed in society are an important reform effort that can reduce crime and save costs.

Large numbers of citizens return to their communities from prison each year with a felony conviction, making it more difficult for them to obtain employment. During my work in the U.S. Attorney's Office in Detroit, I frequently met with returning citizens, who said that their greatest obstacle to success was their inability to find work. Without a job, it is difficult for a person to make ends meet without violating the law. The lure of the drug trade beckons on a regular basis. For that reason, finding jobs for returning citizens is an important crime prevention strategy.

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[16] Kahryn Riley, *Detroit a Model When it Comes to Solving the Opioid Epidemic*, THE HILL (Feb. 7, 2018, 7:45 AM EST), https://perma.cc/UJ9E-GV32.

[17] *Id.*

[18] Andrea Fox, *Top 5 Recidivism Reducing Programs*, GOV1 (Jan. 27, 2017), https://www.gov1.com/public-safety/articles/top-5-recidivism-reducing-programs-Y0Qm03jLSadTwD38/

[19] *See* Mariel Alper, Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, BUREAU OF JUST. STAT. 4 (May 2018), https://perma.cc/YW9E-4PKN.

[20] *Id.*

Some of the most successful reentry programs focus on employment. One program, the Prison Entrepreneurship Program (PEP), is a non-government organization in Texas that connects returning citizens with executives as mentors to teach business and leadership skills.[21] PEP services include case management, housing, social services, and assistance finding employment. The recidivism rate for graduates of the program is below 7%. Another successful program is the Delancey Street Foundation, a residential program that began in San Francisco and helps returning citizens and other at-risk individuals obtain college degrees and find employment as truck drivers, movers, furniture makers, and employees in its café and bookstore.[22] The Last Mile, out of San Quentin State Prison in California, provides training to prisoners in digital communication and technology, including computer coding, leading to jobs in coding upon release.[23] All three programs were noted as recidivism programs with the highest rates of success and as models for communities that need help with offender re-entry.[24]

During my time as a federal prosecutor, I saw a successful reentry program called the Help Offenders Positively Excel (HOPE) Initiative in the U.S. District Court for the Eastern District of Michigan. Individuals who were on supervised release following the completion of their prison sentences and who scored at the highest risk for recidivism based on various factors were eligible to participate in the program. Participants were required to submit to intensive supervision along with any recommended treatment, such as substance abuse treatment or cognitive behavioral therapy. The incentive to participate and succeed was early termination of supervision. A team consisting of a judge, probation officer, federal defender, prosecutor, and a treatment provider met with each participant every month to help set goals in education or employment, and to monitor progress. The rates of success were very high, with most participants "graduating" from the program and ending their supervision early.

Various models for reentry exist and can be replicated around the country if adequately funded. While reentry programs can be costly, they might be the most effective way to reduce crime and ultimately save costs because they are narrowly tailored to a target population that is at substantial risk to re-offend.

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[21] *Empowering Innovation*, PRISON ENTREPRENEURSHIP PROGRAM, https://perma.cc/3CYD-9YH6 (last visited July 6, 2021).

[22] *How We Work*, DELANCEY STREET FOUND., https://perma.cc/H7SZ-QCNK (last visited July 6, 2021).

[23] Andrea Fox, *supra* note 18.

[24] Andrea Fox, *supra* note 18.

CONCLUSION

Professor Osler has identified some causes for slow progress in achieving criminal sentencing reform and offers ideas to hasten the process. One reason that progress may be slow for sentencing reform is that it may be perceived by some as inconsistent with the purposes of the criminal justice system of public safety, deterrence, punishment, and respect for the rule of law. Moreover, commutation of sentences on a large scale is inconsistent with our policy preference for finality in judgments.

Instead, reform efforts might be more widely accepted if we focus on the front end of the criminal justice process. If we want to promote liberty, protect public safety, keep families together, and reduce prison costs, we should focus on prevention rather than simply shortening sentences. By investing in drug treatment, mental health treatment, diversion programs, and prisoner reentry, we can achieve far more than we could by just reducing sentences and releasing prisoners early. If we can prevent crimes from occurring in the first place, then no social harm will have occurred, no victim will have been injured, and no one has to go to prison at all. Isn't it better for a citizen to have stayed out of prison altogether than to be released from prison early?

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Slow and Steady May Win This Race: Lasting Criminal Justice Reform in a Time of Broad, but Shallow, Bipartisan Consensus

ADAM STEVENSON*

This is still a country that is less revolutionary than it is interested in improvement. Americans like seeing things improved, but the average American doesn't think we have to completely "tear down the system and remake it."[1]

In my day-to-day work, I supervise law school clinical students working with inmates at a medium security federal prison. For over ten years, I have met with countless individuals, and after talking about their cases, many often ask some form of the same questions: "Is something going to change? Are sentences going to come down? Is there anything going on to change things?" Occasionally there may be small, longshot items or minor changes I get to reference that are at some stage of the legislative process. However, inevitably, my answer is something along the lines of "not at the moment, nothing significant, and not for the foreseeable future."

I welcomed the chance to respond to Professor Osler's article on criminal justice reform and the First Step Act. His thoughtful work on clemency has helped numerous people and was an integral part to my own work during President Obama's clemency initiative. That we have similar views on the need for reform likely does not need to be said, but when I considered Professor Osler's article, I was brought back to those many conversations I have had with incarcerated individuals. Whether it was in 2010 as a new clinician, or even just this past summer, my answer to their questions has largely remained the same. Where, then, does there seem to be a disconnect between my thinking and Professor Osler's hope for faster, fuller, and more

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[1] Grace Segers, *Obama Says Average American Doesn't Think We Have to "Tear Down the System and Remake It,"* CBS NEWS (Nov. 16, 2019, 10:13 AM), https://perma.cc/XY45-6YCE (quoting former President Barack Obama).

effective reform, rather than the "brutal timidity" he identifies?[2]

Upon further reflection on Professor Osler's work, I believe there are two premises to which I continue to return that give me pause. I believe they are where our reasoned difference of perspective may lie. First, Professor Osler's article opens by positing "there currently exists a true bipartisan coalition in support of systemic and meaningful criminal law reform."[3] I do not disagree that there are some from both sides of our political divide that have united for the criminal justice cause. The question I return to is just what this group has united to do, and whether perhaps even the coalition itself truly agrees on anything concrete. Second, the underlying premise of the article appears to be that significant reform, in whichever form that may take, can be achieved through legislative efforts or broad, systemic changes.[4] However, while it is true that there were significant events in the creation of the present carceral state, even the rise of America's prison population is a story of a number of changes that have gained steam over time. This same gradual change is most likely to lead to the lasting changes of opinion necessary for significant reform. In the end, I do not believe either premise is wrong or a true barrier to the significant and meaningful reform Professor Osler and I seek. However, we must all wrestle with these questions in order to achieve significant improvements.

Many sources point to a bipartisan consensus or growing discussion between liberals and conservatives in the realm of criminal justice reform.[5] However, when one pulls back the layers of any such consensus, a few questions arise. First among them is just what any coalition may actually agree on. The safest statement on the nature of what such a group agrees on is "too many Americans go to too many prisons for far too long."[6] However, the two primary concepts often discussed alongside this belief—mass

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[2] *See generally* Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020).

[3] *Id.*

[4] *See id.* (discussing the incrementalism of federal legislation and the potential for more rapid reform).

[5] *See, e.g.*, Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 793 (2019); Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), https://perma.cc/U7T3-2PHN (discussing continued bipartisan agreement on criminal justice issues); Rachael Bade, *Criminal Justice Reform Gains Bipartisan Momentum*, POLITICO (July 15, 2015, 5:15 AM EDT), https://perma.cc/W5XC-HJKW (noting that even in 2015, Democrats and Republicans "never agree on anything but 'a lot of them agree on [criminal justice reform]'"); Mark Holden, *Criminal Justice Reform Is Ripe for Bipartisan Achievement*, THE HILL (Jan. 3, 2017, 2:26 PM EST), https://perma.cc/TT6J-V5WT (discussing six key areas of reform).

[6] *See* Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), https://perma.cc/4E48-SGE5 (quoting Attorney General Eric Holder at the annual meeting of the American Bar Association).

incarceration and overcriminalization—are rarely, if ever, defined.[7] Yet, beyond the agreement that "something has to change," the "something" that is often described is one or both of these concepts. In fact, the organizations that are often identified as being a part of the consensus use these terms. "As descriptive terms (i.e., 'mass incarceration' and 'overcriminalization') that carry significant normative weight, their definitions matter. Uncertainty as to the nature of the phenomena poses significant real-world problems—fixing either of these problems requires an accurate understanding of the problem itself, and definitional differences yield vastly different policy solutions."[8] However, when you begin to dig deeper, you see that the coalition may very well just be at the "too many, too many, and too long" level, rather than on anything more concrete.

Looking at a few of the identified liberal or conservative groups draws sharper focus to the differences between them. Some organizations, such as the Vera Institute of Justice, the Sentencing Project, and the Brennan Center for Justice, appear to focus on mass incarceration, alongside equal and social justice and eliminating racial disparities.[9] The organizations speak to alternatives to arrest or confinement, along with sentencing policies.[10] However, even when there may be a national consensus on a slightly more particular issue, such as race in the criminal justice system, there is no actionable agreement on what the problem is or how to correct it.[11] Instead, the agreement seems to be on systemic inequities more broadly and that jail and prison populations are too high (without saying what the "right" population may be).

Other more conservative organizations, such as Right on Crime, appear to prioritize a focus on overcriminalization.[12] This is also true of the Koch Institute.[13] Diving deeper, the primary focus of overcriminalization appears

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[7] Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (noting it is not uncommon for the same article to use the terms with a fair amount of slippage).

[8] *Id.*

[9] *End Mass Incarceration*, BRENNAN CENTER FOR JUST., https://perma.cc/PL8F-ZH7G (last visited Aug. 2, 2021); *Issues*, VERA INST. OF JUST., https://perma.cc/8XRH-4S6D (last visited Aug. 2, 2021) *Sentencing Policy*, SENT'G PROJECT, https://perma.cc/NAN2-976P (last visited Aug. 2, 2021).

[10] *See, e.g.*, *Ending Mass Incarceration*, VERA INST. OF JUST., https://perma.cc/TK5S-CCFV (last visited Aug. 2, 2021).

[11] Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

[12] *See Priority Issues*, RIGHT ON CRIME, https://perma.cc/PJK8-MTG5 (last visited Aug. 2, 2021) (listing overcriminalization first among a list that does not, at top level, appear to speak to sentencing).

[13] *See Criminal Justice Reform*, CHARLES KOCH INST., https://perma.cc/3RLZ-XPUJ (last visited Aug. 2, 2021).

to be business and regulatory offenses.[14] Members of the Heritage Foundation seem to speak more to "overincarceration" rather than mass incarceration.[15] Incarceration is seen as a potential positive, but the "inputs" into the system seem to be the larger concern. However, these views appear if not at odds, then at least starkly different from the articulated aims of the organizations concerned primarily with mass incarceration.

Notably, in all cases I reviewed, neither side mentions the other term. Rather, each appears to agree that the system must change, but even what to generally call that change is a point of disagreement between leading organizations on both sides. This is not to say that either side is right or "more right," but rather identifying a foundational problem with any consensus: there may not be real, actionable consensus at all. This may be true now, and it has been true before. Many have pointed to past times as the moment when there was a bipartisan consensus, and the time was right for significant and meaningful criminal justice reform. However, the end results have often been limited, like how Professor Osler characterizes the First Step Act as having been timid and incremental.

There is no doubt that many conservatives, often and historically viewed as endorsing the political position of retributivist policies, have started to talk about criminal justice reform. And there have been times when liberal groups have coalesced around improvements in the criminal justice system alongside conservative voices. However, others have pointed to a similar bipartisan consensus as meaning the time was right for significant reform, only for smaller, but lasting, reforms to result.

For example, 2010 was seen as a time of bipartisan consensus when longtime conservative legislators, such as Rep. James Sensenbrenner (WI) and Rep. Dan Lungren (CA), joined members of the Congressional Black Caucus (CBC) to support criminal justice reform.[16] This was the Fair Sentencing Act, the change from a statutory 100 to 1 crack to powder cocaine ratio to 18 to 1.[17] This change was narrow (applying only to crack cocaine sentences) and less than ideal (not a 1 to 1 ratio), but it has endured and been furthered by subsequent change, such as the First Step Act.

Before that, in the early 2000s, a coalition formed between liberal members of the CBC and conservative Republican Representatives Rob Portman, Chris Cannon, Lamar Smith, and Howard Coble. Eventually, Senator Sam Brownback was the lead sponsor of the legislation to come out

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[14] *See Overcriminalization*, RIGHT ON CRIME, https://perma.cc/6FJE-FWME (last visited Aug. 2, 2021).

[15] *See, e.g.*, John-Michael Seibler, *A Toast to Criminal Justice Reform*, HERITAGE FOUND. (Jan. 28, 2019), https://perma.cc/ZM24-WL3P (noting the value of early release mechanisms while beginning by stating that "[i]ncarceration has a clear upside").

[16] Kara Gotsch, *Bipartisan Justice*, AM. PROSPECT (Dec. 6, 2010), https://perma.cc/NL7D-SS4N.

[17] *Id.*

of this combination, the Second Chance Act. The Act provided additional reentry funds, but no great sentencing reform, reduction in the number of criminal offenses, and other more significant changes.[18] These changes have also endured, with lengthened halfway house placements still available to federal inmates. The First Step Act builds on some of this work.

While the general tone of bipartisan consensus has shifted from "tough on crime" to "too many, too many, and too long," even in recent years these same moments of consensus have existed, and the results have been lackluster. One explanation is that there was the same high-level agreement, but underlying disagreements stymied results. The other potential reason for the limited nature of the impact is the issue that our government and political system is slow by design, and lasting change is slow in arriving, slow in correction, but lasting as a result.

Regarding the speed of reform, the backdrop of the speed of the creation of the problem bears mentioning. While it is true that there are a few items of note that individuals can point to as key moments in the ballooning of our prison population and criminal justice system, that creates the impression that it was created in a year or two. Rather, the increase in the prison population is a story of nearly three decades.[19] In addition to the War on Drugs, there were also changes to societal views on crime and the way in which we craft our system. Recently, scholars have pushed back on the idea that the current state of the criminal justice system was entirely attributable to tough on crime strategies employed by both parties in the 1980s and 1990s.[20] The shift toward increased penalties, more crimes, and a race to be the toughest was brought about through a renewed interest in and use of the victim as a political constituency and tool.[21] Legislators, prosecutors, and police set themselves as the champions of victims, rather than broad representatives of the community, which includes the accused.[22] Even if the rise of criminalization and incarceration was, at least, in part a response to the increase in violent crime in the 1980s and 1990s,[23] the feelings of the

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[18] *See President Bush Signs H.R. 1593, the Second Chance Act of 2007*, THE WHITE HOUSE (Apr. 9, 2008, 10:31 AM EDT), https://perma.cc/H8FT-QAGA.

[19] *See* John F. Pfaff, *Locked Up*, THE BAFFLER, July 2019, https://perma.cc/5S2K-JX9V (explaining that "[i]t was in the middle of the 1970s that U.S. prison populations started to rise steadily," then noting that "the prison boom peaked about ten years ago").

[20] *See* Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 36–37 (2018) (noting that recent scholarship discusses how fault for the state of the system can be attributed to tough on crime policies but also more progressive policies relating to poverty and other subjects).

[21] *See* Jonathan Simon, *Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247, 267 (2003).

[22] *Id.*

[23] *See* Nathan James, *Recent Violent Crime Trends in the United States, R45236*, CONG. RESEARCH SERV. 2, fig. 1 (June 20, 2018), https://perma.cc/N2WW-L4Q6; *see also* John Gramlich, *What the*

population remained inelastic, tied to the fear that violence was still high or would return quickly if the ratcheting up of the system stopped.[24] That fear led to further increases in incarceration and criminalization, while also likely undermining the direction of any reform efforts.[25] Public sentiment is shifting, but it shifts slowly.

This is the backdrop against which any reform would arise. This leads to the likelihood that any reform would be slow and incremental, like the First Step Act. For example, the most popular form of criminal justice reform seems to avoid the issues of the victim and violence by pointing to the "first time," "low level," or "non-violent" drug offender.[26] However, even if there were significant reforms to our drug laws, whether it be the rescheduling of marijuana or dramatic changes to the enforcement and sentencing of other controlled substances, only approximately 20% of individuals incarcerated at any given time are incarcerated for a drug offense.[27] That number is for an offense, not necessarily a conviction. However, for many, their present offense is most likely not their first, especially for those in federal custody, approximately 12% of that total.[28] Those individuals would not fit the "first time" or perhaps "non-violent" mold, or perhaps even the "low level" designation. However, no one would suggest that reform impacting these individuals, whatever the percentage, would not be significant. But in order to make a significant impact on at least the incarceration side of the equation, changes need to be focused on offenses involving "violence" or property crimes.[29] However, there does not appear to be a bipartisan consensus for that type of reform.[30]

This example shows the problem and nature of our increase in incarceration and reform. The process of our rising prison populations and the rapid growth of our criminal justice system were slow and complex. It took nearly three decades to peak. That process changed the nature of our understanding of criminal law, or at least its perception, and that has become inelastic. While there are strong calls for "reform," that reform is nuanced

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Data Says (And Doesn't Say) About Crime in the United States, PEW RES. CENTER (Nov. 20, 2020), https://perma.cc/7UM2-NUKU (noting that there have been "dramatic declines in U.S. violent and property crime rates since the early 1990s, when crime spiked across much of the nation").

[24] *See* Pfaff, *supra* note 19.

[25] *See* Pfaff, *supra* note 19.

[26] *See* Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018, 4:21 PM EST), https://perma.cc/MH7W-255B.

[27] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://perma.cc/4SE4-NKQY.

[28] *See generally id.*

[29] *See* Pfaff, *supra* note 19.

[30] Pfaff, *supra* note 19 (noting that 68% of conservatives and 55% of liberals were against reduced sentences for "violent offenders").

and limited. However, one less person incarcerated is a victory, one less crime could be a success, and each causes a sense of inertia that seems to have a lasting effect. There would be reason to expect that as reforms are passed, such as the 2010 Fair Sentencing Act, they will have staying power and beget more reforms, such as the First Step Act. The reforms will grow, slowly, but surely, and change things. Clearly, delay means that individuals will continue to be arrested, prosecuted, and incarcerated in ways that we deem unjust, but more and more will not, and any change may be better than none.[31]

While the legislative premise of Professor Osler's article struck me as an area for further exploration, he did identify one area in which dramatic reform, both in speed and breadth, was possible. However, while this reform provides contrast with 'timid' but systemic reform, it also comes with a steep cost.

In recent years, we have seen a wave of "progressive prosecutors" elected to offices large and small.[32] These individuals come from diverse backgrounds, and often from outside of the prosecutorial establishment. Their rise to power can potentially solve two issues with criminal justice reform. First, as Professor Osler notes, and as others have described, prosecutors have often been staunch opponents of decriminalization or decarceration movements.[33] New voices in that movement may break that significant opposition. Second, the discretion of prosecutors is often unchecked and unparalleled, so any changes these prosecutors make will be direct, swift, and often significant. For example, DA Larry Krasner of Philadelphia has worked to change bail practices and has reduced prosecutions of marijuana and prostitution offenses, resulting in $82 million in savings in city and state funds per quarter.[34] Similar prosecutors have been elected in Chicago, St. Louis, and other major cities, as well as in smaller communities.[35] While these individuals need enough consensus to be elected to office, and reelected, the details of what to change, when to do it, and how are left to that individual while in office.

Similarly, another actor that can be the sole force in some aspects of reform is the chief executive. As Professor Osler has written in the past, a proper functioning clemency system can act as a dramatic check and safety

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[31] *See* Hopwood, *supra* note 5 (noting that holding out for "comprehensive reform, or the perfect bill" may be detrimental when the system and politics of the moment will only allow for incremental reform).

[32] Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (Aug. 19. 2019, 4:47 AM EDT), https://perma.cc/9WY5-QPDE.

[33] Osler, *supra* note 2; *see* Simon, *supra* note 21, at 267.

[34] Steve Volk, *Larry Krasner Vs. Everybody: Inside the Philly DA's Crusade to Revolutionize Criminal Justice*, PHILA. MAG. (Nov. 23, 2019, 9:00 PM), https://perma.cc/3DA7-MT5B.

[35] Daniel Nichanian, *Voters Beyond Big Cities Rejected Mass Incarceration in Tuesday's Elections*, THE APPEAL (Nov. 7, 2019), https://perma.cc/5VZE-G4NA.

valve on our criminal justice system.[36] In recent years, this has been a path to notable changes, at least in several individual cases. President Obama was able to give effect to a range of prospective sentencing changes by commuting the sentences of over 1,700 federal inmates.[37] This same work has been done by governors in Kentucky,[38] Oklahoma,[39] California, and Pennsylvania,[40] just to name a few. This power, perhaps the most significant and unilateral privilege of our chief executives, can very quickly, dramatically, and single-handedly change a given case, or, like in President Obama's example or that in Oklahoma, give effect to broader reform through mass commutations.

However, while both examples show how there may be ways around the unclear and shifting bipartisan consensus and the glacial pace of reform at a broad/legislative level, they also show that there is volatility in both directions with this approach. Regarding the "progressive prosecutor," we have seen states push back against this approach. In Philadelphia, the federal and state government have started to introduce checks on the traditional prosecutorial discretion local prosecutors have enjoyed. Increased federal intervention,[41] state-based prosecution of some crimes, and increased mandatory minimums control the local discretion of prosecutors.[42]

Likewise, the blowback against clemency actions has been strong and, at least to this author, surprisingly bipartisan. President Obama's clemency work, aimed largely at individuals serving sentences for non-violent drug offenses, was criticized as usurping legislative power.[43] More recently, outgoing Kentucky Governor Matt Bevin's hundreds of pardons and clemencies received significant negative response from many liberal groups, decrying "the decision to release 'violent criminals.'"[44] This was also the case

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[36] *See, e.g.*, Rachel Barkow, Mark Holden & Mark Osler, *The Clemency Process Is Broken. Trump Can Fix It.*, THE ATLANTIC (Jan. 15, 2019), https://perma.cc/94XN-MK78.

[37] Charlie Smart, *Obama Granted Clemency Unlike Any Other President in History*, FIVETHIRTYEIGHT (Jan. 19, 2017, 4:40 PM), https://perma.cc/4HEL-38YF.

[38] Sarah Mervosh, *Matt Bevin, Ousted in Kentucky, Sets Off Furor with 'Extreme Pardons,'* N.Y. TIMES (Dec. 13, 2019), https://perma.cc/4ZAP-L7R9.

[39] Katie Rose Quandt, *The Largest Commutation in U.S. History*, SLATE (Nov. 8, 2019, 3:51 PM), https://perma.cc/7FAC-SD3V.

[40] *Id.* (discussing California and Pennsylvania clemencies).

[41] *See* German Lopez, *The Trump Justice Department's War on Progressive Prosecutors, Explained*, VOX (Aug. 16, 2019, 1:10 PM EDT), https://perma.cc/MHV2-2RFQ.

[42] *See* Chris Palmer & Samantha Melamed, *Could a New Pa. Law Strip Control over Gun Prosecutions from Philly DA Larry Krasner?*, PHILA. INQUIRER, https://perma.cc/9APE-DH9J (last updated July 8, 2019).

[43] Steven T. Dennis, *GOP Cries Foul on Obama's Commutations of Drug Offenses*, ROLL CALL (July 14, 2015, 7:40 PM), https://perma.cc/9GLZ-HU3M.

[44] Adam H. Johnson, *Misplaced Outrage over Kentucky Governor's Pardons Harms Criminal Justice Reform*, THE APPEAL (Dec. 20, 2019), https://perma.cc/EQD2-T2FH.

with outgoing Mississippi Governor Haley Barbour's pardons, which included a small number of individuals convicted of homicide.[45]

Both situations show the high cost of speedy action. With all credit to Sir Isaac Newton, these situations show the current physics of criminal justice reform: for every (dramatic) action, there is an equal and opposite reaction. While the use of prosecutorial discretion or executive authority has the ability to have the quick and direct impact many may seek, if that work does not have real, explicit bipartisan support, it can have dramatic negative implications that can, like new mandatory minimums or a stigmatization of the clemency power, have lasting effect.

Despite these areas for further contemplation, the fact remains that Professor Osler, myself, and many others of all political leanings appear to now realize that something needs to be done about our criminal justice system. Whether it is because of the ballooning costs of incarceration, the generational impact on people of color, the shifting of medical and mental health issues to criminal justice concerns, or other reasons, many favor a change to the way we are doing things. The First Step Act, though perhaps small in relative impact, still moves us forward toward fewer people in the system and prisons and for shorter periods of time. However, in order to successfully implement change, lasting and meaningful change, the question remains about just how to accomplish it. Reasonable people can and do disagree on these issues. The important part is that we have the conversations at the root of the issue, so that when the time is right, we can move forward with solving the goals we all have when we identify them. I believe Professor Osler's article can be the jumping point to just such conversations.

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[45] Julia Dahl, *8 of the Murderers Haley Barbour Pardoned Killed Their Wives, Girlfriends*, CBS NEWS (Jan. 13, 2012, 2:36 PM), https://perma.cc/XT7L-FVW9.

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Don't Reject Federal Prosecutors' Role in Criminal Justice Reform

JOYCE WHITE VANCE*

INTRODUCTION

There are a lot of things that are easy to reject out of hand. Peanut butter and mayonnaise sandwiches are an abomination.[1] Orange juice does not belong in your cereal.[2] And, as we have recently learned, Tito's Vodka cannot be used to make hand sanitizer.[3]

All too often, stakeholders in the criminal justice system have had the same reaction to the notion of prosecutors being involved with criminal justice reform. After all, prosecutors are charged with putting people in jail, not advocating for them. How could they possibly play a meaningful role in reform?

Professor Osler argues that criminal justice reform is glacial and offers meaningful suggestions for picking up the pace. In the face of overwhelming evidence of the system's malfunction—from mass incarceration, to bias, to unnecessary and excessive cost that fails to produce a reduction in crime—it impossible to refute the need for reform. And with bipartisan clamor for change, it is difficult to understand why more progress is not being made. Osler suggests structural factors keep federal prosecutors from playing a role[4] and diagnoses some of the dysfunction that has prevented stakeholders

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[1] *See* Lyn Mettler, *A Peanut Butter and Mayo Sandwich? This Polarizing Combo Is Shocking the Internet*, TODAY (Sept. 24, 2018, 5:28 PM EDT), https://perma.cc/52DH-SFK3.

[2] Scotty Smalls, *People Who Put Orange Juice in Their Cereal Must Be Stopped*, VICE (Sept. 18, 2015, 11:30 AM), https://perma.cc/S82D-J5W4.

[3] Bethany Biron, *Tito's Vodka Is Warning Consumers That It Can't Be Used as a Hand-Sanitizer Replacement as the Coronavirus Spreads Across the US*, BUS. INSIDER (Mar. 5, 2020, 1:43 PM), https://perma.cc/9VRF-URDV.

[4] *See* Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161 (2020)

from working together effectively. But despite his excellent analysis, I part company with him on the value federal prosecutors could bring to this work, particularly if their partnership is properly valued, they are mobilized, and they are incentivized to do the work.

Little appeals more to advocates of criminal justice reform than being heretical about common wisdom. They have successfully moved a conversation that was once relegated to the far reaches of the left and reserved for liberals and civil rights lawyers into the bipartisan mainstream. Unusual alliances formed to work on reform, like the partnership between Obama administration officials and Koch Industries executives, suggest the possibilities.[5] If the ACLU and the Faith and Freedom Coalition can work together, one might hope that even such estranged bedfellows as prosecutors and defense lawyers could form alliances to further justice and fairness.

An emerging generation of elected reformer district attorneys in state systems have begun to change the narrative about prosecutors.[6] These progressive attorneys have created conviction integrity review units.[7] In states from Indiana to Virginia to Michigan, they have announced plans to stop charging low-level, non-violent offenses like simple marijuana possession.[8] Although there has been some criticism of the success of reformer district attorneys, and there have been arguments that structural components of the criminal justice system prevent them from bringing about meaningful change,[9] in practice, their work has been effective enough to draw criticism from law enforcement, including former-Attorney General William Barr.[10]

In this piece, I turn my attention to the role of federal prosecutors. Federal prosecutors differ from their state counterparts in at least one significant way—they are not elected and need not curry favor or temper their prosecutive decisions to suit the perceptions of voters. This frees them

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[5] *Nonpartisan Council on Criminal Justice Launched*, PND (July 24, 2019), https://perma.cc/V6EM-PGE9.

[6] *See* Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://perma.cc/5HMH-3DEA.

[7] *See* Richard A. Oppel Jr. & Farah Stockman, *Prosecutors Usually Send People to Prison. These Are Getting Them Out.*, N.Y. TIMES (Nov. 28, 2019), https://perma.cc/A2Y4-BL28.

[8] Jess Arnold & Nick Boykin, *New Fairfax Co. Prosecutor Will No Longer Pursue Charges for Simple Marijuana Possession*, WUSA9 (Jan. 2, 2020, 4:26 PM EST), https://perma.cc/C2X5-3TAV; Trace Christenson, *Prosecutor: Simple Possession of Pot No Longer Prosecuted*, BATTLE CREEK ENQUIRER (Nov. 19, 2018, 4:32 PM ET), https://perma.cc/UM4W-5QAN; Katie Cox & Matt McKinney, *Marion County Will No Longer Prosecute Simple Marijuana Possession Cases*, WRTV INDIANAPOLIS (Sept. 30, 2019, 10:39 AM), https://perma.cc/4LEK-9R3E .

[9] *See generally* Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748 (2018).

[10] Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (Aug. 19, 2019, 4:47 AM EDT), https://perma.cc/9WY5-QPDE.

from concerns that they will be subject to claims of being "soft on crime" that are often lodged against district attorneys when the run for reelection if they have any sort of reformer bent. It permits federal prosecutors to make charging and sentencing decisions based solely on the facts and the law. They need not concern themselves with political repercussions in the next election cycle if they choose, for instance, to send first-time, non-violent drug offenders to rehabilitation programs, deferring prosecution. This freedom gives federal prosecutors a baseline of flexibility to adopt reform measures.

I. Criminal Justice Reform at DOJ During the Obama Administration

In fact, DOJ's leadership did just that during the Obama Administration. In May of 2010, Attorney General Eric Holder issued a memo that directed prosecutors to depart from the long-standing DOJ practice of charging the most serious readily provable crime in every case. He instructed them to make charging decisions:

> in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime" [USAM 9-27.300]. In all cases, the charges should fairly represent the defendant's criminal conduct, and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution. As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.[11]

This guidance was a sea change for federal prosecutors. Holder followed up in 2013 with guidance that directed prosecutors to reserve mandatory minimums and § 851 enhancements for the most serious and dangerous offenses, rather than routinely applying the enhancements whenever possible.[12] Along with other work begun in the federal system during President Obama's tenure—including the Fair Sentencing Act of 2010, the retroactive relief amendments implemented by the U.S. Sentencing Commission,[13] and the DOJ's Clemency Initiative[14]—by 2014, the Bureau of

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[11] Memorandum from Eric H. Holder, Jr., Attorney Gen., Dep't of Justice, to All Federal Prosecutors, *Department Policy on Charging and Sentencing* (May 19, 2010), https://perma.cc/ZS72-GVRK.

[12] Memorandum from Eric H. Holder, Jr., Attorney Gen., Dep't of Justice, to The United States Attorneys and Assistant Attorney General for the Criminal Division, *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013), https://perma.cc/2J69-CK4Y.

[13] *See* Mark Osler, *The Problem with the Justice Department*, THE MARSHALL PROJECT (May 30, 2017, 10:00 PM), https://perma.cc/6DYA-KZ4Y.

[14] Brandon Sample, *Clemency Project and Clemency Initiative*, CLEMENCY.COM (Dec. 4, 2018), https://perma.cc/UA4V-DVHQ.

Prisons was experiencing its first reduction in prison population after almost forty years of steady growth.[15] These policies came to be known as "smart on crime" in contrast to the "tough on crime" policies that had characterized earlier administrations and the War on Drugs.

II. The Fate of Criminal Justice Reform When Administrations Change

Eight years was not enough to eradicate the mass incarceration that resulted from decades of sustained growth in federal prison populations due to tough on crime charging and sentencing requirements for Department of Justice prosecutors.[16] The lack of permanence to Obama-era changes became readily apparent when President Trump's first Attorney General, former-Southern District of Alabama U.S. Attorney Jeff Sessions, promptly rescinded Holder's charging guidance and returned to the traditional tough on crime approach.[17]

In contrast to his predecessors in the Obama Administration, Sessions arrived at DOJ having played a major role in defeating a bill that would have reduced prison sentences for low level drug offenders, roundly criticized policing reforms implemented by the Obama Administration during a Senate hearing called "The War on Police", and opined that "good people don't smoke marijuana."[18] He reinstated the requirement that prosecutors charge the most serious, readily provable offenses and propose sentences based on those charges that include stacking mandatory minimums and filing § 851 enhancements, which result in lengthy sentences.[19] That policy directive remained in place under Attorney General Barr, who made no secret of his distaste for reformer district attorneys.[20] The number of cases federal prosecutors brought ticked upwards as a result of this guidance, fueled by low-level immigration and firearm cases.[21]

Although some aspects of criminal justice reform remained in vogue after President Trump took office, with the President advocating for passage

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[15] Philip Bump, *The Federal Prison Population Dropped for the First Time in 30 Years. It May Have Been Inevitable.*, WASH. POST (Sept. 23, 2014), https://perma.cc/S9H2-MFB2; *see* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 33 (2014).

[16] *See* Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, SENT'G PROJECT (Nov. 5, 2018), https://perma.cc/L574-RB52.

[17] German Lopez, *The Trump Administration Just Took Its First Big Step to Escalate the War on Drugs*, VOX, https://perma.cc/L36K-URNU (last updated May 12, 2017, 9:41 AM EDT).

[18] *Id.*

[19] *Id.*

[20] *See* Michael Brice-Saddler, *41 Prosecutors Blast Attorney General Barr for 'Dangerous and Failed' Approach to Criminal Justice*, WASH. POST (Feb. 13, 2020), https://perma.cc/5G5Z-2PHE.

[21] *See Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019*, U.S. DEP'T OF JUST. (Oct. 17, 2019https://perma.cc/3BBT-PDE4; *Federal Gun Prosecutions Up 23 Percent After Sessions Memo*, U.S. DEP'T OF JUST. (July 28, 2017), https://perma.cc/767Q-88YJ.

of the First Step Act[22] and promoting the use of pardons and commutations,[23] the commitment of leadership to a full range of reforms designed to impact meaningful change in the system—at a minimum, crime prevention, charging reform, sentencing reform, prison reform and reentry work—dissipated. Prison reform, though much vaunted, was not fully funded in President Trump's proposed 2020 budget.[24] The commitment to reform did not manifest as advertised.[25]

On balance, DOJ's ability to alter its approach to criminal justice reform in response to the views of a new president or attorney general is undoubtedly disconcerting for would-be partners. Stability and reliability are necessary in any relationship, and even criminal justice stakeholders who fully expect and prepare for change at DOJ as administrations put their own imprimatur on policy must find an abrupt about-face raises questions about whether DOJ can be counted on as a long-term partner in progress. So, why, in the face of this institutional uncertainty, should prosecutors still be considered good partners?

In the next two sections, I attempt to answer those questions, discussing why federal prosecutors are key partners if reform goals are to be achieved and what could be done to create a more sustained commitment to the bipartisan goal of criminal justice reform.

III. Prosecutors Are Essential Partners in Criminal Justice Reform as the System Is Currently Configured Because They Are the Gatekeepers for Many Key Decisions

Should prosecutors be involved in reform? It is a truism that in any effort to reform policy, you can go fast alone or far together. Prosecutors are an essential stakeholder in the criminal justice system, along with judges, defense lawyers, probation officers, prison officials, victims, defendants' families, communities, and others. Prosecutors exercise broad and unique discretion to make decisions regarding who gets investigated, what for, who gets charged, what plea deals are offered, what sentence is recommended, and even what sorts of pretrial diversion and reentry programs exist and who gets to participate in them.

Absent an overhaul of the criminal justice system that statutorily

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[22] Justin George, *First Step Act Comes Up Short in Trump's 2020 Budget*, THE MARSHALL PROJECT (Mar. 12, 2019, 6:00 AM), https://perma.cc/2KHL-YKBA (explaining that despite passage, the First Step Act was not close to fully funded in the 2020 budget).

[23] *See* John Kruzel, *Trump Flexes Pardon Power with High-Profile Clemencies*, THE HILL (Feb. 18, 2020, 6:40 PM EST), https://perma.cc/V9VH-NRQF.

[24] *See* Scott Shackford, *Trump's Budget Shortchanges the Prison Reform Bill He Signed*, REASON (Mar. 12, 2019, 12:30 PM), https://perma.cc/47MR-8JPB.

[25] *See* Samantha Michaels, *Trump Just Bragged About Criminal Justice Reform. Look Closer at How His Administration Is Undoing It.*, MOTHER JONES (Feb. 4, 2020), https://perma.cc/JN83-4E7J.

transforms decision-making authority, prosecutors uniquely control many of the stages in investigations and prosecutions that most impact outcomes for individuals and the system itself. Other than at sentencing where judges (although they may be constrained by the charges brought) have the ultimate say, prosecutors exercise near-exclusive control, and their decisions can only be upended in rare, exceptional cases.[26]

Some scholars have argued federal prosecutors have too much power.[27] They argue that the system should be overhauled rather than tweaked.[28] Be that as it may, because federal prosecutors, now and for the foreseeable future with Congress in gridlock, have the ability to make decisions that determine who gets charged and what type of sentences they are eligible for, prosecutors' engagement in reform is highly desirable. In fact, it is essential precisely because of the decisions they are entrusted with. Criminal justice policy is at its best when it is made on the basis of data, not ideology. It would be transformative if prosecution guidelines were updated to reflect what decades of data tells us about the criminal justice system. We can have safer communities and less crime, while spending fewer taxpayer dollars on prison systems, if prosecutors focus on prosecuting the most serious crimes and seeking shorter sentences. Prosecutors who understand that the transfer of resources from prisons to communities, with an emphasis on prevention and support for people reentering their communities after serving sentences in prison, could play an essential role in making our communities safer and achieving reform.[29]

Although Osler believes prosecutors are unlikely to be a force for change, or at least suggests there are serious systemic impediments to their participation, their engaged participation could move the work forward dramatically, as it began to do during the Obama Administration.[30] That is not to say it would generate the complete transformation of the system that many see as the goal, but, because of the decisions prosecutors control, their involvement has the potential to be more transformative than any changes, absent statutory ones, can be.

Policy updates on the federal level that enable prosecutors to take on the role of criminal justice reformers would have nationwide impact. Of course,

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[26] *See, e.g.*, United States v. Ammidown, 497 F.2d 615, 635 (D.C. Cir. 1973).

[27] Angela J. Davis, *Federal Pros[e]cutors Have Way Too Much Power*, N.Y. TIMES (Jan. 14, 2015, 11:57 AM), https://perma.cc/M5G6-C8H7.

[28] *The Paradox of "Progressive Prosecution," supra* note 9, at 758–60.

[29] *See, e.g.*, Sheridan Watson, *Pennsylvania Sees Steady Decline in Crime Rate over Last 20 Years*, CSG JUST. CENTER (Dec. 18, 2019), https://perma.cc/7TBD-YSUA.

[30] *See Department of Justice to Launch Inaugural National Reentry Week*, U.S. DEP'T OF JUST. (Apr. 22, 2016), https://perma.cc/PRP3-MY88 (describing how prosecutors in virtually all of the 94 federal districts sponsored events during "reentry week" to focus attention on and educate communities about the work they were doing to help people who were reentering communities after serving prison sentences).

a new direction can only succeed if it is built on a solid foundation of buy-in from DOJ prosecutors across the country. Exposure to data that confirms the benefits of reform is essential. Prosecutors must be educated about the merit of the smart on crime approach, as contrasted to the failures and waste of tough on crime strategies, if they are to become committed to exercising prosecutorial discretion in a fashion that achieves the goals of reform. Simply put, once in progress and accepted by prosecutors, a generational culture change would have long-lasting effects.

Osler sees "[t]he consistent and powerful influence of prosecutors in developing policy"[31] as part of the problem. Imagine if that "consistent and powerful influence" could be used to effect change. Prosecutors can have a profound impact if their north star is keeping their communities safe and enhancing justice, guided by data about where the criminal justice system has succeeded and where it has failed. Their day-to-day decisions have an enormous impact and can transform the system.[32]

IV. What Are the Conditions That Make It Possible for Prosecutors to Be Good Partners?

DOJ's leadership sets criminal justice policy. But it is implemented by line prosecutors and supervisors across the country as they investigate, charge, and prosecute criminal matters. Their exercise of prosecutorial discretion is informed by the guidance set forth in the Principles of Federal Prosecution.[33]

So implementing criminal justice reform in the federal system at charging, plea, and sentencing should be as easy as rewriting those policies and principles, right? Of course, we know it is not that easy. DOJ, like any other institution, can be as agile as a battleship when it comes to changing direction. But, with the right conditions and incentives, progress is possible. Given all of the gatekeeping prosecutors do for key decisions in the system, the question that we should be asking is, what changes and conditions need to be made to make it possible for prosecutors to be full partners in criminal justice reform?

I would argue three key conditions need to be met for prosecutors to be successful criminal-justice reformers:

There must be a commitment to criminal justice reform from leadership.

There must be education for prosecutors that focuses on data supporting the shift from a tough on crime approach to a smart on crime one, demonstrating that it makes communities safer while reducing costs in the

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[31] Osler, *supra* note 4, at 162.

[32] *See* Lucy Lang, *Prosecutors Need to Take the Lead in Reforming Prisons*, THE ATLANTIC (Aug. 27, 2019), https://perma.cc/M5D9-TNB6.

[33] *9-27.000 - Principles of Federal Prosecution*, U.S. DEP'T OF JUST., https://perma.cc/X8Y4-EJ7G (last updated Feb. 2018).

system and restoring people to their lives and families.

There must be a change in the metrics DOJ and communities use to evaluate prosecutors' "success" that supports criminal justice reform goals.

It is not possible to turn a battleship unless the captain is fully committed to the maneuver. An essential element for success is a top down commitment to reform. But what does reform mean? It should be comprehensive and include planning for different stages in the criminal justice life cycle. During the Obama administration, some of my U.S. Attorney colleagues and I argued that prosecutors had to do more than just change how they prosecuted their cases—they had to be committed to prevention and reentry work as well as to traditional prosecutions. We believed that these three aspects of the criminal justice system had to come together to form a three-legged stool and that if these priorities were pursued in a balanced fashion, prosecutors could help to transform the system.

Traditionally, prosecutors' primary role has been limited to prosecuting cases. They have not been involved in other aspects of the criminal justice system. But federal prosecutors are deeply committed to public safety and to justice and fairness. It is what attracts most of them to the work in the first place. When they are engaged in their work prosecuting cases, they are involved in making their communities safer. They exercise their discretion in a way they have been trained to believe will make their communities safer. If their leadership helps redefine their role into an expanded one that involves more than prosecuting cases, most of them will approach the work with enthusiasm. For instance, during the Obama administration, prosecutors embraced the mandate to implement reform-minded programs and strategies.[34]

The question is not just how to create new policy directives. For long-term success, the need for criminal justice reform must be widely accepted by prosecutors. They must be convinced, which can only happen if data that supports the view that criminal justice reform policies offer the best results for the communities that they serve is socialized across the Department. It will require a significant commitment of time and resources to educate prosecutors. But culture change across an organization whose leadership has more often focused on the rhetoric of tough on crime than on the data-driven rationale for smart on crime approaches is essential for permanence. Experience has shown that when a change in policy is explained by underlying data that supports its objectives, education achieves results. In 2016, Deputy Attorney General Sally Yates discussed the impact of the

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[34] *See generally* NYU Center on the Administration of Criminal Law, *Disrupting the Cycle: Reimagining the Prosecutor's Role in Reentry*, NYU LAW (2017), https://perma.cc/T2KU-3UDE (discussing how, under the Obama Administration's Smart on Crime initiative, several U.S. Attorneys' Offices assisted those reentering society with securing employment and educated employers about hiring the formerly incarcerated).

changes Attorney General Holder implemented:

> I'm not going to tell you that every single prosecutor out there would have written the Smart on Crime policy him or herself, but what I can tell you is we know they're doing it. The stats show that . . . particularly for prosecutors who've been doing this for a long time, we've seen that mandatory minimums done the old way cast too broad a net because they focus just on one feature—drug quantity—and doing so doesn't distinguish between the drug kingpin and the courier. Prosecutors who have been doing this for a long time have recognized that.[35]

Education works. Osler uses the example of disparate sentencing for crack and powder cocaine and points out that greater fairness for crack sentencing only happened when there was data available that "exploded the myth of racial neutrality," showing that Blacks and Hispanics were prosecuted at disparate rates.[36] All too often, as with the initial sentencing regime that treated crack and cocaine cases differently, criminal justice policy is made on the basis of ideology, not data. Introducing data and educating prosecutors about policies that have failed and beliefs that are outmoded is the path forward.

But setting priorities and educating prosecutors alone will not be sufficient. The metrics that are used to define federal prosecutors' success at their jobs must change. Both internally and externally, prosecutors are evaluated based on the numbers: number of cases indicted and tried, number of defendants prosecuted, and so forth. These metrics incentivize prosecutors to work on the cases that are the easiest and the quickest to move forward. Not only are these numerical metrics used internally at DOJ to measure the work of both individual prosecutors and the overall success of U.S. Attorneys' offices, but the public and the press evaluate prosecutors based on them too.

It is simple to understand the impact: if prosecutors are criticized for prosecuting fewer cases, if they lose resources because of it, they will tend to pursue the kinds of cases that result in greater numbers of prosecutions. We see that now with the dramatic increase in numbers of low-level immigration and gun possession prosecutions referred to in Part II. It is more difficult and far more time consuming to investigate and prosecute a long-term public corruption case or a civil rights matter than it is to prosecute a person for being a felon in possession of a firearm. If our goal is to make our communities safer, we should encourage prosecutors to prosecute fewer—but more serious—crimes and reward them when they do. We need new and better metrics to do that.

Prosecutors ultimately put themselves out of business if they are

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[35] Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), https://perma.cc/TZG8-6ZP2.

[36] Osler, *supra* note 4, at 166.

successful—less crime, fewer cases. But if the metric for success is how many cases an office prosecutes, then success means failure. We need metrics that evaluate whether prosecutors are creating better community outcomes and that incentivize prosecutors to do what they would prefer to do absent the tyranny of raw statistical evaluation: prosecute the most serious, significant cases, even if they take more time and have less certain outcomes.

Metrics that consider community engagement and safety promote the ability of prosecutors to engage in programs that focus on criminal justice reform: for instance, Birmingham, Alabama's Reconciliation and Listening Sessions as part of the National Initiative for Building Community Trust—which sought to improve community-police relations by focusing on procedural justice, implicit bias, and restorative justice[37]—or High Point, North Carolina's domestic violence initiative.[38] Freed of the gravitational pull of numbers of cases as the only metric for success, prosecutors could play an important role in reform, both in their prosecution practices and, more generally, as they expand their notion of their responsibilities to include prevention, reentry, and other work in the community.[39]

CONCLUSION

Prosecutors should be, the linchpin in successful criminal justice reform because of their unique decision-making responsibilities and their ability to reinvent their role to better serve their communities. Given an administration with leadership that is committed to a full scope of reform, education and updated metrics for evaluating prosecutors could be used to create a culture change that would make prosecutors true partners and leaders in reforming the criminal justice system.

Osler suggests we "must be bold in what we ask for"[40] when it comes to criminal justice reform, and this is true. What could be bolder than to ask that prosecutors, those the system charges with prosecuting people accused of crimes, also become advocates for them?

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[37] National Initiative for Building Community Trust & Justice, *Case Study: Integrating Community Members into Reconciliation Listening Sessions in Birmingham*, NAT'L NETWORK FOR SAFE COMMUNITIES 1 (Mar. 2019), https://perma.cc/2NVJ-AWNX.

[38] *See Domestic Violence Initiative*, CITY OF HIGH POINT POLICE DEP'T., https://perma.cc/8LDX-LSTR (last visited July 16, 2021).

[39] *See, e.g.*, Angela J. Davis, *Meet the Criminal Justice System's Most Powerful Actors*, THE APPEAL (May 29, 2018), https://perma.cc/Q75C-TYTZ.

[40] Osler, *supra* note 4, at 197.

The Clock Stops Here: A Call for a Resolution of the Circuit Split on Plea Bargain Exclusions Within the Speedy Trial Act

Nicholas Babaian[*]

INTRODUCTION

After a long and demanding day of work, John walks to his car and begins his drive home.[1] Unbeknownst to John, a broken taillight on his car catches the attention of the local police, and he is subsequently pulled over. Two officers walk to either window of the car and mistake John, as a suspect they have been looking for in a recent drug trafficking scandal. The police arrest John and take him to the local jail where federal prosecutors soon indict him for the crime of drug trafficking. Due to an extraordinarily high bail and John's low income, he is unable to secure a bond for release and awaits his distant trial from the cold jailhouse cell. In the interim, the government begins to recognize its futile case against John but decides to offer him a plea deal to buy some time to secure a better case. John begs the prosecutor to acknowledge that they have charged the wrong person, but the prosecutor persists. Negotiations for a plea deal last about three months, all while John maintains his innocence. John's federal public defender continues to entertain the agreement, knowing he does not have the resources to bring John's case to trial. Because John will not admit to something he did not do, a plea agreement is not reached. It has now been

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[1] This scenario is fictional and solely the work of the author to illustrate a potential issue presented in this Note.

four months since John's indictment, four months of sitting in a jail cell for a crime that he did not commit.

The U.S. Constitution provides all criminal defendants the right to a speedy trial.[2] This right, developed from English law, establishes one of the most fundamental rights preserved by the Constitution.[3] Legal scholars for generations have equated the delay of a criminal trial with a denial of "fundamental justice."[4] The Speedy Trial Act of 1974 provides mandated timelines that qualify as a criminal defendant's Sixth Amendment right to a speedy trial.[5] The Speedy Trial Act requires that an information or indictment charging a defendant with an offense must be filed within thirty days from an individual's arrest in connection with the crime.[6] The Speedy Trial Act also provides that a criminal defendant's trial must commence within seventy days of the indictment.[7] Of course, this timeline is not entirely rigid and provides for reasonable delays such as those "resulting from other proceedings concerning the defendant," which are automatically excludable from the speedy trial clock.[8] A delay, however, can also be excluded under other provisions in the Speedy Trial Act; for example, a delay will be automatically excluded when it results from a continuance granted to serve "the ends of justice."[9] For this exclusion, the reason for the delay must serve "the ends of justice" and must be set in the record.[10] Consequently, the various federal circuit courts have split as to whether criminal plea negotiations are automatically excludable as "resulting from other proceedings concerning the defendant" or under the "ends of justice" exclusion.[11]

A circuit split on such an important issue effectively creates disparate

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[2] U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

[3] *The Right to a Speedy Trial*, ABA, https://perma.cc/56LZ-QJPF (last visited May 24, 2021).

[4] *See* Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO. J. INT'L L. 747, 748–49 (2011) (stating that the current state of criminal justice forces defendants in custody to wait exceedingly long periods of time before having their cases brought to trial).

[5] 18 U.S.C. § 3161 (1996).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* (stating that the "ends of justice" delay is proper where the delay would serve the administration of justice and fairness in the trial).

[11] 18 U.S.C. § 3161; *see* Courtney E. Bailey, Comment, United States v. Huete-Sandoval: *Is the Plea Bargaining Process an Excludable Delay from a Defendant's Speedy Trial Act Calculation?*, 36 AM. J. TRIAL ADVOC. 395, 395–96 (2012).

treatment for individuals facing criminal charges around the country.[12] Defendants in some jurisdictions will have their cases dismissed after a violation of the Speedy Trial Act, where others will encounter the prejudices of a delayed trial.[13] The Supreme Court of the United States avoided resolving the circuit split in early 2018, further delaying a remedy to this critical problem.[14] This Note stands on the proposition that the Supreme Court must recognize this discrepancy and present a resolution for the circuit split, ultimately in favor of a criminal defendant's rights.[15] Conversely, this Note will also propose an alternative solution through a legislative amendment by Congress.[16]

In John's hypothetical case, the majority of circuit courts would likely exclude the timeframe of plea negotiations from his speedy trial calculus.[17] John will be incarcerated long after the seventy-day requirement under the Speedy Trial Act has lapsed, essentially allowing plea negotiations to bypass his constitutional right to a speedy trial. After four months behind bars and no sign of justice coming to help, John's employment, family, and defense strategy are all in grave jeopardy.

Part I of this Note will provide a brief history of the Sixth Amendment right to a speedy trial, the Speedy Trial Act of 1974, the plea-bargaining process as it relates to the speedy trial calculus, and the circuit split on plea negotiations' excludability within the speedy trial calculus. Part II addresses the importance of a resolution to the circuit split. Part III argues that the Supreme Court should resolve the split in favor of excluding plea negotiations from the speedy trial clock. Lastly, Part IV will alternatively argue that Congress has the authority to address the split and should do so if the Supreme Court continues to elude this issue.

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[12] *See* Evan D. Bernick, *The Circuit Splits Are Out There—And the Court Should Resolve Them*, FEDERALIST SOC'Y (Aug. 13, 2015), https://perma.cc/7NMD-B96W; *see also* Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), https://perma.cc/L2GB-9FMZ.

[13] 18 U.S.C. § 3162(a)(1) (stating that if an indictment is not returned within the prescribed time, "such charge against that individual contained in such complaint shall be dismissed or otherwise dropped"). *See generally* Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 710–15 (2014) (discussing the shortcomings of the Speedy Trial Act. Shon Hopwood, the author, is a convicted bank robber who now teaches at Georgetown Law); Brooks Holland, *The Two-Sided Speedy Trial Problem*, 90 WASH. L. REV. ONLINE 31, 31 (2015) https://perma.cc/BE9G-SPFM (discussing the issues with the Speedy Trial Act from the perspective of a public official).

[14] *See* White v. United States, 138 S. Ct. 641, 641 (2018).

[15] *See infra* Part III.

[16] *See infra* Part VI.

[17] *See supra* note 1.

I. Background

A. *Speedy Trial, a Constitutional Right*

The right to a speedy trial was built into the foundation of the United States after originally being introduced by the American colonies' first bill of rights, the Virginia Declaration of Rights of 1776.[18] Sir Edward Coke, who authored influential treatises that the American colonies frequently relied upon, argued that the right to a speedy trial had been fundamental to English law since the issuance of the Magna Carta in 1215.[19] Accordingly, the principle of a criminal defendant's speedy trial was not novel as it was a simple extension of a right that had existed in English law for generations.[20]

Although important, the U.S. Supreme Court did not evolve the jurisprudence surrounding the right to a speedy trial until well into the twentieth century.[21] The right to a speedy trial was finally determined to apply to the states through the Fourteenth Amendment in the 1967 case of *Klopfer v. North Carolina*.[22] In that case, Peter Klopfer was criminally charged with trespass while participating in a civil rights protest.[23] The trial court continued the case twice after the state moved for a *nolle prosequi* with leave, allowing the state to suspend prosecution until returning to a future docket.[24] After the Supreme Court granted certiorari on Klopfer's case, Chief Justice Earl Warren, writing for the majority, held that the Due Process Clause of the Fourteenth Amendment applied the Sixth Amendment right to a speedy trial to the individual states.[25] Essentially, the Court ruled that the prosecution's delay of the trial was a violation of Mr. Klopfer's right to a

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[18] Klopfer v. North Carolina, 386 U.S. 213, 223–25 (1967) (holding that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and that "[t]hat right has its roots at the very foundation of [the United States'] English law heritage").

[19] *Id.* at 224–25; Lewis LeNaire, Comment, Vermont v. Brillon: *Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219, 220–21 (2010); *see* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 161 (2006).

[20] LeNaire, *supra* note 19, at 220.

[21] *See Klopfer*, 386 U.S. at 223–26.

[22] *Id.* at 222–23; *see* Barker v. Wingo, 407 U.S. 514, 515 (1972) ("*Klop[f]er v. North Carolina* . . . established that the right to a speedy trial is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States.").

[23] *Klopfer*, 386 U.S. at 217.

[24] *Id. See generally Nolle Prosequi*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *nolle prosequi* as a "formal entry upon the record, by the plaintiff in a civil suit or the prosecuting officer in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether").

[25] *Klopfer*, 386 U.S. at 222–24.

speedy trial.[26]

Four years later, the Supreme Court established the timing for when the right to a speedy trial attached to a criminal defendant.[27] In *United States v. Marion*, the defendant filed a motion to dismiss the criminal indictments against him because of a three-year delay between the government's discovery of the crime and the receipt of the indictment.[28] After the district court dismissed the indictments due to the government's failure to timely prosecute, the Supreme Court granted certiorari to determine the correct timing of the Sixth Amendment's protection.[29] Looking to the language of the Sixth Amendment, the Court concluded that the speedy trial clause protects those accused of a crime, effectively establishing that the speedy trial calculus begins at the time the prosecution starts.[30]

B. *The History of the Speedy Trial Act*

By the time *Klopfer* rolled around, all fifty states had already prescribed speedy trial protections for the citizens of their respective state.[31] Congress, however, stepped in and created the Speedy Trial Act to implement and enforce the protections of the Sixth Amendment right to a speedy trial and to ensure uniformity of the application of the right throughout the nation.[32] The Speedy Trial Act systematically regulates the timeline within which the criminally accused must be heard.[33] The Act was designed to broaden "the speedy trial protections afforded to both the individual and society by the Sixth Amendment" by setting "fixed time limits" for criminal cases.[34] Accordingly, a criminal indictment against a defendant must be filed within thirty days of the arrest or the service of a summons on the defendant.[35] Further, the Speedy Trial Act requires that the criminal defendant's trial must begin within seventy days of the filing of the indictment, or within

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[26] *Id.*

[27] *See generally* United States v. Marion, 404 U.S. 307, 310–13 (1971).

[28] *Id.* at 310.

[29] *Id.* at 308, 310.

[30] *Id.* at 313. *See generally* Seth Osnowitz, Note, *Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the* Barker v. Wingo *Test*, 67 CASE W. RES. L. REV. 273, 282 (2016) (noting other important evolutions of the speedy trial act established by the United States Supreme Court).

[31] *See* Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 476 (1968); *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 847 (1957).

[32] *See* Randall S. Susskind, *Right to a Speedy Trial*, 30 AM. CRIM. L. REV. 1239, 1246 (1993).

[33] *See generally* Zedner v. United States, 547 U.S. 489, 490 (2006) (noting the legislative history of the Speedy Trial Act and the application of its principles).

[34] SPEEDY TRIAL ACT AMENDMENTS ACT OF 1979, S. REP. NO. 96-212, at 9 (1979) [hereinafter *S. Rep. on Public Law 96-43*].

[35] 18 U.S.C. § 3161 (1996); *see Speedy Trial*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 448, 458–59 (2017).

seventy days of the date the defendant first appears before a judicial officer, whichever is later.[36]

Although the Speedy Trial Act sets strict timing requirements for the criminally accused to be heard, numerous pre-trial delays are automatically excluded from the Speedy Trial Act's calculus.[37] For example, the Speedy Trial Act unambiguously excludes delays that are caused by the unavailability or absence of the charged defendant or essential witness.[38] The excludability of other pretrial delays, such as the complexity of the case or the Speedy Trial Act deadlines of codefendants, is subject to judicial discretion.[39]

C. *The Speedy Trial Act, the Relevant Part*

In relevant part, the following portion of the Speedy Trial Act demonstrates where circuits have voiced split interpretations.[40] The periods of delay outlined below are not excluded in calculating the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
>
> (B) delay resulting from trial with respect to other charges against the defendant;
>
> (C) delay resulting from any interlocutory appeal;
>
> (D) delay resulting from any pretrial motion, from the filing

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[36] 18 U.S.C. § 3161(c) (2019).

[37] *Id.* §§ 3161(h)(1)–(5) (listing the available exclusions under the Speedy Trial Act that are automatic and do not require a showing of reasonableness or actual delay, which include include pre-trial motions, delays by the defendant, delays caused by unavailable witnesses, and others).

[38] *Id.* § 3161(h)(3); *see, e.g.*, United States v. Patterson, 277 F.3d 709, 710–12 (4th Cir. 2002) (holding a delay was properly excludable because an essential witness was charged with homicide and was therefore unavailable).

[39] *See* § 3161(h)(6); Zedner v. United States, 547 U.S. 489, 497–99 (2006) (noting that a court could grant a continuance under the "ends of justice" exclusion based on whether the case is unusually complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, and it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by the Speedy Trial Act).

[40] *See generally* Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, FED. JUDICIAL CTR. (Aug. 1980), https://perma.cc/N4QX-L8ST.

> of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> (E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;
>
> (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;
>
> (G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and
>
> (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.[41]

Despite its lengthy legislative history, the Speedy Trial Act contains a large number of ambiguities and unresolved policy issues.[42] Some of these ambiguities have been addressed by the federal courts, whereas others have not.[43]

D. *How Plea Bargaining Factors into the Equation*

Justice Neil Gorsuch recently noted that "those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'"[44] When considering the various effects of the different circuits' positions on plea bargaining and the speedy trial clock, it is essential to

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[41] § 3161(h)(1)(A)—(H).

[42] *See* Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 677 (1976) (noting that in addition to the usual problems that arise from revisions and compromises, the Speedy Trial Act faced major difficulties in defining excludable time periods, interim provisions, and allowable sanctions).

[43] *See, e.g.*, United States v. Adedoyin, 369 F.3d 337, 341–42 (3d Cir. 2004) (finding that the denial of an "ends of justice" extension requested after the September 11, 2001, terrorist attacks was proper, despite major disruptions in the region and the concerns about the jurors' states of mind following the attack); United States v. Ospina, 485 F. Supp. 2d 1357, 1360 (S.D. Fla. 2007) (holding that the Sixth Amendment right to a speedy trial attaches at indictment, arrest, or when the defendant is otherwise officially accused and continues until the date of trial).

[44] United States v. Haymond, 139 S. Ct. 2369, 2375 (2019); *The Earl of Clarendon to William Pym*, EWING TOWNSHIP BOARD OF EDUCATION, https://perma.cc/P4LK-GEJL (last visited May 24, 2021).

understand the function of plea negotiations in a criminal trial.[45] Most people in the United States believe that when a person is accused of a crime they will subsequently have some form of a trial to determine their culpability.[46] This is, however, not the case for the vast majority of criminal defendants.[47] Approximately ninety-five percent of criminal cases are resolved before trial, usually after a plea agreement has been issued.[48] In *Lafler v. Cooper*, Justice Kennedy, writing for the majority of the court, stated that "criminal justice today is, for the most part, a system of pleas, not a system of trials."[49]

Unbeknownst to some, the plea bargaining process can be relatively straightforward.[50] A prosecutor will evaluate a case and generally offer the criminally accused a reduced punishment in exchange for a guilty plea.[51] The defendant then receives the benefit of knowing the outcome of their case, eluding the uncertainty of a trial, and the prosecutor benefits by quickly disposing of the case and assuring a conviction.[52] Currently, § 3161(h)(1)(G) of the Speedy Trial Act allows exclusions for "delay[s] resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government."[53] This section, however, does not reference whether delays resulting from the actual plea negotiation process are to be excluded from the speedy trial clock.[54] Circuits have split on this ambiguity, questioning whether plea negotiations are excludable as "resulting from other proceedings concerning the defendant" or the "ends of justice" exclusion, also provided for under the Speedy Trial Act.[55] Therefore, if a jury trial is the "heart and lungs of liberty" than a plea

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[45] *See generally* Tim Lynch, *The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice*, CATO INST. (June 24, 2011), https://perma.cc/F3CS-WNTB.

[46] *See id.*

[47] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 (2004).

[48] *See* Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 561 (2013); David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011); Markus Surratt, Comment, *Incentivized Informants, Brady, Ruiz, and Wrongful Imprisonment: Requiring Pre-Plea Disclosure of Material Exculpatory Evidence*, 93 WASH. L. REV. 523, 571 (2018) (citing to the same, well known statistic that defendants enter plea agreements far more often than seeking their constitutional rights to a jury trial).

[49] 566 U.S. 156, 170 (2012).

[50] *See* Klein, *supra* note 48, at 560.

[51] *See* Klein, *supra* note 48, at 561.

[52] *See* Anne R. Traum, *Fairly Pricing Guilty Pleas*, 58 HOW. L.J. 437, 448–49 (2015) (noting that a fair plea deal is much like a "socially fair price" for a consumer product—both are "not exploitative of consumer demand, and [don't] result in outsized profit or benefit to the seller").

[53] 18 U.S.C. § 3161(h)(1)(G) (1996).

[54] *See id.*

[55] *See generally* United States v. Huete-Sandoval, 668 F.3d 1, 5–6 (1st Cir. 2011) (referencing

bargain is the knife that viciously removes it from the body of justice.[56]

II. The Circuit Split

The various circuits have continually acknowledged the split over whether plea negotiations are automatically excluded under § 3161(h)(1).[57] The question of whether plea negotiations that fail to reach a finalized plea agreement are "automatically excludable from the Speedy Trial Act calculation as 'other proceedings' or 'serve the ends of justice' pursuant to [the Speedy Trial Act]" has resulted in a four-to-four split amongst the circuits.[58]

A. *On the One Side: Automatic Exclusion as "Other Proceedings Concerning the Defendant"*[59]

The Seventh Circuit was first to weigh in on plea negotiations as they relate to the excludable time within the speedy trial calculus.[60] In *United States v. Montoya*, the defendant, William Montoya, was charged with distribution and possession of cocaine.[61] Montoya was arrested on August 5, 1985, starting the thirty-day speedy trial clock running from the period between arrest and indictment.[62] Montoya, however, was not indicted on the charges until November 14, 1985, a total of 101 days from his arrest.[63] Montoya moved to dismiss the indictment, arguing that his right to a speedy trial was violated because of the undue delay of his indictment.[64] The government, however, claimed that almost the entirety of the delay, all 101 days, were excludable under the Speedy Trial Act due to pretrial plea negotiations that took place during that time.[65] The Court seemingly agreed

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the circuit split on plea negotiations and the speedy trial clock).

[56] *See* United States v. Haymond, 139 S. Ct. 2369, 2375 (2019) (noting that without a jury trial, there is no liberty remaining, and although this case dealt with a bench trial, not a plea bargain, the principle is the same where a jury is not called to determine guilt).

[57] *See Huete-Sandoval*, 668 F.3d. at 7 n.8.

[58] *Id.*

[59] *See generally* United States v. Leftenant, 341 F.3d 338 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214 (8th Cir. 1997); United States v. Fields, 39 F.3d 439 (3d Cir. 1994); United States v. Bowers, 834 F.2d 607 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143 (7th Cir. 1987) (comprising one side of the position is the Fourth, Sixth, Seventh, and Eighth Circuit Courts of Appeals).

[60] *See Montoya*, 827 F.2d at 150.

[61] *Id.* at 145 (among others, Montoya challenged his convictions on the basis of alleged violations of the Speedy Trial Act).

[62] *Id.* at 146.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 147–48 (noting there never was a trial on Montoya's Texas charges because he entered

with this argument and held that the Speedy Trial Act was not violated where delay caused by Montoya's plea negotiations qualified as "other proceedings" and were, therefore, excludable from the speedy trial calculus.[66] The Court noted that the plea bargaining process qualifies as one of the "*many* other proceedings" under the generic exclusion section of the Speedy Trial Act, explaining that the "ten listed proceedings are inclusive, not exclusive" and that "negotiating a plea bargain could be considered a proceeding."[67]

The Eighth Circuit also supports the position that plea negotiations are excludable under the Speedy Trial Act.[68] In *United States v. Goodwin*, the Eighth Circuit held that plea negotiations fall squarely within the automatically excludable category of the Speedy Trial Act.[69] The Court's decision effectively placed delays related to plea negotiations that do not reach a final judgment into the non-enumerated "other proceedings" group under the Speedy Trial Act, therefore making plea negotiations automatically excludable.[70]

B. *On the Other Side: Excluded but Not Automatic as "Serving the Ends of Justice"*

The Second Circuit's holding in *United States v. Lucky* widely illustrates the point of view held by the other group of circuits on the issue of plea bargaining and the speedy trial clock.[71] In *Lucky*, the defendant was indicted for possessing a firearm as a felon.[72] He was arraigned in January 2005 and a magistrate judge ordered a period of excludable delay until the date of the initial status conference in February 2005.[73] At a subsequent status conference in June of 2005, defense counsel reported that a plea bargain was unlikely, and noted that "it appears . . . this case is headed towards trial."[74]

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into plea negotiations with the government and pled guilty to one of the two counts brought against him).

[66] *Montoya*, 827 F.2d at 148–49 (noting that other circuits have also reached this conclusion); *see* United States v. Goodwin, 612 F.2d 1103, 1105 (8th Cir. 1980) (holding exclusion under generic "other proceedings" of the Speedy Trial Act).

[67] *Montoya*, 827 F.2d at 150 (finding direct support for its ruling in the language of the statute, the Seventh Circuit has on numerous occasions upheld this holding).

[68] *Goodwin*, 612 F.2d at 1105 (explaining that the defendant in this case was arraigned on April 3, 1979; his trial commenced eighty-six days later, on June 29, 1979, although at the time, the time limit with respect to the period between arraignment and trial was eighty days).

[69] *Id.*

[70] *Id.*

[71] Bailey, *supra* note 11, at 407.

[72] United States v. Lucky, 569 F.3d 101, 103 (2d Cir. 2009).

[73] *Id.*

[74] *Id.* at 104.

After the defendant's conviction at trial, the defendant appealed, arguing a violation of the Speedy Trial Act when the District Court failed to include the period of time for plea bargaining in the speedy trial calculus.[75] The Court ultimately concluded that plea negotiations that fail to reach an agreement are not *automatically* excluded under the Speedy Trial Act.[76] The Court noted that if such time is to be excluded from the Speedy Trial Act's calculus, a judge must first, on-the-record, decide that a continuance would serve the "ends of justice."[77]

The Eleventh Circuit has similarly acknowledged the decision of the Second Circuit in *Lucky* and held that the *automatic* exclusion of plea negotiations would conflict with the function of the Speedy Trial Act.[78] In *United States v. Mathurin,* the government argued that a thirty-day period was tolled because the parties were engaged in plea negotiations.[79] The Court, however, rejected this argument after finding that the Speedy Trial Act tolls the period during which a court considers a plea agreement but does not automatically exclude time for plea negotiations.[80] The Court added that plea negotiations are not included in the plea agreement exception because the parties, not the court, control the plea negotiation process and this exception is aimed at delays attributable to court inaction.[81] The Court did, however, find a placement for plea negotiations within the Speedy Trial Act.[82] Looking at § 3161(h)(1), the Court stated that plea negotiations would fall under the provision which allows for delays that serve the "ends of justice."[83]

III. Why Resolve the Circuit Split in Favor of Defendants' Rights?

The Sixth Amendment right to a speedy trial is designed to minimize the possibility of lengthy incarcerations before trial, to reduce the impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of

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[75] *See id.* at 105–07.

[76] *See id.* at 107.

[77] *Id.* at 106.

[78] United States v. Mathurin, 690 F.3d 1236, 1240–41 (11th Cir. 2012).

[79] *Id.* at 1240.

[80] *Id.* at 1242.

[81] *Id.*

[82] *See id.*

[83] *Id.* (noting that this "method of tolling the speedy-indictment clock for plea negotiations is more consistent with the structure and purpose of the statute because it avoids creating the kind of loophole that would exist under the government's [position of automatic exclusion as 'other proceedings concerning the defendant']"); *see* Bloate v. United States, 559 U.S. 196, 197 (2010).

unresolved criminal charges.[84] This right dates back to the creation of the United States, forever grounding its importance on the criminal justice system.[85] Essentially, the right to a speedy trial protects both those charged with a crime from "undue and oppressive incarceration prior to trial" and the public's interest in the prompt disposition of criminal cases.[86]

The Speedy Trial Act implements the principles of the right to a speedy trial by requiring that an indictment charging a criminal defendant with an offense be filed within thirty-days from an individual's arrest and that the defendant's trial commence within seventy days from the date that the indictment is filed.[87] The Speedy Trial Act provides for an enumerated list of excludable delays that will toll the speedy trial calculus; however, the various circuits have found ambiguity in the reading of these exclusions.[88] One position held by the various circuit courts, including the Fourth, Sixth, Seventh, and Eighth Circuits, is that delays resulting from plea negotiations are automatically excludable under the provision allowing delays "resulting from other proceedings concerning the defendant."[89] The Sixth Circuit, in *United States v. White*, held that "[a]lthough the plea bargaining process is not expressly specified in § 3161(h)(1), the listed proceedings 'are only examples of delay "resulting from other proceedings concerning the defendant" and are not intended to be exclusive.'"[90] The First, Second, Fifth, and Eleventh Circuits, on the other hand, hold that delays resulting from plea negotiations are only excludable under the Speedy Trial Act when the judge makes findings *on the record* that the delay serves "the ends of justice."[91] This group of circuit courts reason that automatic exclusions are only appropriate for delays connected to official judicial proceedings

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[84] United States v. MacDonald, 456 U.S. 1, 8 (1982); *Id.* at 21 (Marshall, J., dissenting) (discussing that the consideration of whether a defendant was denied a speedy trial is based on the length of the delay, the reason for it, the defendant's assertion of the right, and the possibility of prejudice).

[85] *See generally* Krishnan & Kumar, *supra* note 4.

[86] United States v. Loud Hawk, 474 U.S. 302, 312 (1986) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[87] *See* 18 U.S.C. § 3161(h)(1)(6) (1996); *see also* Knut Johnson, *Speedy Trial 18 USC Section 3161*, L. OFFICE OF KNUT JOHNSON, https://perma.cc/7TRN-LK6R (last visited May 24, 2021).

[88] United States v. Huete-Sandoval, 668 F.3d 1, 5 (1st Cir. 2011) (stating that there is a well-recognized split between the circuits on the issue of excludability of plea negotiations within the speedy trial calculus).

[89] *See, e.g.*, United States v. Leftenant, 341 F.3d 338, 344 (4th Cir. 2003); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987); United States v. Van Someren, 118 F.3d 1214, 1217–18 (8th Cir. 1997).

[90] 679 F. App'x 426, 431 (6th Cir. 2017).

[91] *See, e.g.*, United States v. Williams, 314 F.3d 552, 556 (11th Cir. 2002); United States v. Lopez-Osuna, 242 F.3d 1191, 1197 (9th Cir. 2000); United States v. Velasquez, 890 F.2d 717, 719 (5th Cir. 1989).

because the enumerated exclusions provided for under § 3161(h)(1) of the Speedy Trial Act all relate to formal judicial proceedings.[92]

The Speedy Trial Act was enacted in order to ensure all criminal defendants uniformly receive a speedy trial as prescribed by the Sixth Amendment.[93] Where there is a split in the interpretation of key provisions of the Speedy Trial Act, however, defendants are left wondering when they will be charged or indicted or how the Speedy Trial Act will apply to their specific case.[94] The legislative intent to treat everyone under the Speedy Trial Act with uniformity and consistency is ineffective where the various circuits have created a disparate treatment for defendants in their respective jurisdictions.[95] The circuit split should be resolved by allowing plea negotiations to continue the speedy trial clock, forcing prosecutors to offer fair and just deals without tolling the defendant's right to a speedy trial.[96] The injustices of plea bargaining should not delay the right to a speedy trial, and there should be greater efficiency in the presentation of potential plea bargains.[97] Because the prosecutor holds the key to arrange plea agreements, exempting plea negotiations from the speedy trial clock could result in the strategic use of plea negotiations to reserve the time prescribed under the Speedy Trial Act.[98] This circumvention of a constitutional right needs to be prevented by a uniform resolution of the circuit split.[99]

If the Supreme Court does not resolve the circuit split, however, Congress must take action and amend the Speedy Trial Act.[100] Congress enacted the Speedy Trial Act to create uniformity in the application of speedy trial timings, and it necessarily follows that Congress should amend the Speedy Trial Act to solidify this uniformity.[101] Congress would also be in the position to best project the Speedy Trial Act's original intent on the resolution of the circuit split, focusing on both the defendant's right to a speedy trial and the public's interest in a quick resolution of criminal trials.[102]

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[92] *See* United States v. Lucky, 569 F.3d 101, 107 (2d Cir. 2009).

[93] *See* 18 U.S.C. § 3161 (1996).

[94] *See generally* Partridge, *supra* note 40.

[95] *See* Petition for a Writ of Certiorari at 2–4, White v. United States, 138 S. Ct. 641 (2018) (No. 17-270) [hereinafter White's Cert. Petition]. *See generally* Partridge, *supra* note 40.

[96] Osnowitz, *supra* note 30, at 280.

[97] Osnowitz, *supra* note 30, at 280.

[98] Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 306–07 (2011) (commenting that "judges, defense counsel, and prosecutors all have enormous incentive to pursue early guilty pleas—as early as the initial arraignment in some jurisdictions").

[99] *See generally* Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 748 (2014).

[100] *See infra* Part IV.

[101] *See infra* Part IV.

[102] *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and*

ANALYSIS

IV. The Supreme Court Must Resolve the Circuit Split

A. United States v. White, *an Illustration of the Dangers of the Circuit Split and a Missed Opportunity by the Court*

The Supreme Court recently dodged an opportunity in *United States v. White* to resolve the circuit split on the excludability of plea negotiations and the Speedy Trial Act.[103] In this case, the Detroit Drug Enforcement Agency (DEA) arrested Jimmie White for possession of illegal drugs and a firearm.[104] Instead of being charged, White was asked to be a cooperating witness for the DEA.[105] About two years later, in April of 2013, however, White's cooperation agreement failed, and he was subsequently charged for the various crimes.[106] In May of 2013, he began plea negotiations with the government and together they filed a stipulation agreeing to exclude two weeks for plea negotiations.[107] The negotiations, however, were unsuccessful and an agreement was not reached, leaving the government to indict White for the charges in June of 2013.[108] White subsequently moved for dismissal of the indictment on grounds that he was prejudiced by the three-year delay between his arrest in May 2010, the filing of the criminal complaint in April 2013, and his arrest and initial appearance in May 2013.[109] The motion, however, was dismissed, and he was found guilty of the crimes charged.[110]

On appeal, the Sixth Circuit held that the time spent during plea negotiations that ultimately do not end in an agreement is automatically excludable as "other proceedings" under the Speedy Trial Act.[111] The Sixth Circuit appeared confident in holding that the plea negotiation process is

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the Congress, 77 OR. L. REV. 405, 427 (1998) (arguing, with regard to a different circuit split, that Congress should fix splits when the Supreme Court fails to do so).

[103] *See* United States v. White, 679 F. App'x 426, 428 (6th Cir. 2017) (leaving the circuit split open after certiorari was granted by the Supreme Court and the judgment vacated); *see also* John Simon, *Should Plea Bargaining Toll the "Speedy Trial Clock?"*, U. CIN. L. REV., (Jan. 28, 2019), https://perma.cc/6H5R-QB7K.

[104] *White*, 679 F. App'x at 428; *see also* Simon, *supra* note 103.

[105] *White*, 679 F. App'x at 429.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 430.

[109] *Id.*

[110] *Id.* (noting that in his motion to dismiss, White argued that he was prejudiced by the three-year delay between his arrest and initial appearance in court).

[111] *See* 18 U.S.C. § 3161(h)(1) (1996) (including "other proceedings concerning the defendant" as an exception for excludability of time).

automatically excluded, noting that while plea negotiations are not explicitly listed within the eight enumerated categories of excludable periods, the enumerated provisions constitute only examples of excludable periods and the list should not be considered exhaustive.[112]

In January of 2018, the Supreme Court granted certiorari in *White v. United States.*[113] The issue presented to the Supreme Court was:

> [w]hether (as four circuits hold), time engaged in plea negotiation that does not result in a finalized plea agreement is automatically excludable as "other proceedings concerning the defendant" under 18 U.S.C. § 3161(h)(1), or whether (as four other circuits hold) such time is excludable only if the district court makes case-specific "ends of justice" findings under 18 U.S.C. § 3161(h)(7).[114]

White claimed that it was a violation of the Speedy Trial Act when more than thirty non-excludable days elapsed between his arrest and indictment, explicitly noting that a fourteen-day continuance to engage in plea negotiations should not be automatically excludable under the exception allowing for "period[s] of delay resulting from other proceedings concerning the defendant."[115] Oddly, the government also acknowledged that this time for plea negotiations should not be automatically excluded and that the court below erred in holding to the contrary.[116] Nonetheless, the government pursued a theory that the indictment remained timely because the lower court did not abuse its discretion in excluding the fourteen-day continuance under § 3161(h)(7), which permits the exclusion of time when the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[117]

The Supreme Court, after granting certiorari, failed to address the circuit split presented by this case and remanded the case back to the Sixth Circuit after learning of errors that the Attorney General made in his brief to the Court.[118] As of March 2019, the Sixth Circuit has yet to rule on the matter.[119] This case presented the perfect opportunity for the Supreme Court to resolve the circuit split, but instead, it kicked the case back down for what will likely

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[112] *White*, 679 F. App'x at 432; *see* Simon, *supra* note 103.

[113] White v. United States, 138 S. Ct. 641, 641 (2018).

[114] White's Cert. Petition, *supra* note 95, at I.

[115] Brief for the United States in Opposition at 7–8, White v. United States, 138 S. Ct. 641 (2018) (No. 17-270) [hereinafter United States' Opposition].

[116] *White*, 679 F. App'x at 431; *see* White's Cert. Petition, *supra* note 95, at 6; United States' Opposition, *supra* note 115, at 7.

[117] 18 U.S.C. § 3161(h)(7)(A) (1982); White's Cert. Petition, *supra* note 95, at 6; *see* United States' Opposition, *supra* note 115, at 7.

[118] *White*, 138 S. Ct. at 641.

[119] *White*, 679 F. App'x at 427; Simon, *supra* note 103; *see* Martha L. Wood, Note, *Determination of Dismissal Sanctions Under the Speedy Trial Act of 1974*, 56 FORDHAM L. REV. 509, 533 (1987).

be another holding that drives a wedge into the already divisive split on plea negotiation excludability within the Speedy Trial Act.[120] The right to a speedy trial is a fundamental right, secured by the Sixth Amendment.[121] Because the Speedy Trial Act is the application of this right, without a resolution to the circuit split, millions of criminal defendants will be held in the uncertain balance.[122] In answering the question presented to the Supreme Court in *White v. United States*, the Justices could have either affirmed the Sixth Circuit's interpretation of the Speedy Trial Act or could have defined the exact contours of enumerated exclusions.[123] In failing to resolve this issue, the Court left open a divisive question, prejudicing both criminal defendants and the attached societal interest.[124]

V. The Supreme Court Should Rule in Favor of a Defendant's Rights

A. *The Significance of Determining Excludability*

When the government violates the timing requirements of the Speedy Trial Act, there is a mandatory dismissal of the case or complaint against the defendant.[125] Congress included dismissal of the case for the government's violation of the Speedy Trial Act as an incentive for the prosecution to stay within the bounds of the Act.[126] When enacting the Speedy Trial Act, many members of the Senate and House opposed the dismissal sanction because of the possibility of a windfall for the defendant if the government could not

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[120] *Supreme Court Avoids Resolving Circuit Split on Speedy Trial Act by Issuing GVR Following Government Confession of Error*, FD.ORG (Jan. 10, 2018), https://perma.cc/69DL-H2WK; *see* United States' Opposition, *supra* note 115, at 7 (noting that the Supreme Court remanded the *White* case back down to the Sixth Circuit Court of Appeals after discovering a discrepancy in the Solicitor General's statements).

[121] U.S. CONST. amend. VI.

[122] Bernick, *supra* note 12 (arguing by analogy that when the circuits split on decisions involving rights protected by amendments such as the Second Amendment, millions risk losing fundamental rights, and that perhaps it is the court's own plummeting docket that is to blame for the various circuit splits); Liptak, *supra* note 12.

[123] *See* Bailey, *supra* note 11, at 396 (fitting a recent case out of the First Circuit into the circuit split).

[124] *See generally* Bailey, *supra* note 11, at 396.

[125] 18 U.S.C. § 3162(a)(2) (allowing for claims to be dismissed with prejudice or without prejudice, depending largely on court discretion); *see* United States v. Caparella, 716 F.2d 976, 979 (2d Cir. 1983) (noting the Speedy Trial Act's legislative history states that the intention and expectation of using the dismissal without prejudice sanction is that it will be the exception and not the rule, making dismissal with prejudice the proper sanction).

[126] *See* Kurtis A. Kemper, Annotation, *Excludable Periods of Delay Under Speedy Trial Act (18 U.S.C.A. § 3161-3174)*, 46 A.L.R. FED. 358, § 4(c) (1980) (collecting cases that apply the excludable grounds of the Speedy Trial Act).

keep to its schedule.[127] The American Bar Association (ABA), however, strongly approved of dismissal for all speedy trial violations, arguing that without dismissal, "the right to a speedy trial was largely meaningless."[128] Because a charge against a defendant must be dismissed after a violation of the Speedy Trial Act, it is imperative to carefully evaluate the timeline of events in any given case.[129] The accused may therefore walk free if the government violates the Speedy Trial Act.[130] Likewise, the prosecution faces the injustice of allowing a potential criminal to escape the charges against him.[131]

Since violations of the Speedy Trial Act can lead to a complete dismissal of a case, there is a potential to use excludable delays as a strategy to acquire more time to prepare for trial.[132] A 1985 report by the Department of Justice noted that excludable time provisions had been used frequently to gain more time in complex cases or cases involving unusual circumstances.[133] This report also indicated that exclusions were recorded in roughly two out of every five cases, with about fourteen percent of all continuances granted under the "ends of justice" provision.[134] Allowing courts to apply delay exclusions from plea negotiations under either the "resulting from other proceedings concerning the defendant" or the "ends of justice" provision would be contrary to the Supreme Court's directive that the plain language of the Speedy Trial Act does not "apply to a matter specifically dealt with in another part of the same enactment."[135] Under the plea agreement exclusion, Congress specifically limited its application to the time that the court takes a proposed plea under advisement.[136] Allowing for a strategic use of

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[127] *See* Wood, *supra* note 119.

[128] *See* Wood, *supra* note 119.

[129] *See* Barker v. Wingo, 407 U.S. 514, 529 (1972).

[130] Susskind, *supra* note 32, at 1245 (noting that "[t]he only method to remedy a violation of the Sixth Amendment speedy trial right is to dismiss the case").

[131] *See Barker*, 407 U.S. at 522 (acknowledging that a total dismissal of a defendant's charge was an "unsatisfactorily severe" remedy, but nonetheless held that "it is the only possible remedy"); *see also* Susskind, *supra* note 32, at 1245.

[132] *See* Meagan S. Winings, *What Does Speed Have to Do with It?: An Analysis of the Seventh Circuit's Application of the Speedy Trial Act*, 6 SEVENTH CIRCUIT REV. 114, 129 (2010).

[133] Nancy Ames et al., *The Impact of the Speedy Trial Act on Investigation and Prosecution of Federal Criminal Cases*, U.S. DEP'T OF JUST. (June 1985), https://perma.cc/U22U-NZB6 [hereinafter *The Report*].

[134] *The Report*, *supra* note 133, at 85.

[135] *See* Bloate v. United States, 559 U.S. 196, 201 (2010); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) (stating that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment").

[136] *Bloate*, 559 U.S. at 203 n.7.

exclusions for the sake of buying more time in a case would create a loophole in Congress' intent to have exact timings that would "give effect to the Sixth Amendment."[137] Further, allowing for a split in the interpretation of key provisions of the Speedy Trial Act leaves defendants wondering when they will be charged or indicted or how the Speedy Trial Act will apply to their specific situation.[138]

B. *An Intolerable Reliance on Plea Bargaining*

When, or if, the Supreme Court decides to address the circuit split, it is vital for the Court to address the fundamental unfairness of including plea negotiations as an excludable delay within the Speedy Trial Act.[139] As a result of the extensive use of plea bargaining, the Sixth Amendment right to a public trial has drastically faded.[140] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[141] Nowadays, however, the criminal justice system has morphed into a system that practices contract drafting rather than criminal law.[142] According to the National Center for State Courts, in 1976, two years after the enactment of the Speedy Trial Act, eight percent of all state felony cases utilized either jury or bench trials. By 2003, however, that percentage had dropped to about three percent.[143] Further, according to some experts, since 1977 the ratio of federal criminal defendants who opt for a jury trial has decreased from one in four cases to one in thirty-two, or about three percent.[144]

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[137] *See* United States v. MacDonald, 456 U.S. 1, 7 n.7 (1982).

[138] *See* United States v. Tunnessen, 763 F.2d 74, 76 (2d Cir. 1985) (reiterating that the Speedy Trial Act's exception to allow delay in the furtherance of justice is not to be frequently used); *see also* Karen L. Helgeson, Note, *The Federal Judiciary Emergency Special Sessions Act of 2005: Allowing Ongoing Criminal Prosecutions During Crisis or Hindering Compliance with the Speedy Trial Act?*, 92 IOWA L. REV. 245, 269–70 (2006).

[139] *E.g.*, United States v. Leftenant, 341 F.3d 338, 344 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214, 1218 (8th Cir. 1997); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987).

[140] Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-*Booker, 37 WM. MITCHELL L. REV. 469, 529 (2011).

[141] U.S. CONST. amend. VI.

[142] Dr. Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 416 (2015) (making the argument that the Supreme Court has moved the "goal posts" with the theory of plea-bargaining, and, in doing so, "the Court applies a new semiotic category—contract law—where defendants are 'free' to engage in the 'give and take' of plea negotiations to their presumed benefit").

[143] National Center for State Courts, *Felony Caseloads in the NACM Network*, 12 CASELOAD HIGHLIGHTS, no. 1, 2005, at 5, https://perma.cc/GDS4-SXUF .

[144] Matt Clarke, *Dramatic Increase in Percentage of Criminal Cases Being Plea Bargained*, PRISON

Although plea bargaining was certainly not a foreign concept to the United States Congress at the time of the Speedy Trial Act's enactment, the current abuse of plea bargaining was unequivocally not predicted.[145] When the plea negotiation process is excluded from the speedy trial calculus, the number of calendar days between a criminal defendant's arrest and trial significantly increases, potentially leading to prejudice to the defendant.[146] Applying this prejudice to the current expansion of plea bargaining, the number of defendants facing long delays before "enjoy[ing] the right to a speedy and public trial, by an impartial jury of the State" has exponentially increased.[147] When enacting the Speedy Trial Act, Congress intended that criminal trials have a uniform timeline that ensures the speedy trial right of the criminally accused.[148] Where three percent of federal criminal defendants opt for a trial, however, the right to a speedy trial is substantially eroded when allowing plea negotiations to toll the speedy trial clock.[149] It is clear that the approach to criminal justice has changed since the enactment of the Speedy Trial Act, and, therefore, just as Congress demanded the quick resolution of a criminal trial, the new system of plea bargaining must demand the same by allowing plea negotiations to keep the speedy trial clock ticking.[150]

C. *How the Supreme Court Should Rule*

When the Supreme Court grants certiorari on a case that could potentially resolve the circuit split, the Court must not allow plea negotiations to be excluded from the speedy trial calculus.[151] The Supreme Court has before relied on legislative intent when interpreting the Speedy Trial Act and should again follow this direction to resolve this circuit split.[152] The Supreme Court has previously rejected an argument that the Speedy Trial Act implicitly provides for the exclusion of time spent preparing pretrial motions, stating that "had Congress wished courts to exclude

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LEGAL NEWS (Jan. 15, 2013), https://perma.cc/5QJB-5CJB.

[145] *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (Jan. 1979) (noting that there were numerous studies on plea bargaining that Congress was aware of at the time of the enactment of the Speedy Trial Act).

[146] *See* FED. R. CRIM. P. 45(a) (stating that when computing the time for compliance, the Speedy Trial Act excludes Saturdays, Sundays, and legal holidays from the calculation).

[147] *See generally* Clarke, *supra* note 144.

[148] 18 U.S.C. § 3161 (1996); *see* Bailey, *supra* note 11, at 395.

[149] *The Report*, *supra* note 133, at 33.

[150] *The Report*, *supra* note 133, at 90 (stating that the Speedy Trial Act serves the societal interest in a speedy disposition of a criminal case "from undue delay in bringing such cases to trial").

[151] *See The Report*, *supra* note 133, at 3.

[152] *See* Zedner v. United States, 547 U.S. 489, 490 (2006).

pretrial motion preparation time automatically it could have said so."[153] In *Zedner v. United States*, the Supreme Court held that an expansive interpretation of the Speedy Trial Act is inconsistent with Congress's intent when enacting the Speedy Trial Act.[154] The Court explained that excludable reasons for delays, other than those spelled out in the parameters of the Speedy Trial Act, would not adequately protect the defendant's constitutional right to a speedy trial or the public's interest in the prompt disposition of criminal cases.[155] The plea negotiation process is directly analogous to the preparation of the pretrial motion process, as both are completed outside of the court's watchful eyes.[156] Therefore, just as pretrial motion preparation has been held to not be excludable in the speedy trial calculus, the plea negotiation process should be similarly excluded from these calculations.[157]

The Supreme Court should resolve the circuit split following a similar holding in the Ninth Circuit's decision in *United States v. Perez-Reveles*.[158] In this case, the Ninth Circuit held that plea negotiations do not account for an excludable delay under the Speedy Trial Act because plea negotiations are not explicitly mentioned as a reason to exclude time.[159] Further, the Ninth Circuit noted that the Speedy Trial Act only references plea agreements as an exclusion of time, leaving out a reference to plea negotiations.[160] Therefore, the Ninth Circuit did not find a basis in the statute for plea negotiations to count as a reason to exclude time from the speedy trial calculus.[161]

It would be entirely consistent with the intentions of the Speedy Trial Act to interpret the exclusions of delay from "other proceedings" in § 3161(1)(h)(1) to apply only to the proceedings described in that section.[162] The delays described as excludable are caused by the filing of other charges; ordered examinations of the defendant; filing through disposition of

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[153] *See* Bloate v. United States, 559 U.S. 196, 211 n.13 (2010).

[154] *See* 547 U.S. at 490 (holding that there is no reason to think that Congress wanted to treat prospective and retrospective waivers under § 3162(a)(2) of the Speedy Trial Act similarly, and continuing to find that if Congress would have intended this, it would have said so).

[155] *See id.* at 508–09 (noting that Congress had concerns over the dangers of exclusions that, if not enumerated in the Speedy Trial Act, "could get out of hand").

[156] *See generally Bloate*, 559 U.S. at 211 n.13.

[157] Simon, *supra* note 103.

[158] *See generally* 715 F.2d 1348 (9th Cir. 1983).

[159] *Id.* at 1352.

[160] *See* United States v. Lopez-Osuna, 242 F.3d 1191, 1197 (9th Cir. 2000) (noting that courts commonly refer to § 3161(h)(8)(A) of the Speedy Trial Act as the "'ends of justice' exclusion").

[161] *Perez-Reveles*, 715 F. 2d at 1352; *but see* United States v. Fields, 39 F.3d 439, 445 nn. 6–7 (3d Cir. 1994).

[162] *See* Winings, *supra* note 132.

motions; interlocutory appeals; removal or transfer from another district; transportation for examination up to ten days; consideration of a proposed plea agreement; and proceedings actually under advisement by the court up to thirty days.[163] These delays are all related to functional court involvement, requiring the court to either hear or rule on the respective delay and further allowing for court oversight.[164] Distinguishably, the plea negotiation process does not involve the court and is much more informal than the other excludable delays described in the Speedy Trial Act.[165]

Allowing plea negotiations to fall outside of the exclusions for the speedy trial calculus has the potential to benefit both the defendant and prosecution.[166] Defendants will enjoy a public trial in fewer calendar days, and the prosecution will ensure a quicker disposition of the case.[167] Additionally, if either the defendant or the prosecution needs more time to prepare for trial, as is often the case, the enumerated provisions that allow for excludable delays can be utilized.[168] For instance, if the defendant needs additional time to explore a plea offer, the defendant can toll the speedy trial clock by written agreement with the government pursuant to § 3161(h)(2).[169] Further, there are numerous grounds that the prosecution could use to seek various delays, such as delays resulting from trial concerning other charges against the defendant.[170]

The rationale held by the circuits that automatically exclude plea negotiations and the speedy trial calculus is that the exclusions expressly provided under the Speedy Trial Act are not exhaustive and therefore encompass a range of other situations which can toll trial preparation and

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[163] *See* 18 U.S.C. § 3161(h)(1)(A)–(H) (1996).

[164] *See id.* (providing that, for example, the excludable delays include the time while the court is taking pretrial motions under actual advisement).

[165] *See* Paul Bergman, *How Plea Bargains Get Made*, NOLO, https://perma.cc/G7CQ-C4QB (last visited May 24, 2021) ("Much of the time, plea bargaining negotiations take place privately between the defense lawyer and prosecutor, outside of court.").

[166] *See* Simon, *supra* note 103.

[167] *See* Simon, *supra* note 103.

[168] *See* FED. R. CRIM. P. 45(a) (stating that when computing the time for compliance, the Speedy Trial Act excludes Saturdays, Sundays, and legal holidays from the calculation, so with less excludable delays, there will be a quicker resolution of the case).

[169] *See* 18 U.S.C. § 3161(h)(2) (1996).

[170] *See, e.g.*, United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988) (allowing a criminal defendant time to retain counsel was excludable under the Speedy Trial Act); United States v. DiTommaso, 817 F.2d 201, 210 (2d Cir. 1987) (delaying trial because of a prosecutor's illness and to allow a new assistant prosecutor to prepare for trial was proper ends of justice finding); United States v. Nance, 666 F.2d 353, 358 (9th Cir. 1982) (allowing the exclusion of three continuances because the defendant's lawyer was unavailable because of a death in the family, a co-defendant's lawyer was unavailable because of his involvement in another trial, and an unrelated trial scheduled on judge's docket took longer than originally expected).

which, on the basis of fairness and efficiency, should not be held against the government.[171] These circuits further reason that the delays caused explicitly by plea negotiations are indistinguishable from the plea agreement process itself.[172] This rationale demands the recognition that plea negotiations are a basis for tolling the speedy trial clock and that this rationale keeps with the Speedy Trial Act.[173] This is plainly wrong.[174] The automatic exclusion of plea negotiations mistakenly recognizes situations which, through no fault of the defendant, delay trial preparation and therefore *should* be ascribed to the government.[175] The plea bargaining power itself is held in the hands of the prosecution, leaving delays that are caused by the plea bargaining process in the control of the government.[176] Additionally, allowing for exclusions of plea negotiations does not keep with the principle of the Speedy Trial Act as it slows the efficiency of charging cases.[177] As has been noted, when plea negotiations are excluded from the speedy trial clock, the number of calendar days between the arrest and trial can significantly increase.[178]

Lastly, these circuits mistakenly hold that plea negotiations and plea agreements are indistinguishable from the plea process itself.[179] Similar to the other excludable delays, the plea agreement exclusion provided under § 3161(h)(1) involves court proceedings and oversight.[180] Distinguishably, however, the plea negotiation process does not in and of itself require court proceedings or supervision.[181] This characteristic is one of the factors that the minority of circuits have focused on to bring plea negotiations outside of the

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[171] *See* 18 U.S.C. § 3161(1); United States v. Lucky, 569 F.3d 101, 107 (2d Cir. 2009).

[172] *See, e.g.*, United States v. Leftenant, 341 F.3d 338, 345 (4th Cir. 2003); United States v. Van Someren, 118 F.3d 1214, 1218 (8th Cir. 1997); United States v. Fields, 39 F.3d 439, 445 (3d Cir. 1994); United States v. Bowers, 834 F.2d 607, 610 (6th Cir. 1987); United States v. Montoya, 827 F.2d 143, 150 (7th Cir. 1987) (holding in each instance that the delay caused by plea negotiations is excluded from the time limitations of the Speedy Trial Act).

[173] *See* United States v. Rector, 598 F.3d 468, 472 (8th Cir. 2010); United States v. Santiago-Becerril, 130 F.3d 11, 20 (1st Cir. 1997); United States v. Davis, 679 F.2d 845, 849–50 (11th Cir. 1982).

[174] *See, e.g.*, *Leftenant*, 341 F.3d at 344–45.

[175] Frase, *supra* note 42, at 680.

[176] Will Bain, *Plea Bargaining, Legislative Limits, and the Separation of Powers*, 32 COLO. LAW., Mar. 2003, at 63, 66.

[177] *See, e.g.*, United States v. Arellano-Rivera, 244 F.3d 1119, 1123–24 (9th Cir. 2001).

[178] *See* FED. R. CRIM. P. 45(a).

[179] Partridge, *supra* note 40, at 50.

[180] *See* 18 U.S.C. § 3161(1) (1996).

[181] Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1159 (2005) (stating that plea bargaining is quite informal and "necessarily based mostly on hearsay, at which the prosecutor decides what . . . plea to accept").

enumerated exclusions unless otherwise found by the court.[182]

VI. Alternative Action: Congress Must Amend the Speedy Trial Act to Better Effectuate Legislative Intent

A. *Congress Must Effectuate the Original Intent of the Speedy Trial Act*

The United States Constitution guarantees the Sixth Amendment right to a speedy trial; however, Congress enacted the Speedy Trial Act of 1974 to expand the rights of the defendant and incorporate protections for societal interests in having a criminal defendant's trial begin on time.[183] It seems abundantly clear that the Supreme Court has a limited interest in resolving the circuit split, so perhaps Congress is the better outlet for a resolution.[184] Congress enacted the Speedy Trial Act to create uniformity in the application of speedy trial timings, and it necessarily follows that Congress should amend the Speedy Trial Act to solidify this uniformity.[185]

As has been noted above, Congress was well aware of the use of plea bargaining when the Speedy Trial Act was enacted.[186] In fact, national attention was given to the problem of plea bargaining in the 1960s when the President's Crime Commission of then-President Lyndon Johnson issued a report conditionally approving plea bargaining.[187] Subsequently in 1968, the ABA recognized the difficulties with plea bargaining and recommended standards bringing plea bargaining under judicial oversight.[188] In 1974, the same year the Speedy Trial Act was enacted, Chief Justice Burger of the Supreme Court conveyed to Congress proposed amendments to the Federal Rules of Criminal Procedure, including Rule 11, which governs plea bargaining.[189] The notes to the proposed amendment stated that there is increasing acknowledgment of both the inevitability and the propriety of plea agreements.[190] These notes also cited recent Supreme Court cases referring to plea bargaining as "an essential component of the administration of justice," and proper administration of plea agreements

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[182] *See, e.g.*, United States v. McFadden, 689 F. App'x 76, 78 (2d Cir. 2017); United States v. Young, 674 F. App'x 855, 859 (11th Cir. 2016); United States v. Hernandez-Meza, 720 F.3d 760, 763 (9th Cir. 2013); United States v. Duckworth, 51 F.3d 1045, 1045 n.6 (5th Cir. 1995).

[183] *See The Report*, *supra* note 133, at 90.

[184] *Supreme Court Avoids Resolving Circuit Split on Speedy Trial Act by Issuing GVR Following Government Confession of Error*, *supra* note 120.

[185] *See* Winings, *supra* note 132, at 130.

[186] *See* Partridge, *supra* note 40, at 11.

[187] *See* Partridge, *supra* note 40, at 59.

[188] *See generally* Partridge, *supra* note 40.

[189] Partridge, *supra* note 40.

[190] Partridge, *supra* note 40.

should be encouraged, making frequent reference to the ABA Standards.[191]

If the Supreme Court remains reluctant to resolve the circuit split on the excludability of plea negotiations within the speedy trial calculus, Congress must then step in and uphold the legislative intent of the Speedy Trial Act.[192] The legislative history makes clear that the Speedy Trial Act is intended to prevent a lengthy criminal process.[193] Even the 1974 Senate Judiciary Committee reasoned that the enumerated provisions under the Speedy Trial Act were to assure "that the time limits do not fall too harshly upon either the defendant or the government."[194] It is clear that Congress' intention was to set a distinct balance between various trial processes that would toll the *clock* for the defendant and the government.[195] Thus, because the plea negotiation process is not explicitly mentioned in the enumerated provisions, it necessarily follows that including plea negotiations as an excludable delay would counter the balance created by the various requirements.[196] By excluding the plea negotiation process itself within the enumerated-excludable provisions, it is unmistakable that Congress intended this process to not disturb the speedy trial calculus.[197]

B. *Societal Interests are Best Preserved by Excluding Plea Negotiations from the Speedy Trial Calculus*

Courts have consistently noted that there are societal interests in the right to a speedy trial that exist separate and distinct from those of the accused.[198] Specifically, society benefits from the judicial economy preserved by a speedy trial, freeing up the courts for continued prosecution of cases.[199] This interest can be furthered by allowing the exclusion of plea negotiations from the speedy trial calculus.[200] When plea negotiations are excluded from

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[191] Partridge, *supra* note 40.

[192] *See* White's Cert. Petition, *supra* note 95, at 7.

[193] *See* White's Cert. Petition, *supra* note 95, at 7.

[194] Partridge, *supra* note 40, at 104 (noting that the work of the committee was to provide assistance to federal judges in fulfilling their responsibilities under the Speedy Trial Act of 1974).

[195] Partridge, *supra* note 40, at 59.

[196] *See* White's Cert. Petition, *supra* note 95, at 7.

[197] *See* White's Cert. Petition, *supra* note 95, at 8.

[198] People v. Blakley, 313 N.E.2d 763, 765 (N.Y. 1974) (noting that the societal interest in the right to a speedy trial is separate, and "at times in opposition," to the rights of the criminally accused).

[199] *See* Suzanne Isaacson, *Speedy Trial Act of 1974—Dismissal Sanction for Noncompliance with the Act: Defining the Range of District Courts' Discretion to Dismiss Cases with Prejudice*, 79 J. CRIM. L. & CRIMINOLOGY 997, 1011 (1988) (noting the competing interests of protecting the defendant's right to a speedy trial and society's interest in controlling crime).

[200] *See id.*

the speedy trial calculus, a defendant's trial clock figuratively keeps ticking for the quick resolution of the case.[201] Senator Ervin, commenting on the Speedy Trial Act, noted that the unfortunate result of the incredible caseloads of the courts is the reliance on plea bargaining.[202] It is clear that supporters of the Speedy Trial Act anticipated benefits for both criminal defendants, by reducing the reliance on plea bargaining, as well as society, by preventing significant delays in the criminal process.[203] By allowing plea negotiations to continue the speedy trial clock, there are fewer calendar delays between a defendant's arrest and the ultimate resolution of the case.[204] This directly supports the societal interest that Congress intended to secure and therefore supports a logical resolution of the circuit split.[205]

CONCLUSION

The right to a speedy trial protects criminal defendants and society alike. Criminal defendants enjoy the important safeguards of preventing undue and oppressive incarceration before trial, minimizing anxiety and concern accompanying public accusation, and limiting the possible delays that could impair the ability of the accused to defend themselves. Society enjoys the avoidance of a number of social troubles that can be traced to court congestion and delay.

Congress enacted the Speedy Trial Act to ensure all criminal defendants receive a speedy trial as protected by the Sixth Amendment. Where there is a split in the interpretation of key provisions of the Speedy Trial Act, however, defendants are left wondering as to when they will be charged or indicted or how the Speedy Trial Act will apply to their specific situation. The legislative intent to treat everyone under the Speedy Trial Act with uniformity and consistency is essentially ineffective where the various circuits have created a disparate treatment for defendants in their respective jurisdictions.

The circuit split on the excludability of plea negotiations in the speedy trial calculus should be resolved by disallowing exclusions for plea negotiations, thereby forcing prosecutors to offer fair and just plea deals without tolling the defendant's speedy trial right. The right to a speedy trial should not be delayed by the injustices of plea bargaining, and there should be greater efficiency in the presentation of potential bargaining.

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[201] *See* Partridge, *supra* note 40.

[202] Partridge, *supra* note 40, at 16; *see S. Rep. on Public Law 96-43, supra* note 34; Simon, *supra* note 103.

[203] *See* Partridge, *supra* note 40.

[204] *See* FED. R. CRIM. P. 45(a).

[205] *See The Report*, *supra* note 133, at 89.

Additionally, where the prosecutor holds the arrangement of plea agreements, effectively exempting them from the clock could result in the strategic use of plea bargaining to reserve the time prescribed within the Speedy Trial Act. This circumventing of a constitutional right needs to be closed.

Ultimately, the Supreme Court is the correct outlet for a uniform resolve of this circuit split. The Court, however, missed a perfect opportunity to resolve the split when hearing *United States v. White*. If the Court does not settle this often-debated issue, Congress must step in and redefine the parameters of the Speedy Trial Act, therefore establishing the correct interpretation of the enumerated exclusions within the Speedy Trial Act.

Looking back at John's hypothetical case, noted above, the majority of circuit courts would likely exclude the timeframe of plea negotiations from his speedy trial calculus, causing him to spend a lengthy amount of time in jail as he watches his possible defenses fade away. However, with a resolution consistent with effectuating the original intent of the Speedy Trial Act, John's right to a speedy trial will be preserved. The plea negotiations in his case will not toll his speedy trial calculus, causing the prosecution to avoid such delays with honest and fair plea offers. Further, society's interest will be advanced with a quick disposition of John's trial in fewer calendar days. Of course, if more time is needed, other exceptions can be applied through the enumerated list provided in the Speedy Trial Act. With this resolution, John will not be left wondering whether the *clock stops here*. Until then, however, many in John's position will be left waiting in a cold jailhouse cell. As their speedy trial continues to be delayed, so does their access to justice, livelihood, and a possible defense.

Time's Up[1]: Eliminating the Statute of Limitations for Rape in Massachusetts

Kileigh Stranahan [*]

INTRODUCTION[2]

On August 29, 2005, Jenny Wendt, a nursing student at Indiana University, went on a date with her teaching assistant, Bart Bareither.[3] At the conclusion of their date, she agreed to go to his apartment to watch a movie.[4] There, Bareither brutally raped Wendt.[5] After the attack, Wendt spent several days in bed suffering from "physical, mental and emotional pain," but told no one what had occurred.[6] After a period of time, Wendt gathered the courage to tell two of her closest friends and her doctor, but she never reported the crime to the police.[7] In 2014, Bareither, on his own accord, walked into the County Sheriff's Department and confessed to raping Jenny Wendt.[8] Although seemingly a victory for Wendt, the state of Indiana could not do anything because the statute of limitations for rape had passed.[9]

Cindy Hillebrand was raped in Topeka, Kansas, in 1985.[10] A decade

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[1] *About*, TIME'S UP, https://perma.cc/KJ6N-2GXW (last visited Aug. 13, 2021).

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[2] For ease of reference, this Note will primarily use she/her pronouns to refer to sexual assault victims. In doing so, it by no means attempts to suggest that men and gender-neutral persons are not also victims of sex crimes.

[3] Bill McCleery & Tim Evans, *Rape Victim Recounts Her Pain, Fear*, INDYSTAR (Feb. 15, 2014, 9:57 PM ET), https://perma.cc/N98R-UUUQ.

[4] *Id.*

[5] *Id.* (describing in detail the violent attack on the victim).

[6] *Id.*

[7] *Id.*

[8] Tim Evans, *When Rape Is Not a Crime: Indiana Case Spotlights Statute of Limitations*, INDYSTAR (Feb. 15, 2014, 9:47 PM ET), https://perma.cc/38Q4-52B9.

[9] *Id.*

[10] Diana Reese, *New Kansas Law Ends Statute of Limitations for Rape Cases*, WASH. POST (Apr. 2, 2013), https://perma.cc/KDQ8-2APY.

later, Hillebrand's rapist, Joel Russel, was identified by DNA evidence, collected in connection with another sex crime.[11] At the time of his identification, Russel was serving a separate sentence, but would never (and could never) be punished for the attack of Hillebrand because the statute of limitations for rape in Kansas had expired.[12]

Lisa Flotlin was seventeen years old when she became close with her high school Spanish teacher.13 After inviting Flotlin to his home, her Spanish teacher "pushed" sexual acts on her.14 At the time of the occurrence, Flotlin did not recognize that she was a victim of sexual abuse.15 Eight years later, when Flotlin was twenty-five years old and able to understand what happened to her, she decided to press charges against her former Spanish teacher.16 She quickly learned, however, that she could not.17 Because Flotlin was over the age of fifteen years old when she was sexually assaulted, the statute of limitations had elapsed and prevented the prosecution of her attacker.[18]

As time and society changes, so too must the law.[19] As the law currently stands in Massachusetts, a victim of rape must put her own mental, emotional, and physical trauma aside to "beat the clock" if she wants to see her attacker brought to justice.[20] This Note will address the need to eliminate the statute of limitations for rape in the state of Massachusetts. Part I will discuss the origin of statutes of limitations and their designated purpose. It will introduce the history of rape law, its evolution throughout time, and the conversation surrounding rape and sexual assault today. Further, Part I will discuss the statutes of limitations for rape across the United States, the recent changes that have been made, and the current statute of limitations for rape in Massachusetts. Part II will introduce the pervasive issue of underreported rapes in the United States. Part III will argue that Massachusetts is unique because of its coveted higher education system. As such, the state's legislature should step in and protect the thousands of individuals who travel to Massachusetts seeking higher education. American colleges have a

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[11] *See* Evans, *supra* note 8.

[12] *See* Evans, *supra* note 8.

[13] Lynsi Burton, *'We Need to Catch Up to the Times': Series of Sexual Assault Reforms Introduced in Wash. Legislature,* SEATTLEPI (Jan. 24, 2019), https://perma.cc/258S-8UJC.

[14] *Id.*

[15] *See id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See generally* Roscoe Pound, *Critique: W. Friedmann's "Law in a Changing Society,"* 46 MINN. L. REV. 117 (1961) (arguing that law must be stable but cannot stand still).

[20] *See* MASS. GEN. LAWS ch. 277, § 63 (West 2012); *see also* Emily Shugerman, *Here's How Many Years You Have to Report a Rape in All 50 States,* REVELIST (Feb. 4, 2019, 4:18 PM), https://perma.cc/Q4EZ-PJ7E.

significant and systemic rape problem, and the legislature can aid these victims by eliminating the statute of limitations for rape. Part IV will argue that the rationale for the original imposition of statutes of limitation no longer holds weight in our growing and technologically advanced society.

I. Background

A. *Origin and Purpose of Statutes of Limitations*

Statutes of limitations are laws that restrict the time in which legal proceedings may be brought.[21] Typically, statutes of limitations are fixed to a period of time after the occurrence of the events that gave rise to the specific cause of action.[22] As such, the cause of action dictates the statute of limitations.[23] Limitations on actions were established first in early Roman law, which restricted the time in which a person could recover property.[24] In England, limitations on actions to recover property were not instituted until the sixteenth century, and those on personal actions, until the seventeenth.[25] Other Continental codes have modeled their own civil statutes of limitations after these laws.[26] The civil actions are often limited in periods by general statutes, which classify various actions into broad groups.[27] The periods prescribed are generally arbitrary and are formed by an estimate of time for which reliable evidence of the respective transactions may be expected to survive.[28]

For criminal prosecutions, however, countries vary in time limits.[29] Presently, in England, for example, there are no general statutes of limitations for crimes.[30] Although crimes that are created by statute often have a limit of time for prosecution, "the common law felon must depend on the forbearance of the authorities for freedom from prosecution for a crime long past."[31] In contrast, many Continental countries impose a

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[21] Editors of Encyclopedia Britannica, *Statute of Limitations*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/9TZQ-HNFT (last visited Aug. 13, 2021).

[22] *Id.*; *Statute of Limitations*, THE LAW DICTIONARY, https://perma.cc/535Y-H2NL (last visited Aug. 13, 2021).

[23] *See* Editors of Encyclopedia Britannica, *supra* note 21.

[24] *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950) [hereinafter *Developments in the Law*]; Editors of Encyclopedia Britannica, *supra* note 21.

[25] Editors of Encyclopedia Britannica, *supra* note 21.

[26] *See Developments in the Law*, *supra* note 24, at 1178 (discussing the impact of Roman law on modern Continental codes).

[27] Editors of Encyclopedia Britannica, *supra* note 21.

[28] Editors of Encyclopedia Britannica, *supra* note 21.

[29] *See Developments in the Law*, *supra* note 24, at 1179.

[30] *Developments in the Law*, *supra* note 24, at 1179.

[31] *Developments in the Law*, *supra* note 24, at 1179.

limitation on the prosecution of all crimes.[32] However, in comparison to the United States, the Continental time limits are often much longer and provide more flexibility.[33]

The United States enacted general statutes limiting the prosecution for most crimes fairly early on in its existence.[34] The primary consideration for such legislation is undoubtedly fairness to the defendant.[35] These statutes have long been justified as "indispensable protection" of the innocent and the wrongly accused.[36] Arguably, one ought not to be forced to defend oneself when "evidence has been lost, memories have faded, and witnesses have disappeared."[37] Thus, statutes of limitations help ensure that trials are based on relatively "'fresh' rather than old . . . evidence and information, thereby facilitating the jury's fact-finding responsibilities in their search for 'the truth.'"[38] When juries are forced to rely on dated evidence, this typically prejudices the defendant, rather than the prosecution.[39] Given that juries often do not fully understand the prosecution's burden and may decide a case based on emotion or gut-feeling,[40] it is possible that jurors will convict innocent defendants because of their inability to exonerate themselves.[41] For example, if defendants have no idea where they were, what they were doing, or who they were with on specific nights in question, this may raise unwarranted suspicion, when in reality it is merely a result of innocent memory diminishment.[42]

Another argued purpose for statutes of limitation is that "[t]here comes a time when [a suspect] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations."[43] Reinforcing the notion that these statutes are for the benefit of the defendant, many argue that, at some point, suspects should no longer have to answer for old

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[32] *Developments in the Law*, *supra* note 24, at 1179.

[33] *Developments in the Law*, *supra* note 24, at 1179; *see* Editors of Encyclopedia Britannica, *supra* note 21.

[34] *Developments in the Law*, *supra* note 24, at 1179.

[35] *Developments in the Law*, *supra* note 24, at 1185.

[36] *See* Gerald D. Robin & Richard H. Anson, *Is Time Running Out on Criminal Statutes of Limitations?*, 47 CRIM. L. BULL., no. 1, Winter 2011; *Developments in the Law*, *supra* note 24, at 1185.

[37] *Developments in the Law*, *supra* note 24, at 1185 (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)).

[38] Robin & Anson, *supra* note 36, at 1.

[39] *See* Robin & Anson, *supra* note 36, at 1.

[40] *See* Bobby Greene, Comment, *Reasonable Doubt: Is It Defined by Whatever Is at the Top of the Google Search Page?*, 50 J. MARSHALL L. REV. 933, 933–34 (2017); Timothy P. O'Neill, *Instructing Illinois Juries on the Definition of "Reasonable Doubt": The Need for Reform*, 27 LOY. U. CHI. L.J. 921, 922 (1996).

[41] *See* Robin & Anson, *supra* note 36, at 1.

[42] *See* Robin & Anson, *supra* note 36, at 1.

[43] *Developments in the Law*, *supra* note 24, at 1185.

crimes.[44] Instead, they "should be able to rest easy ('repose') and get on with their lives, without worrying about criminal charges indefinitely hanging over their heads."[45] The Supreme Court of the United States has endorsed this justification when it stated that "criminal limitations statutes are to be liberally interpreted in favor of repose."[46] The Court further explained that repose is favored even though it will almost always permit a "rogue" to escape.[47]

Several other justifications for the creation of limiting statutes are not quite as defendant centric.[48] One argument is that these statutes "free up the courts."[49] If "inconsequential and tenuous claims" cannot be brought, then courts will be more effective because they will not be required to bear the burden of adjudicating such claims.[50] Further, it has been said that the existence of statutes of limitations forces police officers to do their jobs more expediently.[51] Arguably, there is a greater incentive to pursue criminal complaints with some urgency when law enforcement officials know that if they do not, the offenders will escape justice.[52] This position assumes, however, that police officers and law enforcement consider the statute of limitations when investigating reported crimes.[53]Although the weakest of the arguments in favor of statutes of limitations, it theoretically reminds police that "justice delayed is justice denied."[54] If the police do not do their jobs quickly, they will lose the opportunity to do their jobs at all.[55]

B. *Sexual Assault and Rape in the United States*

1. Anglo-American History of Rape

In seventeenth and eighteenth century England, rape was defined as some variation of "carnal knowledge of a woman forcibly and against her will."[56] Rape not only required sexual conduct that was non-consensual, but

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[44] *See Developments in the Law*, *supra* note 24, at 1185; *see also* Robin & Anson, *supra* note 36, at 1.

[45] Robin & Anson, *supra* note 36, at 1.

[46] Toussie v. United States, 397 U.S. 112, 115 (1970); Robin & Anson, *supra* note 36, at 2.

[47] *Toussie*, 397 U.S. at 123.

[48] *See* Robin & Anson, *supra* note 36, at 3; *Developments in the Law*, *supra* note 24, at 1185–86.

[49] *See Developments in the Law*, *supra* note 24, at 1185.

[50] *Developments in the Law*, *supra* note 24, at 1185.

[51] Robin & Anson, *supra* note 36, at 3.

[52] Robin & Anson, *supra* note 36, at 3.

[53] *See* Robin & Anson, *supra* note 36, at 3.

[54] Robin & Anson, *supra* note 36, at 3.

[55] *See* Robin & Anson, *supra* note 36, at 3.

[56] Thomas Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J.

there also needed to be a presence of actual physical force.[57] During this time period, the requirements to bring suit were also rather stringent.[58] Rape victims, most commonly women, had to make a "fresh discovery and pursuit of the offense and offender."[59] If not, a victim's suit was presumptively malicious, and would be faced with criticism and skepticism.[60] Additionally, if an alleged victim did not possess any visible injuries as proof of a struggle, her testimony was likely not to be credible.[61] An illustrative example is a Massachusetts case from the seventeenth century.[62] A woman named Elizabeth Emerson accused a man of raping her.[63] However, when the public discovered that she had not scratched or kicked him, and further, she became pregnant, her suit was discredited and dismissed.[64] Society believed that conception could not occur as a result of rape, and that rape victims should struggle vigorously and call out for help.[65]

These notions stemmed from the belief that rape was not a crime against a woman, but against her chastity.[66] A woman's chastity was believed to be her worth.[67] According to society, a woman must vigorously struggle with her rapist because she must protect her chastity with all of her power, at any cost.[68] Because of this, many acts that society deems rape today were not then considered rape because the acts had no negative implications for a woman's purity.[69] For example, a woman could not be raped by her husband because "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[70] The same rationale applied to an unmarried woman who lived in the same quarters as her alleged rapist.[71] Further, if a woman consented after-the-fact, this was likely to be deemed sufficient consent.[72]

GENDER L. & SOC. POL'Y 73, 85–88 (2010) (discussing prominent jurists which all define rape similarly).

[57] *Id.* at 85 (stating that threat of force was insufficient).

[58] *See id.* at 87–89.

[59] *Id.* at 87.

[60] *See* SIR MATTHEW HALE, HISTORIA PLACITORUM CORONÆ 632 (1847 ed.) (1736).

[61] *See id.* at 633.

[62] Mitchell, *supra* note 56, at 90.

[63] Mitchell, *supra* note 56, at 90.

[64] Mitchell, *supra* note 56, at 90.

[65] Mitchell, *supra* note 56, at 90.

[66] *See* Mitchell, *supra* note 56, at 77.

[67] *See* Mitchell, *supra* note 56, at 85.

[68] *See* Mitchell, *supra* note 56, at 85.

[69] *See* Mitchell, *supra* note 56, at 85.

[70] *See generally* HALE, *supra* note 60, at 628 (comparing treason to marriage).

[71] Mitchell, *supra* note 56, at 86.

[72] Mitchell, *supra* note 56, at 86–87.

2. Second-Wave Feminism and Its Impact on Legal and Societal Perceptions of Rape

It was not until the 1970s, as a result of second-wave feminism, that there was a drastic shift in thinking about rape and the injury that it caused.[73] Instead of being thought of as solely an injury to chastity, society instead began to understand the crime as an affront to autonomy.[74] Society began to understand the concept that a woman has the power to choose when, where, and with whom she will be intimate, and stripping a woman of this power is a grievous injury.[75] Because of this new found understanding of gender and power, rape shield laws were implemented in the United States.[76] In the late 1970s, these laws were enacted to protect victims from being re-victimized by their alleged rapists at trial.[77] Prior to the creation of these laws, defendants were allowed to present evidence of victims' sexual activity to the jury.[78] The accused rapists often mounted character attacks and painted their victims as immoral and unchaste.[79] "If she was impure—how could she be trusted?"[80] When chastity no longer became the focus of the crime of rape, it logically followed that it should no longer be the focus of a rape trial.[81]

However, rape was still considered a crime that was committed by a stranger in a dark alley, not by someone you knew and trusted.[82] Often when rape *was* committed by a spouse, friend, acquaintance, or relative it was kept silent, uncharged, and often not even thought of as rape.[83] This likely

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[73] *See* Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 686–89 (2001).

[74] *See id.* at 686; *see also* Mitchell, *supra* note 56, at 86.

[75] *See* Rodes, *supra* note 73, at 686.

[76] Denise Roman, *Under the Rape Shield: Constitutional and Feminist Critiques of Rape Shield Laws*, UCLA CTR. FOR THE STUDY OF WOMEN 38, 38 (Apr. 1, 2011), https://perma.cc/27LU-L5VM.

[77] *See Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO (Nov. 8, 2013), https://perma.cc/AG28-MHT2 [hereinafter *Rape Shield Laws*]; *see also* Mitchell, *supra* note 56, at 100.

[78] *Rape Shield Laws*, *supra* note 77.

[79] *Rape Shield Laws*, *supra* note 77.

[80] *Rape Shield Laws*, *supra* note 77.

[81] *See Rape Shield Laws*, *supra* note 77.

[82] *See* Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, THE CUT (July 26, 2015, 9:00 PM), https://perma.cc/H97P-UWS8 [hereinafter Malone & Demme, *Stories*] ("In 1975, it wasn't an issue that was even discussed. Rape was being beaten up in a park. I understood at the time that it was wrong, but I just internalized it and dealt with it and pushed it down, and it resided in a very private place.").

[83] *See* Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen: Patricia Leary Steuer*, THE CUT (July 26, 2015, 9:00 PM), https://perma.cc/8WNC-QJ9K ("[I]n the late '70s, women didn't challenge powerful men.").

stemmed from the notion that if a woman knew someone, it was "more likely" that she consented at the time but simply regretted it after.[84] Change was effected when the marital exemption to rape was finally foreclosed in the 1980s.[85] This gave women the ability to put a name on sexual invasions at the hands of their husbands and gave them an avenue to seek assistance and retribution.[86] But, just because wives were given this ability does not mean that they frequently used it.[87] In fact, many women had difficulty with calling sexual abuse by their husbands the word "rape."[88] Further, many were afraid to report any incident due to their financial dependence on their husbands.[89] Speaking up about rape and sexual violence has long been stigmatized and suppressed.[90]

3. The Modern Era

Due to the rise of various movements and several famously offensive rape cases, the conversation surrounding rape and sexual assault has become more fluid and open.[91] In 2006, Tarana Burke founded the "me too" movement to help survivors of sexual violence find "pathways to healing."[92] A little over ten years later, however, the phrase took off on social media when actress Alyssa Milano posted a tweet stating "[i]f you've been sexually harassed or assaulted write 'me too' as a reply to this tweet," in response to the sexual assault accusations against Harvey Weinstein.[93] Milano received

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[84] *See* Mitchell, *supra* note 56, at 77; *see also* Clifford Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 715 (1995).

[85] Roman, *supra* note 76, at 39. *See generally* State v. Smith, 85 N.J. 193 (1981) (discussing at length the legal history of the marital exemption).

[86] *See* Roman, *supra* note 76, at 39. *See generally* Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R.4TH 105, § 2(a) (1983).

[87] *Marital Rape: The Sexual Assault No One Talks About*, SAFE HAVEN (Oct. 20, 2017), https://perma.cc/VC45-TYWH [hereinafter *Marital Rape*]. *See generally* Walsh, *supra* note 86, § 2(a).

[88] *See Marital Rape*, *supra* note 87.

[89] *See, e.g.*, *Marital Rape*, *supra* note 87.

[90] *See* Christine Ro, *Why Most Rape Victims Never Acknowledge What Happened*, BBC NEWS (Nov. 5, 2018), https://perma.cc/XP8D-9FM2.

[91] *See, e.g.*, Tarana Burke, *History & Inception*, ME TOO, https://perma.cc/DER9-NYCR (last visited Aug. 13, 2021); TIME'S UP, *supra* note 1; *see also* People v. Turner, No. B1577162, 2016 WL 3440260, at *1 (Cal. Super. Ct. Mar. 9, 2016); Graham Bowley, *Bill Cosby Assault Case: A Timeline*, N.Y. TIMES (Apr. 25, 2018), https://perma.cc/W89M-5BNG; Christine Hauser & Maggie Astor, *The Larry Nassar Case: What Happened and How the Fallout Is Spreading*, N.Y. TIMES (Jan. 25, 2018), https://perma.cc/7WWN-B3MZ.

[92] *See* Burke, *supra* note 91.

[93] Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW (July 31, 2018), https://perma.cc/5DSD-ELUJ; Nadja Sayej, *Alyssa Milano on the #MeToo Movement:*

55,000 replies and #MeToo became the number one trending hashtag on Twitter.[94] Since the 2017 tweet, #MeToo has made its way across the globe and has provided women with a voice to speak out about their stories and history with rape and sexual violence.[95] Additionally, the #MeToo movement has impacted laws in the United States.[96] For example, some states placed restrictions on non-disclosure agreements in sexual assault and harassment cases.[97] The #MeToo movement has also generated other movements.[98] For example, the "Time's Up" movement stemmed from #MeToo, but has a separate and more specific goal—to ensure women in the workplace are free from discrimination, sexual harassment, and abuse.[99]

In addition to these movements, some recent and particularly shocking rape cases have sparked conversation and increased the reporting of rape and sexual assault.[100] In 2016, Brock Turner's case gained national attention, specifically because of his light sentence.[101] Turner was accused of raping an unconscious twenty-two year old woman behind a dumpster.[102] He was convicted of three charges of felony sexual assault, but not rape.[103] Despite this, the news headlines often described him as "Stanford Swimmer," and although he could have been sentenced to up to fourteen years in prison, he was only sentenced to six months.[104] This fueled outrage and discussion.[105] Because of the Turner case, California lawmakers decided to expand the definition of rape in the state, so that acts like Brock Turner's would be

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'We're Not Going to Stand for it Any More,' THE GUARDIAN (Dec. 1, 2017, 7:00 EST), https://perma.cc/2W5K-492C; *see* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://perma.cc/U66D-99CP.

[94] *See* Garcia, *supra* note 93; Sayej, *supra* note 93.

[95] *See* Beitsch, *supra* note 93.

[96] *See* Beitsch, *supra* note 93.

[97] Beitsch, *supra* note 93.

[98] Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (Mar. 8, 2018, 6:00 AM EST), https://perma.cc/8ZKG-C3V3.

[99] *Safe, Fair, and Dignified Work for Women of All Kinds.*, TIME'S UP, https://perma.cc/NPW4-TTZM (last visited Aug. 14, 2021).

[100] *See, e.g.*, Bowley, *supra* note 91; Hauser & Astor, *supra* note 91; *see also* People v. Turner, H043709, 2018 WL 3751731 (Cal. App. 6th Dist. Aug. 8, 2018).

[101] Kayla Lombardo, *How a Rape Case Involving a Stanford Swimmer Became National News*, SPORTS ILLUSTRATED (June 9, 2016), https://perma.cc/2VAN-6VJH.

[102] *Id.*

[103] *Id.*

[104] Naomi LaChance, *Media Continues to Refer to Brock Turner as a "Stanford Swimmer" Rather Than a Rapist*, THE INTERCEPT (Sept. 2, 2016, 1:45 PM), https://perma.cc/69JA-UDL3; *see, e.g.*, Veronica Mocha & Brittny Mejia, *Stanford Swimmer Convicted of Sex Assault Lied About Never Partying, Documents Show*, L.A. TIMES (June 10, 2016, 6:50 PM PT), https://perma.cc/J453-WFX8.

[105] *See* Callie Marie Rennison, *I'm the Professor Who Made Brock Turner the "Textbook Definition" of a Rapist*, VOX (Nov. 17, 2017, 8:30 AM EST), https://perma.cc/HH2P-LTTA.

included in the definition.[106]

Another famous case is Larry Nassar's.[107] He was sentenced to 175 years in prison for the sexual abuse of over 156 women.[108] Nassar, an Olympic doctor, used his position to take advantage of the young gymnasts he was assigned to care for.[109] Many of his victims came forward with allegations against Nassar long before any investigation was undertaken, but were simply told to "be quiet" or were not believed.[110] In response to Nassar's case, Michigan enacted two laws, with over twenty more in the works.[111] The first extended the civil statute of limitations and "gave childhood sex abuse victims more time to sue, including by creating a 90-day window for Nassar victims to do so retroactively."[112] The second extended the criminal statute of limitations and "gave prosecutors 15 years or until a victim's 28th birthday to file charges in second- and third-degree sexual conduct cases if the victim was younger than 18."[113]

Lastly, the case that really shocked the country and enabled over fifty women to speak out about what had happened to them was the case against Bill Cosby.[114] In 2018, Cosby, who was coined as "America's Dad," was sentenced to three to ten years in state prison for drugging and sexually assaulting a woman fourteen years earlier.[115] Although he was only prosecuted for this one crime, dozens of other victims were able to sigh in relief knowing he was finally brought to justice.[116] Most of these women, who only came forward to support those who already had, legally could not bring charges against Cosby.[117] This was because the statute of limitations

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[106] *Id.*

[107] Roland Hughes & Rajini Vaidyanathan, *Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC NEWS (Jan. 25, 2018), https://perma.cc/8QXY-NL7C.

[108] *Id.*

[109] *Id.*

[110] *See* Caitlin Flynn, *Larry Nassar's Time Is Up—But Why Did It Take Over 150 Victims to Finally Bring Him to Justice?*, HELLO GIGGLES, https://perma.cc/EG3Z-6LK3 (last updated Jan. 25, 2018, 12:53 PM); Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40-175 Years for Sex Crimes*, WASH. POST (Jan. 24, 2018), https://perma.cc/BKF6-CNLC.

[111] David Eggert, *More Larry Nassar-Inspired Bills Headed to Michigan Governor*, LANSING ST. J. (Dec. 4, 2018, 4:02 PM ET), https://perma.cc/54D5-BJ4B.

[112] *Id.*

[113] *Id.*

[114] Bowley, *supra* note 91.

[115] Bowley, *supra* note 91.

[116] *See* Bowley, *supra* note 91 ("During the trial, Ms. Constand became something of a proxy for other women, more than 50, who have accused Mr. Cosby of similar sexual misconduct.").

[117] *See* Malone & Demme, *Stories*, *supra* note 82 ("I came forward to offer my support as a witness. I knew my statute of limitations had run out. When only one or two women came out, a couple of years ago, they were ridiculed more.").

had passed.[118] As such, Cosby was only able to be sentenced to three to ten years, as opposed to the rest of his life, like Nassar.[119]

C. *Changes in Statute of Limitations for Rape and Other Sex Crimes Across the United States*

As a direct result of Bill Cosby's case, California changed its statute of limitations.[120] Before the Cosby accusations, the statute of limitations for rape and other sex crimes in California was just ten years.[121] However, as of January 1, 2019, California no longer has a statute of limitations for felony sex crimes, including rape.[122] In recent years, many other states either have altered, or are in the process of altering, their statute of limitations for felony sex crimes as well.[123] As stated above, Michigan changed its statute of limitations in response to the Larry Nassar case.[124] Although Michigan has not had a statute of limitations for criminal sexual conduct in the first degree for over a decade,[125] the new law altered the statute of limitations for second- and third-degree sexual assault cases.[126]

Pennsylvania lawmakers are also currently attempting to eliminate the statute of limitations for child sex abuse cases.[127] After the release of a grand jury report into "[d]iocesan child sexual abuse that claimed more than 1,000 child victims by more than 300 church officials," the Pennsylvania legislature vowed to react.[128] They did so by creating Senate Bill 261, which would "eliminate the statute of limitations [for the] criminal prosecution of child sex crimes and would allow victims until the age of 50 to sue in civil court."[129]

D. *Massachusetts' Statute of Limitations for Rape*

The statute of limitations for rape in Massachusetts is currently fifteen years, and it begins running at the commission of the offense.[130] However, if

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[118] *See* Bowley, *supra* note 91.

[119] *See* Bowley, *supra* note 91.

[120] Eric Levenson, *California Ended Its Statute of Limitations on Rape After Bill Cosby. It May Not Apply to the Golden State Killer*, CNN (Apr. 26, 2018, 4:51 PM EDT), https://perma.cc/S4YT-R8J3.

[121] *Id.*

[122] CAL. PENAL CODE § 799 (West 2020).

[123] *See, e.g.*, Eggert, *supra* note 111.

[124] Eggert, *supra* note 111.

[125] *See* MICH. COMP. LAWS § 767.24 (2018).

[126] Eggert, *supra* note 111.

[127] Brent Addleman, *Local Lawmakers Support Bill That Would Extend Statute of Limitations for Child Sexual Abuse Victims*, NEW CASTLE NEWS (Aug. 15, 2018), https://perma.cc/94WQ-2DC3.

[128] *Id.*

[129] *Id.*

[130] MASS. GEN. LAWS ch. 277, § 63 (West 2012).

the victim of the offense is under the age of sixteen at the time of its occurrence, the statute of limitations does not begin to run until the victim reaches the age of sixteen.[131] To be clear, this means that if a victim is raped at the age of fifteen, the prosecution must indict the defendant before the victim is thirty-one in order to remain within the confines of the statute of limitations.[132] Further, an indictment or a complaint for the sexual abuse or rape of a child, or conspiracy to commit thereto, may be discovered and filed at any time.[133] However, if filed more than twenty-seven years after the commission of the offense, it must be supported by "independent evidence that corroborates the victim's allegations."[134]

II. Rape Is Pervasive and the Most Underreported Crime in the United States

In the United States, one in five women and one in seventy-one men will be raped at some point in their lifetime.[135] And yet, over 63% of sexual assaults go unreported.[136] These statistics, taken from the National Sexual Violence Resource Center, while seemingly high, are likely not giving the full picture.[137] Because these numbers are often obtained by the U.S. Census Bureau when it conducts in-house interviews, it is highly unlikely that every individual is entirely forthcoming.[138] If an individual has not reported the event to the police, the likelihood that the person will discuss it with the Census Bureau is very low.[139]

The lack of reporting in this country may be attributed to many different factors.[140] The reasons for not reporting can depend upon the victim, the victim's personality, how the victim copes with trauma, and the nature of the event.[141] However, simply because these crimes are not reported does not mean that the problem is declining.[142] Rather, there is no completely accurate way to discover what the rate of sexual assault and rape is in the United States because of the high number of unreported events.[143]

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131 *Id.*

132 *See id.*

133 *Id.*

134 *Id.*

135 *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://perma.cc/P5XF-GK3Y (last visited Aug. 14, 2021).

136 *Id.*

137 *See* Emily Thomas, *Rape Is Grossly Underreported in the U.S., Study Finds*, HUFF. POST (Nov. 21, 2013, 11:07 AM EST), https://perma.cc/QM6X-N82X.

138 *Id.*

139 *See id.*

140 *See infra* Part III(B).

141 *See* Ro, *supra* note 90.

142 Thomas, *supra* note 137.

143 *See* Thomas, *supra* note 137.

What is quantifiably minimal, however, is the number of false accusations of rape and sexual assault.[144] Contrary to popular belief, only between 2% and 10% of reported sexual assaults and rapes are the result of false accusations.[145] For example, "a study of 136 sexual assault cases in Boston found a 5.9% rate of false reports."[146] Rape is an epidemic in America.[147] It is not something individuals invent in their heads or a "figment of some collective feminist man-hating agenda."[148] Rape is a problem in this country; it affects more Americans than not, whether directly or indirectly, and something needs to be done.[149]

ANALYSIS

III. The Massachusetts Legislature Should Step in and Protect Students Seeking Higher Education in the State

A. *Massachusetts' Higher Education System*

Several colleges in Massachusetts are renowned and well-respected all over the world.[150] The state "boasts the oldest and arguably most prestigious college[s] in the country."[151] In 2019, Forbes magazine ranked the colleges throughout the United States, and Harvard University—a Massachusetts school—topped the list at number one.[152] Further, seven more Massachusetts colleges ranked within the list's top fifty in the country.[153] Because of this, students from all over the world travel to the state to receive an education from one of the 121 Massachusetts colleges and universities.[154]

Specifically, over 340,000 students attend college in Massachusetts.[155] Approximately 55,000 of those students are individuals who travelled from

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[144] Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), https://perma.cc/66GK-PG2A.

[145] *Id.*

[146] *Statistics About Sexual Violence*, *supra* note 135.

[147] Victoria A. Brownworth, *America Has a Rape Problem*, HUFF. POST (June 18, 2014, 4:30 PM ET), https://perma.cc/6GSG-DGT2.

[148] *Id.*

[149] *Id.*

[150] *See America's Top Colleges 2019*, FORBES (Aug. 15, 2019, 7:00 AM), https://perma.cc/99MM-RT5Z.

[151] *Study in Massachusetts*, INT'L STUDENT, https://perma.cc/845Y-GTB6 (last visited Aug. 14, 2021).

[152] *America's Top Colleges 2019*, *supra* note 150.

[153] *America's Top Colleges 2019*, *supra* note 150.

[154] *See Best Colleges in Massachusetts*, COLL. CHOICE, https://perma.cc/BM9L-PUW6 (last updated June 9, 2021).

[155] *Best Massachusetts Colleges*, COLL. SIMPLY, https://perma.cc/Z6HE-THSH (last visited Aug. 14, 2021).

another country to attend school in Massachusetts.[156] In fact, many international students who "may have first considered living in the fast-paced, densely populated New York City, then decided the dynamic city of Boston offered all the cultural richness, diversity, and stimuli of the big city, but on a more welcoming, slightly smaller, and more moderately-paced scale."[157]

B. *Rape and Underreporting on College Campuses*

1. Prevalence of Rape in College

Rape is a systemic and growing problem in American colleges.[158] In fact, rape is the most common violent crime that occurs on college campuses today.[159] Between 20% and 25% of women will experience rape, or attempted rape, during their time in college.[160] Although women are the most common victims of rape, women are not the only individuals affected by this crime.[161] Notably, 15% of men will also experience some form of sexual violence while in college.[162] Nevertheless, it is college women who are more at risk of rape and other forms of sexual assault than women who are the same age but do not attend college.[163] Further, women are more at risk of rape while in college than they are at any other point in their adult lives.[164]

The majority of women who are raped in college are victims of acquaintance rape—rape that is committed by someone known to the victim.[165] This could be a classmate, a friend, a boyfriend, an ex-boyfriend,

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[156] Laura Krantz, *Number of Foreign College Students in Boston Surges*, BOS. GLOBE (Nov. 16, 2015, 7:20 PM), https://perma.cc/4TWS-UQ8R.

[157] *Study in Massachusetts*, *supra* note 151 ("Boston is a great place for international students because so many people in this city are students themselves, and a lot of us aren't native to the city either.").

[158] *See* Crime on College Campuses: Institutional Liability for Acquaintance Rape, 1 ANN. ATLA-CLE 499, 499 (2004) [hereinafter Crime on College Campuses]; Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 42 (1991); Abby Jackson, *American Colleges Have a Massive Rape Problem, and There's No Clear Solution in Sight*, BUS. INSIDER (Apr. 2, 2018, 1:22 PM), https://perma.cc/C65P-DDEC.

[159] Crime on College Campuses, *supra* note 158, at 499.

[160] *Statistics About Sexual Violence*, *supra* note 135.

[161] Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out 'We're Up Against a System That's Not Designed to Help Us,'* HUFF. POST (Jan. 27, 2015, 7:33 AM ET), https://perma.cc/954F-FCJ5 ("While women have 'really moved the ball forward,' resulting in a heightened awareness about sexual assault against women and children, it's an awareness that doesn't include men as victims.").

[162] *Statistics About Sexual Violence*, *supra* note 135.

[163] Crime on College Campuses, *supra* note 158, at 499.

[164] Crime on College Campuses, *supra* note 158, at 499.

[165] *See* Steinberg, *supra* note 158, at 41; *see also Acquaintance Rape*, MERRIAM-WEBSTER, https://perma.cc/MAL9-2F6T (last visited Aug. 14, 2021).

or someone that they have seen around campus.[166] Some characteristics specific to the college environment increase the probability of acquaintance rape.[167] A college campus is one of the few places where individuals between the ages of eighteen and twenty-four are able to live in close quarters and spend a majority of their time with each other for a number of years.[168] College students live together, eat together, do homework together, and socialize together.[169] When first arriving at college, a new sense of "freedom away from home begins, and peer pressure on students—mostly male—to become sexually active may develop."[170] The close proximity of male and female students not only increases the opportunity to form relationships, but also increases the opportunity for breaches of trust within those relationships.[171]

Additionally, alcohol is almost always a factor in acquaintance rape on college campuses.[172] It naturally follows that colleges with higher rates of binge drinking have higher rates of on-campus rape.[173] Although alcohol does not *cause* rape, its presence makes it more likely that a rape will occur.[174] Alcohol has the effect of impairing judgment, creating misperceptions, and weakening a victim's ability to physically resist.[175] When students drink alcohol, it is often in the presence of friends at a dorm room or a fraternity party, with a false sense of invincibility.[176]

2. Culture Against Reporting

When women are raped in college, most do not report the incident to the police or the school administration.[177] Specifically, the American Civil Liberties Union estimates that at least 95% of campus rapes in the United

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[166] Crime on College Campuses, *supra* note 158, at 499.

[167] *See* Steinberg, *supra* note 158, at 43.

[168] Steinberg, *supra* note 158, at 43.

[169] Steinberg, *supra* note 158, at 43.

[170] Steinberg, *supra* note 158, at 43.

[171] Steinberg, *supra* note 158, at 39, 43 ("During my last semester of law school, a friend tried to rape me in my apartment in Cambridge, Massachusetts.").

[172] Crime on College Campuses, *supra* note 158, at 499 ("Seventy-five to 90 percent of the acquaintance rapes that occur on campus involve either drugs or alcohol.").

[173] Crime on College Campuses, *supra* note 158, at 499.

[174] *The Realities of Sexual Assault on Campus*, BEST COLLEGES, https://www.bestcolleges.com/resources/preventing-sexual-assault/ (last visited Jan. 30, 2020) (stating that the responsibility for the attack lies solely with the perpetrator).

[175] *See* Crime on College Campuses, *supra* note 158, at 499; *see also Alcohol-Related Brain Damage*, THE RECOVERY VILLAGE, https://perma.cc/TGZ6-SFTG (last updated June 29, 2021).

[176] Steinberg, *supra* note 158, at 43 n.24 ("A fraternity member is more than twice as likely to commit rape as is his non-affiliated classmates.").

[177] Rana Sampson, *Acquaintance Rape of College Students*, ARIZ. ST. UNIV. (Aug. 2011), https://popcenter.asu.edu/content/acquaintance-rape-college-students-0.

States go unreported.[178] There are a number of reasons why women do not report rape.[179] For college women, one of the most significant reasons is the fear of being ostracized or disbelieved.[180]

As noted, most campus rapes occur in the presence of alcohol, surrounded by friends, by someone the victim is friendly with.[181]A victim's decision to report can be heavily influenced by the relationship that the victim has with the offender.[182] When a victim is raped by someone the victim knows or is friends with, the culture of college often persuades the victim not to report.[183] A real and rational fear that the victim's peers will side with the rapist and disengage friendship comes into play.[184]

Another major reason why college victims, specifically women, do not report is that they themselves feel like they contributed to what happened to them—they feel guilty and or ashamed.[185] This self-blame can derive from the fact that a victim was drinking, she allowed herself to be alone with the offender, or she may feel that she led the person on in some fashion.[186] When these factors are present, college victims may not realize that what happened to them in fact constitutes rape.[187] Although antiquated, the myth that rape can only be committed by a stranger in a dark alley is still very much prevalent.[188] When the attacker does not fit the expectation of what a rapist "should" be, it can be difficult to classify what happened as rape.[189] Further, and in the same vein, if a victim does not feel like she acted in a way that a victim "should" act, the victim may not understand that she was in fact raped.[190]

Even when a victim recognizes that she was raped by an acquaintance, regardless of the fact that she was drinking or that she was alone with the offender, she may not report because she fears that others will not

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[178] *The Realities of Sexual Assault on Campus*, *supra* note 174.

[179] *See supra* Part II.

[180] Steinberg, *supra* note 158, at 40-41 ("I did not report my attempted rape to the police because I was afraid that too many people would believe common misconceptions, and not me.").

[181] *See supra* Part III(B)(1).

[182] Marjorie Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 158 (2006).

[183] *See The Realities of Sexual Assault on Campus*, *supra* note 174.

[184] *See* Steinberg, *supra* note 158, at 39.

[185] *See* Sampson, *supra* note 177.

[186] *See* Sampson, *supra* note 177.

[187] Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014, 6:41 PM EDT), https://perma.cc/T5EC-U8FT.

[188] *See* Ro, *supra* note 90.

[189] *See* Ro, *supra* note 90.

[190] *See* Ro, *supra* note 90.

understand.[191] Victims who do report are often questioned about what they were wearing, what drugs or alcohol they consumed, what their prior relationship with the offender was, and why they were with the offender at the time of the rape.[192] This type of questioning, in essence, re-victimizes rape victims and frequently dissuades them from coming forward with any allegations against both acquaintance rapists and stranger rapists.[193]

3. Undeveloped Trauma Processing

When in college, victims of rape, regardless of whether it is acquaintance rape or stranger rape, suffer a magnitude of trauma.[194] Many women can experience "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction."[195] In addition, it is very common for rape victims to suffer from rape trauma disorder, which is a medically verifiable disorder that is a form of post-traumatic stress disorder.[196]

> Women who have been raped normally experience one or more of the following symptoms for the first three to four months following the rape: re-experiencing the rape, nightmares about the rape, fear of men who look or act like the rapist, frequent or unexplained crying, intense fright and surprise when touched, avoiding the location of the rape, withdrawal, fear of future harm, depression, anger, fear of dying, shame, and avoiding sex.[197]

College acquaintance rape victims face additional consequences.[198] Many either drop out of school or transfer because, if they stay, they may have to face their rapists in their classes, in their dorm rooms, in the dining hall, and around campus.[199] Further, because most victims do not report, there is no way to prevent them from reencountering their attackers.[200] When a victim does not report, the traumatic effects of the rape have the potential to have a long-lasting impact on the victim.[201]

If a college victim does not report a rape, it is unlikely the victim will

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[191] *See* Sampson, *supra* note 177.

[192] *See* Sampson, *supra* note 177.

[193] *See* Sampson, *supra* note 177.

[194] *See* Crime on College Campuses, *supra* note 158, at 499.

[195] Crime on College Campuses, *supra* note 158, at 499.

[196] Steinberg, *supra* note 158, at 45–46.

[197] Steinberg, *supra* note 158, at 45–46.

[198] Sampson, *supra* note 177.

[199] Sampson, *supra* note 177.

[200] *See* Steinberg, *supra* note 158, at 46.

[201] *See* Steinberg, *supra* note 158, at 46.

receive the help that the individual may need.[202] College students are particularly vulnerable to trauma.[203] "Advancements in neuroscience have confirmed that the adolescent brain does not fully mature until people reach their mid-twenties."[204] As such, it takes victims longer to process, understand, and cope with what has happened to them.[205]

C. *The College Adjudication Process Is Insufficient to Assist Victims*

College rape victims have two potential avenues to seek justice against their attackers: the institution's adjudication process or the formal legal system outside of their colleges.[206] Far too frequently, however, students do not pursue either option.[207] Many college victims recognize the difficulty in proving that they were raped.[208] A common misbelief is that if someone who is raped in college cannot meet the lower standard of proof to a school administration board, it is unlikely that a formal criminal proceeding would be successful.[209] However, the manner in which colleges handle sexual assault and rape proceedings is entirely inadequate.[210]

Although there are legitimate reasons why colleges should treat sexual assault investigations and hearings differently than criminal courts do, that does not "give colleges a pass to deny students their constitutional rights."[211] Colleges have a duty to ensure their campuses are safe places for all to pursue their academic endeavors.[212] This duty was upheld by the Supreme Judicial Court of Massachusetts in *Mullins v. Pine Manor College*.[213] In *Mullins*, the court held that the college had a duty to protect its students from criminal acts against third parties, and as such, had a duty to provide

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[202] Sampson, *supra* note 177 (stating low reporting rates ensures that few victims receive adequate help).

[203] *See* Steinberg, *supra* note 158, at 46.

[204] Christopher Ramos, *Adolescent Brain Development, Mental Illness, and the University-Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship with Their Students*, 24 S. CAL. REV. L. & SOC. JUST. 343, 348 (2015).

[205] *See, e.g.*, Malone & Demme, *Stories*, *supra* note 82 ("Eighteen is very young. It took me a long, long time to come to terms with the fact that it was him, it wasn't me. Life has not been easy for me. I had addiction problems as I got older.").

[206] *See* LAUREN J. GERMAIN, CAMPUS SEXUAL ASSAULT 33 (2016).

[207] *See supra* Part III(B)(2).

[208] GERMAIN, *supra* note 206, at 33 (quoting an interview with a university student, "because it's a he said/she said type of case. There was no witnesses; there was no physical evidence. He is probably going to deny it if ever asked . . . it's, I feel like, the University would have a lot of problems accepting my story.").

[209] GERMAIN, *supra* note 206, at 34.

[210] *See* Jackson, *supra* note 158.

[211] Jackson, *supra* note 158.

[212] *See* Jackson, *supra* note 158.

[213] Mullins v. Pine Manor College, 389 Mass. 47, 53–56 (1983).

security for its students.[214] Because colleges have this unique duty, they should be incentivized to conduct thorough and detailed hearings.[215] Instead, however, trials at colleges are relatively quick, the process is confidential, and the results are often "middling rulings" or findings of not responsible.[216]

When a school does decide that a victim produced enough evidence to prove that a rape occurred, the outcome of this decision remains limited to the college's authority.[217] Schools do not have the power to send a rapist to jail; a college only has the authority to expel a studen.[218] Yet, colleges often do not take such measures.[219] Instead, many who are deemed to have committed wrongdoing against fellow students are eventually allowed to return to campus, graduate, and join the workforce.[220] Schools' failure to properly investigate and find wrongdoing by their students has been attributed to the mandated reporting requirements under the Clery Act.[221] Motivated by a desire to have a campus with a low crime rate, college administration boards cannot be completely neutral when faced with a complaint of sexual assault.[222]

Many colleges' shortcomings are recognized and dealt with by women on their campuses.[223] Instead of relying on the colleges' adjudication process, a number of students have taken matters into their own hands.[224] In 1990, a bathroom wall in the basement of Brown University's library read, "Beware of [student name], he doesn't take no for an answer."[225] In the following weeks, other students added the names of men who assaulted them to

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[214] *Id.*

[215] *See* Jackson, *supra* note 158.

[216] *See* Jackson, *supra* note 158 (addressing middling rulings and the impression they give: "[w]e kind of believe the victim but don't want to get sued, so let's split the difference."); *see also* GERMAIN, *supra* note 206, at 38.

[217] Jackson, *supra* note 158.

[218] Jackson, *supra* note 158.

[219] *See* Jackson, *supra* note 158.

[220] *See* GERMAIN, *supra* note 206, at 80 ("I think it's dumb . . . cheat on an exam? And then you're kicked out . . . And you can rape someone and then it's like 'See you on Monday'"); *see also* Jackson, *supra* note 158 (discussing Yale's inadequate repercussions for students who were deemed to have raped others).

[221] *Summary of the Jeanne Clery Act*, CLERY CTR., https://perma.cc/483U-BJ78 (last visited Aug. 14, 2021); *see* GERMAIN, *supra* note 206, at 77–78.

[222] *See* Jackson, *supra* note 158.

[223] GERMAIN, *supra* note 206, at 77–78.

[224] GERMAIN, *supra* note 206, at 82.

[225] Sophia Seawell & Patricia Ekpo, *'Rape List' Returns: 25 Years of Sexual Assault Activism at Brown*, BLUESTOCKINGS MAG. (May 15, 2014), https://perma.cc/Q3XP-US22; GERMAIN, *supra* note 206, at 71.

caution other students.[226] "Rape lists" have reappeared in the twenty-first century at colleges like Brown and Columbia University.[227] The administrations at these colleges have failed the students who have been subject to sexual violence.[228] As such, college women have banded together to help each other by writing the names of their attackers on bathroom walls as a warning.[229] Some self-defined justice, however, is not quite as peaceful.[230] A few women have made up for their colleges' deficiencies by engaging in physical violence towards their attackers.[231] This further demonstrates that the current process undertaken by colleges is inadequate and leaves victims to seek out their own form of justice.[232]

IV. In Light of Societal and Technological Advances, the Interests of the Victim Outweigh the Rationale for Imposing a Statute of Limitations for Rape

A. *Combating the Rationale*

1. Protection of the Innocent Defendant

As previously mentioned, the key rationale for imposing a statute of limitations is protecting the innocent from having to defend themselves after time has passed, evidence has gone stale, and memories have faded.[233] The idea is that, if a defendant is falsely accused, the defendant will be unable to provide a sufficient alibi due to the passage of time and will be wrongly convicted.[234] Although this rationale had merit when statutes of limitations were originally implemented, it can no longer justify placing a time limit on the prosecution of rape.[235]

First, false accusations of rape are extremely rare.[236] Further, not all "false accusations" are necessarily "made-up accusations."[237] There are many factors that might result in an allegation being deemed false.[238] One is

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[226] GERMAIN, *supra* note 206, at 71; Seawell & Ekpo, *supra* note 225.

[227] GERMAIN, *supra* note 206, at 71; Seawell & Ekpo, *supra* note 225.

[228] *See* Steinberg, *supra* note 158, at 47.

[229] Steinberg, *supra* note 158, at 47.

[230] GERMAIN, *supra* note 206, at 83.

[231] GERMAIN, *supra* note 206, at 83.

[232] *See* GERMAIN, *supra* note 206, at 83.

[233] *See generally supra* Part I(A).

[234] Robin & Anson, *supra* note 36, at 1.

[235] *See* Robin & Anson, *supra* note 36, at 1.

[236] *See* Katty Kay, *The Truth About False Assault Accusations by Women*, BBC NEWS (Sept. 18, 2018), https://perma.cc/F39D-EGMM.

[237] Katie Heaney, *Almost No One Is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), https://perma.cc/K3VW-2F4Z.

[238] *See id.*

that a woman who initially made an accusation chooses to recant it.[239] This, however, does not necessarily mean that she was lying.[240] "If you don't want to go through a police investigation, for any reason—and there are many many reasons why you might not want to, it's really traumatizing—then the easiest and quickest way to get out of it is to recant and say you were lying[.]"[241]

Additionally, the police also may deem an allegation false merely because they find incriminating evidence on the part of the accuser.[242]

Although infrequent, false allegations do occur.[243] When false allegations occur, they hardly ever lead to wrongful convictions or jail time.[244] In the age of technology and DNA evidence, the prosecution of a criminal case rarely relies solely on eye-witness testimony.[245] With the advent of DNA evidence, there is less concern about an innocent defendant being wrongly convicted.[246] In fact, many states have already carved out an exception to the statute of limitations for rape when a perpetrator is later identified through DNA evidence.[247] Furthermore, "social media and technology is changing the nature of evidence in [rape] cases."[248] Recent cases of rape and sexual assault have been supported by evidence of videos, screenshots, and recordings from social media applications.[249] Texting, emailing, and communicating through applications on our cell-phone has become so ubiquitous in society, that there is a record of almost everything that Americans do.[250] With this new form of evidence, innocent defendants will be able to defend themselves in a way that was impossible to do when statutes of limitations were originally imposed.[251]

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *See* Stacy M. Brown, *Could False Accusations Threaten the #MeToo Movement?*, THE PHILA. TRIBUNE (Jan. 1, 2019), https://perma.cc/RJ2P-DSDL (discussing the history of false allegations of sexual assault against Black men).

[244] Kay, *supra* note 236.

[245] *See* Robin & Anson, *supra* note 36, at 1.

[246] *See* Brittany Ericksen & Ilse Knecht, *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, THE NAT'L CTR. FOR VICTIMS OF CRIME (Aug. 21, 2013), https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf.

[247] *Id.*

[248] Kari Paul, *Texts and Emails Could Ultimately Help Kill the Statute of Limitations for Sex Crimes*, MARKETWATCH (Sept. 28, 2018, 9:06 AM ET), https://perma.cc/EP9V-ESJE.

[249] *Id.*

[250] *Id.*

[251] *See id.*

2. Suspect's Right to Repose

Another justification used to defend statutes of limitations is the suspect's right to repose.[252] The belief is that, at some point after a person commits a crime, the person should be able to move on with life without having to fear prosecution for old wrongdoings.[253] However, the notion that criminals should live freely without their past crimes haunting them for the rest of their lives seems backwards when considering the effects that their past crimes have on victims, especially in the context of rape.[254] Rape has a lasting and traumatic effect on victims.[255] Some of these effects can stay with victims for their entire lives.[256] There are various social and psychological factors that may inhibit a victim of sexual abuse from coming forward promptly with allegations.[257] As such, the law should no longer favor a criminal's right to repose over a victim's right to seek justice.[258]

B. *Victim's Interest in Prosecuting Rape Without a Time Limit*

The legislature should treat the statute of limitations for the crime of rape as it does the crime of murder.[259] Because rape is a particularly severe, intrusive, and sometimes violent crime, rape victims have the same interest that the families of murder victims do in ensuring that offenders are brought to justice without a time limit.[260] The Massachusetts legislature established that the crime of murder is exceptionally severe such that it warrants an unlimited amount of time for prosecution.[261] There is no statute of limitations for murder in the state, even though "evidence may be lost, memories may fade, and witnesses may disappear."[262] This is arguably

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[252] *See* Robin & Anson, *supra* note 36, at 1.

[253] Robin & Anson, *supra* note 36, at 2.

[254] *See* Robin & Anson, *supra* note 36, at 18 (discussing the absurdity of giving criminals the right to repose while victims remain long-injured).

[255] *See supra* Part III(B)(3).

[256] *See supra* Part III(B)(3).

[257] *See* Steph Machado, *Sexual Abuse Victims Testify for Elimination of Statute of Limitations*, WRPI (MAY 4, 2018, 6:59 AM EDT), https://perma.cc/BF9K-MMEM; *see also* Shaila Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), https://perma.cc/F8G7-DC5Y (explaining the many reasons why a victim of sexual violence may not come forward with allegations).

[258] *See* Robin & Anson, *supra* note 36, at 18.

[259] *See* Zoe Lake et al., *'Got a Pass'? Dennis Hastert Case Renews Debate Over Sex Crime Statute of Limitations*, ABC NEWS (Oct. 29, 2015, 12:37 PM), https://perma.cc/V8AT-P7HF; *see also* MASS. GEN. LAWS ch. 277, § 63 (2012).

[260] *See generally* Natalie Worlow, *Why is There No Statute of Limitations on Murder but There is Regarding Rape and Molestation?*, QUORA (June 1, 2015), https://perma.cc/3255-XRNK (describing lawmaker's rationale for imposing a statute of limitations for rape but not murder).

[261] MASS. GEN. LAWS CH. 277, § 63 (2012).

[262] *Supra* Part I(A).

"because no one thinks the passage of time should shield a killer from answering for his crime."[263] However, some individuals believe that rape is a more heinous crime than murder.[264] This begs the question of why the passage of time should provide a rapist with such a "legal escape hatch."[265] The required and necessary answer is that it should not.[266]

CONCLUSION

The Massachusetts legislature should eliminate the statute of limitations for rape. The states that have already eliminated, or are in the process of eliminating, their statutes of limitations for rape have only done so after horrendous events occurred within their borders. Massachusetts should not wait until its citizens suffer the same fate, especially considering the state's coveted higher education system. The state of Massachusetts has one of the best higher education systems in the country, and thousands of people, all over the world, travel to the state to go to school. Campus rape is a significant and systemic problem in the United States. Because colleges seemingly cannot redress this issue on their own, the legislature must step in and eliminate the statute of limitations for rape. The statute of limitations can no longer be supported by the argument that an innocent defendant will be wrongly convicted or that a guilty defendant deserves to repose. With the advent of DNA evidence, as well as social media, there is ample opportunity for innocent defendants to relieve themselves of culpability. It is time for the legislature to recognize the interests of the victims, who should have the right and the ability to report their rape when they are emotionally, mentally, and physically ready.

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[263] Lake et al., *supra* note 259.

[264] *Which is Worse Rape (Yes) or Murder (No)?*, DEBATE.ORG, https://perma.cc/P4WJ-M77T (last visited Aug. 14, 2021) ("I believe rape is worse because as a survivor myself, I wish the man that did it would've killed me, the pain would be gone.").

[265] Lake et al., *supra* note 259.

[266] *See* Lake et al., *supra* note 259.