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We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

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An Eight-Strand Braided Cable: Hawaiian Tradition, *Obergefell*, and the Constitution Itself as "Dignity Clause"

Robert J. Morris (Kapā'ihiahilina), JD, PhD*

He ma'i nui ka hilahila.[1] Shame is a great sickness.

—Hawaiian Proverb

We feel the very basic wrong of these statutes is that they rob the Negro race of their dignity, and fundamental in the concept of liberty in the Fourteenth Amendment is the dignity of the individual, because without that, there is no ordered liberty.[2]

—Oral Argument in *Loving v. Virginia*

 Formerly University of Hong Kong Department of Law (retired 2011); J.D. University of Utah Quinney Law School (1980); Ph.D. University of Hong Kong Faculty of Law (2007); web page www.robertjmorris.net. This article is dedicated with love and thanks to Roberta (Sistah Robi) Kahakalau, Emily 'Ioli'i Hawkins, and Puakea Nogelmeier, my teachers at the University of Hawai'i at Mānoa, respectively, of First and Second Year Hawaiian, Third Year Hawaiian, and Fourth Year+ Hawaiian. They provided a moveable feast. *I ulu nō ka lālā i ke kumu.* The branches grow because of the trunk (the students flourish because of the teacher)—a play on the word *kumu* as both teacher and source, root, origin. Unless otherwise noted, all Hawaiian words, phrases, and definitions herein are from MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (1986) (hereinafter PUKUI & ELBERT, HAWAIIAN DICTIONARY), and MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS (1983) (hereinafter PUKUI, 'ŌLELO NO'EAU). My Hawaiian name, Kapā'ihiahilina, comes from the epic tale of Lonoikamakahiki and his partner (*aikāne*), the man Kapā'ihiahilina, the defining idea of which is, "Because I love you, I will accompany you on the epic journey" / *Aloha au iā 'oe, ukali mai nei.* The word *ukali* here means to follow with the intent of waiting upon, serving, taking care of.

[1] Stigmatized, ostracized, humiliated, embarrassed, disgraced, shamed, degraded. PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 70 (translation provided by author); PUKUI, 'ŌLELO NO'EAU, *supra* note *, at 783 (translation provided by author).

[2] Attorney Philip J. Hirschkop, speaking of Virginia's antimiscegenation statutes. Transcript of Oral Argument, Loving v. Virginia, 388 U.S. 1 (1967) (holding antimescegenation statutes unconstitutional) (excerpt of transcript available at ENCYCLOPEDIA VIRGINIA, www.encyclopediavirginia.org/Excerpts_from_a_Transcript_of_Oral_Arguments_in_Loving_v_Virginia_April_10_1967) (last visited Sep. 22, 2017)).

Abstract

The Supreme Court's 5-4 decision in Obergefell v. Hodges (2015) made same-sex marriage legal throughout the United States pursuant to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[3] One of the most contentious issues in Justice Kennedy's majority opinion was the central view that the dignity of marriage equality is a constitutional value and right. All of the Justices in the minority took issue with that idea.[4] This Article reviews those arguments briefly and then sets forth a view, grounded in Hawaiian culture, language, and tradition, that absolutely affirms dignity as a fundamental value and argues that the presence of Hawaiian culture and tradition requires national attention to this value as an integral part of the "tradition and heritage of America" in which such constitutional principles are claimed to be "deeply rooted."[5] This includes the long history of dealing with struggles for dignity in Hawai'i through episodes of oppression, dehumanization, stigmatization, colonization, and racism. The analysis suggests that the result turns more on the definition of "tradition" than on "dignity" itself, and it provides some ideas on ways in which dignity may be made justiciable through recourse to a more eclectic view of tradition. Among these ideas are the metaphors of love in Hawaiian literature showing the knotting, weaving, and binding together (hilo, pōlena) of numerous equally valent cords or strands into one strong cable. It must be admitted, at a minimum, that if dignity and equality are "deeply rooted" in the culture, history, and tradition of our Nation—the standard formula for the analysis of constitutional liberties—then the malleable and evolutionary nature of those phenomena render those definitions in turn malleable and evolutionary.[6] The process interrogates the usual categories of enumerated vs. unenumerated, substantive vs. ephemeral, traditional vs. contemporary, fundamental vs. ephemeral, objective vs. subjective, and the like, by which we often parse constitutional discourse. It further interrogates the meaning of every seemingly simple element—"American," "deeply rooted," "our," "ordered liberty," and "tradition"—in the standard formula. Given the vagaries associated with this formula, one might reasonably assume that the problem that the minority Justices have with dignity is not so much with its textual presence or absence in the Constitution as with the perceived absence (and unworthiness) of the parties to the litigation who claim dignity. Properly seen in this way, the legal study of Hawaiian history and tradition is not an

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[3] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[4] Chief Justice Roberts, Justice Scalia, and Justice Thomas dissented. *Id.*

[5] Washington v. Glucksberg, 521 U.S. 702, 721-22 (1997). *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[6] *Glucksberg*, 521 U.S. at 721-22.

exercise in comparative law (such as Italian vs. Russian law would be), but in integrative law—as a part of the legal corpus of American law. Dignity is notoriously hard to define—or to confine—and is often best observed by looking not only at its synonyms but at its absence or its opposites: stigma, shame, etc. We might say that the dignity interested here, implicated as it might be in sex, sexuality, relationship, and marriage, is not primarily about any one of those things, but is about having the full choice to participate, or not, in any of those things.

INTRODUCTION: THE PROBLEMATIQUE OF "HISTORY" & "TRADITION"

One of the most frequently invoked, yet superficially examined, clichés in constitutional law is the reference to something being "deeply rooted in our history and traditions."[7] It appears in many contexts, and it thrives, perhaps because as a verbal formula, it has a certain ring of truth and authority, if only because of its seeming simplicity. It is the ultimate qualifier for any right or privilege claiming to be "fundamental," as an essential measure of "ordered liberty," and when the Court does not find those deep roots in tradition, the cliché becomes a sword against LGBT equality.[8] It is offered, usually without comment, as a given, an immutable truth that everyone implicitly understands and agrees upon. Surely, this is a common starting point, the argument goes, and we can move on without further adieu.[9] The difficulty, of course, is that the tacit understanding assumed to be present in this deployment does not exist. A moment's thought ought to convince any observer that "American tradition" is not a set piece, certainly not a monolith, and therefore that what the deep roots seem to be deeply rooted in is at least malleable, if not transitory or downright ephemeral.[10] If critical thinking (*no'ono'o loi*) is to form the foundation of our equal protection and due process narrativity, then

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[7] *Id.* at 720-22. *Accord Palko*, 302 U.S. at 325 (holding that the Due Process Clause protects a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[8] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[9] *See* Stephen Riley, *Human Dignity and the Rule of Law*, 11 UTRECHT L. REV. 91 (2015) (providing a jurisprudiential overview of the subject and analyzing human dignity's systemic role in law).

[10] John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. LIBERTY 172 (2009) (arguing that the "deep roots" test of "tradition" does little to limit judicial discretion and militates against personal autonomy, majoritarianism, and normative progress). *See also* Mark A. Graber, *Constitutional Democracy, Human Dignity, and Entrenched Evil*, 38 PEPP. L. REV. 889 (2011).

acquiring the whole story (*mo'olelo piha*) would be a minimal responsibility. Martin Krygier spells out the underlying complexities:

> [E]ven in constantly vetted traditions such as law, the past speaks with many voices. This is inevitable precisely because of the traditionality of law. For in every complex written tradition, any particular "present" is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world. This assorted stock forms the constantly changing present of the tradition, to which each generation of participants contributes in turn. . . .
>
> So, the past is not univocal in complex traditions.[11]

In 1835 Tocqueville adumbrated the nexus of liberty, equality, and dignity, and if this is sufficient to count as tradition, it remains for us to define what it means today for our contemporaries. He wrote: "All of our contemporaries who would establish or secure the *independence* and the *dignity* of their fellow men must show themselves the friends of *equality*; and the only worthy means of showing themselves as such is to be so: upon this depends the success of their holy enterprise."[12]

Those of us who have lived and worked through, say, the past fifty years of LGBT advocacy know how "history," which is said always to be shaped by the victors, has been weaponized against us.[13] Quite apart from the veracity of any claimed "collected reason of the ages,"[14] we have learned, through painful and painstaking reclamations, excavations, and reconstructions, that received history and tradition, as purveyed by the ecclesiastical and political homophobiat, are highly edited, bowdlerized, line-item vetoed, mistranslated, misremembered,[15] and processed products. This is as true for Hawai'i[16] as it is for the United States generally. The

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[11] Martin Krygier, *Law as Tradition*, 5 L. PHIL. 237, 242 (1986).

[12] Khalil M. Habib, *Machiavelli and Tocqueville on Majority Tyranny*, *in* ALEXIS DE TOCQUEVILLE AND THE ART OF DEMOCRATIC STATESMANSHIP 88 (Brian Danoff et al. eds., 2011) (citing and discussing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 695 (1835)) (paraphrased from original) (emphasis added).

[13] *See, e.g.*, Conde Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279 (D.P.R. 2016) (discussing "tradition" as a sword to defy U.S. Supreme Court ruling in Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

[14] Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 354 (2006).

[15] "[T]o remember here and there, imperfectly, as a song." Pa'a pāhemohemo, PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *.

[16] Vicente M. Diaz, *Sniffing Oceania's Behind*, 24 CONTEMP. PAC. 324 (2012); Jocelyn S. Linnekin, *Defining Tradition: Variations on the Hawaiian Identity*, 10 AM. ETHNOLOGIST 241 (1983); Brandy Nālani McDougall, *Putting Feathers on Our Words: Kaona as a Decolonial Aesthetic Practice in Hawaiian Literature*, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y , no. 1, 2013 at 1 (2014); Marietjie Oelofse, *Applying Principles of*

recovery efforts in every discipline have made clear that any reliance on received history and tradition must be maximally circumspect, particularly with regard to LGBT issues, and even more particularly with regard to the law. If received American History had been replete with the truth, there would have been no need in 1976 for Jonathan Ned Katz's *Gay American History*,[17] or the need (still) for Michael Bronski's *A Queer History of the United States*[18] in 2011. The depictions of colonial North America's sexual culture in Richard Godbeer's 2002 *Sexual Revolution in Early America* would not have sharply contradicted the stereotype of Puritanical abstinence that persisted in the popular imagination.[19] If received history and tradition really could be adverted to for addressing the discrimination again the LGBT minorities, then Rachel Hope Cleves's *Charity & Sylvia*[20] would have found no research gap to fill in 2014, and would have made no "new contribution to knowledge."[21] That such reifications, restorations, and restatements are needed, and will continue to be needed, cast serious doubt on the use of history and tradition to determine rights and privileges under the Constitution. As John Toro has noted:

> [T]he Supreme Court's decisions using the deep roots test demonstrate that the test fails meaningfully to restrain judicial discretion. First, the Court has vast discretion in deciding which traditions to take into account. Second, there is substantial discretion in determining how to define the tradition at issue, which can be exploited to advance the predilections of the justices. Finally, even if the Court finds that an asserted liberty interest is supported by "American tradition," it must take the further step of determining whether that interest *should* receive modern-day protection—an inquiry which depends heavily on the type of moral judgment the Court sought to avoid by using the deep roots test.[22]

Historical Critique: Authentic Oral History?, 5 IPEDR 41 (2011). *See* McDermott v. Ige, 135 Haw. 275, 387 (2015) (providing that plaintiff state legislator alleged personal harm by the legalization of same-sex marriage based on his own concept of "Hawai'i's cultural norms.").

[17] JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (1978). *See also* GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY (2017).

[18] MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES (2011).

[19] RICHARD GODBEER, SEXUAL REVOLUTION IN EARLY AMERICA (2002).

[20] RACHEL HOPE CLEVES, CHARITY & SYLVIA: A SAME-SEX MARRIAGE IN EARLY AMERICA (2014).

[21] Robert J. Morris, *The "New Contribution to Knowledge": A Guide for Research Postgraduate Students of Law*, U.H.K. SCHOLARS HUB (June, 2011), http://hub.hku.hk/bitstream/10722/134610/2/content.pdf.

[22] Toro, *supra* note 10, at 181.

In 2004, James Q. Whitman compared European and American ideas of privacy and dignity, noting that American attempts to import continental principles into the law had been largely unsuccessful.[23] Such limited successes as had been achieved, he noted, were grounded largely in the Fourth Amendment, although not strictly limited to it.[24] Whitman was writing in the immediate aftermath of *Lawrence v. Texas*,[25] in which Justice Kennedy "tries energetically to found his opinion on ideals of both liberty and dignity," but in the end "finds no doctrinal hook on which to hang its talk of 'respect.'"[26] Whitman therefore ends in pessimism about any constitutional future for the role of dignity: "History suggests, though, that such arguments will fade in American discourse with time. This makes the prospects for a constitutionalized right to gay marriage, for example, dim."[27] Whitman's understandable pessimism decries the "shallow intuitionism"[28] that attends a lack of justiciable standards and concrete definitions of dignity, and ends with a set of alternatives:

> [W]e can declare that American gays can realistically expect only to have their liberty rights protected. The prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote. *After all, protecting people's dignity is quite alien to the American tradition.* Or we can do what most moral philosophers want to do: We can reject the notion that different societies should have differing standards. But if we take

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[23] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151, 1204 (2004). The word "privacy," like "dignity," does not appear in the text of the Constitution and is not an "enumerated right," a point made in the *Obergefell* arguments. In Hawaiian, identity, *piko'u*, is a recently coined word. *See* NĀ HONUA MAULI OLA HAWAI'I GUIDELINES FOR CULTURALLY HEALTHY AND RESPONSIVE LEARNING ENVIRONMENTS, NATIVE HAWAIIAN EDUCATION COUNCIL & KA HAKA 'ULA O KE'ELIKŌLANI COLLEGE OF HAWAIIAN LANGUAGE, UH-HILO (adopted by the Native Hawaiian Education Council June 4, 2002). This is not to say that dignity had no meaning in traditional culture, but that it was expressed operationally. Yet one must wonder at the need for this inasmuch as Hawaiian has always had highly articulate ways of expressing the idea of self and selfhood, including words for oneself, in propria persona, and oneself proper. *See, e.g.*, *iho*, *kino*, *'oiwi*, and *pono'ī*, PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *.

[24] Whitman, *supra* note 23, at 1212 (citing Schmerber v. California, 384 U.S. 757, 767 (1966)) (stating that the Fourth Amendment protects both "personal privacy and dignity" from unwarranted intrusion by the state).

[25] Lawrence v. Texas, 539 U.S. 558 (*2003*) (holding that statute outlawing adult consensual sodomy was unconstitutional). For a personal account of the case *see* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2013).

[26] Whitman, *supra* note 23, at 1162, 1214.

[27] *Id.* at 1214.

[28] *Id.* at 1220.

> that tack, we must face the fact that we will not succeed in changing either world unless we embark on *a very large-scale revaluation of legal values.*[29]

This article challenges that assumed "American tradition" and undertakes a "revaluation of legal values" by means of an approach *vis-à-vis* Hawaiian culture. It asserts that the weaponizing of a presumed monolithic definable "tradition" is often an evasion of reality and, in the bargain, a project that is sexist, misogynistic, racist, and homophobic. Its purpose is to expand the imaginary of what America is at the front of the 21st Century,[30] and to suggest that an honest assessment of "tradition" would hew more closely to the United Nations Charter, for example, and the various human-rights covenants and treaties enacted pursuant to it which protect both "Western" and "Eastern" rights, in a total equation that constitutes "the true meaning of 'human rights.'"[31] The legal and cultural events that have intervened between the 2004 of Whitman and today, including the Supreme Court decisions in the *Hollingsworth*,[32] *Windsor*[33], and *Obergefell*[34] cases, as well as legalization of same-sex marriage by courts and legislatures in many states, are quite remarkable and have shown that the once "dim" prospects for a constitutionalized right to dignity *vis-à-vis* LGBT matters are instead rather bright. This reification will illuminate why Whitman's predictions were wrong, particularly because the revaluation has indeed been "on a very large scale," and why that is a matter worthy of deeper study and analysis.[35] In the process of doing this, I also identify some actual

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[29] *Id.* at 1221 (emphasis added).

[30] IMAGINING OUR AMERICAS: TOWARDS A TRANSNATIONAL FRAME (Sandhya Shukla & Heidi Tinsman, eds. 2007) (imagining a more pluralistic image of society than is usually accounted for in invocations of "culture" and "tradition").

[31] Amy J. McMaster, *Human Rights at the Crossroads: When East Meets West*, 29 VT. L. REV. 109, 114-16 (2004) (citing the United Nations Charter and analyzing aspects of Chinese law). *See also* Robert J. Morris, *Globalizing & De-Hermeticizing Legal Education*, 2005 BYU EDUC. & L.J., no. 1, 2005 at 53, 62 (2005) (commenting on the isolation of legal education, law, and the law school from mainstream activity on the globalization of higher education); Robert J. Morris, *The Teaching of Law to Non-Lawyers: An Exploration of Some Curriculum Design Challenges*, 2 INT'L J. L BUILT ENVT. 232 (2010) (on the application of out-come based education, work-integrated education, and criteria-referenced assessment to law classes outside the law school).

[32] *See* Hollingsworth v. Perry, 133 S.Ct. 2652 (2013) (holding that California's Proposition 8 was unconstitutional).

[33] *See* United States v. Windsor, 133 S.Ct. 2675 (2013) (concluding that federal Defense of Marriage Act (DOMA) was unconstitutional).

[34] *See* Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

[35] Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015) (providing an overview of the subject anticipating the *Obergefell* decision and summarizing some of the literature, including United States v. Virginia, 518 U.S. 515 (1996), which held that even the long standing tradition of all-male military schools must

justiciable standards for dignity itself. At bottom, these are questions about cultural change—how, when, and indeed if, it ever happens, and what it means. In most cases, the appeal to "culture" and "tradition" is a conservative appeal, as in the well known words of William F. Buckley, writing in 1955, to stand "athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it."[36] Buckley railed against the "radical social experimentation" of the "Social Engineers, who seek to adjust mankind to conform with scientific utopias, and the disciples of Truth, who defend the organic moral order." He then declared the notion of what American tradition means to most traditionalists:

> Instead of covetously *consolidating its premises*, the United States seems tormented by its *tradition of fixed postulates* having to do with the meaning of existence, with the relationship of the state to the individual, of the individual to his neighbor, so clearly enunciated in *the enabling documents of our Republic*.[37]

In entering upon the present errand of interrogating "tradition," then, we may take as keynote, as well as juxtaposition to Buckley, the remarks of Supreme Court Justice William J. Brennan, when he spoke in 1983 at the tenth anniversary dedication of the new Richardson Law School facilities at the University of Hawai'i at Mānoa. He emphasized the "equality principle" that must be for all the people, not just some, as being the "noblest mission of judges," in the face of the "ugly inequities [that] continue to mar the national promise." He adumbrated all of this specifically within "the social experiment on which Hawai'i is embarked."[38]

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yield to the requirements of Equal Protection). For a summary of this case, *see* Christina Gleason, United States v. Virginia: *Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801 (1996) (declaring the traditional notion of treating men and women differently based solely on gender dates back to the origin of our country).

[36] William F. Buckley, *Our Mission Statement*, NAT'L. REV. para. 2 (Nov. 19, 1955), www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr. For a more thorough exploration of these forces, *see* COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN (2011) (explaining that all right wing ideologies, from the eighteenth century through today, are historical improvisations on a theme: the felt experience of having power, seeing it threatened, and trying to win it back). Edmund Burke, as a metonymy and therefore a flashpoint of this dispute, is central to the invocation of received tradition. Morris, *infra* note 47.

[37] Buckley, *supra* note 36, at para. 3 (emphasis added).

[38] Phil Mayer, *Justice Brennan Lauds Law Process at UH Dedication*, HONOLULU STAR-BULL., Jul. 23, 1983, at A3.

It is from that point of embarkation, from the assumptions inherent in that statement and the Hawaiian social experiment, that we may begin to interrogate what "tradition" fully means thirty-five years on.

BACKGROUND: THE DIGNITY OF EQUALITY

Hanohano nā pua o Hawai'i nei
No ke kaua kauholo me ke aupuni
Pa'a pū ka mana'o no ka pono o ka 'āina
Imua nā pua
Lanakila Kaho'olawe.[39]

In its 5-4 Opinion in *Obergefell*, the U. S. Supreme Court held that the Fourteenth Amendment prohibits any state from barring same-sex marriages or refusing to recognize same-sex marriages performed in other states.[40] In the exchange of arguments among the majority and the dissents, the idea of human dignity became a locus of attention, and much of their argument occurred on the contested ground of American "tradition."[41]

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[39] HARRY KUNIHI MITCHELL, KE MELE O KAHO'OLAWE (SONG OF KAHO'OLAWE) (*circa* 1977) (translation provided by author).

Hawai'i's own blossoms (children) are filled with dignity
For going to contend with the government
Firm and united in thought for the justice of the land
Going forward the children
To victory for Kaho'olawe.

Kaho'olawe is one of the Hawaiian Islands. Once used as a military target range, it is reclaimed now as a symbol of Hawaiian dignity. Both its ancient and modern history have been rife with conflict and symbolism, all captured nicely in the word *hanohano*, dignity. The second line of the lyric, *No ke kaua kauholo me ke aupuni*, is often sung incorrectly as "*No ke kaua kauholo me ka 'aupuni.*" I have corrected it here.

[40] Obergefell v. Hodges, 135 S.Ct. 2584 (2015). *See* Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CAL. L. REV. 1207 (2016) (providing an overview of the case and the issues).

[41] The legal and social literature on dignity is huge, and my purpose here is not to review it generally but with specific reference to same-sex marriage and Hawai'i. For an encyclopedia overview of the subject, *see* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES (Marcus Düwell, Jens Braarvig, Roger Brownsword, & Dietmar Meith eds., 2014). For useful and comprehensive recent surveys *see* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169 (2011) (noting that "dignity is a concept in disarray" because its "meanings and functions are commonly presupposed but rarely articulated"). *See also* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (widespread acceptance of dignity in modern constitutional jurisprudence has not produced consensus on the meaning of dignity); Matthias Mahlmann, *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, 192 PROCEED. BRIT. ACAD. 593 (2013) (investigating the importance of historical genealogies of the idea of dignity and the necessity of defining the theoretical justifiability (and justiciability) of the concept for law). In this article, I argue that a good

The majority opinion, authored by Justice Anthony Kennedy, and the four dissents, authored by Justices Roberts, Scalia, Thomas, and Alito, framed much of the argument in terms of what they conceived to be long-standing history, tradition, and culture, not only in the United States, but worldwide, about sexuality and marriage. Their statements include vastly longitudinal and essentialist claims about practices and understandings that they allege have been in place unchanged for millennia and across all cultures. The several opinions argue that dignity is inconsistent with some of these traditions, yet wholly consistent with others.[42] These might have been questions presumably laid to rest[43] as long ago as the Supreme Court's

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part of this disarray is due to a misunderstanding of "tradition" as it impacts dignity *vis-à-vis* marriage.

Certainly, the *Obergefell* decision, which *brings* dignity and tradition together but does not necessarily *put* them together, partakes of this disarray. For a rich compendium of discussions, albeit predating the advent of same-sex marriage, *see* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer & William A. Parent eds., 1992). In terms of case law, for the most usually cited decision of the Constitutional Court of South Africa, *see* SACC, National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs and Others 1999 (2) SA 1 (CC) at 451 (S. Afr.). *See also* Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014) (framing the racial question in terms of African-Americans only to identify a "fissure between the black community and the gay community"). This is a focus that I believe is too narrow. *See also* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (describing a more nuanced dealing with more "groups," including transgender and bisexual persons (whom Hawaiian culture identifies as *māhū*)); DRUCILLA CORNELL & NICK FRIEDMAN, THE MANDATE OF DIGNITY: RONALD DWORKIN, REVOLUTIONARY CONSTITUTIONALISM, AND THE CLAIMS OF JUSTICE (2016), (dealing with the South African Constitution).

[42] I have argued that essentializing culture one way or another misses the diversity of the American experience. Robert J. Morris, *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J. L. & HUMAN. 105-60 (1996) (discussing a traditional story that concerns, *inter alia*, the dynamics of equality and antisubordination between two men, one being a high chief *ali'i*, the other a commoner *maka'āinana*, whose name was Kapā'ihiahilina, my namesake); Robert J. Morris, *Hulihia ke Au: Implications of Hawai'i Same-sex Marriage for Policy, Practice, and Culture*, 20 UCLA ASIAN PAC. AM. L. J. 1 (2015) (discussing traditions of dignity and equality, *inter alia*, as manifested in the key Hawaiian stories of Pele and Hi'iaka).

[43] *See* George Chauncey, *"What Gay Studies Taught the Court": The Historians' Amicus Brief in* Lawrence v. Texas, 10 GLQ: J. LESBIAN AND GAY STUD. 509 (2004) (discussed in Robert J. Morris, *The Oxford Handbook of Empirical Legal Research, Peter Cane and Herbert M. Kritzer*, 41 HONG KONG L. J. 883-89 (2011) (book review)). In the historiography of LGBT work, the foundational work remains JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. (1976). *See also* NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA (2017) (providing the modern context forty years later).

Lawrence decision[44], or even in *Loving*,[45] and again as recently as its *Windsor* decision[46], yet they persist in jurisprudential discourse throughout the United States.[47] Dignity, therefore, deserves a closer look,[48] particularly *vis-à-vis* the accepted, received, and/or assumed understanding of "tradition,"[49] and particularly with regard to marriage. Recent research finds a link between reduced suicide attempts among adolescents and the approval of same-sex marriage:

> Stigma based on sexual orientation is associated with mental distress, anxiety and depression, and greater rates of suicide attempts. Policies preventing same-sex marriage constitute a form of structural stigma because they label sexual minorities as different and deny them legal, financial, health, and other benefits that are associated with marriage.[50]

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[44] Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating sodomy laws as unconstitutional and overturning Bowers v. Hardwick, 478 U.S. 186 (1986)).

[45] Loving v. Virginia, 388 U. S. 1 (1967) (holding that antimescegenation statutes were unconstitutional).

[46] United States v. Windsor, 133 S.Ct. 2675 (2013) (finding that the federal Defense of Marriage Act (DOMA) was unconstitutional).

[47] Robert J. Morris, *Reviews*, 19 CHINA REV. INT'L. 629 (2012) (reviewing THOMAS A. METZGER, THE IVORY TOWER AND THE MARBLE CITADEL: ESSAYS ON POLITICAL PHILOSOPHY IN OUR MODERN ERA OF INTERACTING CULTURES (2012)) (concluding Metzger's paradigm is the Great Modern Western Epistemological Revolution (GMWER)).

[48] *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015) (providing a comprehensive history and analysis of the idea in comparative law). *See also* JEREMY WALDRON, DIGNITY, RANK & RIGHTS (2012) (describing dignity as a principle of morality and a principle of law); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a 'Pointless Indignity'*, 66 STAN. L. REV. 987 (2014) ("dignity as a placeholder for any of the many qualitative considerations that a quantitative proxy for a constitutional term has unjustifiably ignored"); MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012) (explaining the philosophy of human dignity).

[49] Not unexpectedly, the Hawaiian language parses both dignity and tradition with many words and expressions that provide nuance to context and subject matter. Perhaps the most common words for dignity are *kapukapu* and *hanohano*, while tradition is commonly *ku'una*. History and tradition, particularly in terms of genealogical connections, are commonly seen as *mo'okū'auhau*.

[50] Julia Raifman, Ellen Moscoe, S. Bryn Austin, & Margaret McConnell, *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA PEDIATRICS 350, 351 (2017) (highlighting relative reduction in the proportion of high school students attempting suicide owing to same-sex marriage implementation by states). *See also* Henny M.W. Bos, Lisette Kuyper, & Nanette K. Gartrell, *A Population-Based Comparison of Female and Male Same-Sex Parent and Different-Sex Parent Households*, FAM. PROCESS (2017), https://www.nllfs.org/images/uploads/bos-et-al-2017-family-process.pdf (online version published before inclusion in an issue).

Is dignity a constitutional right, value, or mere *desideratum*? Tradition is often what the majority imagines or mis-remembers[51] it to be, or what it is thought to have been at The Founding. As the song has it, *'O 'oe ka'u i hā'upu a'e nei.* You are just what I have remembered.[52] But as the Hawaiian scholar and lawyer, Pōkā Laenui, has posited, this image regarding the colonization and suppression of Hawaiian culture reveals the definitional problem: "[t]he customs and traditions of the native people were ridiculed and shoved to the back of the closet."[53] It is an apt image for the suppression of LGBT culture as well. As a principle of legal analysis, the power to define what is "deeply rooted tradition" is the power to include and exclude, to foster or hinder equality. This is because, as Bishop Hoadley famously put it, "[W]hoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the *Law-Giver* to all intents and purposes, and not the person who first wrote or spoke them."[54] In a far-ranging discussion of the "religious roots of pluralism," Rabbi Irving Greenberg noted that the "dignities" of "[i]nfinite value, equality, uniqueness . . . are the characteristics inherent in the very fact of being human," and he lamented that "these dignities have been obscured by various cultural processes."[55] This explanation provides the theoretical framework for the discussion that follows.

HAMILTON'S CONSTITUTIONAL "DIGNITY"

The concept of "dignity," which figures so centrally in Justice Kennedy's majority opinion, comes in for special scorn by the dissenters in *Obergefell.* Kennedy had indeed adumbrated it two years earlier in *Windsor*, and even before that.[56] Kennedy assimilates dignity to autonomy, nobility, equality, and identity (*piko 'u*), and raises it as a foundational concept, not only for his definition of marriage, but also for the basis of the right to marry *vis-à-vis* due process and equal protection. Justice Thomas provides an opposing

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[51] *Pa'a pāhemohemo.* PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 300.

[52] *Id.* at 62 (translation provided by author).

[53] Pōkā Laenui (Hayden F. Burgess), *Hawai'i: The Cause of Hawaiian Sovereignty*, 43-44 IWGIA NEWSLETTER 115-56 (1985).

[54] BENJAMIN HOADLY, THE NATURE OF THE KINGDOM, OR CHURCH, OF CHRIST: A SERMON PREACHED BEFORE THE KING, MAR. 31, 1717 (1717); *quoted in* John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 33 n. 1 (1892); *discussed in* James L. Oakes, *The Role of Courts in Government Today*, 14 AKRON L. REV. 175, 177 (1981).

[55] Irving Greenberg, *Seeking the Religious Roots of Pluralism: In the Image of God and Covenant*, 34 J. ECUMENICAL STUD. 385, 387 (1997).

[56] *See* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J. L. & GENDER 243 (2014).

view. He cannot abide same-sex marriage as involving either "liberty" or "dignity," for he writes:

> Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples.... The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.[57]

Chief Justice Roberts says nearly the same thing by arguing the absence of an enumerated Dignity Clause:

> Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an enumerated constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution.[58]

Roberts presses the point by noting the non-democratic role of the judiciary and the need for judicial self-restraint whenever announcing new rights: "Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"[59] While these arguments have the color of legitimate "enumerated rights" reservations, they do not easily pass analytical muster, if only because of the complexity of the questions involved. It has been argued that the Due Process[60] and Equal Protection Clauses[61] do not themselves state substantive guarantees of their own, but provide, rather, for equality and fairness with regard to such other

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[57] Obergefell v. Hodges, 135 S.Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

[58] *Id.* at 2616 (Roberts, J., dissenting).

[59] *Id.* at 2618 (Roberts, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)). For the inception of the doctrine of "ordered liberty" and part of its rich history *vis-à-vis* dignity, *see* Jacob W. Landynski, *Due Process and the Concept of Ordered Liberty: "A Screen of Words Expressing Will in the Service of Desire"?*, 2 HOFSTRA L. REV. 1 (1974).

[60] Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring) ("'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

[61] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) ("Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.").

substantive rights and theoretical content as the law requires, or as the courts or legislatures may invest them with.[62]

Justice Thomas argues that the majority opinion "rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government.[63] This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic."[64] Using examples from African-American slavery and the Japanese internment camps of World War II, and arguing that the Declaration of Independence holds that dignity is innate in human nature, Thomas provides this elision beginning with the actual text of the Declaration:

> Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created

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[62] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Numerous writers have opposed or problematized Westen's views. *See, e.g.*, Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

[63] Thomas B. McAffee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L. J. 138 (2001) (discussing the basis of natural law, including concepts of race in biology, the meaning of the 9th Amendment, and the accommodation of slavery in both the Declaration and the Constitution). For further analysis on these subjects, *see* ADRIAN DESMOND & JAMES MOORE, DARWIN'S SACRED CAUSE: RACE, SLAVERY AND THE QUEST FOR HUMAN ORIGINS 98-100, 280, 284 (2009) (giving focused attention to Polynesia and the *māhū* (transgender, bisexual)).

For a useful comparative study regarding the innovation of the definition of "marriage," particularly with reference to polygamy, and with appeals for its recognition in constitutional law *vis-à-vis* the Ninth Amendment and other provisions both enumerated and unenumerated, *see* Brigham Young, *Constitutional Powers of the Congress of the United States—Growth of the Kingdom of God*, 10 J. DISCOURSES 38, 39-41 (1862). Brigham Young was the president ("prophet, seer, and revelator") of the Mormon Church (Church of Jesus Christ of Latter-day Saints) in Utah, having succeeded to that position after the death of Mormon founder, Joseph Smith, in 1844. In his full-throated and decades-long defense of polygamy, Young said, "I say God speed everybody that is for freedom and equal rights!" Brigham Young, *The Gospel—The One-Man Power*, 13 J. DISCOURSES 268, 274 (1870). The *Journal of Discourses* is a 26-volume set, variously published by the church in England and Salt Lake City between 1854 and 1886. Polygamous Mormonism taught that God was a hermaphrodite—both male and female. *See* Erastus Snow, *Here is a God—Communion With Him an Inherent Craving of the Human Heart—Man in His Image—Male and Female Created He Them—Spirit and Flesh—Mortal and Immortal*, 19 J. DISCOURSES 266, 269-75 (1878). *See also* Robert J. Morris, *"What Though Our Rights Have Been Assailed?" Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands* (Hawai'i), 18 WOMEN'S RTS. L. REP. 129 (1997).

[64] *Obergefell*, 135 S.Ct. at 2631 (Thomas, J., dissenting).

> in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.[65]

Thomas asserts, somewhat contradictorily, that on the one hand, "[t]he government cannot bestow dignity, and it cannot take it away," but on the other hand that, "[o]ne's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State."[66] The contradiction, of course, is that there would be no need for a "shielding" against something that cannot be taken away or otherwise assaulted. Even if we grant that dignity is inherent in the human being and not granted by any government, it does not follow in *Realpolitik* that the government "cannot" take dignity. Governments take dignity away all the time. Surely, if a government can foist indignity and humiliation upon its citizens, as we know it can, then *a fortiori* it can bestow the opposites of those things, as well.[67]

Justice Alito argues that by taking the decision on marriage out of the hands of "the people," the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[68] In addition, as key support for their arguments, the dissents of both Chief Justice Roberts and Justice Scalia cite the *Federalist Papers* (*Federalist* No. 78), authored by Alexander Hamilton, as authority for the argument that courts are limited to "merely judgment" only,[69] and may exercise "neither Force nor Will."[70] Hence, they argue, there is no Dignity Clause in the Constitution. Taking their lead, it is therefore appropriate to note that in the first *Federalist Paper* (No. 1), which is the introduction and preamble to the collected *Papers*, the same Alexander Hamilton combined both liberty and dignity as the basis for happiness in his advocacy of the new Constitution:

> In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the *evidence of truth.* You will, no doubt, at the same time, have collected *from the general scope of them*, that they proceed from a source not unfriendly to

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[65] *Id.* at 2639.

[66] *Id.* at 2639-40.

[67] *See* Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L. J. 3076 (2014).

[68] *Obergefell,* 135 S.Ct. at 2642 (Alito, J., dissenting).

[69] *Id.* at 2611 (Roberts, C.J., dissenting).

[70] *Id.* at 2631 (Scalia, J., dissenting) (citing THE FEDERALIST NO. 78, at 522-34 (Alexander Hamilton) (J. Cooke ed., 1961)). For a forensic discussion of this subject vis-à-vis the Founding era, *see* Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J. L. & PUB. POL'Y 569 (2017).

> *the new Constitution.* Yes, my countrymen, I own to you that, after having given it an attentive consideration, I am clearly of opinion it is your interest to *adopt it* [the new Constitution]. I am convinced that this is the safest course for *your liberty, your dignity, and your happiness.*[71]

If we take Hamilton at his word, the whole Constitution itself is a Dignity Clause.[72] The sum of the Constitution's parts, read together within its four corners, add up to dignity, inasmuch as dignity, happiness, and liberty potentiate each other within the entire structure. This answers Roberts's "enumerated rights" argument because we are not searching for a right *in* the Constitution, but looking instead at the Constitution itself. *Federalist* No. 1 is centrally concerned with the federal union versus the then thirteen States as "separate confederacies of distinct portions of the whole"[73]—the familiar question of the tensions between federalism and democracy.[74] Hamilton noted especially:

> Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under *the State establishments*; and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from *the subdivision of the empire into several partial confederacies than from its union under one government.*[75]

In other words, in order to facilitate the dignity, happiness, and liberty of the people, the necessity was for a central Union of firmness, vigor, and

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[71] THE FEDERALIST NO. 1, at 89 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added). For more discussion on the quotation from Hamiltion, *see* BARAK, *supra* note 48, at 186 n. 10; Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 748 n.50 (2014) (stating that scholars differ on "whether the Founding Fathers intended dignity to serve as a value underlying the Constitution"). For an exposition of some of these concepts in Hawai'i, *see* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B. U. L. REV. 801 (2007); Robert J. Morris, *Court Bashing in the Legislature: A Modern Lesson in Civics from the "Federalist"*, 6 L. RPTR., no. 6, 1994, at 5.

[72] However, an appeal to the *Federalist* would, in this instance, be ironic inasmuch as such citations are increasingly used by a conservative "originalist" Court. *See* Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RESEARCH Q. 329, 339 (2005).

[73] THE FEDERALIST NO. 1, *supra* note 71, at 90 (Alexander Hamilton).

[74] Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173 (2011).

[75] THE FEDERALIST NO. 1, *supra* note 71, at 88 (Alexander Hamilton) (emphasis added).

efficiency, even where that meant a "diminution" of the power of the states and their respective officials. Crucially, Hamilton's advocacy was for the original text of the Constitution, as yet unamended by the Bill of Rights, and nearly a century before adoption of the 14th Amendment. For him, the original text alone was sufficient to join dignity, happiness, and liberty among the People of the Union as inherent in the document. The balance he struck was on the side of a federal or national concept of dignity. Even so, other "equalizing voices," such as those of Jefferson and Madison, urged the need for amendments to bolster the protection of equality and dignity. As Justice Ruth Bader Ginsburg put it:

> Although the word "equal," or "equality," in relation to individual rights does not even appear in the original U.S. Constitution or in the first ten amendments that compose the Bill of Rights, the *equal dignity* of individuals ideal is part of our constitutional legacy, even of the *pre-Civil War original understanding*, in this vital sense. The founding fathers rebelled against the *patriarchal power* of kings and the idea that political authority may legitimately rest on birth status. *Their culture held them back* from fully perceiving or acting upon ideals of *human equality and dignity*.[76]

The search for the meaning of dignity in the minds and words of the Founders—the "dignity clause" cluster of problems—is not a new exercise. It is another manifestation of the search not only for "original meaning," but also for "original public meaning" that attempts to deal with the slipperiness and vagaries of language by word counting, frequency statistics, lemmatization, and phrasal collocation.[77] Yet in the model under consideration here, of a more diverse and complicated "American tradition," hard empirical, glottometric data on texts of the Founding era would be helpful, but probably only with GMWER[78]-type understanding of "original meaning." They would have no use in searching for the meanings of minority words and traditions that would nevertheless be(come) worthy of constitutional protection at or after the Founding era in, say, immigrant, Asian, Pacific Islander, or Native Hawaiian meanings.[79] If such searches were made in the Hawaiian language databases, would fewer occurrences of the word *māhū* (transgender individual) or of *māhū* characters and stories

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[76] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1188 (1992) (emphasis added).

[77] James C. Phillips, Daniel M. Ortner, & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016) (noting that originalism, which has been the predominant interpretive methodology for constitutional meaning in American law, has evolved into "original public meaning").

[78] *See infra* pp. 21-27 (Great Modern Western Epistemological Revolution).

[79] JEFF MARCK, TOPICS IN POLYNESIAN LANGUAGE AND CULTURE HISTORY (2000).

in the Hawaiian canon[80] indicate that the traditional culture gave them lesser importance or greater importance than other forms of characterization, including *aikāne* (same-sex lover or partner)? As Phillips et al. define their approach:

> A corpus, in linguistic terms, is merely a searchable body of texts used to determine meaning through language usage. A corpus, usually tens or hundreds of millions of words in size, can help with the small sample sizes that have usually plagued originalist research . . . .
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> But a linguist-designed corpus is more than just a big database. Because linguist-designed general corpora have a balance of different genres of texts, one can obtain a more representative slice of language usage and meaning.[81]

If this is a viable approach to determining what constitutes originalism, and hence where the "deep roots" of American tradition lie, then it must count *all* texts of *all* peoples and cultures that now constitute the American polity. Researchers have studied several Pacific languages (Marquesan, Rarotongan, Samoan, Māori), including Hawaiian, in comparison with many other non-Pacific languages, to determine frequency and meaning of word occurrence.[82] Among other theories, they deployed the so-called Zipf's Law[83] of George Kingsley Zipf to examine whether "the frequency of occurrence of a word is almost an inverse power law function of its rank"[84] in examining a number of traditional Hawaiian stories. If scientometric analyses bear out the hypothesis that the *māhū* personages and stories are of lesser frequency than those of, say, the *aikāne*, then the question becomes whether that indicates an "almost inverse" function, or vice versa? And what portion of American tradition does this comprise when the counting is all done? If this inclusive model had been the metric for defining American tradition in 1986, then Justice White's statement in

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[80] PUAKEA NOGELMEIER, MAI PA'A I KA LEO: HISTORICAL VOICE IN HAWAIIAN PRIMARY MATERIALS, LOOKING FORWARD AND LISTENING BACK (2010) (dealing with this process and its vagaries *vis-à-vis* the Hawaiian databases).

[81] Phillips et al., *supra* note 77, at 24.

[82] *See* IOAN-IOVITZ POPESCU, RADEK ČECH, & GABRIEL ALTMANN, THE LAMBDA-STRUCTURE OF TEXTS (2011); IOAN-IOVITZ POPESCU, JÁN MAČUTEK, RADEK ČECH, KARL-HEINZ BEST, & GABRIEL ALTMANN, VECTORS AND CODES OF TEXT (2010); IOAN-IOVITZ POPESCU, WORD FREQUENCY STUDIES (2009).

[83] GEORGE KINGSLEY ZIPF, THE PSYCHO-BIOLOGY OF LANGUAGE: AN INTRODUCTION TO DYNAMIC PHILOLOGY (1935); GEORGE KINGSLEY ZIPF, SELECTED STUDIES OF THE PRINCIPLE OF RELATIVE FREQUENCY IN LANGUAGE (1932). *See also* Ioan-Iovitz Popescu & Gabriel Altmann, *Zipf's Mean and Language Typology*, 16 GLOTTOMETRICS 31 (2008).

[84] Wentian Li, *Random Texts Exhibit Zipf's-Law-Like Word Frequency Distribution* 1, (Sante Fe Inst., Working Paper No. 1991-03-016, 1991), www.santafe.edu/media/workingpapers/91-03-016.pdf.

Bowers v. Hardwick—"to claim that a right to engage in such conduct [consensual homosexual sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious,"[85]—would have been known to be false *ab initio*.

The modern invocation of dignity *vis-à-vis* same-sex marriage was given its strongest scholarly voice in 2010 with the publication of Professor Karen Lee's prescient global study of the subject,[86] in which she demonstrated the

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[85] Bowers v. Hardwick, 478 U.S. 186, 194 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

[86] *See* MAN YEE KAREN LEE, EQUALITY, DIGNITY, AND SAME-SEX MARRIAGE: A RIGHTS DISAGREEMENT IN DEMOCRATIC SOCIETIES (2010); Tai Y. T. Benny (戴耀廷) & Lee Man Yee Karen (李敏儀), *The Discourse on "Human Dignity" in the Constitution of the People's Republic of China* /《中華人民共和國憲法》中關於「人的尊嚴」的論述, 38 HONG KONG J. SOC. SCIENCES /《香港社會科學學報》59 (2010); Man Yee Karen Lee, *Universal Human Dignity: Some Reflections in the Asian Context*, 3 ASIAN J. COMP. L. 283 (2008). *See also* Karen Lee, *Confucian Culture and the International Trend of Legalising Same-Sex Marriage*, POL. ANTHROPOLOGIST (2017), www.politicalanthropologist.com/2017/05/03/confucian-culture-international-trend-legalising-sex-marriage. The literature on human dignity in Chinese culture generally is voluminous, but for a good summary and collection of sources *see, e.g.*, Qianfan Zhang, *The Idea of Human Dignity in Classical Chinese Philosophy: A Reconstruction of Confucianism*, 27 J. CHINESE PHIL. 299 (2000). For a comparative study, *see* Mee-Yin Mary Yuan, *Human Rights in China—Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings*, 8 INTERCULTURAL HUM. RTS. L. REV. 101 (2013). This became all the more salient on May 24, 2017, when the Taiwan Constitutional Court (The Council of Grand Justices (大法官會議)) rendered its Interpretation No. 748, declaring that laws prohibiting same-sex marriage are unconstitutional. While grounding its holding, of course, on the Taiwan Constitution, the court relied for its *ratio decidendi* on standard American Equal Protection analysis and direct citation of *Obergefell*. The importation of *Obergefell* as a decisional basis, along with the Equal Protection jurisprudence of rational basis, heightened scrutiny, discreet and insular minorities, immutable characteristics, fundamental rights, and most significantly from *Obergefell*, the central notion of human dignity (**人性尊嚴**), may be seen in this key statement by the Grand Justices:

> Unspoused persons eligible to marry shall have their freedom to marry, which includes the freedom to decide "whether to marry" and "whom to marry" (see former Interpretation No. 362). *Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity*, and therefore is a *fundamental right* to be protected by Article 22 of the [Taiwan] Constitution.
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> **適婚人民而無配偶者，本有結婚自由，包含「是否結婚」暨「與何人結婚」之自由（本院釋字第362號解釋參照）。該項自主決定攸關人格健全發展與人性尊嚴之維護，為重要之基本權**（a fundamental right），**應受憲法第22條之保障。**

(emphasis added) (translation provided by author). The online texts of the decision, both Chinese and English, respectively, are available at the Web page of the Taiwan Constitutional Court: www.judicial.gov.tw/constitutionalcourt/p03_01_1.asp?expno=748; www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748. While the majority in Interpretation No. 748 validated the Kennedy majority opinion, two of the Grand Justices dissented with arguments that often echoed the dissents in Obergefell. How much

essential nexus between dignity and equality as universal rights. This is the correct longitudinal and essentialistic substance of dignity throughout history, tradition, and culture.[87] Thus, even as late in the day as *Obergefell* (2015), and earlier *Windsor* (2013), it should be accepted that dignity is a constitutional value beyond peradventure. It should also be accepted that dignity, like the inherent rights to life, liberty, and the pursuit of happiness, as well as the rights noted in the Bill of Rights, are congenital, are inborn in human beings just because they are born human, and it is the design of the Constitution not to grant such rights, nor even to enumerate them all, but to prohibit any force from taking them away. Hence, and most ironically, Justice Thomas is correct in saying that "the government would be incapable of bestowing dignity,"[88] any more than the government can "bestow" the freedom of speech or religion. Birthright has already bestowed these things on us.[89] Even so, the question of whether dignity is an underlying constitutional principle or right is contested ground. We may find some certainty in a more forensic examination of tradition.

PLURALISM AND DIVERSITY: DIGNITY IN "MAINSTREAM" AMERICAN TRADITION

Obergefell intertwines the discussion of dignity with the nation's tradition. Both the majority and the dissenting opinions are rife with discussions of the United States' national past. The words "history," "historical," "historic" appear in the decision more than sixty times, and the word "tradition" appears nearly fifty times. The word "precedent" appears 26 times, and the word "past" 10 times. However, it seems clear that often the assumption in these usages is that "tradition" means something close to

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Interpretation No. 748 may amount to "global judicial dialogue" remains to be seen . . . *But see, e.g.*, David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 976-86 (2015) (stating that study of foreign courts and their decisions is a substantial undertaking of the TCC); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 568 (2011) (arguing that the TCC and the U.S. Supreme Court "approach foreign law so differently"). *See also* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15 (2004) ("Human dignity has become an important part of the transnational vocabulary of constitutionalism and human rights."). In any case, Interpretation No. 748 is a flection point in the legal study of dignity.

[87] *See* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002).

[88] Obergefell v. Hodges, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

[89] The literature discussing this paradigm is, of course, enormous, but for a recent summation, using a Darwinian approach, *see, e.g.*, Edwin Fruehwald, *A Biological Basis of Rights*, 19 S. CAL. INTERDISC. L.J. 195, 197 (2010) ("[R]ights can be based on anthropocentric truths—that rights arose from human nature.").

what the philosopher Thomas Metzger calls the Great Modern Western Epistemological Revolution or GMWER, an amalgam of the philosophical systems of mostly white, male, Western, and heteronormative writers.[90] While it may be argued that this was the received (and hegemonic) tradition of America, what does "tradition" really mean today, and how then do tradition and dignity assimilate to each other?[91] Any empirical observation of the modern American society must admit that it has become hugely diverse. Part of the problem in understanding the true, and often misunderstood, nature of constitutional dignity is that the constitutional nature of tradition is also misunderstood. The discussions of tradition persist in deploying a cramped and unilateral definition that does not square with the 21st Century reality of American pluralism. It is a singularized,

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[90] *See* METZGER, *supra* note 47. The assumptions about "tradition" are not new to the Court's jurisprudence on LGBT issues, and they continue to be skewed for the same reasons. *See* Morris, *supra* note 42, at 106-10. Many of the same ideas are present in current movements to "decolonize" the university curriculum. *See, e.g.*, Kenan Malik, *Are SOAS Students Right To "Decolonize" Their Minds from Western Philosophers?*, GUARDIAN, Feb. 19, 2017, www.theguardian.com/education/2017/feb/19/soas-philosopy-decolonise-our-minds-enlightenment-white-european-kenan-malik. For an explication of the GMWER *vis-à-vis* "mainstream" religion, *see* Brief of Major Religious Organizations as Amici Curiae Supporting Petitioner, Gloucester County School Board v. G.G. ex. el Grimm, 137 S. Ct. 1239 (2017) , www.scotusblog.com/wp-content/uploads/2017/01/16-273-amicus-petitioner-major_religious_organizations.pdf. *See also*, ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW (2017).

[91] With special regard to this element of Eurocentrism, see CARL F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS (1998) (discussing how "insider" and "outsider" groups, particularly with regard to gender and sexual orientation, are deployed in the construction of a national consciousness or "national imaginary"). For a good basic introduction to the complex subject of "tradition" and what actors define it, see DAVID B. GOLDMAN, GLOBALISATION AND THE WESTERN LEGAL TRADITION: RECURRING PATTERNS OF LAW AND AUTHORITY (2007); Martin S. Pernick, *Defining the Defective: Eugenics, Esthetics, and Mass Culture in Early Twentieth-Century America*, in THE BODY AND PHYSICAL DIFFERENCE: DISCOURSES OF DISABILITY 89-110 (David T. Mitchell & Sharon L. Snyder eds., 1997). This implicates questions of "identity politics" in the global world. *See* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J/REVUE DE DROIT DE MCGILL 225, 240-41 (2013) (emphasizing that human dignity is the one value that is most fundamental, after which all others are ranked as "more or less consonant with serving human dignity"); Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331 (2012) (providing that human dignity is better viewed as a constitutional principle than a freestanding fundamental right); Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26 (2016) (interrogating transnationalist and cultural approaches); Sonia Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97 (2002) (highlighting that questions of gay rights and identity are "deeply context-specific").

essentialized, and unified definition that almost always goes with the pronoun "it."

In his affirmative critique of *Obergefell*, Professor Kenji Yoshino[92] interrogates dignity *vis-à-vis* the Supreme Court cases of *Poe v. Ullman*[93] and *Washington v. Glucksberg*,[94] which deal with notions of rights that are "deeply rooted" in the nation's history and tradition. He teases apart the subtle differences between the two cases, but stays with the unitary definition of American tradition as an "it," noting only briefly that "the *Obergefell* Court looked to a confluence of various traditions."[95] To facilitate his analysis, he coins the term "antisubordination" and "antisubordination liberty" as tools for measuring the impact of inequality and marginalization on individuals and groups.[96] Even so, the "confluence" remains largely Metzger's GMWER.

In a response to Yoshino's piece, Professor Laurence Tribe generally agrees with Yoshino, but faults him for using "received practices" (i.e., tradition) for maintaining a "fashionable preference" etc.[97] Tribe fashions a doctrine of "equal dignity" by noting that "*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity. . . ."[98] His discussion, and the sources he invokes, are nevertheless still largely Eurocentric, much like the GMWER,[99] and in that he finds a "considerable doctrinal pedigree."[100] He notes that the concept of equal dignity included the "dignity of the states" to be respected in the construct of federalism,[101] but he also urges the study of the Constitution *as amended* in searching for this tradition.[102] If all this is correct, then *Obergefell* does not, as Justice Alito claimed, represent any kind of "new orthodoxy" in the Court's search for American tradition.[103] It rather accepts, as it must, the equal dignity of

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[92] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 149-51 (2015).

[93] Poe v. Ullman, 367 U.S. 497, 544-45 (1961).

[94] Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997).

[95] Yoshino, *supra* note 92, at 164.

[96] *Id.* at 174-75.

[97] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 18-19 (2015) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting)).

[98] *See id.* at 17, 23.

[99] *Id.* at 20.

[100] *Id.* at 23.

[101] *Id.* at 28. *See also* Morris, *supra* note 71.

[102] Tribe, *supra* note 97, at 27 (citation omitted).

[103] *Id.* at 30 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting)).

non-GMWER sources such as, *inter alia*, the State of Hawai'i as participants in the definition of tradition.

Yoshino has previously deconstructed the "erasure of bisexuality" from and by the received mainstream culture,[104] i.e., Euro-American culture,[105] but that project did not undertake to analyze the affirmative presence of bisexuality in non-mainstream traditions. Erasing bisexuality from mainstream American culture, and erasing bisexuality by erasing the minority cultures that privilege it, are two quite different projects. Yoshino notes:

> . . . the fact that bisexuality is *not part of our cultural or semantic stock*: it is difficult constantly to read cases, articles, or popular accounts that erase bisexuals without following suit. But this just displaces the question from the individual level *to the cultural level*, for it is ultimately not that interesting simply to point out that individuals erase bisexuals because they belong to cultures that do. And when the question arises of what *cultural investments* might lead to the erasure of bisexuals, I believe the investments I have described gain in plausibility.[106]

However beguiling and often persuasive these arguments are, they remain partial because they continue to deploy, and often to reify, the unspoken assumption that the deeply rooted tradition of which the cases speak is, by definition, the unified and essentialized inherited Judeo-Christian tradition of Western Europe and the Christianized Americas that forms the "mainstream" of American culture—especially with regard to sexuality and marriage.[107] They maintain the pretense—indeed the legal

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[104] Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (discussing the organization of "contemporary American society" along "traditional" lines of sexuality).

[105] Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

[106] Yoshino, *supra* note 104, at 460-61 (emphasis added). The cross-cultural or inter-cultural question is of prime importance vis-à-vis dignity. Kim Berry, *Designing "'Queer' Across Cultures:" Disrupting the Consumption of Diversity*, 34 HUMBOLDT J. SOC. RELATIONS 15 (2012) (discussing the effects of Darwinian discourses of race, colonialism, and cultural differences); R. Hames, Z. Garfield, & M. Garfield, *Is Male Androphilia a Context-Dependent Cross-Cultural Universal?*, 46 ARCHIVES SEXUAL BEHAV. 63 (2017) (answering yes to the question of the title, i.e., there is a common biological foundation). It would seem that studies such as the several collected in the *Archives* constitute an imperative to the usefulness of comparative and borrowed law set forth in this article. *See also* Debra W. Soh, *Cross-Cultural Evidence for the Genetics of Homosexuality*, SCI. AM. (Apr. 25, 2017), www.scientificamerican.com/article/cross-cultural-evidence-for-the-genetics-of-homosexuality.

[107] JENNIFER D. THIBODEAUX, THE MANLY PRIEST: CLERICAL CELIBACY, MASCULINITY, AND REFORM IN ENGLAND AND NORMANDY 1066-1300 (2015).

fiction—that "tradition" is a thing that can be sought out, identified, limned, delimited, and described with precision, as Metzger does with the GMWER. Specifically with regard to LGBT rights, this unquestioned "tradition" forms the anti-sodomy and traditional marriage nexus that formed the basis of such cases and *Lawrence v. Texas*[108] and *United States v. Windsor*.[109] Such essentialized tradition is highly impervious to change, even by the law.[110] The problem with this unexamined assumption is that it erases entirely a whole array of cultures other than the Christianized West whose people, language, and cultures were (and continue to be) under assault by the white, patriarchal, racist, predominantly Judeo-Christian, and sexist elements of the received majority "tradition," Metzger's GMWER. It also erases much of the Greek and Roman traditions of the Classical world that are still part of American life. And many of these "other" cultures stand in stark opposition to the received tradition in that they not only accept but also favor and celebrate such things as homosexuality, bisexuality, transgenderism, same-sex partnerships, and multifarious configurations of what constitutes a "family."[111] Some of these traditions inhere in the Native American Tribes throughout the United States, and another lives in the Native Hawaiian culture of Hawai'i.[112] Restoration of these cultures and what they have to say about LGBT rights would obviate the need to distinguish between the analysis of *Poe* and *Glucksberg*, at least with reference to the methodological choices for analysis. These non-"traditional" parts of America force us to ask: *How rooted is "deeply rooted"?*

After being an American Territory for more than a half century, Hawai'i entered the Union in 1959 as a State on "equal footing" with every other state.[113] Hawaiian history and culture became part of "one nation,

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[108] Lawrence v. Texas, 539 U.S. 558 (2003).

[109] United States v. Windsor, 133 S. Ct. 2675 (2013).

[110] Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law To Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (noting that legislation is usually more effective in working social change than litigation); Erin C. Westgate, Rachel G. Riskind, & Brian A. Nosek, *Implicit Preferences for Straight People over Lesbian Women and Gay Men Weakened from 2006 to 2013*, COLLABRA: PSYCHOL. (2015), www.collabra.org/articles/10.1525/collabra.18 ("Knowing how and when implicit attitudes change on a cultural level is vitally important to understanding how long-term enduring changes in implicit attitudes occur.").

[111] *See* MOLLY FUMIA, HONOR THY CHILDREN: ONE FAMILY'S JOURNEY TO WHOLENESS (1997) (chronicling a Japanese-American family, with connections to both Hawai'i and California, dealing with homosexuality, AIDS, and homophobia).

[112] *See* Morris, *supra* note 42. For the most recent authoritative summation of these rights and this culture *vis-à-vis* the law, see NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie, Susan K. Serrano, & D. Kapua'ala eds., 2015).

[113] Morris, *supra* note 42, at 4-5, 12-13.

indivisible" with the rest of American history and tradition, and deeply rooted in them. This advent changed the field of that history and tradition in ways that may have been foreseeable and apparent at the time, but may also have introduced unforeseeable consequences for the future.[114] As Pollock and Maitland put it, "[s]uch is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web."[115] In fact, there is no "seamless web" of a unified history (or tradition) inasmuch as there have been many such "tearings" along the way since 1787. The admission to the Union of a new state, such as Hawai'i, amends the meaning of "state" and "states" in the text of the Constitution, as, for example, in the phrase, "[n]o state . . . ." of the 14th Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[116]

Acceptance of this reality amends "tradition" and constitutes the "dignity" of the state, its people, and its traditions themselves, to which equal respect is due.[117] Specifically with regard to Hawai'i, it was

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[114] The mere doing of any of these activities changes the Constitutional field or valence—an idea developed by Felix Cohen. *See* Felix Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950).

[115] 1 FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 1 (2d. ed. 1898).

[116] U.S. CONST. amend. XIV, § 1. Tribe notes that the "equal dignity" forged in the *Obergefell* double helix "does the work that the Privileges or Immunities Clause was originally designed to do." Tribe, *supra* note 97, at 21. A few years following the 1868 adoption of the Fourteenth Amendment, Senator George S. Boutwell of Massachusetts stated that the purpose of the Privileges and Immunities Clause of the Amendment was to "lift him [the humblest citizen] to the dignity of equality. . . ." MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 64 (1999).

[117] The U.S. Supreme Court adumbrated this notion in *Rice v. Cayetano*, holding that a Hawai'i state statute requiring Hawaiian ancestry as a prerequisite to vote in elections for trustees of the Office of Hawaiian Affairs violated the Fifthteenth Amendment. Rice v. Cayetano, 528 U.S. 495, 517 (2000). *See* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1937 n.86 (2003); Steve D. Shadowen, Sozi P. Tulante, & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 107 (2009) (contextualizing *Rice*). *See also* Robert E. Rodes, Jr., *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165, 178 (2004) ("[H]ow the worth of a particular group of people [here Hawaiians] is to be affirmed today depends in great part on how it was denied some other day.") (citing Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury)). The issues surrounding the *Rice* case are fraught and have been the subject of much legal debate. It is not my

recognized from the beginning, when the first statehood constitution was framed in the convention of 1950, to the ratification of statehood in 1959, that the Exotic Other was indeed being incorporated into the fabric of American culture.[118] This was both known and intended. However, by this point it may be apparent that full reception of all these "traditions" will lead to a United States that simply cannot be defined by a single unified tradition, such as Metzger's GMWER.[119] It may be time to abandon the notion of things "deeply rooted" in some once imagined tradition, whether in the paradigm of *Poe* or *Glucksberg*. We may need to revisit Justice Holmes's oft-quoted notion: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[120] If, as I have argued elsewhere,[121] the inclusion of Hawai'i and other non-majority traditions in the body politic is mandatory upon constitutional interpretation, then anything approaching the GMWER cannot be used as a tool of that interpretation. It may be that the only viable tradition upon which we may rely in the 21st Century is that of constitutional interpretation itself, in an amended Constitution, rather than some notion extraneous to the Constitution.[122] This would require a major shift or expansion of current paradigms of "tradition" in both cognitive and noncognitive realms,[123]

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purpose to suggest any solutions here. I merely note the early presence of dignity *vis-à-vis* Hawaiian culture in the studies.

[118] *See* Robert J. Morris, *Re-Identifying American State Democracy: Implications for Same-Sex marriage and the Nonfungibility of Hawai'i in the "Exotic" 1950 Statehood Constitution*, 22 U. HAW. L. REV. 1, 3 (2000).

[119] Michael J. Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130 (2013) (maintaining that the contexts of political, social, and cultural changes, influenced through education, have more impact on seminal Supreme Court decisions than constitutional doctrine). *See also* Ryan C. Black & Ryan J. Owens, *Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*, 60 AM. J. POL. SCI. 30 (2016).

[120] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). *See* Morris, *supra* note 47, at 637-41.

[121] Morris, *supra* note 42.

[122] Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 95 (1989) (describing the Constitution that we follow today is an evolved document, the result of "momentous social transformation," not the original of 1787).

[123] *See* Robert J. Morris, *Not Thinking Like a Nonlawyer: Implications of "Recogonization" for Legal Education*, 53 J. LEGAL EDUC. 267 (2003) (discussing the application of cognitive psychology and the study of "heuristics" to legal education as per the work, *inter alia*, of psychologists Daniel Kahneman and Amos Tversky). *See also* MICHAEL LEWIS, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2016) (providing an updated discussion on the impact, background, and context of Tversky and

including intellectual, emotional, and visceral factors.[124] We may, indeed, be back to Hamilton's "dignity" after all. Tribe asserts that "*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity,"[125] and in this he is consistent with the Hawaiian notion that *pōlena pa'a 'ia iho ke aloha i kuleana like ai kāua*, in love wound tightly together, you and I have equal rights.[126] Dignity inheres in love. For this sense of inclusiveness, we may take an appropriate image from another verse of "The Song of Kaho'olawe":

Alu like kākou lāhui Hawai'i
Mai ka lā hiki mai i ka lā kau a'e
Kūpa'a a hahai hō'ikaika nā kānaka.
Kau li'i mākou nui ke aloha no ka 'āina.[127]

This language is something of a measure of what dignity means in modern times, and it shares much of the same values found in a pre-Contact (before Captain Cook, 1776) world of pristine traditional values.[128]

LESSONS FROM THE MISSIONARY ERA & THE OVERTHROW OF 1893

Dignity, or rather the stripping away of dignity, has been at the heart of the Hawaiian experience for nearly 200 years. Queen Lili'uokalani, the last

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Kahneman's work); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CAL. L. REV. 1, 54 (2016) (dealing with such other named biases and the ways they may skew legal judgment, noting how modern prejudice is more subtle and sophisticated that the "overt animus" of "old-fashioned" bigots); Michael Lewis, *How Two Trailblazing Psychologists Turned the World of Decision Science Upside Down*, VANITY FAIR (Nov. 14, 2016), www.vanityfair.com/news/2016/11/decision-science-daniel-kahneman-amos-tversky (elaborating on the impact of Michael Lewis's work).

[124] Ronan E. O'Carroll, Catherine Foster, Grant McGeechan, Kayleigh Sandford, & Eamonn Ferguson, *The "Ick" Factor, Anticipated Regret, and Willingness to Become an Organ Donor*, 30 J. HEALTH PSYCHOL. 236 (2011) (the scientific study of fear and disgust in decision-making).

[125] Tribe, *supra* note 97, at 17.

[126] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 338 (translation provided by author).

[127] HARRY KUNIHI MITCHELL, KE MELE O KAHO'OLAWE (SONG OF KAHO'OLAWE) (*circa* 1977).

We all work together, the nation of Hawai'i
From sunrise to sunset
Steadfastly to pursue the strengthening of the people
We are few, but our love for the land is great.

[128] Robert J. Morris, *Aikāne: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook's Third Voyage (1776-80)*, 19 J. HOMOSEXUALITY 21 (1990).

reigning Hawaiian monarch, was overthrown in a *coup d'état* fomented by foreigners, mostly Americans, on January 14-17, 1893. Part of the process included the denigration of the Queen, and her brother King Kalākaua before her, in racist terms.[129] They were defamed as the "opéra bouffe monarchy."[130] Kalākaua was labeled as a "half Negro" and his sister as having "exaggerated Negroid features and black skin," which had to be put down before annexation of Hawai'i to the United States could become acceptable,[131] in other words, before Hawai'i would be allowed to become part of the American "tradition." The English "nigger" occurred frequently in the contemporary vernacular as the transliterated *nika*.[132] The literature on the overthrow is massive and continues to grow, inasmuch as the Queen, the Overthrow itself, and the events that ensued, are very much part of the ongoing Hawaiian nationalist or populist movements today.[133] The 1890s were something of an end-point in a tumultuous seven decades since the arrival of the first Christian missionaries in 1820.[134] In the view of many missionaries, the Hawaiian people, whose language and culture until then were solely oral,[135] needed to be pried into dignity, and that prying involved linguistic imperialism and what many have called *linguacide*, the murder of a language that embraced, *inter alia*, what today we call LGBT equality.[136] As the official *Missionary Herald* reported, "[i]f ever the Sandwich Islanders are elevated to the dignity and happiness of a thinking, intelligent

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[129] *See* Robert J. Morris, *The Crossroads of the Pacific: The Development of Multicultural Families in Hawai'i*, *in* WORLD CONFERENCE ON RECORDS (1980), www.robertjmorris.net/WorldConference.pdf (presented at the World Conference on Records on Aug. 12-15, 1980).

[130] TED MORGAN, A SHOVEL OF STARS: THE MAKING OF THE AMERICAN WEST –1800 TO THE PRESENT 469 (1995).

[131] HOUSTON WOOD, DISPLACING NATIVES: THE RHETORICAL PRODUCTION OF HAWAI I 87 (1999).

[132] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 266.

[133] *See* Overthrow of Hawai'i, S.J. RES. 19, 103rd Cong. (1993) (acknowledging the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i, and to offer an apology to Native Hawaiians on behalf of the United States). *Whereas*, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993, should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies. . . . *Mahalo* to *kumu hula* (*hula* teacher/master) Brad Lum for this reference.

[134] John Charlot, *Towards a Dialogue Between Christianity and Polynesian Religions*, 15 STUD. RELIGION/SCI. RELIGIEUSES 443 (1986) (arguing that intercultural conflicts of religion create problems for the world views and self images of indigenous peoples).

[135] ALBERT J. SCHÜTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 7 (1994).

[136] *See* Robert J. Morris, *Translators, Traitors, and Traducers: Perjuring Hawaiian Same-Sex Texts Through Deliberate Mistranslation*, 51 J. HOMOSEXUALITY 225 (2003) (mistranslating is an intentional humiliation or stripping of dignity).

community, the [printing] press, with the blessing of God, will be the lever by which an object so desirable will be effected."[137]

"Unthinking"[138] was one of the most common adjectives the missionaries used to describe the Hawaiians. This, along with their other pejoratives, amounted to a national slander.[139] "Mind among such a people as the Sandwich Islanders, to a great extent is dormant. . . ."[140] "There is a mass of mind on these islands just waking into a consciousness of existence."[141] Hawaiian men are "the degenerate plants of a strange vine."[142] Their souls were "a cage of every unclean bird. . . ."[143] The missionaries' graphic descriptions and gestures of the Hawaiians' heathen conditions "are sufficient to make even the abandoned sailor blush."[144] They still "hanker after the 'old kingdom,' as they call it, meaning the former days of darkness."[145] Male Hawaiian students were "materials,"[146] which, like all Hawaiians when brought under the influence of the gospel, could be molded as the missionaries pleased.[147] As if to compound the slander, they wrote: "We sometimes feel it dangerous to state even real

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[137] *Sandwich Islands. Extracts from the General Letter of the Mission Dated June 23, 1832.*, 29 MISSIONARY HERALD 161, 161 (1833). The Missionary Herald was published in Boston by Crocker & Brewster starting in 1819. Formerly called *The Panoplist*, it was the publication of record for the ABCFM's missions throughout the world. Every volume contained reports from Hawai' i.

[138] *E.g.*, *Sandwich Islands. Journal of Mr. Armstrong on the Island of Maui.*, 34 MISSIONARY HERALD 244, 246 (1838) ("[The missionary lecturers] told the people that the most unyielding obstacle to their improvement is their [*na'aupō*] (ignorance,) and their [*mo'ono'o'ole*] (want of reflection;). . . .").

[139] *See* BERTHOLD SEEMANN, NARRATIVE OF THE VOYAGE OF H.M.S. HERALD DURING THE YEARS 1845-51 (1853); *Alliquis, Query*, FRIEND (Haw.), Oct. 1, 1873, at 81, https://hmha.missionhouses.org/files/original/b875b79d74dbab7c0d1022a9ee34a8f4.pdf. The FRIEND was a newspaper published in Hawai'i and was, like THE MISSIONARY HERALD, an official organ of the mission. Texts are available in the Hawaiian Mission Houses Digital Library and Archives, www.missionhouses.org/library/digital-collection.

[140] *Sandwich Islands. Island of Hawaii.*, 31 MISSIONARY HERALD 17, 20 (1835).

[141] *Sandwich Islands. General Statement Respecting the Mission.*, 25 MISSIONARY HERALD 180, 181 (1829).

[142] *Sandwich Islands. Extracts from a Letter of Messrs. Green and Dibble, Dated at Hilo, Oct. 4th 1831.*, 28 MISSIONARY HERALD 218, 219 (1832).

[143] *Sandwich Islands. Extracts from a Letter of Messrs. Thurston and Bishop, Dated at Kailua, May 21, 1835.*, 32 MISSIONARY HERALD 147, 147 (1836).

[144] *Id.*

[145] *Sandwich Islands. Extracts from Letters Showing the State of Missionary Labor at Various Stations.*, 30 MISSIONARY HERALD 367, 370 (1834).

[146] MISSIONARY HERALD, *supra* note 138, at 252.

[147] *See Sandwich Islands. Hawaii. Kairua[sic]. Extracts from Messrs. Thurston and Bishop's Communication.*, 24 MISSIONARY HERALD MH 273, 274 (1828).

facts of a favorable nature, because too much is inferred from them."[148] The "natives" themselves, of course, did not all read the *Missionary Herald.* A significant part of the problem was the observation by the missionaries of "sodomy" among the Hawaiians. The Rev. Joseph Goodrich observed in April 1830: "[The Hawaiians] freely own, that Paul's description of the vices of the heathen, in the first chapter of Romans, is a correct delineation of their character, and say, [h]ow could he have known it so well?"[149]

The reference to "hankering after the old [pre-Contact] kingdom" is telling, and to that we now turn in the form of two Hawaiian language stories. These are little-known stories that shed much light on how the Hawaiians felt about the loss of their Queen, their culture, and their language.[150] It is important because the story of Lili'uokalani, the tenor of the times, and the forces that were at play in those days have great import for LGBT people and their modern struggle. Its politics, its images, its courage are excellent role models, if only because so often our lives are, *ua ho'opāku'iku'i 'ia mai kō lāua noho 'ana malaila e nā kānaka*, beaten again and again by the people.[151] With this background in mind, we turn now to the two illustrative stories, one of the modern era, and one about pre-modern times, to learn what dignity meant then and what an analysis using Yoshino's "antisubordination liberty" might mean for its modern application to constitutional theory.[152] The first story is taken from materials published in a Hawaiian newspaper in 1890 that demonstrates something of the undignified mindset that characterized inequality at that time. The second story is something of a *Bildungsroman* and a road story. It

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[148] *Sandwich Islands. Extracts from a Joint Letter of the Missionaries at Lahaina, Dated Nov. 20th, 1833.*, 30 MISSIONARY HERALD 338, 339 (1834).

[149] *Sandwich Islands. Extracts from the Journal of Mr. Goodrich at Waiakea, on Hawaii.*, 28 MISSIONARY HERALD 41, 42-43 (1832). The discrepancy of dates occurs because of the travel time for correspondence from Hawai'i to reach New England, and the usual time after that to achieve publication. Goodrich, a graduate of Yale College, was stationed in Hilo. Romans chapter 1 reads in pertinent part:

> 26 For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature:
>
> 27 And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.

Romans 1:26-27 (King James).

[150] For an extended insight into the legal issues, see Akina v. State of Hawai'i, 835 F.3d 1003 (9th Cir. 2016) and its trial, appellate, and Supreme Court filings.

[151] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 306.

[152] *See* Yoshino, *supra* note 92. *Compare* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1368, 1374 (1992) (noting "domination, degradation, and dehumanization" as elements antithetical to dignity).

is about an encounter with the ghosts of dead chiefs and is primarily political. It is a prophetic tale ostensibly set in the past but actually taking place simultaneously in the present with a story line that seems futuristic.[153]

FIRST STORY

On Saturday, April 5, 1890, the Hawaiian-language newspaper *Kū'oko'a* notified its readers of the commencement of "our English-language column" (*ko kākou kolamu 'ōlelo haole*).[154] The notice viewed the new endeavor as a great benefit and blessing (*waiwai, pōmaika'i*) to Hawaiian readers in order that they might be able to put forth their thoughts in that language. One of the specific benefits listed was being able to understand the foreign way of thinking (*ka 'ike i ka no'ono'o haole*). The column would be directed to young people, particularly boys (*nā keiki*), to help them become familiar with and be prepared in English the same as they were in Hawaiian, the "mother tongue of the land" (*ma ka ho'oma'ama'a 'ana a mākaukau ma ia 'ōlelo e like me ka mākaukau ma ka 'ōlelo makuahine o ka 'āina*). Feedback and responses to the exercises were to be directed to one H. R. Hitchcock of Hilo, an entrepreneur and descendant of missionaries.

While such a project might in itself be unremarkable, given the increasing participation of Hawai'i in the global world order, the simple goal of bilingualism had much more behind it in practice, and the method it used was even more remarkable. The column was subtitled, "Uncle Phil's Desk," and bore the epigram, "In Youth Prepare for Manhood."[155] This linguistic and contextual exclusion of girls and womanhood was consistent with capitalism and the world-view of English. In the first column, which appeared on the same date, "Uncle Phil" characterized himself as "an old

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[153] In this respect, students of comparative literature might see parallels with WILLIAM FAULKNER, ABSALOM, ABSALOM! (1964). Without putting too fine a point on it, I suggest the broad parallels might be seen in the references to the Quentin-Shreve/Henry-Bon duality, "the two the four the two," or "Charles-Shreve and Quentin-Henry," in *Absalom. See* Don Merrick Liles, *William Faulkner's Absalom, Absalom!: An Exegesis of the Homoerotic Configurations in the Novel*, 8 J. HOMOSEXUALITY 99 (1983); Christopher Peterson, *The Haunted House of Kinship: Miscegenation, Homosexuality, and Faulkner's Absalom, Absalom!*, 4 CR: NEW CENTENNIAL REV. 227 (2004).

[154] Of the numerous Hawaiian language newspapers published in the nineteenth century, *Ka Nūpepa Kū'oko'a (*The Independent Newspaper), is usually considered to be the most prominent. *See* Joan Hori, *Background and Historical Significance of Ka Nupepa Kuokoa, in* SPECIAL COLLECTIONS, HAMILTON LIBRARY, UNIVERSITY OF HAWAI'I AT MANOA 1, 3-4 (2001).

[155] *Uncle Phil's Desk*, KA NŪPEPA KŪ'OKO'A (INDEPENDENT NEWSPAPER), Apr. 5, 1890, at 4.

school-master who likes to see young faces around him," and he compared his "desk" to a cupboard full of "all kinds of good food for the *minds* of boys and girls."[156] He asked questions about "famous Hawaiians" and "Uncle Sam's Farm."[157] He told his readers to write him short letters with short sentences and short words.[158]

A ten-year-old girl wrote, "my mama has been dead over three months," described her lessons in arithmetic, geography, spelling, history, reading, and writing, and closed with a note about her "two pet kitties."[159] To this interesting and provocative letter, "Uncle Phil" responded: "Uncle Phil thinks that this little 10-year-old girl has too many studies to trouble her brain with. She should have more time to play with her pet kitties."[160] "Uncle Phil's" column for Saturday, April 26, 1890, was about "troublesome fractions."[161] Here is his first explanation:

> A farmer offered to give to a negro who was cultivating his land one-third of all he would raise. But the negro was very much determined to have one-sixth! So the farmer had to take six bits of paper, and by them show the negro that *one third* was more than *one sixth.*
>
> "Well, boss," said the negro doubtfully, "ef you say *one third* is the *most*, I reckon it *is* so. But I allowed *one sixth* was the most."[162]

Following this example for "learning English," "Uncle Phil" then told the "very funny" story of "C'lumbus."

> The King of Spain said to Clumbus, "Can you discover America?" "Yes," said Clumbus, "if you will give me a ship."
>
> When the ship got near [to America], the land was full of black men. Clumbus said, "Is this America?"
>
> "Yes, it is," said they.
>
> Then he said, "I suppose you are the niggers."
>
> "Yes," they said, "we are."
>
> Then the chief said, "I suppose you are Clumbus?"
>
> "You are right," said he.

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156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Uncle Phil's Desk*, KA NŪPEPA KŪ'OKO'A (INDEPENDENT NEWSPAPER), Apr. 26, 1890, at 4.
162 *Id.*

> Then the chief turned to his men and said, "There is no help for it; we are discovered at last." Perhaps that is the way the chiefs felt when Captain Cook first came to Waimea, Kauai.[163]

Nothing could be more simplistically wrong. The Hawaiian response to Cook's advent was one of profound curiosity and deep debate, and the interactions between them greatly nuanced and often fraught.[164] These excerpts demonstrate the interlinked patterns of racism, sexism, and condescension inherent in the process of linguacide, as well as an astonishing assault on dignity, all of which serve well for a project of colonialist subservience. Clearly, the message was that Hawaiians = "niggers," and that language they ought to become familiar with = "Uncle Phil's" condescending Creole. A recent commentator on the "Uncle Phil" phenomenon (Kawai'ae'a) encourages modern young readers to study Hawaiian for the same reasons (*waiwai, pōmaika'i*) and notes:

> In the year 1896, a mere six years after the writing of that column noted above, the use of the Hawaiian language was discontinued in the schools. It was impossible to take Hawaiian in school from that year until the founding of the Hawaiian-language "immersion" program in 1987.[165]

Parsing the pre-Contact and post-Contact sources and claims to traditional legitimacy is especially crucial in dealing with Hawaiian materials. Prior to Contact, there was no writing in Hawai'i—all culture was oral and visual.[166] Pre-Contact Hawaiian civilization developed indigenously and independently as a sovereign "primary state."[167] After Contact, the foreigners introduced their languages, which were written, and the processes of writing, publishing, and recording of archives. It cannot be assumed that everything about the pre-Contact world was somehow captured and written down in the post-Contact world in a great, unbroken continuity.[168] The post-Contact period of transition in the 19th Century

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[163] *Id.*

[164] Morris, *supra* note 128.

[165] Noelani Kawai'ae'a, *Ko Kākou Kolamu 'Ōlelo Haole* (Our English-Language Column) ("*I ka makahiki 1896, he 'eono wale nō makahiki ma hope o ke kākau 'ia 'ana o ia kolamu ma luna a'e nei, ua ho'opau 'ia ka ho'ohana 'ia 'ana o ka 'ōlelo Hawai'i ma nā kula. 'A'ole i hiki ke loa'a hou mai ke kula ma ka 'ōlelo Hawai'i. Ma hope o kēlā makahiki a hiki i ka ho'okumu 'ia 'ana o nā papa kaiapuni Hawai'i i ka makahiki 1987.*"). *See* 1 NĀ MAKA O KANA (THE EYES OF KANA), no. 6, 1993, at 1, 8.

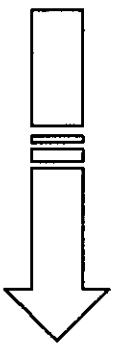
[166] Teresia Teaiwa, *"What Remains to be Seen": Reclaiming the Visual Roots of Pacific Literature*, 125 *PMLA* 730 (2010).

[167] *See* ROBERT J. HOMMON, THE ANCIENT HAWAIIAN STATE: ORIGINS OF A POLITICAL SOCIETY (2013).

[168] *See* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004).

operated something like the Cambrian divide in geological time,[169] as illustrated here:

Pre-Contact Era
(*Ka Wā Mamua* – The Era Before)
(Pukui and Elbert 1986:381)



Post-Contact Era
(*Ka Wā Mahope* – The Era After)

Like the creatures in the pre-Cambrian era, some parts of the culture may have gone extinct, and some that made it across the barrier may have mutated. Some may have survived intact. As in paleontology and anthropology, identifying which parts fall into which categories must be the work of painstaking analysis and research—not of cliché and assumption. Until such work is done, it cannot be said with authority that a "traditional" story, recorded in writing in modern times, is paradigmatic. This discontinuity is a problem that both William Kikuchi[170] and Aleardo Zanghellini[171] address in various ways. Driskill *et al.* note that colonialist heteropatriarchy, often in the form of white supremacism, is often so ingrained in present-day indigenous cultures "that it is internalized and institutionalized as if it were traditional," [172] i.e., as if it were authentically pre-Contact, as if there were no Cambrian boundary. Zanghellini states:

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[169] *See* STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY (1990).

[170] *See* William K. Kikuchi, *Ka Pae Ki'i Mahu o Wailua: The Petroglyphs of Wailua, District of Lihu'e, Island of Kaua'i. Site 50-30-08-105A*, 8 RAPA NUI J. 27, 31 (1994).

[171] *See* Aleardo Zanghellini, *Sodomy Laws and Gender Variance in Tahiti and Hawai'i*, 2 LAWS 51 (2013).

[172] Qwo-Li Driskill et al., *Introduction* to QUEER INDIGENOUS STUDIES: CRITICAL

> The main reason why this question matters should be clear: . . . [It is important] to investigate the role that law plays in influencing the construction of gender and sexual identities. There is a growing body of work addressing, and sometimes foregrounding, the question of how law is productive of sexual and gender identities, focusing on the historically-situated ways in which particular legal dynamics have precipitated the emergence of, or facilitated changes to, certain sexual or gender subjectivities, particularly homosexuality. . . .[173]

SECOND STORY

Ka Nūpepa Puka Lā Aloha 'Āina, the "Patriot Daily News,"[174] came into being and died all within less than a year.[175] Its only purpose was to write about the overthrow.[176] The serialized story, "He Moʻolelo Hawaiʻi o Kekahi Lāhui i Kapa ʻia Ka Mū o Lāʻauhaelemai, Ka Poʻe i Kapa ʻia He Poʻe ʻAi Maiʻa" (A Hawaiian Story of a Nation Called the Mū of Lāʻauhaelemai [Island of Kauaʻi], a People Called a Banana-Eating People), ran from Tuesday, October 24, through Tuesday, December 19, 1893—the year of the overthrow. The text is difficult to read, having been put together on a shoestring and in great haste, with typographical and grammatical breaches, spelling mistakes, dropped words and letters, and so on, but if indeed "the medium is the message,"[177] then the optics of that haste are dramatic. This was a newspaper put together with little money but great urgency as was befitting of the times. It is transcribed in the Papakilo Database, from which I reproduce it here *verbatim*.

Ostensibly, this was a parable about the Mū people, relatives of the Menehune or so-called "little people" of aboriginal Hawaiʻi who lived in

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INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE 19, 34 (Qwo-Li Driskill et al. eds., 2011).

[173] Zanghellini, *supra* note 171, at 52.

[174] Published in Honolulu, Buke [book] 1, helu [number] 1 (Sepatemaba 30, 1893)-buke 2, helu 67 (Ianuari 4, 1894) (I. K. [var. J.K.] Kaunamano, ed.).

[175] It is contextualized with other Hawaiian-language newspapers. *See* Helen Geracimos Chapin, *Newspapers of Hawai'i 1834 to 1903: From "He Liona" to the Pacific Cable*, 18 HAWAIIAN J. HIST. 47, 86 (1984); *Hawaii Newspapers A Union List*, *in* HAW. NEWSPAPER PROJECT, 51 (Sophia McMillen & Nancy Morris, eds., 1987).

[176] All translations that follow are mine. An online version of the Hawaiian text, with PDF of the original paper plus many useful search tools, may be studied as follows: http://papakilodatabase.com/pdnupepa/cgi-bin/pdnupepa?a=d&d=KNPAA18931026-01.2.8&srpos=&e=-------en-20--1--txt-txIN|txNU|txTR-------#; http://papakilodatabase.com/pdnupepa/cgi-bin/pdnupepa?a=d&d=KNPAA18931026-01.2.8.

[177] *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964) (coining the enduring phrase).

the uplands of Kaua'i.[178] Mū means the silent ones, with various cognates, all pronounced *mū*, meaning destructive bugs, the public executioner, a bird, a fish, a crab, and the assembled multitude.[179] All are meanings with which the name of the Mū People in the story is redolent—the left-behind, the marginalized, the second-class, the minority, the abused.[180] The protagonist is their fish-watcher (*kilo*) who embarks on a search (a Jungian night-journey) for a new priest and in the process encounters many adventures, gains many insights, and becomes a seer (*kilokilo*) with great powers. As a fish-watcher, his job is to stand on the cliffs high above the ocean, spot shoals of fish, and signal the fishermen in the canoes below where to catch them. He and they represent metaphorically a people who are relegated to the backlands, who are strange (*'e'epa)*, and therefore outcasts, strangers in their own land. His hair and beard are long. He

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[178] About whom the literature is massive, but for an introduction to the subject, see Katharine Luomala, *The Menehune of Polynesia and Other Mythical Little People of Oceania*. 203 BERNICE P. BISHOP MUSEUM BULL. (1951). Much of their story, like the present newspaper serial, takes place in and around the legendary district of Hā'ena on the north shore of Kaua'i. This place is, of course, of central importance in the seminal compendium of stories about the volcano goddess Pele, her great sister Hi'iaka, and the men Kauakahiapaoa and Lohi'au, who are *aikāne*. I have treated these stories at length in Morris, *supra* note 42.

[179] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 254-55.

[180] Social science research is much occupied currently with these and related questions. *See, e.g.*, Robert Bidwell, *A Deeper Understanding: Reflections of Times Past*, *in* HAWAI'I COALITION AGAINST SEXUAL ASSAULT (HCASA), LGBTQ-ENHANCED BEST PRACTICE STANDARDS FOR THE DELIVERY OF SEXUAL ASSAULT SERVICES IN HAWAI'I 1-8 (ch. 1) (2015); J.R. HOLMES ET AL., HAWAI'I SEXUAL & GENDER MINORITY HEALTH REPORT (2017); Henny M. W. Bos, Justin R. Knox, Loes van Rijn-van Gelderen & Nanette K. Gartrell, *Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health*, 37 J. DEV. BEHAV. PEDIATR. 179 (2016); Rebecca L. Stotzer, *Sexual Orientation and/or Gender Identity/Expression Discrimination and Victimization Among Self-Identified LGBTQI Native Hawaiians in Hawai'i*, 3 J. INDIGENOUS SOC. DEV. 1 (2014). *See also* A. M. GALINSKY, C. E. ZELAYA, C. SIMILE & P. M. BARNES, HEALTH CONDITIONS AND BEHAVIORS OF NATIVE HAWAIIAN AND PACIFIC ISLANDER PERSONS IN THE UNITED STATES, 2014: DATA FROM THE NATIVE HAWAIIAN AND PACIFIC ISLANDER NATIONAL HEALTH INTERVIEW SURVEY, 3 VITAL AND HEALTH STAT. (2017). A remarkable failure and missed opportunity to address these issues occurred in the report, OFFICE OF HAWAIIAN AFFAIRS/'AHA KĀNE, KĀNEHŌ'ĀLANI [*sic*: Kānehoalani]–TRANSFORMING THE HEALTH OF NATIVE HAWAIIAN MEN (2017), https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/Kane_Health_Report_Final_web-REV.pdf, in which "health" included no mention of sexual or gender health. For my corrected reading of Kānehoalani in the note above, see PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 84. A better study, albeit not about Hawaiian men, is ROBERT BLY, IRON JOHN: A BOOK ABOUT MEN (1990) (taking men back, through myth and legend, to the source of their masculinity).

watches the concourse of life through dark, crimson, darting eyes (*maka poniponi*), and he ruminates on the state of the world:

> I see the waves of the ocean, and perhaps my home is there, perhaps not. Yes, the clouds on the horizon repudiate me: "You are not one of us, you are a stranger in this place." Yes, the story in the dream is true, that I am not a citizen of Kaua'i, island of Chief Mano [kalanipō]. I am a clump of seaweed washed up on shore by waves of tears, and there is no friend on the day of wrath, only a single sound of the gun, and Hawai'i is overthrown on the 17th of January.[181]

Elsewhere, the *kilo* paused to consider a similar thought while looking down upon humanity:

> The love of this Mū nation is like the love of the Hawaiian nation for their country and their ruling chiefs, and they resent the plundering by those with lustful eyes, shameless, and wealth-sotted. So did this seer feel, and his tears flowed down for the love of his land. It is true that our people's tears also flow for our beloved motherland.[182]

This is a metonymy of the Hawaiian people themselves after the overthrow: second-class citizens in their own country. It is a cry for antisubordination. The voice of the redactor and the voice of the *kilokilo* become one. The *kilokilo* meets a pair of dead chiefs, or rather their ghosts, to whom he extends his love and blessings.[183] They want to live again, and he has the power to restore them (i.e., Hawai'i itself) to life. In other words, he has himself become the seer he set out to find. He says to them:

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[181] J.K. Kannamano, *Mu v Laanhaelemai*, KA NUPEPA PUKA LA ALOHA AINA, Nov. 1, 1893, at p.4 ("*[K]e ike nei au i na ale o ka moana a o ko'u home paha ia aole paha. Ae, ke hoole mai nei na paeopua, aole ou kuleana me makou, he malihini oe ma keia wahi. Ae, he oiaio kela puana a ka moe, aole io no keia mea he kapa ao Kauai o Mano. He limu pae hewa keia e kulolia nei i ke ala a ka waimaka, aohe makamaka i ka la o ka inaina hookahi no ka hao ana a ka pu, hulipu o Hawaii i ka la 17 o Ianuali.*").

[182] J.K. Kannamano, *Mu v Laanhaelemai*, KA NUPEPA PUKA LA ALOHA AINA, Oct. 30, 1893, at p.4 ("*[U]a like ke aloha o keia lahui Mu me ka lahui Hawaii i ke aloha i ko lakou aina me ko lakou ahi aimoku, i ka hao ia a me ka pakaha ia e na maka keleawe hilahila ole a puni waiwai a pela no keia kilo i kulu 'iho ai kona mau waimaka no kona aina a he mea oiaio kela he kulu io no ka waimaka o ka lahui no ko lakou aina makuahine aloha ke kilo o ua Mu. . . .*").

[183] Any story dealing with ruling chiefs (*ali'i*) is important because what was important to them became the main cultural signifiers for Hawaiian society—the received tradition. *Ke ali'i ke pi'i i ka 'i'o*, the chief is the one ascending to true significance. PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 102. *See, e.g.*, Robert J. Morris, *Same-Sex Friendships in Hawaiian Lore: Constructing the Canon*, *in* OCEANIC HOMOSEXUALITIES 71-102 (Stephen O. Murray ed., 1992).

> Like a great cliff for me is the feeling of shame; to dwell in the shelter of others . . . a friendless life is scarred; I will wear the love of you both as a flower *lei*.[184]
>
> Then one of the ghosts answered, "You are right, I also love you. I only ask if it is possible to restore me to life. My companion here may remain to enjoy the night's entertainment of the chief below. As for me, I swear that if I come to life again, then you will become my *aikāne*, and wherever you go, there the two of us will be."[185]

The seer agreed to restore their lives and thus thank them for their hospitality (*ho'okipa*). He enlisted the aid of their relatives and retainers, promising them:

> "Your chiefs will live again." They all talked at once of their love for their chiefs. From that period down to the present comes the love of this nation for the chiefs, even before the growing up of the deep-green islands of the Archipelago of Green-Backed Hawai'i.[186]

He ordered two long houses (*hālau*) built, and he restored the chiefs to life through certain rites and prayers. In the middle of this narration, the author inserts this paragraph:

> Your writer bears in mind the 14th day of January, which is not forgotten in the hearts of every nation because of the voice of the ruling chiefess, Lili'uokalani, called Holokūlani in her own beloved royal nation. . . .[187]

Thus, the author crafts a story in which a seer dialogues with ghosts and receives a promise of becoming an *aikāne* (same-sex lover, mate, spouse) of one of them if he will exercise his powers to restore the life of the nation, and thus the dignity of the people. The redactor dialogues with us as participants. The literary conceit of such a relationship is a stroke of genius, for the legendary premise is thus brought into dialogue with the present

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[184] J.K. Kannamano, *Mu v Laanhaelemai*, KA NUPEPA PUKA LA ALOHA AINA, Nov. 20, 1893 ("*He pali nui nau o Hoohilahila wale ka hale hoopili wale i walea no ka hoa kanu i ka like me Kaukoopua ke pua mai la i luna o Hihimanju manjumanu ka pua mai la i lun ao Hihimanu manumanu ka noha ana makama ka ole e lei no au i ko olua aloha aeha la. . . .*").

[185] *Id.* ("*[H]oi eolelo mai la kekahi uhane ae he oiaio kau, ua aloha au ia oe, oka'u wale no ina he mea hiki ia oe e hoola ia'u oi nei no o maua ke hooaku i ka po lea o kelii olalo, ano'u iho ke hoohiki nei au me oe a ola au alaila e lilo oe i aikane nau a ma koa wahi e hele ai malaila pu aku kaua ia wa. . . .*").

[186] *Id.* ("[E] *ola ana na hi o oukou ia wa noi oho like mai ai na leo aloha alii mai ia wa mai ke aloha o keia lahui ina alii a hiki ia wa e noho nei ka lahui a mamua aku no o ka ulu ana o na mokupuni ahuli o na Pae moku o Hawaii Kuauli. . . .*").

[187] *Id.* ("*[K]e hoomanao ae nei kou mea kakau moolelo i ka la 14 o Ianuari poina ole i ka puuwa o kela ame keia La hui i k aleo o ka lani alii aimoku Liliulani i ke kapu holokulaui i kona lahui aloha alii. . . .*").

political crisis to form a story about what, hopefully, will take place in the near future. The *aikāne* status of the interlocutors becomes the *pahu hopu* or primary goal, not only of living again but of being chiefs again, of being *Hawaiian* again. The story ends with something of what comparative literature might call a *deus ex machina*, in which the mythical Island that Kāne hides (Kānehūnāmoku), crosses the sea to touch the shore of Kaua'i, and the downtrodden people walk onto it and are saved.[188] It is an event befitting the restoration of dignity to a people[189] and the triumph, at least in part, of antisubordination. As the adage has it, *Ku'u lā pōloli, ā ola i kou aloha 'īna'i pū me ka waimaka.* On my day of hunger, your love saves me, seasoned with tears.[190] The element of love is always central to these images of equality and dignity. They of course encompass the extended family (*'ohana*),[191] including its adopted (*hānai*) members[192] and those persons who identify as non-binary,[193] acting in mutuality and reciprocity (*pāna'i like*).[194] *'A'ohe lokomaika'i i nele i ka pāna'i.* No kind heart lacks a reward (a reciprocation).[195]

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[188] J.K. Kannamano, *Mu v Laanhaelemai*, KA NUPEPA PUKA LA ALOHA AINA, Dec.13, 1983 ("*A olelo aku la ke kilokilo ia Kanehunamoku, e hoihoi ana au i na kanaka o Kauai, ua ae mai la ke alii, a ke kauoha aku nei au ia oe, e hoi oe a no ko oukou la e hoi mai ai, oia ka la a'u e hookokoke aku ai maWaho o Haena, a i kela wa ke kilokilo i olelo aku ai auhea oe, e ka haku e oluolu mai oe e olelo aku au ia oe, e hele anma i ka makaikai i na moku o kea kuhihewa a me kama a me Hawaa o keawe, a mahope ho mai au. Ua olelo mai la o Kanehunamoku, e hoihoi moa mai oe i na ohana ou e noho ala.*"). Additional references to this all-important event appear on Oct. 27, 31, 1983; Nov. 9, 14, 1983; and Dec. 2, 4, 12, 1983.

[189] The literature on the primary god Kāne, his many epithets, his importance in the pantheon, and his powerful symbolism, is significant. His presence as Kānehūnāmoku in this story could not, therefore, be more important or have more allusional force. *See generally* MARTHA BECKWITH, HAWAIIAN MYTHOLOGY 67-97, 326-48, 448, 539-42 (1970).

[190] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 100.

[191] The house with love reaches far, *hāloa ka hale o ke aloha. See id.* at 54.

[192] A point rightly urged in Neo Khuu, Obergefell v. Hodges: *Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184 (2017), but without reference to Hawaiian or similar sources.

[193] *See* Rebecca L. Stotzer, *Family Cohesion Among Hawai'i's Māhūwahine*, 7 J. GLBT FAM. STUD. 424 (2011); Gary J. Gates, *Same-sex Couples in Hawaii: A Demographic Summary*, WILLIAMS INST. (Oct. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/HI-same-sex-couples-demo-oct-2013.pdf.

[194] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 689 (2008) (taking a global view of the subject, including discussion, *inter alia*, of Planned Parenthood v. Casey, 505 U.S. 833 (1992) (stating that American law affords constitutional protection to decisions and choices central to personal dignity and autonomy, including marriage, family relationships, and child rearing)). *See also* UNDERSTANDING HUMAN DIGNITY (Christopher McCruden ed., British Acad., reprt. 2014) (providing an extensive comparative anthology of the subject).

[195] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 313.

"A VERY CONVENIENT INSTRUMENT OF JUSTICE"

On March 7, 2016, the Supreme Court delivered a *per curiam* opinion in the Georgia-Alabama same-sex adoption case of *V.L. v. E.L.*, applying the Constitution's Full Faith and Credit Clause to an interstate same-sex adoption dispute.[196] The court overturned a decision by the Alabama Supreme Court, which had held that Alabama courts were not required to accord full faith and credit to the decision of a Georgia court regarding the adoption and custody of a child by a now separated female couple.[197] Whether Full Faith and Credit[198] would apply to the vicissitudes of same-sex marriage had long been a matter to dispute.[199] Writing in *Federalist* 42 (January 22, 1788), James Madison noted the improvements made in the new Constitution over the Articles of Confederation as to Full Faith and Credit among the states:

> The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. *The power here established may be rendered a very convenient instrument of justice*, and be particularly beneficial on the borders of contiguous States [such as Alabama and Georgia], where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.[200]

Significantly, Madison discusses this subject in conjunction with the Privileges and Immunities Clause[201] (both "comity" or "reciprocity" (*pāna'i like*) clauses) as dealing with the equality (what I would call the homogenization) of citizens in all the states.[202] As David Engdahl has noted, Madison's purpose was "aimed at strengthening the national union,"[203] a purpose reified by the Supreme Court in the *V.L. v. E.L.* case.

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[196] V.L. v. E.L., 136 S. Ct. 1017 (2016).

[197] *Id.* The Court did not state whether the couple were actually divorced or had actually been married (the implication is that they were neither), and it did not refer to *Obergefell*. While many may see the two cases as related, on its facts and law the instant case is solely about parental rights through adoption.

[198] U.S. CONST., art. IV, § 1.

[199] *See* Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L. J. 95, 95-99 (2014).

[200] THE FEDERALIST NO. 42, at 278-79 (James Madison) (emphasis added).

[201] U.S. CONST., art. IV, § 2, cl. 1.

[202] THE FEDERALIST NO. 42, at 277-78 (James Madison).

[203] David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L. J. 1584, 1586

The Full Faith and Credit Clause, it said, "serves to 'alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation,'" qualifying for "recognition throughout the land."[204] This nationalizing of recognition must be taken into account in making any definition of what is "deeply rooted" in American history, "tradition," and culture—and it must expand the constricting boundaries of definitions such as the GMWER. To come down to immediate cases, it must necessarily include Hawai'i and Hawaiian culture and the ancient "Hawaiianness" and continuous "indigeneity" of such things, as I have argued elsewhere,[205] as same-sex adoption *hānai* and its implications for images of the "nuclear family" and the "extended family."[206] Not only does recent research "contribute[s] to the mounting evidence that children reared by same-sex parents fare at least as well as those reared by different-sex parents on a variety of measures used to assess psychological adjustment,"[207] it also confirms the validity for modern life and practice of traditional "extended family" arrangements in Hawaiian culture.[208] Nevertheless, concerns about stigmatization are high among same-sex parents: "Studies have also shown that lesbian mothers have concerns about rearing their children in a homophobic society and feel more pressure to justify the quality of their parenting than their heterosexual counterparts."[209]

(2009).

[204] V.L. v. E.L., 135 S. Ct. 1017, 1020 (2016) (quoting Milwaukee Cty. v. M.E. White CO., 296 U.S. 268, 277 (1935)).

[205] Morris, *supra* note 42, at 4.

[206] Sean M. Smith, *The "Hawaiianness" of Same-Sex Adoption*, 30 U. HAW. L REV. 517 (2008) (discussing the preservation of Hawaiian culture and values as mandated by the state constitution includes same-sex families). Same-sex marriage, non-traditional families and relationships, and gender non-conforming individuals *vis-à-vis* Hawai'i receives generous treatment in the three volumes of THE SAGE ENCYCLOPEDIA OF LGBTQ STUDIES (Abbie E. Goldberg, ed., 2016). *See also* Henny M. W. Bos, Justin R. Knox, Loes van Rijn-van Gelderen & Nanette K. Gartrell, *Same-Sex and Different-Sex Parent Households and Child Health Outcomes: Findings from the National Survey of Children's Health*, 37 J. DEV. BEHAV. PEDIATR. 179 (2016) ("No differences were observed between household types [same-sex or opposite-sex] on family relationships or any child outcomes."). KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1997), is still one of the best discussions of this topic, but see more recently, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2009) (recognizing the plethora of familial configurations in modern life).

[207] Bos *et al.*, *supra* note 180, at 185.

[208] Smith, *supra* note 206.

[209] Bos *et al.*, *supra* note 180, at 182.

The "homophobic society" is, of course, the subject of all discussions about dignity as the opposite of stigma, antisubordination, and the presence and definition of "tradition." It takes as its base the notion of the "stigma of impairment," in which the "concept of stigma is central to Disability Studies. It designates the social discredit experienced by people who fail to conform to received social expectations."[210] Truly, "being shamed is a great sickness."[211] Stated another way, the Georgia-Alabama same-sex adoption case of *V.L. v. E.L.*[212] would easily have been decided under Hawaiian principles, or would never have arisen in the first place.

THE SAVING POWER OF TRADITION

Getting right the definition of "deeply rooted tradition" is an all-important project. At best it becomes an exercise in exclusion vs. inclusion; at worst it may be a matter of life and death. The mythologist Joseph Campbell produced a body of work that studies the crucial value of tradition. In a revealing series of discussion with Bill Moyers in the late 1980s, entitled *The Power of Myth*,[213] Campbell answered the question: Why should be concern ourselves with these traditional stories? He said that if we ignore the lessons of the past, we are on our own, we must work life out for ourselves, and we will repeat the mistakes of our forebears. This idea, if repeated so often, almost becomes a cliché, yet we find it in the most serious of contexts. For example, Plato concludes *The Republic* by having Socrates say, "[a]nd thus, Glaucon, a tale was saved and not lost; and it could save us, if we were persuaded by it, and we shall make a good crossing of the river of Lethe and not defile our soul."[214] When Campbell

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[210] Ron Amundson & Akira Oakaokalani Ruddle-Miyamoto, *A Wholesome Horror: The Stigmas of Leprosy in 19th Century Hawaii*, 30 DISABILITY STUD. Q., no. 3/4 ¶4 (2010), http://dsq-sds.org/article/view/1270/1300 (providing that stigma is a conceptual apparatus of customary social manifestations that confirms what seems innate, instinctive, and natural to the members of a received culture or tradition). Similar analyses may be found in ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). Following on Goffman's work, see Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015) (identifying "stigma" as the greatest antipode to dignity). *See also*, SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009); Douglas C. Baynton, *Disability and the Justification of Inequality in American History, in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 33-57 (Paul K. Longmore & Lauri Umanski eds., 2001).

[211] *He ma'i nui ka hilahila.* PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 70. *See also* PUKUI, 'ŌLELO NO'EAU, *supra* note *, at 783.

[212] V.L. v. E.L., 136 S. Ct. 1017 (2016).

[213] *See Joseph Campbell and the Power of Myth with Bill Moyers* (PBS television broadcast 1968), www.jcf.org/new/index.php?categoryid=83&p9999_action=details&p9999_wid=765.

[214] PLATO, THE REPUBLIC 303 (Allan Bloom, trans., Basic Books 2d ed., 1968),

discussed ideas such as these, he always emphasized that each person must apply the stories to himself in order to work out what his own path in life is. He called it "following your bliss." In this way, he said, the traditions are at once universal and personal. In his compilation of selections from the work of Carl Jung, *The Portable Jung*, Campbell quoted Jung on the importance of mythic archetypes thus: "He [Jung] asked himself, 'What is the myth you are living?'" and found that he did not know. 'So, in the most natural way, I took it upon myself to get to know 'my' myth, and I regarded this as *the task of tasks*. . . .'"[215]

Thus, discovering the full meaning of America's complex, diverse, and pluralistic "deeply rooted tradition" is both national and personal "task of tasks." Insofar as it is a test or standard for interpreting the Constitution and determining rights under it, this importance becomes even more apparent. Unlike the GMWER, which arguable may have once been the true "deeply rooted" tradition of the United States at the founding of the Constitution, today it is rather more like the Hawaiian idea of *aloha*, love. Mary Kawena Pukui provides these concluding lines from a chant:

> Look forward with love for the season ahead of us,
> Let pass the season that is gone.
>
> *Aloha 'ino nō kā ho'i ke kau ma mua.*
> *'U'ina 'ino nō ho'i ke kau i hala aku nei.*[216]

This recognizes the truth that "deeply rooted tradition" evolves step by step as new states are added to the Union and new conditions arise. It explains the process by which "implied fundamental rights [must] be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"[217] A Hawaiian song[218] provides this image of union:

> *Hilo pa'a 'ia ke aloha*
> *I ka lino hilo pāwalu . . . .*
>
> Love is bound fast

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www.inp.uw.edu.pl/mdsie/Political_Thought/Plato-Republic.pdf.

[215] Joseph Campbell, *Introduction* to THE PORTABLE JUNG vii-viii (Joseph Campbell ed., R.F.C. Hull, trans., Penguin Books 1976) (1971) (emphasis added).

[216] MARY KAWENA PUKUI & E.S. CRAIGHILL HANDY, THE POLYNESIAN FAMILY SYSTEM IN KA'Ū, HAWAI'I 85 (1972).

[217] Obergefell v. Hodges, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

[218] Mary Kawena Pukui & Kahauanu Lake, *Pua Lililehua*, www.realhula.com/pdf/03-Pua%20Lililehua.pdf (translation provided by author).

> By an eight-strand braided cable.[219]

The image suggests the common weal, from which we ultimately derive the commonwealth. The American commonwealth might be described as a fifty-plus, strand-braided cable, which has evolved from only thirteen. It incorporates the dignity of the In-Betweens: Mulattos, Three-Fifths of a Person, Concubines, Bisexuals, Transgendered, *Māhū*, *Los Desaparecidos*, the Invisibles, the Sissies, the polyglots, the Marginalized, *Los Olvidados*, and all who are like unto them—*E pluribus unum*. It also includes the dignity of sex itself.[220]

CONCLUSION

In his novel *Grendel*, John Gardner retells the story of Beowulf through the eyes of the legend's antagonist-antihero, and writes of the spellbinding power of the storyteller, Hrothgar, and the impact of his story on its audience:

> I too crept away, my mind aswim in ringing phrases, magnificent, golden, and all of them, incredibly, lies.
>
> What was he? The man had changed the world, had torn up the past by its thick, gnarled roots and had transmuted it, *and they, who knew the truth, remembered it his way—and so did I.*[221]

Such is the nature of "tradition," both as Gardner remakes it and as Hrothgar remade it. The power of the present storyteller to describe the "past" in his own way, and thus to cause it to be "remembered" as such, is axiomatic. Some of us have always taken for granted that the "evolving standards of decency that mark the progress of a maturing society,"[222]

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[219] Eight, as a multiple of four, is a "sacred and formulistic number." PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note * at 435.

[220] Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L. J. 1 (2008); Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CAL. L. REV. CIR. 117, 117 (2015), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1078&context=clrcircuit (providing that *Obergefell* shifts dignity's focus from respect for the freedom to choose towards the respectability of choices and choice makers).

[221] JOHN GARDNER, GRENDEL 43 (1989) (emphasis added).

[222] Trop v. Dulles, 356 U.S. 86, 101 (1958). *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009) (noting that across a stunning variety of civil liberties contexts, the Supreme Court routinely and explicitly determines constitutional protection based on whether a majority of states agree with it, even when formally claiming "originalist" grounds). Lain concludes: "To the extent a sufficiently large number of states act in a pernicious manner, the Court is unlikely to do anything about it, resulting in a new, not-so-countermajoritarian difficulty: constitutional protection that, like the fair-weather friend, is there in good times but gone when needed the

which lie at the heart of our law, simply presume dignity as a constitutional value. The fact that such a value could even be questioned seems absurd, and indeed a bit offensive, at this late date. As Hamilton correctly noted, this is, or ought to be, obvious in the "evidence of truth" as seen from the "general scope" of impressions about the Constitution.[223] At the constitutional intersection of dignity and tradition, it must now be obvious that "We the People" includes many more diverse elements than were constituted (or are today imagined to have been constituted) in the "original understanding" of the Framers, and that imagining as worthy of constitutional dignity only those persons within the limited category of Metzger's GMWER squares with neither reality nor the constitutional mandate of equality. Indeed, just because many of the non-GMWER traditions are minority traditions, they ought to qualify for special protection under equality analysis and, indeed, the entire Constitution as Dignity Clause. If there is any enduring wisdom in the Hawaiian images of braided cables of sennit, lashings of a voyaging canoe, a house, an adze, or a fishing net and lives knotted tightly together in love,[224] it must be that any theory of justice, whether of equal protection or of due process, that systematically excludes, erases, or minimizes any of the strands that are present, is a theory that cannot serve. The ideal eight-strand braided cable is impoverished if only seven strands are used. The parsing of equality by means of culture, history, or tradition legally weaponized dangerously weakens the structure. It misses the strength of the braided cable, the ideal of which ought to be, "[f]orward, forward, companions, unite to obtain progress and good fortune."[225] It is, again, the epic journey of Lonoikamakahiki and his partner (*aikāne*), the man Kapā'ihiahilina, where the defining idea is, "[b]ecause I love you, I will accompany you" / *Aloha au iā 'oe, ukali mai nei.*).[226]

In the Hawaiian *heiau*, or temple, language, religion, and the arts were woven together to create a special "archive" of Hawaiian oral and mnemonic tradition. These came together in "conversation" as symbolized by the *'aha* cord, the strands of which are intertwined to form a braided cord of many strands. *Ua like nā 'aha*, the sides of the structure are equal.[227] Valeri notes the real and metaphorical connections between the ceremony of weaving the *'aha* sennit cord, on the one hand, and the

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most." *Id.* at 418.

[223] THE FEDERALIST NO. 1 (Alexander Hamilton).

[224] *See supra* text accompanying notes 126, 218-20.

[225] *I mua, i mua, e nā hoa, a e pūpūkahi i loa'a ai ka holomua a me ka pōmaika'i.* PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 357 (1986).

[226] *See supra* Abstract and accompanying notes 3-6.

[227] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 5.

composition of poetry and social relationships on the other.[228] The political function coincides with the poetic function. The way in which the chants (*mele*) are composed shows concretely how, by "weaving" them, the *haku* [composer] weaves relations among men. When the *mele* (chant) is finished, it is "fastened in the memory" (*pa'a na'au*) of all those who have taken part in its composition. Thus, the poem, a collective work, becomes a bond that, bound in the memory of all, binds them all. The text is the texture of society. The creation of the chant is the creation of society through the chant. By "weaving" the *'aha* (ritual cord) the king "weaves" his people. Moreover, the ritual "weaving," just like the "weaving of the chants," is also an intellectual weaving, since social relations are reconstituted by the reproduction of the ideas that are their correlate and justification. This is why, as Gadamer puts it, understanding the meaning of any text is not merely a reproductive, but always a productive attitude as well.[229] This is the attitude toward dignity that a tradition, properly understood, should produce.

In this statement about the "natural dignity of man," Thomas Paine gives a picture of dignity as something innate to human nature:

> When I contemplate the natural dignity of man, when I feel . . . for the honour and happiness of its character, I become irritated at the attempt to govern mankind by force and fraud, as if they were all knaves and fools, and can scarcely avoid disgust at those who are thus imposed upon.[230]

As discussed in this article, both dignity and tradition exist (at least for the present) on a macro level: dignity as the entire Constitution, and tradition as the whole of American tradition, every strand, from at least as early as the Declaration of Independence. Each potentiates the other from a position of equal status, but increasing American pluralism requires a rethinking of the notion of tradition as a tool of constitutional interpretation. The task of tasks in this endeavor is to ensure that in creating our definition

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[228] *See* VALERIO VALERI, KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAI'I 299 (1985).

[229] HANS-GEORG GADAMER, TRUTH AND METHOD 263-64 (2d. ed. 1979). I have written about how this process occurs in other contexts. *See, e.g.*, Robert J. Morris, *Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically, in* INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 97-111 (Hualing Fu, Lison Harris & Simon N. M. Young eds., 2007); Robert J. Morris, *China's* Marbury*:* Qi Yuling v. Chen Xiaoqi*—The Once and Future Trial of Both Education and Constitutionalization*, 2 TSINGHUA CHINA L. REV. 273 (2010). Both articles deal with the problems of what meanings "words will bear" and how those meanings can be manipulated.

[230] THOMAS PAINE, RIGHTS OF MAN 35 (Tom Griffith ed. 1996). Paine's statement is contextualized in Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 77 (2011). *See also*, Robert J. Morris, *supra* note 47, at 640-41 (2012).

of what is "deeply rooted in tradition," the Hawaiian part of it is not "ridiculed and shoved to the back of the closet."[231] As the seer said to the ghosts in the Overthrow story, "[l]ike a huge mountain to me is this absolute Humiliation."[232] Humiliation *hilahila* is, of course, the opposite or the absence of dignity *hanohano*. If dignity is essential to a just society, then surely its absence or opposite, shame (*hilahila*), is a "great sickness."[233] To operationalize this in the law would be undignified. In the crucible that works out the rights and privileges of Americans, a line of Hawaiian poetry provides a useful image of equality: *I ka hele 'ana o ka imu ā 'ena'ena, ua 'ōhelo noho'i ka lā'au ulu imu a nonoho a pae like.* When the oven is becoming red-hot, the oven-poking stick is pushed around so that [the heated stones] are arranged in even levels.[234]

In early 2017, Attorney General Jeff Sessions spoke dismissively about the State of Hawai'i, saying, "I really am amazed that a judge sitting on an island in the Pacific can issue an order [regarding an immigration ban] that stops the president of the United States from what appears to be clearly his statutory and constitutional power."[235] In this we see the remarkable congruence of the Hawaiian culture where "the customs and traditions of the native people were ridiculed and shoved to the back of the closet,"[236] and that of LGBT people who are routinely dismissed in the same way. Dignity in the final analysis is the right to "antisubordination,[237] the right not to be dismissed or treated diminutively. It is, in sum and substance, like the *kilokilo* seer of the story in *Ka Nūpepa Puka Lā Aloha 'Āina*,[238] the right of yourself and your people to feel proud and secure. We have common cause in standing firm together, as the motto of Queen Lili'uokalani has it—*'onipa'a kākou*.[239] In that unity, we claim to have *ho'okahi nō māpuna leo a ke aloha*, a singular ebullient voice made by love,[240] within "the social experiment on which Hawai'i is embarked."[241]

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[231] Laenui, *supra* note 53.

[232] Kannamano, *supra* note 184. *He pali nui nau o Hoohilahila wale.*

[233] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 70.

[234] *Id.*, at 298. The images are sexual. For example, plays on the word *'ohelo* and *helo* (to move rapidly, back and forth, to ram) have sexual implications in *mele 'ohelo* (songs) and *hula 'ohelo* (dances). PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 277.

[235] Charlie Savage, *Jeff Sessions Dismisses Hawaii as "An Island in the Pacific,"* N.Y. TIMES (Apr. 20, 2017), www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html.

[236] Laenui, *supra* note 53.

[237] Yoshino, *A New Birth of Freedom?*, *supra* note 92.

[238] Kannamano, *supra* note 188.

[239] PUKUI & ELBERT, HAWAIIAN DICTIONARY, *supra* note *, at 289.

[240] *Id.* at 241 (translation provided by author).

[241] Mayer, *supra* note 38.

"To Sit or Stand": Transgender Persons, Gendered Restrooms, and the Law

Jack B. Harrison*

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This article is dedicated to the memory of Leelah Alcorn and to all transgender students working hard to make a way in the world. *If you or someone you know is struggling with suicidal thoughts due to queer identity and discrimination, please find help at the Trevor Project: (866) 488-7386. Text, chat, or call to talk.*

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I. INTRODUCTION

> The only way I will rest in peace is if one day transgender people aren't treated the way I was, they're treated like humans, with valid feelings and human rights. Gender needs to be taught about in schools, the earlier the better. My death needs to mean something. My death needs to be counted in the number of transgender people who commit suicide this year. I want someone to look at that number and say "that's fucked up" and fix it. Fix society. Please.[1]

"If you told me two years ago that the Supreme Court was going to have to approve whether I could use the school restroom, I would have thought you were joking."[2] These are the words of Gavin Grimm, the young man at

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[1] J. Bryan Lowder, *Listen to Leelah Alcorn's Final Words*, SLATE: OUTWARD (Dec. 31, 2014), http://www.slate.com/blogs/outward/2014/12/31/leelah_alcorn_transgender_teen_from_ohio_should_be_honored_in_death.html.

[2] Gavin Grimm, Opinion, *I'm Transgender and Can't Use the Student Bathroom. The Supreme Court Could Change That*, WASH. POST (Oct. 27, 2016),

the center of a major court case for transgender rights and a national controversy.

Gavin Grimm was born a biological female. However, Grimm felt from an early age that being a girl was not who he was. As a young child, he desired to follow his twin brother onto the football field.[3] By age six he refused to willingly wear girls' clothing.[4] He felt highly uncomfortable in dresses.[5] So much so, that when forced to wear a dress to a sister's wedding, he was so traumatized by the situation that he spent the day in a catatonic state.[6] In middle school, he began to wear mostly boys' clothes and cut his hair short.[7] The road for Grimm in the early days of transition was not easy. He suffered severe anxiety and depression as a result of concealing his gender identity to those close to him.[8] Around age twelve, he acknowledged his male gender and began to identify as male.

In Grimm's freshman year of high school he came out as a transgender male.[9] Grimm's decision to come out took such an emotional toll on him that he was not able to attend high school during his last semester of freshman year.[10]

Eventually, Grimm began seeing a psychologist who diagnosed him with Gender Dysphoria.[11] Following his psychologist's recommendation, Grimm began living his life in accordance with his male gender identity.[12] After using boys' restrooms at local amusement parks, stores and restaurants,

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https://www.washingtonpost.com/opinions/im-transgender-and-cant-use-the-student-bathroom-the-supreme-court-could-change-that/2016/10/27/19d1a3ae-9bc1-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.6bb934f50ca1.

[3] Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn't Think the Nation Would Debate It*, WASH. POST (Aug. 30, 2016) https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the-bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.04d5236d037d.

[4] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 739 (E.D. Va. 2015).

[5] Balingit, *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Robert Barnes & Moriah Balingit, *Supreme Court Takes Up School Bathroom Rules for Transgender Students*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html.

[10] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 739 (E.D. Va. 2015).

[11] *Id.*

[12] *Id.*

Grimm felt that using the boys' restroom at his school was the next step in his progression to living his life as a male.[13] About a month into his sophomore year of high school, Grimm received the green light from the school administration that he could begin using the boys' bathroom.[14] According to Grimm, his use of the male bathroom at his school was nothing remarkable, "I went in, went out, same deal as always," Grimm said. "It was like, 'Okay, great — I can use the bathroom now.'"[15]

Some in the community did not take Grimm's use of Gloucester High School boys' restrooms as lightly as Grimm. A community member eventually took issue with Grimm's use of the male facilities at school and this led to two heated meetings that Grimm attended.[16] For Grimm these meetings were not easy for him. He stated, "I felt very small in there, because I knew the majority of individuals who were in there were not very positive towards me."[17] Nevertheless, Grimm pled his case with the board at these meetings stating, "I am just a human. I am just a boy," and urged the Gloucester County School Board to "please consider my rights when you make your decision."[18] Following these community meetings, the Gloucester County School Board barred Grimm from using the boys' restrooms.[19]

The school did offer him what they viewed as a reasonable accommodation. Under the new policy, Grimm was allowed to use either the bathroom in the nurse's station, or newly constructed single stall bathrooms.[20] For Grimm, this was unacceptable.[21] He was the only student mandated to use the restrooms.[22] Grimm found the entire process painful and humiliating.[23] Grimm would frequently try to "hold it" in hopes of avoiding the lengthy and embarrassing walk to the nurse's station.[24] Grimm's decision to "hold it" in order to avoid the pain and embarrassment of using the bathroom in the nurse's station led to health problems as

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[13] Balingit, *supra* note 3.

[14] *Id.*

[15] *Id.*

[16] Ariane de Vogue, *Meet Gavin Grimm, The Transgender Student at the Center of Bathroom Debate*, CNN (Sept. 8, 2016), http://www.cnn.com/2016/09/08/politics/transgender-bathroom-issues-gavin-grimm/.

[17] *Id.*

[18] Balingit, *supra* note 3.

[19] de Vogue, *supra* note 16.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Grimm, *supra* note 2.

[24] *Id.*

Grimm developed urinary tract infections.[25] Likewise, the school's policy placed him in less than ideal situations while attending school events.[26] For example, at a school football game, Grimm needed a restroom break, but the football stadium did not have unisex restrooms and the main school building was locked.[27] As a result, Grimm's night, which should have been spent enjoying a football game with friends as a normal teen, was marred with the realization that he would need to go to a nearby gas station simply to use the restroom.[28]

Grimm, with the help of the American Civil Liberties Union (ACLU), brought an action against the Gloucester County School Board. His case continues in the courts. As a shy, unassuming teen from a rural town in Virginia, Grimm stands at the center of national controversy in a vital case for transgender rights.

The issue of transgender bathroom access appears to be the next major area of focus in the struggle for expanded civil rights for LGBTQ persons. Over the past two years, states have considered and passed legislation which defines gender and restricts access for transgender persons, particularly students, from the restroom that corresponds with their gender identity in public facilities, particularly public schools. In response, during the Obama administration, the federal government, through the authority of the Department of Education, the Department of Justice, and the EEOC, pushed back against these state restrictions. In doing so, the federal government argued that both Title VII and Title IX provide protections for transgender persons to access the restroom facilities that correspond with their gender identity. Since the election of President Trump, the position of the federal government on these issues has been evolving. However, it is clear that the Trump administration will not be as aggressive in pushing for the protection of transgender students as the Obama administration.

In order to understand the issues raised surrounding restroom facilities, it is important to examine the history and background of the development of gendered restroom facilities in public facilities and workplaces. This Article will first examine the history of sex-separation in restroom facilities in public facilities, exploring how this separation was firmly rooted in the "separate spheres" ideology of the nineteenth century.[29] The central thesis

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[25] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 739 (E.D. Va. 2015).

[26] Grimm, *supra* note 2.

[27] *Id.*

[28] *Id.*

[29] *See* discussion *infra* Part II. *See also* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007) [hereinafter *Law, Architecture, and Gender*] (discussing the development of the separate spheres

of this ideology was that a woman's proper place in society was to be in the home, tending the household and rearing children.[30] However, the emergence of technology, industry, and transportation in America in the nineteenth century began to challenge this "separate spheres" ideology as an increasing number of women left the home to enter the workplace to meet the demands of an expanding economy.[31] These developments ultimately led legislators to regulate public architectural spaces in order to preserve a Victorian social view of women.[32] One aspect of this regulation was the creation of sex-separated toilet facilities, washrooms, and dressing rooms.[33]

After examining the historical context for gendered restroom facilities, this Article turns to a discussion of the emerging body of law regarding the protection of access for transgender persons to the restroom facilities that correspond with their gender identity.[34] This Article first focuses on the development of the protections against discrimination "because of sex" that are contained in both Title VII and Title IX, looking at how courts have expanded the notion of "sex" beyond a simple gender binary understanding.[35]

The Article will then look at recent litigation and legislation focused on the use of restroom facilities by transgender persons, including developments in North Carolina and Virginia.[36] By way of example, the

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ideology).

[30] *See Law, Architecture, and Gender*, *supra* note 29, at 20.

[31] *See id.* at 6.

[32] *Id.*

[33] *See id.* at 4.

[34] *See* discussion *infra* Part III – V. *See generally* Shannon Price Minter, *"Déjà Vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161 (2017); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017) [hereinafter *Public Restrooms*]; *Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722 (2014); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 201-02 (2012); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U.L. REV. 133 (2010); Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1248 (1997).

[35] *See* discussion *infra* Part III & IV.

[36] While recognizing that the term "transgender" may, as Susan Stryker points out, refer to "all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries," throughout this article, I employ the term to include all individuals whose gender expression or identity fail to conform to societal norms or expectations for the sex assigned at the birth of these individuals. *See* Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, *in* TRANSGENDER STUDIES READER 244, 254 n. 2 (Susan Stryker & Stephen Whittle, eds., 2006); Paisley Currah, Richard M. Juang, & Shannon Price Minter, *Introduction*, *in*

Article will examine in depth the issues developed through the *Grimm* case, looking at the case from its inception, its consideration by the Supreme Court, and its pending status before the United States Court of Appeals for the Fourth Circuit.[37] Ultimately, this Article argues that the Supreme Court should expand the understanding of prohibited discrimination on account of "sex" under Title VII and Title IX to include transgender persons.[38]

II. GENDERED PUBLIC RESTROOMS: HOW DID WE GET HERE?

Throughout the lifetimes of almost all living Americans, public restrooms have been a constant reminder of the reality of public separation according to gender.[39] In every facet of our public lives, we are faced with these labels marking "Women" and "Men."[40] As Terry Kogan has written in his study of the relationship between the architecture of gendered public restrooms and the social construction of sex, gender, and gender difference:

> Recent cultural theory has uncovered how aspects of human identity that seem natural, aspects including sexuality, gender, race, and class, are in fact socially constructed. The discourse of architecture--construction--is borrowed to describe this fundamental tenet of postmodern identity theory. Only recently has architectural theory itself begun to focus on how the physical spaces that a society builds and occupies contribute to the ways in which human identity is socially constructed.[41]

TRANSGENDER RIGHTS xiii, xiii- xiv (Paisley Currah, Richard M. Juang, & Shannon Price Minter, eds., 2006).

[37] *See* discussion *infra* Part VI.

[38] *See* discussion *infra* Part VII.

[39] As Sanders asserts in STUD: ARCHITECTURES OF MASCULINITY:

> In one of modern intellectual history's stranger alliances, contemporary cultural theorists have recently borrowed from architectural discourse the language of "construction" to denaturalize sexual identity. Arguing that identity is "constructed" rather than natural, "mapped" rather than given, these theorists draw on the popular perception of architecture as manmade precisely in order to de-essentialize gender. But in the process of erecting an argument about gender, cultural theory draws on a view of architecture – architecture as human artifice- that the discipline itself has, throughout its long history, sought either implicitly to camouflage or emphatically to deny.

Joel Sanders, *Introduction* to STUD: ARCHITECTURES OF MASCULINITY 11, 12 (Joel Sanders ed., 1996).

[40] Rather than these words, sometimes we see the universal symbols for "Women" and "Men."

[41] *Law, Architecture, and Gender*, *supra* note 29, at 7-8. *See also* Sanders, *supra* note 39 at 10; AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995); Leslie Kanes Weisman, DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT (1992).

When we approach these gendered restrooms, what is it that we encounter? We encounter doors that look identical with similar signage on the door indicating which gender may appropriately walk through that door. As Kogan asserts, "[t]his appearance of architectural equality suggests a benign justification for separating public restrooms by sex, one based perhaps on inherent biological differences between men and women that result in different functional needs."[42] Yet, is that, in fact, what these two doors represent?

In discussing how culture and society construct and understand gender and sexual difference, Jacque Lacan discusses how these two doors and their corresponding identification of gender create what he calls the "laws of urinary segregation."[43] In his discussion of both Lacan and Joel Sanders, Kogan asserts that even beyond the signifiers manifested by the doors themselves, the very architecture of these spaces further reinforce this gender segregation.[44] However, the ubiquity of these gender-segregated

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[42] *Law, Architecture, and Gender*, *supra* note 29, at 10. *See also, e.g.*, Sanders, *supra* note 39, at 164 ("Conventional bathroom architecture confirms and naturalizes gender distinctions by segregating the sexes within rigidly contained spaces. Subscribing to the popularly held belief that lavatory design responds to the functional demands of anatomical difference, the public restroom perpetuates the notion that gender rests squarely on the foundations of anatomy.").

[43] JACQUES LACAN, ECRITS (1966).

[44] *Id.* In STUD: ARCHITECT OF MASCULINITY, Sanders argues that architecture acts as one of the subjectifying norms that create and constitute gender performativity, stating:

> This opposition of public and private, upon which sexual binaries like male/female and heterosexual/homosexual crucially depend, is itself grounded on the prior spatial dualism, inside/outside. Through the erection of partitions that divide space, architecture colludes in creating and upholding prevailing social hierarchies and distinctions. Working on vastly different scales – from developer house plans that sequester the housewife in the kitchen from the husband in the family room, to large-scale urban masterplans that isolate the feminine world of the suburb from the masculine world of the city – architecture's bounding surfaces reconsolidate cultural gender differences by monitoring the flow of people and the distribution of objects in space.
>
> The spatial differentiation of the sexes may find its most culturally visible form in the construction of the sexually segregated public bathroom. It is not by accident that Jacques Lacan chooses, as his privileged example of the institutionalization of the sexual difference, adjoining public bathrooms in a railway station. Seated opposite one another by the window of a train pulling into a station, a boy and a girl misrecognize their socially prescribed destinations. "Look," says the brother, "We're at Ladies!" "Idiot!" replies his sister, "Can't you see we're at Gentlemen?" In this parable, of what he calls the "laws of urinary segregation," Lacan attributes the division of sexes to the powerful signifying effects of language. But sexual difference is also a function here of spatial division. Lacan's reduction of the problem of sexual difference to the two-dimensional surface of a pair of bathroom doors, one labeled "Ladies" and the other "Gentlemen," conceals the more complex ways that the actual three-dimensional space

facilities has not always been the case throughout history. For example, it was only during the Victorian period that specific architectural spaces segregated by gender began to emerge in society. Included among these spaces were "ladies' reading rooms" in libraries, "ladies' parlors or lounges in hotels, department stores, restaurants, and banks, and "ladies' railroad cars."[45]

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of the public bathroom assigns sex and gender identity. The architecture of the public bathroom, where the physical walls literally segregate the sexes, naturalizes gender by separating "men" and "women" according to the biology of bodily functions.

While Lacan shows us two bathroom doors identical in every respect for their labels, we never see beyond the doors to the interiors themselves, which in fact are quite different. The common assumption that purely functional requirements specified by anatomical difference dictate the spatial layout and fixture design of restroom architecture reinforces the reigning essentialist notion of sexual identity as an effect of biology. Just one look inside the typical domestic bathroom shared by both sexes discloses the ways in which segregated public restroom facilities answer to the requirements of culture, not nature.

Sanders, *supra* note 39, at 17. *See generally* Minter, *supra* note 34; *Law, Architecture, and Gender*, *supra* note 29; *Public Restrooms*, *supra* note 34; Aaron Betsky, QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE (1997); Aaron Betsky, BUILDING SEX: MEN, WOMEN, AND THE CONSTRUCTION OF SEXUALITY (1995). (asserting that "architecture in its broadest sense is how we construct our sexualities in the real world and thus define ourselves in a given place and time.")

[45] Kogan describes this situation as follows:

A rarity in America before 1850, the few public libraries that existed were bastions of male status that often excluded women. As public libraries began to develop, the question of women's presence became a serious issue. Some library leaders advocated admitting women into public libraries to assure that private libraries would continue to be exclusive male enclaves. Others, however, were concerned that women would be disruptive to the concentration of serious readers.

Nonetheless, embracing the vision of the cult of true womanhood, many library leaders believed that women would enhance a library's cultural mission to uplift the populace. But women's moral superiority also led such library leaders to perceive them as vulnerable to the advances of vulgar males.

The solution to allowing women into public libraries was architectural: create a separate ladies' reading room stocked with fashion and home advice magazines. In 1859, the Boston Public Library opened its first building with a ladies' reading room located on the floor below the general reading room. By the last quarter of the nineteenth century, a separate women's space became an accepted part of American library design. The furnishings in such rooms were generally less institutional than those in the rest of the library, often reflecting the furnishings in a private home. One common feature of such rooms was a hearth, which combined with the furniture, carpets and window treatments to reflect the domestic spaces associated with women's separate sphere. To protect the modesty of "true women," these rooms often provided discrete access to the women's toilet, invisible to other parts of the library. Abigail Van Slyck explains:

> Ladies' reading rooms established in American public libraries in the late nineteenth century did not welcome women as full participants in the public

These gender segregated facilities ultimately led to the mandate for gender segregated restroom facilities in the American workplace. As Kogan tells us:

> In 1887 Massachusetts adopted the first law mandating that "water closets" in factories and other workplaces be separated by sex; New York enacted a similar law two months later. By 1920, 43 states had adopted similar legislation. Legislative history of state laws in the late nineteenth century is virtually unavailable, but the passage of these laws followed several patterns. A significant number were enacted as amendments to existing labor legislation aimed at protecting women and children workers. Other legislation mandating workplace sex-separated toilet facilities aimed more narrowly at protecting only women. Some states adopted toilet legislation using gender-neutral terms, with no specific reference to protecting women. Still other laws included a toilet sex-separation requirement as one provision in comprehensive legislation aimed at improving factory sanitation.[46]

By the early years of the twentieth century, both states and the federal government were engaged in an examination of factory working conditions in America. One of the major concerns of these examinations was the working conditions for women in the American factory. A universal conclusion of this review of working conditions was that factory water closets should be separated by gender.[47] Kogan identifies four reasons underlying the conclusion that public toilet facilities should be segregated by gender:

> sphere. Rather they played an active role in reproducing a particular set of gender assumptions. Their design and location suggest that they constituted a partitioning of the public sphere through the provision of specially arranged settings that encouraged female readers to assume culturally prescribed postures of genteel femininity.

Law, Architecture, and Gender, *supra* note 29, at 30-31 (citing Abigail A. Van Slyck, *The Lady and the Library Loafer: Gender and Public Space in Victorian America*, 31 WINTERTHUR PORTFOLIO: A J. OF AM. MATERIAL CULTURE 221, 241 (1996). *See also* Abigail A. Van Slyck, *The Lady and the Library Loafer: Gender and Public Space in Victorian America*, 31 WINTERTHUR PORTFOLIO: A J. OF AM. MATERIAL CULTURE 221, 223-241 (1996).

[46] *Law, Architecture, and Gender*, *supra* note 29, at 39-40. *See also* Elizabeth Brandeis, *Labor Legislation*, *in* 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 397-400, 461-62 (John R. Commoner ed. 1935; reprinted Augustus M. Kelley Pub. 1966) (1935); George Martin Kober, *History of Industrial Hygiene and its Effects on Public Health*, *in* A HALF CENTURY OF PUBLIC HEALTH 361, 377 (Mazyck P. Ravenal ed., 1921); George M. Price, THE MODERN FACTORY: SAFETY, SANITATION AND WELFARE 489 (1914)

[47] *Law, Architecture, and Gender*, *supra* note 29, at 41.

1. Toilet facilities separated by gender were necessary as a protection to the weaker body of the female factory worker.[48]

2. Toilet facilities separated by gender were a necessary aspect of the obligations of a factory to provide its workers a sanitary – "clean and adequate" – working facility, including toilet accommodations.[49]

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[48] *Id.* Kogan describes this rationale as follows:

Turn-of-the-century concerns about working women often focused on their reproductive capacity. For example, the author of a 1908 monograph on occupational diseases wondered whether the increased speed of machinery might result in female workers mothering "infants who are puny, ill-nourished and of a highly strung nervous system?"

Women's greater physical vulnerability led to the recommendation that separate, special facilities for women be provided in the workplace. State laws mandating sex-separate toilets were often joined with a requirement that women employees be provided with separate dressing rooms, wash rooms, lunch rooms, and resting rooms. These requirements were similarly justified based on the increased vulnerability of women employees. For example, a 1913 report by Dr. George Price on the dress industry notes:

> There is, however, one important matter of sanitation in which the shops suffer in common with the shops of many other industries, namely, the absence of lunch and retiring rooms. In the shops where there are a large number of girls working, it is probable that there are a number likely to have sudden attacks of dizziness, fainting or other symptoms of illness, for whose use provision should be made in the form of rest or emergency rooms.

Because dizziness and fainting were considered conditions unique to women, special spaces needed to be set aside in which women workers could rest. The first theme that emerges from the literature is that sex-separated restrooms (along with other sex-separated facilities) were necessary to provide a protective haven for the vulnerable bodies of women employees, a place where a woman could seek comfort and rest when her weak body gave out on the job.

Law, Architecture, and Gender, *supra* note 29, at 42-44. *See also*, George M. Price, Joint Board of Sanitary Control in the Dress and Waist Industry, Special Report on Sanitary Conditions in the Shops of the Dress and Waist Industry 13 (1913); Carroll Smith-Rosenberg, Disorderly Conduct 197-216 (1985).

[49] *Law, Architecture, and Gender*, *supra* note 29, at 41. As Kogan states:

The sections of reports examining sanitation regularly considered the "adequacy" of a factory's toilet facilities. Subsumed under the concept of adequacy were concerns of the sufficiency of the number of toilets and concerns as to whether the facilities were conveniently located. The sex-separation requirement is melded into considerations of sanitation as an issue of adequacy. For example, in a section on "General Sanitation" in the Department of Commerce and Labor report, the reporter notes:

> The provision of adequate toilet rooms has received much attention from factory inspectors, in the States included in this study, with good results. Only three cases were noted during the investigation where separate

3. Toilet facilities separated by gender were necessary to ensure the protection of the privacy interests of the factory workers, particularly female factory workers.[50]

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provision for the sexes was not made. . . . In the excellent class were placed those rooms in which the plumbing was of good modern pattern, the floors of cement or tile or carefully constructed of wood, and cleaning was so frequent and careful that even suspicious inspection would not disclose offense in odor or appearance.

Sex-separation is a sanitation concern comparable to cleanliness and ventilation. An investigator's final recommendations regarding sanitation often included a recommendation that sex-separate facilities be provided. That recommendation is considered part and parcel of the adequacy of a factory's sanitation. A second theme to emerge from the literature concerning factory toilet facilities is that sex-separation of such facilities is one aspect of a factory's maintaining sanitary, clean, and "adequate" toilet facilities.

Id. at 45-46.

[50] *Id.* at 41. Kogan describes this privacy interest as follows:

Personal privacy became an obsession in late Victorian society. "The right of individual privacy, under new pressures in the brashly inquisitive metropolis and subject to the development of new technologies of intrusion and publicity, was elevated to sacred status, which everyone was bound to respect." This interest in privacy was heightened with respect to issues surrounding bodily functions, and concerns over such functions became deeply intertwined with social morality.

Given this obsession with privacy, public spaces such as the workplace posed a special problem for late Victorian society. Obviously, the "more intimate functions" had to be performed in such locations. One way to assure privacy was to cordon off toilet spaces from more public spaces by requiring floor-to-ceiling walls and "properly screened" approaches.

The literature makes clear that Victorian concerns over modesty and privacy in the workplace were directed more toward protecting women than men. For example, the reporter notes in the Department of Commerce and Labor report on the cotton textile industry:

> In a very large proportion of the mills there is not reasonable privacy of approach to the water-closets. In some cases the water-closets for females immediately adjoin those for males. In some mills the construction of the water-closets is disgraceful; closets are built within the workrooms, and the thin board partitions do not extend to the ceilings, and in some instances the doors do not reach to the floor. Where this is the case the feet and lower parts of the skirts of females occupying the water-closets can be seen from the workrooms.

It is female vulnerability that is of concern in this report. It is a violation of Victorian modesty for any part of a woman's anatomy to be subjected to public scrutiny while she performs intimate bodily functions.

Id. at 47-48 (footnotes omitted). *See also*, JOHN F. KASSON, RUDENESS & CIVILITY: MANNERS IN NINETEENTH CENTURY URBAN AMERICA 116-126 (1990); ELIZABETH WILSON, THE SPHINX IN THE CITY: URBAN LIFE, THE CONTROL OF DISORDER, AND WOMEN 37 (1991).

4. Toilet facilities separated by gender were necessary to support the social morality of the period, particularly a social morality rooted in the "separate spheres" ideology of the nineteenth century, where womanhood was something to be preserved and protected.[51]

A review of the historical development of gender specific restrooms finds that this development is rooted in the cultural and social movements that occurred in the latter part of the nineteenth century and the early part of the twentieth century, rather than being rooted in some understanding of anatomical gender differences. The result of this development is not benign;

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[51] *Law, Architecture, and Gender*, *supra* note 29, at 41. As described by Kogan:

Separating public restrooms by sex was necessary to foster the cult of true womanhood. This theme proves to be the driving force behind the laws mandating sex-separated public restrooms.

Strong evidence as to the overwhelming importance of this fourth theme is embodied in a book entitled *Factory Sanitation*, published in 1913 by the Standard Sanitary Manufacturing Company of Pittsburgh, Pennsylvania, one of the country's major manufacturers of plumbing fixtures. *Factory Sanitation* served two functions. The second half of the book consisted of an extensive catalog of workplace bathroom fixtures manufactured by the company. The first half of the book contained an extended essay also entitled "Factory Sanitation," by J.J. Cosgrove, a highly regarded sanitary engineer who published a number of technical books and histories used in colleges and technical schools to teach sanitation and plumbing architecture.

* * *

Beneath a picture of a filthy wooden structure in the corner of a workroom with two adjacent doors, the following extended caption appears:

> *Toilet Facilities as Bad Morally as From a Sanitary Standpoint*
>
> Moral decency requires that where males and females are employed, separate accommodations shall be provided which, in every sense of the word, will be private. Ignoring the obvious filth of this double accommodation for "men" and "females," close proximity of the fixtures separated only by a thin board partition, far from sound proof, and the common approach, such accommodations would be morally objectionable even if they were sanitary, clean, well lighted and well ventilated.
>
> Apply the golden rule in business. You would recoil with horror at the thought of your daughter being forced to avail herself of such accommodations. Treat other men's daughters, then, as you would like them treat yours.

Though set forth in a technical scientific essay on factory plumbing and sanitation, Cosgrove's concern for a sex-separated bathroom is not founded in the "adequacy" needs of sanitary science. His concern is based upon a vision of true womanhood, which aims to vindicate the early century separate spheres ideology. The appeal to one's "daughter" is meant to invoke a vision of woman as pure and virginal. Despite the scientific pretensions of the realist and sanitarian movements, the moral ideology of the early nineteenth century continues to shape technological decisions at the turn of the twentieth century.

Id. at 50-52 (footnotes omitted). *See generally* J.J. COSGROVE, FACTORY SANITATION (1913).

it has concretized and codified the belief that women are somehow weak and must be protected and that men are predatory by nature.[52]

As this paper now turns to a discussion of the protections provided by Title VII and Title IX against discrimination based on sex, particularly as related to transgender persons, it is important to keep in mind that the segregation and discrimination present in gendered restrooms is historically rooted in stereotypical understandings of cultural and sociological differences between men and women. Segregation by gender in public restroom facilities has not been historically driven primarily by some biological understanding of these differences, but rather out of an archaic vision of womanhood. Given this, the question must be raised as to what continued purpose is served by gendered public restrooms.

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[52] *Law, Architecture, and Gender*, *supra* note 29, at 55-57 (footnotes omitted). Kogan describes this development as follows:

> Despite common intuitions, the historical and social justifications for the ubiquitous practice of separating public restrooms by sex were based not on a gender-neutral policy related to simple anatomical differences between men and women. Rather its origins were deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society.
>
> Were the impact of this practice benign, the facts uncovered in this Article might offer little more than a historical curiosity. However, this architectural practice causes both physical challenges and emotional harms to significant groups of people: transsexuals facing workplace discrimination based on an employer's refusal to allow them to use the restroom designated for the sex with which they identify; persons with disabilities needing assistance from an opposite sex partner who is not allowed into the opposite-sex's restroom; parents with opposite sex children facing hostile stares when they bring their child into a public restroom; women at public events inevitably waiting in long restroom lines during intermission, well after the men's restroom has cleared; intersexual persons facing the emotional challenges in choosing which restroom to use.
>
> But the damage done by our regime of sex-separated public restrooms goes beyond these daily challenges faced by many. Sex-separated public restrooms convey subtle, yet potent messages about the nature of gender and gender difference, messages that date back two hundred years. Separate public restrooms for men and women foster subtle social understandings that women are inherently vulnerable and in need of protection when in public, while men are inherently predatory. Moreover, the two-restroom model teaches that there are two, and only two sexes, a message highly problematic to the public's acceptance of transsexual and intersexual people.

Id. at 55-56 (footnotes omitted).

III. WHAT CONSTITUTES DISCRIMINATION "BECAUSE OF SEX" UNDER TITLE VII?

A. Legislative History of Title VII

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[53] Although the protected classifications of Title VII may appear to be self-explanatory on their face, the meaning of "sex" under Title VII has been subject to intense debate in academic and judicial circles.

Much of this debate stems from the fact that the legislative history of Title VII contains little to no guidance for scholars or judges for determining what constitutes "discrimination based on sex." The original House Bill that ultimately became Title VII made no mention of discrimination based on sex.[54] The statutory text of Title VII never defines the terms "discriminate" or "sex."[55] Attempting to understand the legislative intent of the term "sex" is further complicated by the fact that the documentary record is meager. The legislative record contains only one afternoon of debate and, surprisingly, no committee reports or legislative hearings.[56]

Less than three months after the assassination of John F. Kennedy, on January 31, 1964, the House of Representatives took up debate on H.R. 7152, an omnibus civil rights bill championed by Kennedy before his untimely death the previous year.[57] The House debate lasted only eleven days before a passing vote was cast on February 10.[58] In those eleven days, some eighteen amendments to the bill were adopted, and the most consequential and perhaps most auspicious was proposed some two days before final passage by a Democrat from Virginia. The "Smith Amendment" was added to H.R. 7152 by House Rules Committee Chairman Howard W. Smith.[59] The genesis of the amendment, which added "sex" as a class protected under Title VII's employment discrimination

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[53] 42 U.S.C. § 2000e-2(a)(1) (2008).

[54] Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 Vt. L. REV. 55, 56 (1995).

[55] Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1319 (2012).

[56] *Id.* at 1318.

[57] U.S. EQUAL EMP. OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964, at 10 (1968).

[58] *Id.*

[59] Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ.: J. THEORY & PRAC. 163 (1991).

rubric, has since been the subject of debate among legal scholars and congressional historians.[60]

Some have argued that Smith's record on civil rights, which includes choice quotes such as, "[t]he Southern people have never accepted the colored race as a race of people who had equal intelligence . . . as the white people of the South," formed the impetus to add "sex" as a poison pill aimed at tanking the bill entirely.[61] It was this attempted sabotage that both scholars and some courts believe led to the ambiguity of the meaning of sex under Title VII.[62] As one court noted, "[S]ex was added to the list of prohibited grounds of discrimination by a congressional opponent at the last moment in the hopes that it would dissuade his colleagues from approving the bill; it did not[,]" and as a result, the court reasoned that the "legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII."[63]

Other scholars believe that in light of H.R. 7152's likely passage in both houses, and a newly minted President Johnson ready and willing to sign the bill, Smith added "sex" as a protective measure for white women who would otherwise be relegated to the back of the hiring line if no protective measures for sex were added.[64] Proponents of the theory that Smith added "sex" as an attempt to torpedo the bill, or "ridicule [it] to death" often point to Smith's address to the House upon introduction of the sex amendment.[65]

In this first address, Smith read excerpts from a letter he received from a "lady" in which the letter writer purported to chastise the government for the numerical disparity apparent in the male and female populations of the United States.[66] Referencing the 1960 census, the letter writer asserted that the imbalance of 2,661,000 more females in the United States than males

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[60] *Id.*

[61] CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (2010). *See* Francine Tilewick Bazluke & Jeffrey J. Nolan, *"Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 363 (2006); Calleros, *supra* note 54 at 57.

[62] *See* Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 572 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) (vacated in light of Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)). In support of this proposition, the *Belleville* decision cited Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[63] *See Belleville*, 119 F.3d at 572 (citations omitted). *See also* Calleros, *supra* note 54, at 57; Major Velma Cheri Gay, *50 Years Later . . . Still Interpreting the Meaning of "Because of Sex" Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F.L. REV. 61, 67 (2015).

[64] *See generally* Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453 (1981), http://digitalcommons.ilr.cornell.edu/cbpubs/11/.

[65] *Id.* at 458

[66] 110 Cong. Rec. 2577-78 (1964).

was due in large part to wars occasioned by prior administrations and policies of the U.S. government.[67] Smith's reading of the excerpts, injected with his own brand of wry cynicism, was met with laughter on the House floor, but in concluding this first address, Smith's tone took a markedly more serious turn: "I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing. I just hope that the committee will accept it."[68]

Whatever his motivation in introducing the amendment, when called upon to offer support during debate, he answered the call with strong, serious arguments in favor of adding sex as a means to level the playing field for white women, whom he feared would face a serious disadvantage in employment matters if race were protected, but not sex.[69] As Smith asserted in debate:

> I put a question to you on behalf of the white women of the United States. Let us assume that two women apply for the same job and both of them are equally eligible, one a white woman and one a Negro woman. The first thing that the employer will look at [unless the Smith amendment is approved] will be the provision with regard to the records he must keep. If he does not employ that colored woman and has to make that record, that employer will say, "Well, now, if I hire the colored woman I will not be in any trouble, but if I do not hire the colored woman and hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit."
>
> That will happen as surely as we are here this afternoon. You all know it.[70]

H.R. 7152's eleven days and eighteen amendments on the House floor was but a whisper when compared to what would eventually become the longest legislative debate in Senate history.[71] After eighty-three days of debate, which included the invocation of cloture to break the filibuster orchestrated by senators vehemently opposed to civil rights measures, the bill was passed in the Senate and signed into law by President Johnson on July 2, 1964.[72]

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[67] *Id.*

[68] *Id.*

[69] *Id.* at 2583.

[70] *Id.*

[71] U.S. EQUAL EMP. OPPORTUNITY COMM'N, Legislative History of Titles VII and IX of Civil Rights Act of 1964 10 (1969).

[72] *Id.* at 11.

B. Early Interpretations of "Because of Sex"

Just one hundred days after Title VII became law, EEOC Chairman Franklin D. Roosevelt, Jr. stated to President Lyndon Johnson that, "[i]mplementation of Title VII's prohibition against discrimination on account of sex has been a particularly challenging assignment for the Commission."[73] Roosevelt admitted that some "traditional ideas" about women's roles would need to be "drastically revisited" in response to Title VII.[74] The challenge for the EEOC to take a broad, general mandate and turn it into comprehensive and comprehensible standards of employer conduct was so difficult that Luther Holcomb, Vice Chairman of the EEOC, went so far as to request that Congress remove the prohibition of sex discrimination from the law.[75]

Much of Roosevelt's and the EEOC's frustration can be linked back to the lack of guidance given by Congress.[76] In Congress' brief debate over particular employment practices under the amendment prohibiting discrimination based on sex, it did not reach any consensus about post enactment viability.[77] Moreover, in these debates, advocates of the amendment did not even argue if Title VII would prevent employers from making distinctions between males and females.[78] Further complicating the situation was the fact much of the EEOC staff had little experience in the field of sex discrimination or women's rights.[79]

These factors, among others, led to some early EEOC decisions that are contradictory to today's jurisprudence. One of the most notable examples involved discrimination in employment advertisements. Just three months after Title VII went in to effect, the EEOC determined that the practice of employment advertisement seeking only men or only women did not qualify as sex discrimination because "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women."[80] The EEOC, at the time, believed this was not sex discrimination as segregating ads by sex

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[73] EEOC Reports to President on First 100 Days of Activity, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) P8024, at 6036 (Nov. 12, 1965) [hereinafter EEOC Reports]. *See also*, Franklin, *supra* note 55, at 1380.

[74] Franklin, *supra* note 55, at 1329.

[75] *Id.* at 1329.

[76] *See id.*

[77] *Id.* at 1330.

[78] *Id.* at 1331.

[79] *Id.* at 1335.

[80] *See* Franklin, *supra* note 55, at 1340. *See also* Hugh Davis Graham, Civil Rights and the Presidency: Race and Gender in American Politics 1960-1972, at 111 (1992).

allowed both applicants and employers to find what they were looking for more efficiently.[81]

In the late 1960's and early 1970's the courts also consistently held that discrimination based on a woman being or becoming pregnant did not constitute sex-based discrimination.[82] The most notable case came before the Supreme Court in *General Electric Co. v. Gilbert*. In *Gilbert*, female plaintiffs brought a class action challenging General Electric's disability plan.[83] This plan provided nonoccupational sickness and accident benefits to all of its employees, but disabilities arising from pregnancy were excluded.[84] The Court ruled that in order for the plaintiffs to prevail, sex-based discrimination must have occurred within the meaning of section 703(a)(1) of Title VII.[85] The Court reasoned that an exclusion of pregnancy from a disability benefits plan was not gender-based discrimination under Title VII.[86] The Court determined that there was no showing that the exclusion of pregnancy disability benefits from General Electric's plan was a pretext for discriminating against women.[87] Concomitantly, the Court noted that although pregnancy is confined to women, it is significantly different from typically covered diseases or disabilities.[88]

Following Gilbert and several other cases that ruled that discriminating on the basis of pregnancy was not discrimination "based on sex," Congress enacted the Pregnancy Discrimination Act (PDA) in 1978. With the PDA Congress rejected the court's interpretation that discrimination against pregnant women was not discrimination "based on sex."[89] Many legislators in favor of the bill expressed surprise that it was necessary to clarify that

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[81] John Herbers, *Help Wanted: Picking the Sex for the Job*, N.Y. TIMES, Sept. 28, 1965, at 4.

[82] *See generally* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (finding that the company policy denying accumulating seniority during pregnancy leave was considered discrimination but excluding pregnancy from sick leave compensation was not considered discrimination); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding the exclusion of public unemployment benefits from disability due to pregnancy was not considered sex discrimination because it did not discriminate the people which the policy intended to protect); Narragansett Elec. Co. v. R.I. Comm'n for Human Rts., 374 A.2d 1022 (R.I. 1977) (finding the policy treating pregnancy disabilities differently than other disabilities is not sex discrimination under the State Fair Employment Practice Act because pregnancy is a unique disability).

[83] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 125 (1976).

[84] *Id.*

[85] *Id.* at 134-36 (citing *Geduldig*, 417 U.S at 494).

[86] *Gilbert*, 429 U.S. at 139-40.

[87] *Id.* at 135-36.

[88] *Id.* at 126.

[89] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

discrimination against pregnant women was, in fact, discrimination "based on sex." In their view, "the assumption that women will become pregnant and leave the labor force . . . [was] at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."[90]

C. Sexual Orientation

Following the passage of Title VII, homosexual individuals attempted to bring Title VII sex discrimination claims claiming that they had experienced discrimination based on their sexual orientation.[91] Victims of same-sex discrimination suffered various degrees of harassment, including unwanted physical touching, sexual innuendo, and verbal abuse at the hands of co-workers.[92] Nevertheless, courts consistently held that discrimination on the basis of sexual orientation was not discrimination on the "basis of sex" under Title VII.[93] In the court's view, discrimination suffered by these plaintiffs was not covered by Title VII since it was discrimination because of sexual "preference," and not gender.

1. Sex Stereotyping

Despite the fact that homosexual individuals cannot maintain a sex based discrimination claim based on allegations of sexual orientation discrimination, such claims may succeed if it can be shown that the discrimination is on the basis of sex stereotyping.[94] In *Price Waterhouse v. Hopkins*, the Supreme Court changed its view that discrimination "because of sex" was only protected in cases where the discrimination was on the basis of biological sex.[95]

In *Hopkins*, Ann Hopkins was a Senior Manager in a large accounting firm.[96] In 1982, Hopkins was proposed for partnership in the firm.[97] She

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[90] Franklin, *supra* note 55, at 1366-67 (citing H.R. Rep. No. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751).

[91] Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir.1989), cert. denied, 493 U.S. 1089 (1990). *See also* De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978).

[92] Carreno v. Local Union No. 226, Int'l Bhd. of Elec. Workers, Civil Action Case No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. Sept. 26, 1990). *See also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999).

[93] *See* Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *12 (6th Cir. Jan. 15, 1992). *See also Williamson*, 876 F.2d at 69; Hinman v. Dep't of Pers. Admin., 167 Cal. App. 3d 516 (1985); *De Santis*, 608 F.2d at 331.

[94] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[95] *Id.*

[96] *Id.* at 231.

was neither offered nor denied the partnership; instead, further consideration of her candidacy was postponed for one year.[98] However, the firm ultimately refused to further consider her candidacy for partner.[99] Hopkins brought suit in federal district court under Title VII.[100] The district court found in favor of Hopkins ruling that Price Waterhouse "unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping."[101] The court of appeals affirmed[102] and the Supreme Court granted certiorari.[103]

In evaluating Hopkins' claims, the Court took into consideration her achievements in the workplace, personality traits, and workplace relationships.[104] The record reflected that Hopkins was praised for her accomplishments. She was praised by both clients and partners for being "an outstanding professional' who had a "deft touch," a "strong character, independence and integrity."[105] She was described by a State Department official as being "extremely competent, intelligent,"[106] "strong and forthright, very productive, energetic and creative."[107]

Despite having top notch professional qualities, Hopkins' interpersonal skills, according to her former employers, needed improvement.[108] On many occasions she was aggressive and abrasive to staff members.[109] Partners evaluating her work counseled her to improve her interpersonal skills.[110] In her bid for the partnership both supporters and opponents of her candidacy "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."[111]

Nevertheless, the record indicates that it was not her aggressive personality alone that caused Hopkins to be denied partnership.[112] In fact, Hopkins' lack of femininity in terms of her gender presentation and/or

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[97] *Id.*
[98] *Id.*
[99] *Id.* at 231-32.
[100] *Id.* at 232.
[101] *Id.* at 237.
[102] *Id.* at 232.
[103] *Id.*
[104] *Id.* 233-37.
[105] *Id.* at 234.
[106] *Id.*
[107] *Id.*
[108] *See id.* at 234-35.
[109] *Id.* at 235.
[110] *Id.* at 234.
[111] *Id.*
[112] *See id.* at 235.

expression also played a role in the decision.[113] Partners and co-workers made statements that she "over compensated for being a woman," was "macho," needed to take a "course at charm school," and was not "lady like."[114] Finally, when inquiring about why her candidacy was placed on hold, she was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[115]

Price Waterhouse attempted to rebut Hopkins' claim by asserting that even if a plaintiff showed that her gender played a role in the firm's employment decision, it was still her burden to show the decision would have been different if the employer had not discriminated. The Court rejected Price Waterhouse's argument.[116] In doing so, the Court noted that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute."[117] The Court further determined that the words "because of sex" do not mean "solely because of" and that Title VII was meant to condemn decisions that were a mixture of legitimate and illegitimate considerations.[118] Thus, the Court concluded, when an employer considered both gender and legitimate factors when making an employment decision, that decision would be "because of sex".

As a result of these conclusions, the Court ruled that when a plaintiff in a Title VII case proved that gender played a motivating factor in their employment, the defendant could only avoid liability by proving, by a preponderance of the evidence, that the defendant would have made the same decision even if it had not taken the plaintiff's gender into consideration.[119]

2. *Oncale and Same-Sex Sexual Harassment*

Soon after Title VII became law, courts quickly established opposite-sex sexual harassment as a cognizable claim under Title VII.[120] However,

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 237.
[117] *Id.* at 239.
[118] *Id.* at 241.
[119] *Id.* at 253.
[120] *See* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (holding that gender was indispensable part of job retention and sexual advances by opposite-sex employer). *See also* Sones Morgan v. Hertz Corp., 542 F.Supp. 123 (W.D. Tenn. 1981) (holding that sexually indecent comments towards female coworkers is sexual harassment prohibited by Title VII); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) (finding that

according to Justice Scalia, the federal courts had taken a "bewildering variety of stances" in determining whether plaintiffs alleging same-sex sexual harassment actually had an actionable claim under Title VII.[121] Some circuits allowed plaintiffs to move forward with same-sex sexual harassment claims just the same as an opposite-sex sexual harassment claim under Title VII.[122] Other circuits would consider the plaintiff's same-sex sexual harassment claim as actionable under Title VII only if the harassed was heterosexual and the harasser was homosexual.[123] While the majority of circuits rejected same-sex sexual harassment finding that it was outside the scope of Congress' intent to provide an actionable claim for same sex harassment under Title VII.[124]

In 1998, the Supreme Court ultimately settled the circuit split with its decision in *Oncale v. Sundowner Offshore Servs., Inc.*[125] In *Oncale*, the male plaintiff was subjected to humiliating, degrading, and lewd sex-related actions at the hands of his male co-workers.[126] At one point, Oncale was even threatened with rape.[127] Oncale complained to Sundowner's supervisory personnel about the harassment, but no action was taken.[128] Since his supervisor took no action and because the harassment continued, Oncale ultimately quit his job. Subsequently, he brought a Title VII claim against Sundowner and the co-workers who harassed him alleging that he had been discriminated against because of his sex.[129] The district court granted summary judgment finding that Oncale had no claim under Title VII because the harassment was caused by his male co-workers. The Fifth

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employment terminated after refusal of repeated sexual advances by employer and discrimination against female employee was not evidenced with males in the same position).

[121] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

[122] *See* Gay, *supra* note 63, at 80-81; *see also* Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 569 (7th Cir. 1997); Sardinia v. Dellwood Foods, 94 Civ. 5458 (LAP), 1995 U.S. Dist. LEXIS 16073 (S.D.N.Y. Oct. 30, 1995); Raney v. Distrcit of Columbia, 892 F. Supp. 283 (D.D.C. 1995). *Contra* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000) (doctor harassed male nurse by "lisping at him" and "flipping his wrist" but was denied relief under Title VII because the actions were considered "homophobic" rather than discriminatory).

[123] *See* Yeary v. Goodwill Indus. Knoxville, Inc., 107 F.3d 443, 446-48 (6th Cir. 1997). *See also* McWilliams v. Fairfax Cty. Bd. of Supervisors, 72 F.3d 1191, 1195-96 (4th Cir. 1996).

[124] *See Gay, supra* note 63, at 80-81. *See also* Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988).

[125] *Oncale*, 523 U.S. at 75-82.

[126] *Id.* at 77.

[127] *Id.*

[128] *Id.*

[129] *Id.*

Circuit Court of Appeals affirmed and the Supreme Court granted certiorari.[130]

In a unanimous opinion, the Supreme Court held that nothing in Title VII necessarily barred a claim of discrimination "because of sex" simply because the parties were the same sex.[131] The Court noted that male-on-male sexual harassment in the workplace was not the principal evil Congress was concerned about when it enacted Title VII, however, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed."[132] Justice Scalia, writing for the majority, stated:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[133]

The Court further established three ways plaintiffs alleging same-sex sexual harassment may have an actionable claim through Title VII's "because of sex" provision.[134] First, the Court determined that same-sex sexual harassment should not be treated differently from opposite-sex sexual harassment if the plaintiff can show credible evidence that the harasser is a homosexual.[135] The Court further concluded that the harassing conduct need not be motivated by sexual desire to support an inference of sex based discrimination.[136] The Court found that a claim under Title VII's sex provision could also be actionable if the harasser was motivated by general hostility to the presence of the opposite sex in the workplace.[137] Lastly, the court established that a plaintiff claiming same-sex harassment could also prove "because of sex" discrimination through "comparative

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[130] *Id.*
[131] *Id.* at 79.
[132] *Id.*
[133] *Id.* at 79-80.
[134] *See id.* at 80-81.
[135] *Id.* at 80.
[136] *Id.*
[137] *See id.*

evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[138] The court cautioned that regardless of the evidentiary route the plaintiff chooses, "he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'"[139]

3. *After Oncale and Hopkins*

Although the *Hopkins* and *Oncale* decisions expanded the understanding of what constitutes "because of sex" discrimination under Title VII, there has been debate amongst scholars, lower federal courts, and the EEOC as to how far the reach of these decisions may actually be.[140] Following both the rulings in *Oncale* and *Hopkins*, claims came before lower courts alleging "because of sex" discrimination under Title VII on the grounds of both same-sex sexual harassment and gender stereotyping.[141] Despite the guidance given by the Supreme Court in *Oncale* and *Hopkins*, lower federal courts have interpreted these claims in a variety of ways.[142] Moreover,

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[138] *Id.* at 81.

[139] *Id.* (internal citation omitted).

[140] *See* Andrea M. Kirshenbaum *"Because of. . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-*Oncale *World*, 69 ALB. L. REV. 139 (2005). In this article, Andrea asserts that "Oncale and its progeny demonstrate that the assumptions underlying the traditional employment discrimination construct can no longer be relied upon to conceptualize the full panoply of sexual harassment and discrimination actionable under Title VII." *Id.* at 142-43. *See also* B.J. Chisholm, *The (Back)door of* Oncale v. Sundowner Offshore Services, Inc.*: Outing Heterosexuality as a Gender-Based Stereotype*, 10 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 239 (2001). *But see* John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's* 1997-1998 *Term*, 71 TEMP. L. REV. 773 (1998), stating that "[i]n *Oncale*, the Supreme Court failed to distinguish between the terms sexual harassment and sex-based harassment. . . . According to the EEOC, 'sexual harassment is a form of sex discrimination in which the prohibited conduct is sexual in nature, not just sex-based.'" *Id.* at 806.

[141] *See, e.g.*, Love v. Motiva Enters., LLC, No. 07-5970, 2008 U.S. Dist. LEXIS 69978 (E.D. La. Sept. 16, 2008) (same sex sexual harassment and gender stereotyping claims brought against employer); Jones v. Pac. Rail Servs., No. 00 C 5776, 2001 U.S. Dist. LEXIS 1549 (N.D. Ill. Feb. 12, 2001); EEOC v. TruGreen Ltd. Pship., 122 F. Supp. 2d 986 (W.D. Wis. 1999).

[142] Matthew Fedor, *Can* Price Waterhouse *and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of* Oncale *Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455 (2002) (In *Oncale*, Justice Scalia noted that some courts have held that "same-sex sexual harassment claims are never cognizable under Title VII." (citing Goluszek v. H.P. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988)) Justice Scalia also pointed out that a few courts have held that such claims are actionable "only if

Oncale and *Hopkins* sparked a slew of claims from plaintiffs claiming discrimination "because of sex" based on their transgender status or gender identity.[143] Likewise, the EEOC's stance on what constitutes discrimination on the basis of sex under Title VII has evolved following *Oncale* and *Hopkins*.[144]

For example, in *Boutillier v. Hartford Public Schs.*, where an elementary school teacher brought an action against her former school district alleging sexual orientation discrimination in violation of Title VII "because of . . . sex," the court held that Title VII protects individuals who are discriminated against on the basis of sex because of their sexual orientation.[145] In recognizing the applicability of the *Hopkins* holding to

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the plaintiff can prove that the harasser is homosexual. (comparing McWilliams v. Fairfax Cty. Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) with Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996)). Justice Scalia also observed that other courts have suggested that "workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations. (citing Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997))).

[143] *See* Oiler v. Winn-Dixie La., Inc., No. 00-3114 § I, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (the phrase "sex" has not been interpreted to include sexual identity or gender identity). *See also* Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509 (N.D. Ohio Nov. 9, 2001) (employee who had Gender Identity Disorder was terminated because her appearance and behavior did not fit into the company's sex stereotypes); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996 (N.D. Ohio 2003) (an employee born male and identifying as female was fired after using both men's and women's bathrooms and refusing to identify with a specific gender).

[144] U.S. Dept. of Labor, Wage, and Hour Div. & U.S. Equal Emp. Opportunity Comm'n, Memorandum of Understanding, (Jan. 6, 2017), https://www.eeoc.gov/laws/mous/dol_wagediv_eeoc.cfm. (Title VII's prohibition against sex discrimination includes discrimination on the basis of pregnancy, childbirth, or related medical conditions; gender identity (including transgender status); and sexual orientation). *See also* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, (E.E.O.C. July16, 2015) (EEOC explained that (1) Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. (2) Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex; and (3) Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. *Id.* at *6-8.); U.S. Equal Emp. Opportunity Comm'n Dept. Of Health and Human Servs. Office for Civil Rights, Coordination of Complaints Involving Health Programs or Activities, Memorandum of Understanding (Jan. 13, 2017), https://www1.eeoc.gov//laws/mous/doh_health_programs.cfm?renderforprint=1 (The EEOC laws broadly prohibit employment discrimination against individuals on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information, or an individual's opposition to discrimination or participation in an EEOC proceeding)

[145] Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255 (D. Conn. 2016).

Title VII claims based on same-sex attraction as a non-conforming gender stereotype, the court asserted, "stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender nonconformity."[146]

In *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, the claim of employment discrimination arose from an employee's discharge from a county emergency medical services department.[147] In *Winstead*, the district court held that sexual orientation discrimination was actionable under Title VII, concluding that:

> No one doubts that discrimination against people based on their sexual orientation was not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[148]

The court asserted that to hold that Title VII's prohibition on discrimination "because of sex" encompasses a prohibition on discrimination based on an employee's homosexuality, bisexuality, or heterosexuality simply requires close attention to the text of Title VII, as well as common sense.[149] Further, the court stated that all that was required to reach this conclusion was an understanding that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[150]

In *Heller v. Columbia Edgewater Country Club*, a lesbian employee alleged discrimination and harassment in violation of Title VII.[151] In confronting the employer's argument that Title VII was not applicable to claims of discrimination based on sexual orientation, the court asserted:

> Defendant contends that Title VII is inapplicable here because the discrimination was on the basis of sexual orientation. I disagree. Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all

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[146] *Id.* at 269.

[147] Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d 1334 (N.D. Fla. 2016).

[148] *Id.* at 1347.

[149] *Id.*

[150] *Id.* (citing City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

[151] *See generally* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002).

> Americans should have an opportunity to participate in the economic life of the nation.[152]

In *Anonymous v. Omnicom Group Inc.*, the United States Court of Appeals for the Second Circuit reversed and remanded the lower court's dismissal of a Title VII discrimination claim where an employee was allegedly discharged for testing positive for HIV and for failing to live up to gender stereotypes of how men should behave.[153] In reversing the lower court's dismissal of the employee's complaint, the appellate court articulated three ways in which a plaintiff could successfully allege Title VII discrimination against employers who engaged in sexual orientation discrimination:

> First, plaintiffs could demonstrate that if they had engaged in identical conduct but been of the opposite sex, they would not have been discriminated against. Second, plaintiffs could demonstrate that they were discriminated against due to the sex of their associates. Finally, plaintiffs could demonstrate that they were discriminated against because they do not conform to some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men.[154]

The court concluded by asserting that "in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII."[155]

On August 15, 2014, a math teacher from Indiana decided she had waited long enough for such a reexamination. After five years of applying for a full-time position with Ivy Tech, a community college in Indiana, Kimberly Hively filed a pro se complaint in the United State District Court for the Northern District of Indiana.[156] Ms. Hively's allegations against the school were simple:

> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under the Title VII of the Civil Rights Act of 1964 were violated.[157]

In dismissing Ms. Hively's complaint on the merits, the district court expressed sympathy for her position, lamenting its duty to be bound by the

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[152] *Id.* at 1222.

[153] Anonymous v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017).

[154] *Id.* at 207.

[155] *Id.*

[156] Hively v. Ivy Tech Cmty. Coll., No. 3:14-cv-1791, 2015 U.S. Dist. LEXIS 25813 (N.D. Ind. Mar. 3, 2015), rev'd 853 F.3d 339 (7th Cir. 2017).

[157] *Id.* at *1-2.

precedent established in *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*[158] In *Hamner*, the United States Court of Appeals for the Seventh Circuit ruled against a plaintiff who had alleged he was illegally discriminated against, in violation of Title VII, when a co-worker repeatedly harassed him based on his sexual orientation, eventually leading to his termination.[159] In its decision, the court of appeals squarely addressed the applicability of Title VII to claims of discrimination based on sexual orientation, ruling that harassment based solely upon a person's sexual preference or orientation (and not on one's sex) was not an unlawful employment practice under Title VII.[160]

Nearly two years after Ms. Hively filed her *pro se* complaint, and with help from the LGBTQ legal advocacy group Lambda Legal, the court of appeals delivered a similarly sympathetic, yet lamenting decision affirming the lower court's ruling.[161] After a comprehensive review of claims of sexual orientation discrimination as a form of actionable discrimination "because of . . . sex" under Title VII, a three judge panel of the court of appeals ultimately ruled that such discrimination was not actionable, unless and until, "either the legislature or the Supreme Court says it is so."[162] However, Hively filed a petition for an *en banc* rehearing, which was granted by the court of appeals in October of 2016,[163] with oral arguments being heard in November of that same year.

On April 4, 2017, just one month shy of the two-year anniversary of Hively's original pro se filing in the federal court for the Northern District of Indiana, the *en banc* panel of the court of appeals reversed the decision that had been reached by the three judge panel.[164] In writing for the 8-3 majority, Chief Judge Diane Wood acknowledged that it was beyond the power of the court to amend the language of Title VII to include gay employees as a protected class.[165] However, this was not the task with which the court was charged. Rather, the court had been asked to determine what it meant to discriminate on the basis of sex in violation of Title VII, and in particular, whether actions taken on the basis of sexual orientation

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[158] *Id.* at *5-6.

[159] Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000).

[160] *Id.* (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)).

[161] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 699 (7th Cir. 2016), *vacated*, No. 15-1720, 2016 U.S. App. LEXIS 20302 (7th Cir. Oct. 11, 2016).

[162] *Id.* at 709.

[163] Hively v. Ivy Tech Cmty. Coll., No. 15-1720, 2016 U.S. App. LEXIS 20302 (7th Cir. Oct. 11, 2016).

[164] *See generally* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

[165] *Id.* at 343.

were within the scope of Title VII's prohibition against discrimination "on the basis of sex."[166]

In reversing the original three-judge panel, the *en banc* court first found that the absence of the words "sexual orientation" from Title VII's language was "of no moment" to the analysis of whether discrimination on such basis was in fact "because of . . . sex" discrimination.[167] Relying upon the decision in *Oncale*, Judge Wood reiterated the late Justice Scalia's conclusions that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed".[168]

The court's conclusions in *Hively* ultimately rested on two arguments: (1) that using the comparative method of substituting a different gendered employee for the employee in question would produce a different result and (2) that the *Loving* decision protects Hively' s right to associate intimately with a partner of the same sex.[169] In analyzing the first argument, the court cites what many have argued for years is common sense: if Hively had been a man with a female partner at home, or a woman with a male partner at home, no adverse employment action would have occurred. As the court acknowledges, such clear differential treatment is paradigmatic discrimination based on the sex of the employee in question.[170] On this first argument, the court also acknowledges that the "gossamer-thin" line between a gender non-conformity claim under *Hopkins* and a sexual orientation claim is non-existent.[171] Considering Hively' s same-sex relationship as gender non-conforming activity is, in the court's opinion, no different from a woman seeking employment in traditionally male dominated workplaces.[172] In discriminating based on Hively's failure to meet the expected gender stereotype, namely, sexual attraction to a man, according to the court, Ivy Tech has engaged in actionable discrimination under Title VII's "because of . . . sex" language.[173]

By anchoring its decision in the associational jurisprudence of *Loving* and tying it to the gender stereotyping line of cases beginning with *Hopkins*, the court articulated a clear framework for finding that the prohibitions against discrimination on the basis of sex found in Title VII

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[166] *Id.* at 344.

[167] *Id.* at 349.

[168] *Id.* at 344 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998)

[169] *Id.* at 345 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

[170] *Id.*

[171] *Id.* at 346 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

[172] *Id.*

[173] *Id.* at 347.

and Title IX include prohibitions against discrimination based on sexual orientation and gender identity.[174]

D. Transgender Status

Following *Hopkins* and *Oncale*, transgender employees attempted to bring Title VII actions claiming that their discrimination flowed from the fact that they were not conforming to traditional sex-stereotypes.[175] Unfortunately, some lower federal courts ignored evidence of gender stereotyping and effectively characterized the harassment as based on the individual's perceived sexual orientation, rather than sex stereotyping rooted in normative gender understandings.[176] Since discrimination on sexual orientation historically has not been actionable under Title VII, courts have consistently ruled against transgender plaintiffs.[177]

However, in *Smith v. City of Salem*, the United States Court of Appeals for the Sixth Circuit recognized that a transgender employee could conceivably bring a valid Title VII claim under a sex stereotyping theory of recovery.[178] In *City of Salem,* Jimmie Smith, a biological male, was a lieutenant in the Salem, Ohio Fire Department.[179] Smith had been with the Salem Fire Department for seven years.[180] Smith was diagnosed with Gender Identity Disorder (GID) and began dressing and acting more femininely.[181] He also informed his supervisor of his intent to make a complete transformation from male to female.[182] Following these changes, Smith's co-workers began to treat him differently, commenting his

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[174] *Id.* at 348-49.

[175] *See* Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996 (N.D. Ohio 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509 (N.D. Ohio Nov. 9, 2001); Oiler v. Winn-Dixie La., Inc., No. 00-3114 § I, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sep. 16, 2002).

[176] Fedor, *supra* note 142, at 470-71. *See also* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084-86 (7th Cir. 2000), *overruled by* Hively v. Ivy Tech Cmty. Coll. Of Indiana, 853 F.3d 339 (7th Cir. 2017).

[177] *See* Bibby v. Phila. Coca Cola Bottling Co., 85 F. Supp. 2d 509 (E.D. Pa. 2000) (claim for sexual harassment was based on sexual orientation and not on sex, defendant's claim for summary judgment granted). *See also* Metzger v. Compass Grp. U.S.A., Inc., No. 98-2386-GTV, 1999 U.S. Dist. LEXIS 14224 (D. Kan. Aug. 31, 1999); Higgins v. New Balance Athletic Shoe, Inc., 21 F. Supp.2d 66 (D. Me. 1998), *aff'd in part, vacated in part, remanded,* 194 F.3d 252 (1st Cir. 1999); Salvatore v. KLM Royal Dutch Airlines, 98 Civ. 2450 (LAP), 1999 U.S. Dist. LEXIS 15551 (S.D.N.Y. Sept. 30, 1999).

[178] Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

appearance and mannerisms were not "masculine enough."[183] As a result of Smith's new conduct, city officials discussed their intentions of using Smith's transsexualism as a basis for terminating his employment.[184] After Smith faced adverse employment action in the form of a suspension, he felt the suspension was unjust and filed suit claiming Title VII sex discrimination.[185]

The district court dismissed his claims, with the dismissal then being appealed to the United States Court of Appeals for the Sixth Circuit.[186] The court of appeals first addressed whether Smith had stated a claim for relief, pursuant to *Hopkins'* prohibition on sex stereotyping.[187] The court of appeals agreed with Smith that he had stated a claim for relief pursuant to *Hopkins*.[188] The court of appeals determined that Smith's "failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions."[189] As a result, the court of appeals concluded that Smith had sufficiently pled claims of sex stereotyping and gender discrimination.[190]

The court of appeals further concluded that the lower court had reached its decision using a series of federal appellate cases *pre-Hopkins* that held that transsexuals, as a class, were not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."[191] The court of appeals noted that these decisions had been eviscerated by *Hopkins*.[192] The court of appeals

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[183] *Id.*

[184] *Id.*

[185] *Id.* at 569.

[186] *Id.* at 567.

[187] *Id.* at 571.

[188] *Id.* at 572-73.

[189] *Id.* at 572.

[190] *See id.* at 575.

[191] *Id.* at 572 (citing Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984) (construing "sex" in Title VII narrowly to mean only anatomical and biological sex rather than gender)) *overruled by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351-52 (7th Cir. 2017) (a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes). *See also* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 661–63 (9th Cir. 1977). (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex;" and "sex" should be given its traditional definition based on the anatomical characteristics).

[192] *Smith*, 378 F.3d at 573.

determined that the facts in *Hopkins* and the facts underlying Smith's claim were analogous.[193] The court of appeals reasoned that an employer who discriminates against women because they fail to wear dresses or makeup is no different from an employer who discriminates against men because they do wear dresses and make up.[194]

E. Recent EEOC Rulings

While cases such as *Hopkins*, *Oncale*, and *City of Salem* provided some limited mechanisms through which homosexual and transgender individuals could maintain a claim under Title VII, recent EEOC rulings suggest that full Title VII protections for discrimination based sexual orientation and transgender status may be on the horizon.[195] These EEOC rulings recognize both discrimination because of sexual orientation and discrimination because of transgender status as sex based discrimination under Title VII.

1. Macy v. Holder

In *Macy v. Holder*, the plaintiff, Mia Macy, was a biological male whose gender identity was female.[196] Macy was a detective in Phoenix, Arizona, but wanted to relocate to San Francisco for family reasons.[197] To accomplish her goal of moving to California, Macy applied for an open position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at its Walnut Creek crime laboratory. Initially, Macy presented herself as a man in phone interviews and was given assurances she would get the job following a successful background check.[198]

Aspen, the contractor responsible for filling the position, then contacted Macy and had her fill out the necessary employment paperwork, including paperwork for a background check.[199] Macy informed Aspen via email that she was in the process of transitioning from male to female and requested that the director of the Walnut Creek crime laboratory be informed.[200] Five days later, Macy received an email from the director stating that the

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[193] *Id.* at 575.
[194] *Id.* at 574.
[195] Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, (July 16, 2015). *See also* Macy v. Holder, EEOC App. No. 0120120821, 2012 WL 1435995, (Apr. 20, 2012).
[196] *Macy*, 2012 WL 1435995, at *1.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*

position was no longer available due to budget cuts. In fact, the position was not cut, but was filled by another candidate.[201]

Macy believed the decision not to hire her was because she was transgender and she filed an equal opportunity complaint with the ATF.[202] In her complaint, Macy alleged discrimination based on "gender identity" and "sex stereotyping."[203] The ATF accepted her complaint, but determined that her claims initially had to be processed according to Department of Justice (DOJ) administrative policy.[204] The DOJ had separate systems for adjudicating claims, one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination.[205] The DOJ process for sexual orientation and gender identity discrimination did not include the same rights offered under Title VII. As a result, Macy appealed to the EEOC.[206]

On appeal, the EEOC held that discrimination against a transgender individual because of their transgender status is, in fact, discrimination because of sex and violates Title VII.[207] The EEOC determined that when an employer discriminates against an employee because the employee has expressed his or her gender in a non-traditional manner, the employer is making a gender based evaluation.[208] As a result, the employer is violating the law as established by *Hopkins*, because an employer may not take gender into account when making an employment decision.[209]

2. Baldwin v. Foxx

In *Baldwin v. Foxx*, David Baldwin, the plaintiff, was a Supervisory Air Traffic Control Specialist.[210] Baldwin was allegedly passed over for a promotion due to his sexual orientation.[211] As a result, Baldwin filed a complaint with the agency alleging unlawful employment discrimination

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[201] *Id.*
[202] *Id.* at *2.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.* at *3.
[207] *Id.* at *4.
[208] *Id.* at *7.
[209] *Id.*
[210] Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641 at *1 (E.E.O.C. July 15, 2015).
[211] *Id.* at *2.

under Title VII.[212] Baldwin's complaint was dismissed and he appealed to the EEOC.[213]

On appeal, the EEOC determined that a claim for sex discrimination under Title VII could be maintained if the discrimination was a result of an individual's sexual orientation.[214] The EEOC determined that sexual orientation discrimination is, in fact, "discrimination on the basis of sex."[215] In the EEOC's view, sex and sexual orientation are inseparable.[216] According to the EEOC, "discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."[217] As a result, the EEOC concluded that "sexual orientation" as a concept could not be defined or understood without reference to sex. This conclusion rested on the fact that it is not possible to determine whether an individual is "gay" or "straight" without first taking his/her sex into consideration. The EEOC stated:

> An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.[218]

The EEOC further concluded that sexual orientation discrimination is sex discrimination, because it is based on gender stereotyping.[219] This argument had been used by homosexual plaintiffs in past Title VII sex discrimination claims, but to no avail.[220] Prior to this ruling, homosexual plaintiffs could only find relief for sex based discrimination if they could show they were being treated differently not because they were homosexual, but because they did not act "masculine" or "feminine" enough for their particular biological sex.[221]

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[212] *Id.* at *1.

[213] *Id.* at *2.

[214] *See id.* at *10.

[215] *Id.*

[216] *Id.* at *5.

[217] *Id.*

[218] *Id.* at *10.

[219] *Id.* at *7.

[220] *Id.* at *9. *See also* Dawson v. Bumble & Bumble, 398 F.3d 211, 217-18 (2d Cir. 2005) (the employee was alleging discrimination based on her lesbianism, she could not satisfy the first element of a prima facie case under Title VII because it did not recognize homosexuals as a protected class); Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 453 (N.D.N.Y. 2002) (harassment was purely sexual in nature rather than based on gender).

[221] *See* Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004). *See also* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (employee claimed harassment and

Undoubtedly, the *Baldwin* opinion is a victory for the LGBTQ community. However, the implications of the case are still evolving, as the decision is only binding on federal agencies.[222] Guidance from the EEOC concerning the interpretation of Title VII will only be considered by federal courts as persuasive authority.

IV. WHAT CONSTITUTES DISCRIMINATION "BECAUSE OF SEX" UNDER TITLE IX?

A. Introduction

Following the women's movement and the civil rights movement of the 1960's, it became clear that efforts were needed to eliminate sexual bias in many areas of American society.[223] One such area that had been rampant with sex based discrimination was public education.[224] In response to national concern, Congress enacted Title IX as part of the Education Amendments of 1972 to combat sex based discrimination in public education. Title IX provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[225]

The Office of Civil Rights (OCR) in the Department of Education is charged with the responsibility of enforcing Title IX.[226] The OCR investigates and resolves allegations of sex based discrimination under Title IX.[227] When an institution is in violation of Title IX and fails to cure the violation, the OCR may seek termination of the institution's federal funds.[228] Moreover, enforcement of Title IX is not restricted to the OCR. The Supreme Court of the United States has held that a private cause of action is implied in Title IX.[229] However, the Court indicated in such private actions, individual relief was preferred over fund termination.[230]

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termination were due to gender stereotyping, the court found that the claim was based on sexual orientation discrimination instead).

[222] *See* 29 C.F.R. § 1614.110 (2009).

[223] Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 323 (1988).

[224] *See id.*

[225] *See id.* at 325. *See also* 20 U.S.C. § 1681(a) (2012).

[226] Staton, *supra* note 223, at 325.

[227] *Id.*

[228] *Id.*

[229] Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979).

[230] *Id.* at 704-07.

Thus, a plaintiff could seek monetary damages or injunctive relief under Title IX.[231]

In the years following the enactment of Title IX, it remained unclear exactly how broad the government's Title IX enforcement powers were. Following its passage, Title IX was used to challenge admission policies,[232] dress codes,[233] sex discrimination in athletics,[234] and sexual harassment.[235] One of the most common questions was whether the government could terminate an institution's federal assistance if only specific program(s) of the institution discriminated in violation of Title IX.[236] In 1984, the United States Supreme Court in *Grove City College v. Bell* provided guidance on this issue.[237] The Court held that Title IX only permitted termination of funds to programs that were violating Title IX, and not the termination of funds to the entire institution itself.[238] Just three years after the Court's decision in *Grove City College*, Congress amended Title IX via the 1987 Civil Rights Restoration Act to reverse the holding of the Court.[239] As a result, unless an exemption exists, Title IX applies to all public elementary and secondary educational institutions and even some private K-12

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[231] *Id.*

[232] *See id.* at 703 (holding female, who was allegedly denied admission to medical schools of two private universities which were receiving federal financial assistance, on basis of her sex, had rights under Title IX of Education Amendments of 1972 to pursue private cause of action against universities).

[233] Trent v. Perritt, 391 F. Supp. 171 (S.D. Miss. 1975) (Male high school student filed class action to enjoin school officials from enforcing countywide school grooming regulation, which prohibited male students from wearing hair below the ear lobe or over the collar).

[234] *See* Othen v. Ann Arbor Sch. Bd., 507 F. Supp. 1376 (E.D. Mich. 1981). *See, e.g.*, Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003). *See also* Bennett v. W. Tex. State Univ., 525 F. Supp. 77, 78 (N.D. Tex. 1981).

[235] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 274 (1998) (holding, "Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."). *See also* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999) (holding "a private Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.").

[236] Staton, *supra* note 223, at 326-27.

[237] Grove City Coll. v. Bell, 465 U.S. 555 (1984).

[238] *Id.* at 556.

[239] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

programs that receive federal grants for classroom supplies or subsidies for school lunch programs.[240]

Furthermore, the Supreme Court has determined that Title IX applies to the employment practices of federally-funded institutions.[241] In *North Haven Board of Education v. Bell*, the Court determined that Congress intended the term, "no person," in Title IX, to include employees as well as students.[242] Therefore, Title IX also applies to the employment practices of federally funded institutions.[243]

B. Sex Segregation under Title IX

In most contexts, Title IX requires institutions receiving federal funds to provide equal opportunity and facilities for students and employees of each sex. However, Department of Education regulations provide that Title IX allows a separate-but-equal approach in certain aspects of education.[244] For example, under these regulations, schools may provide separate athletic opportunities to students of each sex, but the separate programs must be equivalent in both the overall quality and the number of opportunities available to each sex.[245] Likewise, schools may offer separate classes to each sex if the classes involve human sexuality, physical education with a contact sports component, or chorus.[246] The regulations permit schools to maintain separate restrooms, locker rooms, shower facilities, dormitories for each sex, provided that the facilities provided for students of one sex are comparable to such facilities provided for students of the other sex.[247]

In 2006, the Department of Education adopted additional regulatory provisions that expanded the ability of elementary and secondary schools to offer single sex classes.[248] Under this new regulatory provision, such classes must exist as part of an overall educational policy designed to provide diverse educational opportunities or be specifically designed to respond to the educational needs of the students.[249] These programs must be

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[240] Erin Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WISC. J.L. GENDER & SOC'Y 219, 225-26 (2013).

[241] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

[242] *Id.* at 530.

[243] *See id.*

[244] *See* 34 C.F.R. § 106.21. *See also id.*. §§ 106.31-.34; §§ 106.41(b), (c).

[245] *Id.* § 106.41(b), (c).

[246] *Id.* § 106.34(a).

[247] *Id.* §§ 106.32-106.33.

[248] See Buzuvis, *supra* note 240, at 227 (citing Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62530-32 (proposed Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106)).

[249] 34 C.F.R. §§ 106.34(b).

voluntary and cannot replace co-education opportunities in the same subject or activity.[250]

C. *The Influence of Decisions Interpreting Title VII on Title IX Jurisprudence*

When interpreting Title IX's "on the basis of sex" provision, courts have deferred to Title VII precedent in determining whether sex based discrimination has occurred under Title IX.[251] In fact, in many cases, courts have used the precedents established in *Oncale*, *Hopkins*, and other similar cases in making their respective Title IX rulings.[252] For example, the court in *Miles v. New York University* and *Montgomery v. Independent School District No. 709* relied on Title VII precedent when deciding whether the plaintiffs could pursue a valid claim under Title IX.[253]

The *Miles* court determined that a transgender student could maintain a Title IX action against a teacher who had sexually harassed her despite the fact that the teacher was of the same biological sex as Miles.[254] The facts of *Miles* are straightforward. Miles, a biological male who was in the process of transitioning to female, was sexually harassed by her professor.[255] Miles' professor, a biological male, presenting himself to be male, made unwanted sexual advances towards Miles, including repeatedly propositioning her for a sexual relationship.[256] Miles sued the university, claiming amongst other things, that such harassment was a violation of Title IX.[257] The university attempted to defend on the grounds Title IX did not extend to biological male on male sexual harassment.[258] The court found the university's defense to be without merit.[259] The court determined that none of the cases cited by the university even suggested that Title IX excludes a claim for male on male sexual harassment.[260] The court noted that prior cases stood for the proposition that Title VII, and hence Title IX, allowed transgender

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[250] *Id. See also* Buzuvis, *supra* note 240, at 227.

[251] *See* Miles v. N.Y. Univ. 979 F. Supp. 248 (S.D.N.Y. 1997). *See also* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).

[252] *See Miles*, 979 F. Supp at 249-50. *See also Montgomery*, 109 F. Supp. 1081.

[253] *Miles* 979 F. Supp. at 249-250.

[254] *Id.*

[255] *Id.* at 248-49.

[256] *Id.* at 249.

[257] *Id.* at 248.

[258] *Id.*

[259] *Id.* at 249-50.

[260] *Id.*

plaintiffs to bring claims against individuals or their employers for same sex harassment.[261]

In *Montgomery v. Indep. Sch. Dist. No. 709*, a male student was routinely harassed both verbally and physically over the course of eleven years while enrolled in the same school district.[262] Montgomery was verbally harassed presumably because of his perceived sexual orientation.[263] Other students routinely directed historical homosexual epithets, such as "faggot," towards him and referred to him by female names.[264] The harassment did not stop at verbal insults. By the sixth grade, several students had begun to physically assault Montgomery.[265] Montgomery also suffered unwanted physical touching on multiple occasions.[266] Due to this repeated harassment and insufficient disciplinary action against his harassers, Montgomery brought civil action against the school board.[267] One of Montgomery's claims asked for relief pursuant to Title IX.[268]

The school board asked the court to dismiss Montgomery's claims on the grounds that "Title IX does not protect individuals . . . based on sexual orientation or perceived orientation."[269] However, Montgomery argued that he was also discriminated against because of his failure to conform to gender stereotypes.[270] The court turned to Title VII precedent, including those established by the decisions in *Oncale* and *Hopkins*, noting that these cases established that discrimination based on a claimant's failure to satisfy sex stereotypes associated with his or her sex constitutes discrimination "because of sex" within the meaning of Title VII.[271] In the court's view, Title VII reasoning that failure to conform to gender stereotypes constitutes sex-based discrimination should also apply in the context of Title IX.[272]

The court determined that Montgomery had been discriminated against because of his failure to conform to gender stereotypes.[273] The court noted that Montgomery has been harassed as early as kindergarten. In the court's

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[261] *Id.*

[262] Montgomery v. Indep. Sch. Dist. 709, 109 F. Supp. 2d 1081, 1083-84 (D. Minn. 2000).

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.* at 1083.

[268] *Id.*

[269] *Id.* at 1089.

[270] *Id.* at 1090.

[271] *See id.* at 1090-92.

[272] *See id.* at 1091.

[273] *Id.*

view, it was highly unlikely that Montgomery at such a tender age would have developed a sexual preference or understood what it meant to be "homosexual" or "heterosexual."[274] The court further concluded that the likelihood of a kindergartener identifying himself as homosexual was quite low.[275] The court found it more plausible that students began tormenting him because he exhibited feminine personality traits and did not engage in behavior befitting a boy.[276] As a result, the court found "these alleged acts to be at least as indicative of harassment based on sex," and denied the defendant's motion for judgment on the pleadings.[277]

Following *Montgomery*, a number of plaintiffs of both sexes have found success invoking *Hopkins* reasoning in their sexual harassment claims.[278] Plaintiffs that were unable to succeed using a *Hopkins* theory to support their claims typically lacked sufficient evidence to show that gender nonconformity motivated the harassment, not from a disagreement on the part of a court that discrimination based on gender nonconformity was sex based discrimination as a matter of law.[279] Likewise, post *Montgomery*, federal agencies with enforcement authority over Title IX have extended their interpretations as to who is protected under Title IX to include individuals who do not conform to gender stereotypes.[280]

V. TRANSGENDER STUDENTS AND A NEW FRONTIER FOR TITLE IX

In recent years, media coverage regarding the mistreatment of transgender students has dramatically increased.[281] These stories make clear that transgender students are being harassed, excluded, and treated

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[274] *Id.* at 1090.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 1093.

[278] *See* Buzuvis, *supra* note 240, at 234. *See also* Patterson v. Hudson Area Sch., 551 F.3d 438 (6th Cir. 2009); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816 (C.D. Ill. 2008); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005).

[279] *See* Buzuvis, *supra* note 240, at 234. *See also* Estate of Carmichael v. Galbraith, No. 3:11-CV-0622-D, 2012 WL 4442413 (N.D. Tex. Sept. 26, 2012); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805 (E.D. Mich. June 27, 2012).

[280] *See* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (Dec. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf. *See also* Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641, (July 16, 2015); Macy v. Holder, EEOC App. No. 120120821, 2012 WL 1435995, (Apr. 20, 2012); U.S. DEP'T OF JUST. CIVIL RIGHTS DIV. & U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Dear Colleague Letter on Transgender Students, (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[281] *See* Buzuvis, *supra* note 240, at 220.

differently by teachers, students, and school administrators. Nevertheless, it is not yet clear if this discrimination is prohibited by law. Although Title IX prohibits discrimination "on the basis of sex," it does not expressly prohibit discrimination against transgender students.[282] Further complicating matters is the fact that recent Department of Education regulations allow, with some limitations, segregation of facilities and classes based on sex.[283]

Those who assert that Title IX does not protect transgender students from discrimination and harassment argue that when Congress prohibited discrimination "on the basis of sex" in passing Title IX, Congress meant biological sex.[284] As a result, they argue that institutions receiving federal funds are not required to allow transgender students to use facilities and participate in activities that conform to the gender with which the student identifies, because schools may maintain separate facilities based on the biological sex of students under Title IX.[285] Despite such opposition, recent rulings using Title VII jurisprudence and OCR interpretations to define what discrimination "on the basis of sex" means may indicate that protections under Title IX for transgender students are on the horizon.

A. Obama Administration Department of Education / Department of Justice Interpretations of Transgender Student's Rights under Title IX

U.S. Department of Education Office of Civil Rights (DOE) and U.S. Department of Justice Civil Rights Division interpretations during the Obama administration may have laid the foundation for expanding what discrimination "on the basis of sex" means under Title IX, but with a change in administrations, their impact is unclear. In December 2014, the DOE and DOJ issued "Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities" to provide guidance on the interpretation of Title IX as related to the treatment of transgender students.[286] Question 31 of this document asked, "how do the

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[282] *See* 20 U.S.C. § 1681(a) (2017).

[283] 34 C.F.R. §§ 106.32-106.33 (2017).

[284] *See* Brief of Defendant – Appellee at 1, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, (4th Cir. May 8, 2017). *See also* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-3522, 2017 U.S. App. LEXIS 9362 (7th Cir. May 30, 2017) (defendants argue that by "sex" congress meant biological sex or physical sex characteristics).

[285] *See* Brief of Defendant – Appellee at 1, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056m (4th Cir. May 8, 2017).

[286] U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (Dec. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

Title IX requirements on single-sex classes apply to transgender students?" The answer provided in the document stated that:

> All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.[287]

The DOE and DOJ went further in 2016 with the issuance of a joint "Dear Colleagues" letter. The letter began by noting that in recent years the agencies had received an increasing number of questions from parents, teachers, principals, and school superintendents regarding civil rights protections for transgender students.[288] They stated that Title IX prohibits sex discrimination in educational programs and activities that receive federal funds. According to the OCR and DOJ, this prohibition includes discrimination based on a student's gender identity and/or transgender status.[289]

The letter further explained that under Title IX, it was the school's obligation to ensure nondiscrimination on the basis of sex by providing transgender students equal access to programs and activities, even in circumstances where other students, parents, or community members raised objections or concerns.[290] The letter further stated that under Title IX, if harassment that targets a student based on their gender identity, transgender status, or gender transition occurred, and the harassment created a hostile environment for the student, the school must take prompt and effective steps to end the harassment.[291] The letter also addressed the issue of sex segregated activities and facilities.[292] The DOE and DOJ stated that Title IX permits schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams and, in certain circumstances, single-sex classes.[293] However, the DOJ and DOE determined that to comply with Title IX, transgender students must be allowed to participate in activities and access facilities that are consistent with their gender identities.[294]

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[287] *Id.*

[288] U.S. DEP'T OF JUST. CIVIL RIGHTS DIV. & U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Dear Colleague Letter on Transgender Students, (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[289] *Id.* at 1.

[290] *Id.* at 2.

[291] *Id.*

[292] *Id.* at 3.

[293] *Id.* at 3-4.

[294] *Id.* at 4.

B. States "Freak Out" – Preemptive Bathroom Laws

Prior to 2015, few states had considered legislation that restricted a transgender individual's freedom to use the restroom which corresponded to the gender they identified with.[295] However, following DOJ and DOE's determination that for schools to comply with Title IX, transgender students must be allowed to participate in activities and access facilities that are consistent to their gender identity, state legislatures began to take action.[296] In 2016 alone, nineteen states considered legislation that would restrict access to multi-user restrooms, locker rooms, and other sex-segregated facilities on the basis of the "biological sex" at birth of the individual.[297]

Several states limited their proposed legislation for sex segregated facilities on the basis of biological sex exclusively to the educational settings.[298] For example, Kentucky considered legislation that required students born male to use only facilities designated as male facilities and students born female to only use facilities designated as female facilities.[299] However, the Kentucky legislation did require schools to provide the best available accommodations to students who identified with a gender that was different from their biological sex.[300] Similarly, proposed legislation in

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[295] *See* Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx (last updated July 28, 2017).

> At least nine states considered bathroom bills in 2015, including: Colorado, Florida, Kentucky, Massachusetts, Minnesota, Missouri, Nevada, Texas and Wisconsin. None of these bills was enacted. At least 19 states considered bathroom bills in 2016. One state – North Carolina – enacted this type of legislation. South Dakota's bill passed in both chambers, but was vetoed by the governor. Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, Oklahoma, South Carolina, Tennessee, Virginia, Washington and Wisconsin also considered similar legislation in 2016.

Id. See also National Equality Maps developed by the TRANSGENDER LAW CENTER (June 21, 2017, https://transgenderlawcenter.org/equalitymap; *State Maps* developed by Gay, Lesbian and Straight Education Network, https://www.glsen.org/article/state-maps (last visted June 21, 2017); Editorial, *Understanding Transgender Access Laws*, N.Y. TIMES, (Feb. 24, 2017). https://www.nytimes.com/2017/02/24/us/transgender-bathroom-law.html.

[296] *See* Kralik, *supra* note 295. Following the letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015 nine states introduced bathroom legislation. Likewise, in 2016 19 states considered bathroom bills.

[297] *Id.*

[298] *Id.* (Two states (New Jersey and Oklahoma) have measures pending in response to Federal Guidance issued in May 2016 regarding schools obligations to transgender students.). *See also* An Act Relating to Student Privacy, S. 76, 15th Reg. Sess. (Ky. 2015).

[299] *Id.* §§ 1-4.

[300] *Id.*

Illinois would amend the state's school code to require each school board to designate multiuser restrooms, changing rooms, and overnight facilities for the exclusive use of one sex.[301] The bill defines "sex" as "the physical condition of being male or female, as determined by an individual's chromosomes and identified at birth by that individual's anatomy."[302]

Along with providing that multiuser user facilities must be used by individuals based on their biological sex in schools, some states proposed legislation that criminalized the improper use of multiuser facilities both in and outside of school settings.[303] Indiana's House of Representatives considered a law that would have made it a class B misdemeanor, punishable by up to 180 days in jail and a fine of up to $1,000, if a biological male or female knowingly or intentionally entered a single-sex facility designated to be used only members of the opposite biological sex.[304] The Indiana Senate considered similar legislation that would have made such an offense a Class A misdemeanor, making the use of a public facility not consistent with one's biological sex punishable by up to one year in jail and a fine of up to $5,000.[305]

Nearly all of the proposed "bathroom legislation" stalled in the governmental body from which it originated. However, South Dakota was an exception. House Bill (H.B.) 1008 was first proposed in the South Dakota House of Representatives in mid-January of 2016.[306] H.B. 1008 provided that every restroom, locker room, and shower room in any public school be "designated for and used only by students of the same biological sex."[307] The Bill further defined biological sex as: "the physical condition of being male or female as determined by a person's chromosomes and anatomy as identified at birth."[308] The bill also required schools to make reasonable accommodations for transgender students; however, such accommodation could not impose an undue hardship on the school district.[309] H.B. 1008 passed the House by a 58-10 vote on January 27, 2016.[310] The bill then passed the South Dakota Senate by a vote of 20-15.[311]

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[301] H.R. 4474, 99th Gen. Assemb., Reg. Sess. (Ill. 2016).

[302] *Id.* at para 1.

[303] *See* S. 35, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). *See also* H.R. 583, 2015 Reg. Sess. (Fla. 2015).

[304] H.R. 1079, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

[305] S. 35, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

[306] H.B. 1008, 91st Leg. Assemb., (S.D. 2016).

[307] *Id.* § 2.

[308] *Id.* § 1.

[309] *Id.* § 3.

[310] H.R. JOURNAL H.B. 1008, 91st Sess. (S.D. 2016), http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1008&Session=2016.

[311] S. JOURNAL 91st Sess. (S.D. 2016),

Despite passing both the South Dakota House and Senate, H.B. 1008 was ultimately vetoed by South Dakota Governor, Dennis Daugaard.[312] In vetoing H.B. 1008, Governor Daugaard determined that H.B. 1008 did not address any of the pressing issues concerning the school districts of South Dakota.[313] Governor Daugaard's primary objection to H.B. 1008 was that the legislation would take power out of the hands of local school districts to determine what would be the most appropriate accommodation for their students by imposing a statewide standard on the schools facilities.[314] In the governor's view, "Local school districts can, and have, made necessary restroom and locker room accommodations that serve the best interests of all students, regardless of biological sex or gender identity."[315]

Had Governor Daugaard not vetoed H.B. 1008, South Dakota would have become the first state to pass legislation mandating discrimination against transgender students. Kris Hayashi, executive director of Transgender Law Center, described Governor Daugaard's decision as sparing South Dakota from a costly experiment.[316] Mr. Hayashi's analysis appears prescient in light of the fallout that occurred from North Carolina passing H.B. 2 just a few weeks after H.B. 1008's veto.[317]

C. North Carolina's House Bill 2

Over the past year, North Carolina has been at the center of the "bathroom legislation" controversy. Therefore, the experience within North Carolina provides an interesting case study as to how certain states approach the issues surrounding transgender persons and gendered public restroom facilities.

In passing House Bill 2 ("H.B. 2"), North Carolina became the first state in the union to legalize discrimination against transgender persons in access to public restrooms. Following the passage of H.B. 2, the pushback directed towards North Carolina was swift and intense. Given the level of scrutiny and criticism of H.B. 2, North Carolina's experience provides a wealth of information in understanding the reasoning of state legislatures in passing

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http://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1008&Session=2016.

[312] Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016), http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/#.

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.*

or wanting to pass "bathroom laws." Further, North Carolina serves as a cautionary tale for states considering similar legislation.

1. Charlotte Ordinance and Origins of H.B. 2

In a highly contentious February 22, 2016 city council meeting, citizens of Charlotte packed the city council chambers to maximum capacity to voice their support and concern regarding the proposed ordinance that would extend the City of Charlotte's nondiscrimination protection to Charlotte's LGBT community.[318] The hot button issue of debate was the fact that passing Ordinance 7056 would allow transgender residents in public facilities to use the bathroom of the gender with which they identified without fear of adverse action being taken against them. Some citizens viewed this as a safety issue for themselves and their children. One citizen stated "I'm not scared of transgenders, but sexual predators will see this as a chance for fresh victims. If one child becomes a victim through this, shame on all of you."[319] Despite these concerns, the council ultimately voted 7-4 to pass the ordinance.

Charlotte's decision to allow transgender individuals to use the bathroom of their choice was met with swift opposition from the North Carolina state legislature. Just one day after Charlotte passed Ordinance 7056, North Carolina House Speaker Tim More called for legislative action to address "the bathroom piece."[320] On March 3, 2016, many key Republican legislators held a press conference exclaiming their support for legislative efforts to overturn Charlotte's ordinance.[321] Republican legislators urged North Carolina's Governor Pat McCrory to call a special session immediately to address the issue.[322] However, he declined.[323] Subsequently, Lt. Gov. Dan Forest, who oversees the Senate, and House Speaker Tim

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[318] Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7-4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016), http://www.charlotteobserver.com/news/politics-government/article61786967.html.

[319] *Id.*

[320] Greg Lacour, *NC Lawmakers Heading for Special Session Wednesday to Discuss LGBT Ordinance, HB2: How North Carolina Got Here (Updated)*, CHARLOTTE MAG. (Dec. 21, 2016), http://www.charlottemagazine.com/Charlotte-Magazine/April-2016/HB2-How-North-Carolina-Got-Here/.

[321] *Id.*

[322] Jim Morrill, *NC Lawmakers Heading for Special Session Wednesday to Discuss LGBT Ordinance*, NEWS & OBSERVER (Mar. 21, 2016), http://www.newsobserver.com/news/politics-government/state-politics/article67418872.html.

[323] *Id.*

Moore, invoked a seldom-used state constitutional provision to call the legislature into session on March 23, 2016.[324]

In this special session, that lasted a single day, both the House and Senate considered, debated, and voted on legislation to respond to the passage of the ordinance by Charlotte.[325] Those supporting the bill cited safety and privacy of North Carolinians as the primary purpose of the bathroom portion of the legislation.[326] Representative Arp in the House painted a bleak picture for his colleagues if the bill did not pass.[327] In debating the bill, Representative Arp began with a hypothetical scenario in which two young girls, Emily, Ashante, and their mother go to the public pool.[328] In his hypothetical, the girls begin to disrobe and a biological man walks in sits down beside them and begins to disrobe.[329] He then stated:

> What just happened? Emily, Ashante and her mother just lost their privacy . . . This bill is necessary to stop that from happening. Just common sense. Biological men should not be in women's bathrooms, showers or locker rooms. All North Carolina citizens expect bodily privacy in showers, locker rooms and bathrooms. Make no mistake, this bill ensures all North Carolina citizens the privacy protections they in fact have.[330]

Representative Arp further argued that if H.B. 2 did not pass, prisoners would have more privacy rights than North Carolina's children and their mothers.[331] To reach this conclusion, he argued that the courts had held that prisoners had the right to use restrooms and changing areas without regular exposure to viewers of the opposite sex.[332] He stated that the courts had recognized a constitutional violation where guards regularly watch inmates of the opposite sex engage in personal activities such as undressing, using toilet facilities, and showering.[333]

Representative McElraft focused her comments on safety concerns.[334] In her view, H.B. 2 simply represented common sense.[335] H.B. 2 was needed to protect females from male predators who, without the bill, would have

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[324] *Id.*

[325] N.C. H.R., Gen. Assemb., 2nd Extra Sess. (Mar. 23, 2016) (debate on H.B. 2), http://www.ncleg.net/sessions/2015e2/HB2Transcripts/HouseFloorDebate.pdf [hereinafter House Debate].

[326] *See id.*

[327] *See id.* at 45-49.

[328] *Id.* at 46 (statement of Rep. Arp).

[329] *Id.*

[330] *Id.* at 46-47.

[331] *Id.* at 47.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 114-15 (statement of Rep. McElraft).

[335] *Id.* at 114.

the authority to go into women's dressing rooms or bathrooms.[336] She told the story of a friend who had travelled through Charlotte and was afraid for her child to go into the bathroom. Representative McElraft further argued that the Charlotte Ordinance not only affects the safety of the people of Charlotte, but everyone who passes through Charlotte, including out-of-staters.[337]

In the Senate, some members of the legislature were even more vocal about their concerns regarding the Charlotte Ordinance.[338] Senator Newton delivered a scathing review of the Charlotte Ordinance.[339] He stated "unfortunately, the City Council of Charlotte lost their mind, and decided to embark upon a very radical course and a -- a new -- I guess you would call it an ordinance."[340] Senator Newton claimed that the city of Charlotte had bowed to the altar of political correctness, did not care about common sense, and were not concerned about public safety in bathrooms.[341] He further concluded, "common sense tells us that men don't belong in the ladies' bathroom. It's a matter of public safety."[342]

Despite overwhelming support for H.B. 2 in both the Senate and the House, the minority clearly expressed their concerns about the legislation.[343] For example, Representative Harrison informed his colleagues that studies had shown that the suicide rate amongst transgender persons was as high as 41 percent.[344] He expressed concern for the safety of transgender students and people who would be forced to use the bathroom of their biological sex.[345] In his view, passage of H.B. 2 would only lead to bullying, harassment, and potential physical harm.[346] Senator Blue expressed great concern over the potential fallout that could ensue if H.B. 2 was passed.[347] He cautioned his fellow legislatures that "21st Century" companies could look at what they are doing and view North Carolina as "a state that celebrates intolerance."[348] He further stated that Fortune 500

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[336] *Id.*

[337] *Id.*

[338] *See* N.C. S., Gen. Assemb., 2nd Extra Sess. (Mar. 23, 2016) (Floor Session Proceedings), http://www.ncleg.net/sessions/2015e2/HB2Transcripts/SenateFloorDebate.pdf [hereinafter Senate Debate].

[339] *See id.* at 14-19.

[340] *Id.* at 14 (statement of Sen. Newton).

[341] *Id.* at 14-15.

[342] *Id.* at 15-16.

[343] House Debate; Senate Debate.

[344] House Debate at 35. (statement of Rep. Harrison).

[345] *Id.* at 35-36.

[346] *Id.*

[347] Senate Debate at 25 (statement of Sen. Blue).

[348] *Id.*

companies had already "expressed their grave concerns and very strong opposition" to the bill.[349] Moreover, some legislators were concerned about the potential ramifications to school funding should H.B. 2 pass. For example, Representative Michaux noted that Title IX educational funds amounting to nearly four billion dollars could be at risk if North Carolina's laws do not comport with federal guidelines.[350]

2. *Federal Response to H.B.2*

On May 4, 2016, the federal government, through the DOJ Civil Rights Division, wrote to North Carolina Governor Pat McCrory.[351] In this letter, the DOJ informed the Governor that they had determined that, because of the passage and implementation of H.B. 2, both he and the State of North Carolina were in violation of federal law, specifically Title VII.[352] The DOJ stated that "[a]ccess to sex-segregated restrooms and other workplace facilities consistent with gender identity is a term, condition, or privilege of employment."[353] Furthermore, the DOJ informed North Carolina that "[d]enying such access to transgender individuals, whose gender identity is different from their gender assigned at birth, while affording it to similarly situated non-transgender employees, violates Title VII."[354] Likewise, the DOJ noted that in interpreting the analogous Title IX sex discrimination provision, the United States Court of Appeals for the Fourth Circuit had held that the "[DOE]'s guidance that educational institutions must 'treat transgender students consistent with their gender identity' is entitled to 'controlling weight[.]'"[355]

The DOJ demanded that the Governor advise the DOJ no later than close of business, May 9, 2016, whether he would remedy the violations of Title VII.[356] The DOJ further asked the Governor to confirm that the State would neither comply with nor implement H.B. 2.[357] On May 9, 2016, the DOJ received its response when Governor McCrory filed a lawsuit asking for declaratory and injunctive relief against the United Stated of America, the DOJ, United States Attorney General Loretta Lynch, and others "for their

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[349] *Id.*

[350] House Debate at 64-65 (statement of Sen. Michaux).

[351] *See* Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., C.R. Divison, to Gov. Pat McCrory, N.C. (May 4, 2016), http://media.charlotteobserver.com/static/images/misc/HB2050412.pdf.

[352] *Id.* at 1.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 1-2 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997).

[356] *Id.* at 2.

[357] *Id.*

radical reinterpretation of Title VII of the Civil Rights Act of 1964 which would prevent plaintiffs from protecting the bodily privacy rights of state employees while accommodating the needs of transgendered state employees."[358]

Just hours later, the DOJ filed its own lawsuit against North Carolina. In the DOJ's Complaint, the Department alleged that H.B. 2 constituted a pattern or practice of employment discrimination on the basis of sex in violation of Title VII, as well as discrimination on the basis of sex in educational programs receiving federal funds in violation of Title IX.[359]

In the months following the passage of H.B., North Carolina faced a significant financial backlash, including the cancellation of planned corporate economic expansion into North Carolina and the cancellation of many high profile sports and entertainment events.[360] By March 2017, the estimated losses in revenue North Carolina could experience as a result of the passage of H.B. 2 were in the hundreds of millions of dollars, with one analysis estimating the total losses to the state by 2028 would be $3.76 billion.[361] Additionally, it was estimated that by March 2017, the passage of H.B. 2 had resulted in the state missing "out on more than 2,900 direct jobs that went elsewhere."[362] Perhaps even more important in the basketball crazy state of North Carolina was the fact that as a result of the passage of H.B. 2, the NCAA had moved all championship tournament games scheduled to be played in North Carolina during the 2016-2017 academic year to other venues, including the Division I men's basketball tournament.[363] Additionally, the NCAA threatened to bar North Carolina from hosting any NCAA championship games in any sport through 2022.[364]

With the election of Roy Cooper as Governor in November 2016 and facing threats from the NCAA, the prospect of repealing H.B. 2 seemed to increase.[365] Following extensive negotiations, on Wednesday, March 29,

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[358] Complaint at 1, McCrory v. United States, No. 5:16-cv-00238 (E.D.N.C. May 9, 2016).

[359] United States v. North Carolina, No. 1:16-cv-00425, 2016 WL 2730796 (M.D.N.C. May 9, 2016.).

[360] Emery P. Dalesio & Jonathan Drew, *Price Tag of North Carolina's LGBT Law: $3.76B*, ASSOCIATED PRESS (May 27, 2017), https://apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8/ap-exclusive-bathroom-bill-cost-north-carolina-376b.

[361] *Id.*

[362] *Id.*

[363] Richard Fausset, *North Carolina Strikes a Deal to Repeal Restrictive Bathroom Law*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/us/north-carolina-lawmakers-reach-deal-to-repeal-so-called-bathroom-bill.html?_r=0.

[364] *Id.*

[365] *Id.*

2017, Republican leaders in the North Carolina General Assembly announced that they had reached an agreement with Democratic Governor Roy Cooper to repeal H.B. 2.[366]

The compromise bill, H.B. 142, repealed HB2 in its entirety.[367] However, H.B. 142 forbade "state agencies, boards, offices, departments, institutions," and "branches of government," including public universities, from regulating "access to multiple occupancy restrooms, showers, or changing facilities."[368] The law also applied this provision to "local boards of education," resulting in a situation where local school boards could not approve trans-positive access policies.[369] H.B. 142 placed control of these access decisions in the hands of the General Assembly, rather than the appropriate local governmental units.[370] Further, the law barred any city from "regulating private employment practices or regulating public accommodations" until December 1, 2020.[371] Not surprisingly, LGBTQ advocacy groups hardly saw the new law as an improvement and quickly denounced it, calling on the NCAA and corporate entities to continue pressure on North Carolina.[372] However, it appeared that all the NCAA needed was a symbolic movement to allow its events to again be scheduled in North Carolina, even if the symbolic movement was simply to replace one anti-LGBTQ law with another.[373]

VI. LITIGATING EXCLUSIONARY BATHROOM LAWS UNDER TITLE IX

A. G.G. ex rel. Grimm v. Gloucester County School Board

In *G.G. ex rel. Grimm v. Gloucester County School Board*, transgender student Gavin Grimm ("Grimm") brought a Title IX action against the Gloucester County School Board after the Board implemented a restroom and locker room policy that allowed students to only use bathrooms that

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366 *Id.*

367 *Id.*

368 Mark Joseph Stern, *The HB2 "Repeal" Bill Is an Unmitigated Disaster for LGBTQ Rights and North Carolina*, SLATE: OUTWARD (Mar. 30, 2017), http://www.slate.com/blogs/outward/2017/03/30/hb2_repeal_bill_is_a_disaster_for_north_carolina_and_lgbtq_rights.html.

369 *Id.*

370 *Id.*

371 *Id.*

372 *Id.*

373 *See* Marc Tracy, *N.C.A.A. Ends Boycott of North Carolina After So-Called Bathroom Bill Is Repealed*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/sports/ncaa-hb2-north-carolina-boycott-bathroom-bill.html.

corresponded to their biological sex.[374] The district court dismissed Grimm's Title IX claim. The district court held Title IX expressly allows schools to maintain separate bathrooms on the basis of sex.[375] The district court concluded that Grimm's sex was female and that requiring Grimm to use restroom facilities that corresponded with his biological sex did not constitute a violation of Title IX.[376]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court's Title IX ruling.[377] In reversing, the court of appeals held that the lower court did not give proper deference to the Department of Education's interpretation on how Title IX should be applied to transgender individuals.[378]

1. G.G. ex rel. Grimm v. Gloucester County School Board - Eastern District of Virginia

In the U.S. District Court for the Eastern District of Virginia, Gavin Grimm challenged Gloucester County School Board's (the "Board") policy that students may only use bathrooms that correspond to their biological sex or otherwise use single stall restrooms on both Title IX and Equal Protection grounds.[379] Grimm requested a preliminary injunction against the Board, barring the implementation of the exclusionary bathroom policy and allowing Grimm to use the boys' bathroom at Gloucester High School until the case is decided at trial.[380] The United States, through the Department of Justice (DOJ), also filed a Statement of Interest, asserting that the Board's bathroom policy violated Title IX.[381]

The Board responded by filing a Motion to Dismiss Grimm's claims and an Opposition to the Motion for Preliminary Injunction.[382] The court granted the Board's Motion to Dismiss Grimm's Title IX claim.[383] The court rested its analysis on its interpretation of the relevant Department of Education regulations, specifically 34 C.F.R. section 106.33 (2000) (Section 106.33).[384] The court began by noting that Title IX stated, "[n]o

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[374] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016).
[375] *Id.* at 717.
[376] *Id.*
[377] *Id.* at 727.
[378] *Id.* at 718-19.
[379] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 738, 742 (E.D. Va. 2015).
[380] *Id.* at 741.
[381] *Id.*
[382] *Id.* at 738.
[383] *Id.*
[384] *Id.* at 744-47.

person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[385]

However the court determined that sex-based decision making is not without exceptions.[386] The court noted that the provisions of Title IX state, "nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."[387] The court determined that the fact the statute did not expressly state that educational institutions may maintain separate bathrooms for different biological sexes was not an issue, as the Department of Education's regulations stipulated that a recipient of Title IX funds could provide separate toilet, locker room, and shower facilities on the basis of sex, so long as such facilities were comparable to those provided to the other sex.[388]

In the court's view, Section 106.33 expressly allows schools to provide separate bathrooms for the sexes as long as the bathrooms are comparable. The court determined that the Department of Education's regulation was not arbitrary, capricious, or manifestly contrary to Title IX.[389] Rather, the court noted that Section 106.33 appeared to effectuate title IX's provision allowing separate facilities based on sex.[390] Furthermore, in the court's view, it did not need to decide whether "sex" in Section 106.33 also included "gender identity".[391] Instead, the court determined that it need only decide whether the Board's bathroom policy satisfied Section 106.33.[392] In order for the Board to meet the requirement of Section 106.33, the single-stall restrooms and the girls' restroom Grimm was permitted to use only needed to be comparable to the boys' restrooms.[393] The court noted that Grimm failed to allege that the restrooms he is permitted to use are incomparable to those provided to individuals who are biologically male.[394] Consequently, because Grimm failed to allege in his complaint that the restrooms he was permitted to use were not comparable to those available

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[385] *Id.* at 744 (citing 20 U.S.C. § 1681 (1986)).

[386] *Id.*

[387] *Id.* (citing 20 U.S.C. § 1686 (1972)).

[388] *Id.* (citing 34 C.F.R. § 106.33 (2000)).

[389] *Id.*

[390] *Id.*

[391] *Id.* at 745.

[392] *Id.*

[393] *Id.* ("Section 106.33 states that sex-segregated bathrooms are permissible unless such facilities are not comparable.").

[394] *Id.*

to biological males, the court conclusively found that he had failed to state a claim under Title IX.[395]

The court also addressed the DOJ's argument that the court should defer to the Department of Education's (DOE) policy, which maintains that segregating bathrooms based on biological sex, and without regard to gender identity, violates Title IX.[396] To support this position, the DOJ provided a DOE guidance letter issued on January, 7 2015, through the Office of Civil Rights (OCR).[397] The letter stated that schools are permitted to "provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances."[398] However, "[w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school must treat transgender students consistent with their gender identity."[399] The letter further cited a DOE significance guidance document which provided that "[u]nder Title IX, a recipient must generally treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes."[400]

The court rejected the DOE position articulated by the DOJ, noting that Section 106.33 had been in effect since 1975 and the DOE had not published a single document prior to 2014 to support its newly adopted position.[401] In light of this, the court stated that the DOE's interpretation did not stand up to scrutiny.[402] The court determined that unlike regulations, statutes, interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines, did not warrant *Chevron*-style deference.[403] Consequently, the court held that the interpretations of Title IX contained in the Letter of Guidance could not supplant Section 106.33.[404]

Nonetheless, the court did note that an agency's interpretation of its own regulation, even one contained in a guidance document, deserved deference if (1) the regulation is ambiguous and (2) the interpretation is not plainly erroneous or inconsistent with the regulation.[405] However, in the court's

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395 *Id.*
396 *Id.*
397 *Id.*
398 *Id.*
399 *Id.*
400 *Id.*
401 *Id.* at 745-46.
402 *Id.* at 746.
403 *Id.* (citing Christensen v. Harris Cty., 529 U.S. 576, 587, (2000)).
404 *Id.*
405 *Id.* (citing *Christensen*, 529 U.S. at 588).

view, even using this standard, the DOE's interpretation should not have been given deference.[406] In the court's opinion, Section 106.33 was not ambiguous.[407] The court determined that Section 106.33 clearly allowed the Board to limit bathroom access on the "basis of sex."[408] Likewise, the court indicated that Section 106.33 was not plainly erroneous or inconsistent with Section 106.33.[409] The court noted that even reading 106.33 liberally in light of *Hopkins* only allows the separation of bathroom facilities on the basis of gender; it does not require it.[410] In the court's view, deferring to the DOE's newfound interpretation would be nothing less than allowing the DOE to create de facto regulations simply by issuing guidance documents.[411] The court indicated that if the DOE wanted to amend its new regulations, it should go through the proper channels for amending its regulations, and not simply change them for the purposes of litigation.[412]

The court also denied Grimm's request for a preliminary injunction, finding that Grimm had not submitted enough evidence to establish that the balance of hardships weighed in his favor.[413] In deciding this, the court examined the hardship placed on Grimm due to the alleged stigma and distress suffered by Grimm because of the school's bathroom policy against the privacy interests of the other students protected by separate restrooms.[414] The court began its balance of the hardships analysis by stating that by "protecting the privacy [interest] of the other students, the Board was protecting a constitutional right."[415] In support of this position, the court noted that the Fourth Circuit had recognized that prisoners have a constitutional right to privacy.[416] The court reasoned that it would be perverse to suppose that prisoners, who forfeit many privacy rights, would retain a privacy right that students would not have.[417] The court noted that not only is bodily privacy a constitutional right, but the need for privacy was even more pronounced in the educational system.[418]

The court determined that Grimm's claims were mostly unsupported, inadmissible hearsay that failed to show that his presence in male restrooms

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406 *Id.*.
407 *Id.*
408 *Id.*
409 *Id.*
410 *Id.*
411 *Id.* (citing *Christensen*, 529 U.S. at 588).
412 *Id.*
413 *Id.* at 747.
414 *Id.* at 750.
415 *Id.*
416 *Id.* (citing Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981)).
417 *Id.* at 750-51.
418 *Id.* at 751.

would not infringe on the privacy of other students.[419] The court noted that while Grimm reported that he "never encountered any problems from other students[,]" this was directly contradicted by other evidence.[420] In the court's mind, the fact Grimm had not encountered problems by other students was likely because the student expressed their discomfort to their parents, who then confronted the Board.[421] The court further examined Grimm's claim that the improvements the Board made to the restrooms minimized any privacy concerns.[422] The court expressed concern for male students who may turn from urinals half zipped accidently exposing themselves to someone who was of the opposite biological sex.[423] The court found that the mere presence of someone who is not the same biological sex might embarrass students, who would feel that their privacy was violated.[424]

Completing its full analysis, the court was almost completely dismissive of Grimm's claims of hardship, concluding that Grimm had failed to articulate the specific harms he would suffer as a result of using the unisex restrooms.[425] The court noted that Grimm only asserted that using such restrooms "would cause him distress and make him feel stigmatized."[426] The court found it compelling that Grimm's declaration mirrored that of his complaint. According to the court, this was a sign that the declaration was drafted by Grimm's lawyers and not Grimm himself.[427] The court was also critical of the declaration given by a psychologist, Dr. Randi Ettner, in support of Grimm's argument for hardship.[428] The court took particular issue with the fact that Dr. Ettner was not the psychologist who diagnosed Grimm with Gender Dysphoria, and had only met with Grimm once.[429] The court determined that Dr. Ettner was only retained for litigation and had little to say about the harm that Grimm would suffer as a result of not using the male bathrooms.[430] As a result, the court held that Grimm had not described his hardship in concrete terms and had supported his claims with nothing more than his own declaration and a declaration of a psychologist who had met him only for the purpose of litigation and not for treatment.[431]

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419 *Id.*
420 *Id.*
421 *Id.*
422 *Id.*
423 *Id.*
424 *Id.* at 752.
425 *Id.*
426 *Id.*
427 *Id.*
428 *Id.*
429 *Id.*
430 *Id.*
431 *Id.* at 752-53.

Consequently, the court held that Grimm had failed to show the balance of hardships weighed in his favor and the injunction was not warranted.[432] As a result, the court did not find it necessary to consider the other showings required for a preliminary injunction.[433]

2. *Appeal to the United States Court of Appeals for the Fourth Circuit*

Subsequently, Grimm appealed the decision of the lower court to the United States Court of Appeals, Fourth Circuit.[434] In his appeal, Grimm asked the court of appeals to reverse the dismissal of his Title IX claim, to issue the preliminary injunction he had sought, and to assign the case to a different judge on remand.[435] Conversely, the Board asked that the court of appeals affirm the lower court's ruling and dismiss Grimm's equal protection claim, on which the lower court had not yet issued a ruling.[436]

The court of appeals first turned to the dismissal of Grimm's Title IX claim, reviewing the lower court's grant of the motion to dismiss *de novo*.[437] Much like the lower court, the court of appeals began by reviewing the text of Title IX and Section 106.33 for guidance.[438] In its review of the statute, the court of appeals noted that sex-segregated restrooms and living facilities were permissible under Title IX.[439] The court then examined the January 7, 2015, DOE/OCR letter, which stated, "when a school elects to separate or treat differently on the basis of sex . . . a school must generally treat transgender students consistent with their gender identity."[440] The court of appeals then considered if Grimm and the DOJ were correct in their assertions that the DOE's interpretation of its own regulation should be given *Auer* deference.[441]

According to the court of appeals, "*Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute."[442] Consequently, the court of appeals noted that it

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[432] *Id.* at 753.
[433] *Id.*
[434] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).
[435] *Id.* at 717.
[436] *Id.*
[437] *Id.* at 718.
[438] *Id.*
[439] *Id.*
[440] *Id.*
[441] *Id.* at 719.
[442] *Id* (citing Auer v. Robbins, 519 U.S. 452 (1991)).

would not accord an agency's interpretation *Auer* deference if the regulation was unambiguous.[443]

Thus, the court of appeals turned its attention to determining whether or not Section 106.33 contained ambiguity.[444] The court of appeals quickly concluded that a reasonable reading of the language Section 106.33 clearly indicated that it is meant to reference males and females.[445] Therefore, schools could provide separate facilities for male and female students and exclude females from male facilities and vice-versa.[446] Despite this conclusion, the court of appeals determined that the inquiry had not ended as a result of that straightforward conclusion.[447] The court of appeals concluded that while the statute unambiguously refers "to males and females, it is silent as to how schools should determine whether a transgender [student] is male or female for the purpose of access to sex-segregated restrooms."[448]

The court of appeals further stated that even under the Board's own "biological gender" formulation it was not clear how the regulation should be applied. For example, the court of appeals questioned how Section 106.33 would be applied in a variety of situations including a transgender student who had undergone sexual reassignment surgery, an individual born with X-X-Y chromosomes, and individuals who had lost their external genitals in an accident.[449] The court of appeals found that the DOE's interpretation, which stated that in the case of a transgender individual using a sex-segregated facility, using the individual's gender identity to determine whether they should use male or female facilities resolved the ambiguity.[450]

Since the court of appeals concluded that the "regulation was ambiguous as applied to transgender individuals," the court further found that the DOE's interpretation was entitled to *Auer* deference, "unless the Department's interpretation is plainly erroneous."[451] In the court of appeals' view, the DOE's interpretation on how to apply Section 106.33 to transgender students was not plainly erroneous with the text of the regulation.[452] In reaching this conclusion, the court of appeals examined

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[443] *Id.*
[444] *Id.* at 719-720.
[445] *Id.* at 720.
[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] *Id.* at 720-21.
[450] *Id.* at 721.
[451] *Id.*
[452] *Id.* at 722.

definitions of the word "sex" from two major dictionaries existing at the time Section 106.33 was enacted.[453] The court of appeals found that the dictionaries used qualifiers for describing the term "sex" such as "reference to the '*sum* of' various factors, '*typical* dichotomous occurrence' and '*typically* manifested as maleness and femaleness.'"[454] As a result, the court of appeals found that the DOE's interpretation of how Section 106.33 should apply to transgender students was not plainly erroneous. Despite the fact that the Department's interpretation may not have been intuitive, the court of appeals found such an interpretation was proper given "the varying physical, psychological, and social aspects—or, in the words of an older dictionary, 'the morphological, physiological, and behavioral peculiarities' – included in the term 'sex.'"[455]

Lastly, the court of appeals examined whether the Department's interpretation of Section 106.33 was "a result of the agency's fair and considered judgment."[456] The court of appeals noted that even a valid interpretation would not be given *Auer* deference where it appeared that the position taken by an agency was no more than a convenient position for litigation or was simply a *post hoc* rationalization.[457] The court of appeals found that the position taken by the DOE was not a convenient position taken simply for the litigation. The court of appeals observed that allowing students to use facilities consistent with their gender identity had been the Department's position since 2014, which pre-dated the Grimm litigation.[458] Finally, the court of appeals determined that the interpretation could not be considered a *post hoc* rationalization since it was consistent with conclusions of a number of federal agencies holding that transgender individuals could use the restroom that corresponded to their gender identity.[459] Thus, the court of appeals held that the Department's interpretation of Section 106.33, its own regulation, as it related to transgender individuals, was entitled to *Auer* deference. Consequently, the

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[453] *Id.* at 721 ("The first defines 'sex' as 'the character of being either male or female' or 'the sum of those anatomical and physiological differences with reference to which the male and female are distinguished . . . .' The second defines 'sex' as: the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness . . . ." (citations omitted)).

[454] *Id.* at 721-22 (emphasis in original).

[455] *Id.* at 722.

[456] *Id.*

[457] *Id.*

[458] *Id.*

[459] *Id.*

court of appeals reversed the lower court's dismissal of Grimm's Title IX claim.[460]

The court of appeals then turned to the lower court's denial of Grimm's request for a preliminary injunction. The court of appeals found that the lower court had misstated the evidentiary standard for preliminary injunctions when the lower court stated, "[t]he complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence."[461] However, the court of appeals noted that preliminary injunctions are governed by a less stringent application of the rules of evidence.[462] Thus, although admissible evidence could have been given more weight than inadmissible evidence in the preliminary injunction context, the lower court erred when it rejected Grimm's evidence simply because it may have been inadmissible at the subsequent trial. Likewise, the court of appeals found that the lower court was in error when it excluded some of Grimm's evidence on hearsay grounds.[463] The court of appeals found that hearsay evidence in an informal proceeding, such as a preliminary injunction hearing, should not be precluded, but rather the evidence should be given appropriate weight. The court of appeals concluded that lower courts could, in appropriate circumstances, rely on hearsay or other inadmissible evidence in deciding whether a preliminary injunction was warranted.[464] Following a complete review of the issues, the court of appeals concluded that the lower court had abused its discretion and vacated the lower court's denial of Grimm's request for a preliminary injunction.[465]

3. *The Supreme Court Proceedings*

On remand, the United States District Court for the Eastern District of Virginia granted Grimm's injunction.[466] In its Order, the district court noted

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[460] *Id.*

[461] *Id.* at 725 (citing G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 747 (E.D. Va. 2015)).

[462] *Id.* "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).

[463] *Id.* at 725-26.

[464] *Id.*

[465] *Id.* at 726.

[466] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2016 U.S. Dist. LEXIS 93164 *2 (E.D. Va. June 23, 2016).

that the injunction only granted Grimm access to the restroom facilities and not to other boys' facilities at Gloucester High School.[467] Following the district court's ruling on the injunction, the Board petitioned the United States Court of Appeals for the Fourth Circuit to stay the Order of the district court pending appeal.[468] This request was rejected by the court of appeals, with the Board then filing an Application to Recall and Stay with the Supreme Court of the United States. The Supreme Court, in a 5-3 vote, granted the stay pending a timely filing of the writ of certiorari, noting that should the writ be denied, the stay would terminate automatically.[469] Ultimately, the Supreme Court granted the writ of certiorari and established a briefing schedule.[470]

a. Supreme Court Argument of the Gloucester County School Board

The Board, in its brief to the Supreme Court, stated that "separating restrooms by physiological sex was plainly valid under Title IX and Section 106.33."[471] In support of this claim, the Board argued that "the text and history of Title IX and Section 106.33 refute the notion that 'sex' can be equated with gender identity."[472]

The Board noted that Section 106.33 allows schools to keep separate bathroom facilities based on sex, so long as the bathrooms for each sex are comparable.[473] As a result, the Board reasoned that Section 106.33 confirmed the legality of the Board's policy under Title IX, "regardless of whether the term 'sex' may include some notion of a person's 'gender identity.'"[474] Furthermore, the Board noted that the district court had correctly concluded that when Section 106.33 was adopted in the mid-1970s, "sex" at a minimum was understood to include the physiological distinctions between men and women.[475] To reinforce the idea that sex was overwhelmingly concerned with the physiological difference, the Board pointed to linguistic evidence found in dictionary definitions.[476] In the

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[467] *Id.*

[468] G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 654 F. App'x 606, 606 (4th Cir. 2016).

[469] Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016).

[470] Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2016), *cert. granted*, 85 U.S.L.W. 3202 (U.S. Oct. 28, 2016) (No. 16-273).

[471] Brief for Petitioner at 25, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273).

[472] *Id.* at 26.

[473] *Id.*

[474] *Id.*

[475] *Id.*

[476] *Id.* at 27.

Board's opinion, the dictionary definitions and linguistic evidence at the time Title IX and Section 106.33 were adopted could not support a finding that "gender identity" could be equated with "sex."[477] As a result, the term "sex" in Title IX could not have been understood to refer to "gender identity" when Title IX became law.[478]

The Board also examined the legislative history of Title IX, and argued that the legislative history confirmed the dictionary definitions.[479] The Board reasoned that Congress's primary purpose in Title IX was to remedy pervasive discrimination against women in educational programs.[480] Additionally, the Board contended that along with prohibiting "sex" based discrimination, Congress also "sought to preserve schools' ability to separate males and females to preserve personal privacy."[481] According to the Board, "[n]ot a shred of legislative history suggests that Congress considered 'gender identity'" when enacting Title IX.[482] Moreover, the Board pointed out that even Grimm had "indicated that the Congress that enacted Title IX and the agency that adopted section 106.33 were focused on physiological sex[,]" never conceiving of gender identity as an issue.[483]

The Board further argued that "[i]n addition to violating Title IX's text and history, . . . requiring access to sex-separated facilities based on gender identity [] would undermine Title IX's structure and make [it] impossible to administer."[484] According to the board, Grimm's interpretation of gender identity, the "innate sense of being male or female," made implementation of Title IX problematic.[485] In the Board's opinion, making sex-separated facilities turn on such an elusive concept, the "'innate sense of being male or female,' . . . would lead to obvious and intractable problems of administration."[486] In the Board's view, under the current guidelines, a school would not be able to "determine a student's gender for the purposes of managing access" to sex-separated facilities.[487]

Furthermore, the Board determined that Grimm's definition of "gender identity" implied that "a student's mere assertion of his or her gender identity settles the matter."[488] The Board found issue with this

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[477] *Id.* at 27-31.
[478] *Id.* at 32.
[479] *Id.*
[480] *Id.*
[481] *Id.*
[482] *Id.* at 33.
[483] *Id.*
[484] *Id.* at 36.
[485] *Id.*
[486] *Id.*
[487] *Id.* at 37.
[488] *Id.*

circumstance, as this would mean that "members of one physiological sex could obtain access to facilities reserved for the other physiological sex simply by announcing their gender identity."[489] As a result, the Board reasoned that the sex separation contemplated by Title IX and its regulations would cease to exist.[490] Moreover, the Board surmised that some students would assert a gender identity for less than worthy reasons.[491] Such a result would fly in the face of what the framers of Title IX had contemplated when providing for separate facilities for opposite sexes.[492] In the Board's view, the drafters of Title IX and its implementing regulations clearly sought to preserve the idea that certain spaces were available to only one physiological sex and were off limits to the other.[493]

The Board also noted that other problems could arise in the context of athletics.[494] Title IX regulations require recipients to "provide equal athletic opportunity for members of both sexes."[495] It also requires that schools provide separate teams for each sex where selection for the team "is based upon competitive skill or where the activity is a contact sport."[496] In the Board's view, "[t]he separation is plainly grounded in physiology."[497] Furthermore, the Board stated that "[s]ex separation in athletics only works, however, if 'sex' means physiological sex; if it means 'gender identity,' nothing prevents athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women."[498]

Lastly, the Board argued that "[i]f 'sex' were equated with 'gender identity,' Title IX and its regulations would be invalid for lack of clear notice."[499] As the Board illustrated, by Grimm's own admission, the interpretation of Title IX sought by Grimm "was unimaginable at the time Title IX and its regulations were first adopted."[500] Consequently, the Board reasoned that "the Fourth Circuit's holding would make Title IX violate the spending clause for failure to afford federal funding recipients clear notice

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489 *Id.*

490 *Id.*

491 *Id.* ("Some may use the opposite sex's facilities to express their gender identity, but other will do so for less worthy reasons.").

492 *Id.* at 37-38.

493 *Id.* at 38.

494 *Id.* at 40.

495 *Id.* (quoting 34 C.F.R. § 106.41(c) (2000))

496 *Id.* (quoting 34 C.F.R. § 106.41(b) (2000))

497 *Id.*

498 *Id.* at 41

499 *Id.*

500 *Id.* at 42.

of the conditions of funding."[501] Citing *Murphy*, the Board noted that "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out unambiguously" because "States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain."[502] The Board contended that for over forty years, "[s]tates have accepted Title IX funding with the understanding they could maintain separate facilities based on [biological sex,]" and that nothing in the text of Title IX even hinted anything else was required.[503] Consequently, the Board maintained that the position taken by the court of appeals must be rejected under the rule of constitutional avoidance.[504]

b. Supreme Court Argument of Gavin Grimm

Grimm in his brief contended that the Board's policy violated the plain text of Title IX.[505] In Grimm's view, under the plain text of Title IX, he had been subjected to discrimination, excluded from participation in, and denied benefits of Gloucester High School "on the basis of sex."[506] To prove this, Grimm focused his argument on four points:

1. The Board's policy subjected him to discrimination;[507]
2. The Board's discrimination was "on the basis of sex;"[508]
3. Title IX could not be narrowed by assumptions about legislative intent;[509] and
4. The restroom regulation did not authorize the Board's discriminatory policies.[510]

Grimm argued that the Board's restroom policy singled him out for different treatment and barred him from using restrooms used by other boys.[511] Grimm's only option was to use single-stall restrooms that no other

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[501] *Id.*

[502] *Id.* (quoting Arlington Cent. Sch. Dist. Bd. Of Educ. V. Murphy, 548 U.S. 291, 296 (2006)) (internal quotations and citations omitted).

[503] *Id.*

[504] *Id.* at 43.

[505] Brief for Respondent at 27, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273).

[506] *Id.*

[507] *Id.* at 27-33.

[508] *Id.* a 33-38.

[509] *Id.* at 38-41.

[510] *Id.* at 41-45.

[511] *Id.* at 27.

Gloucester High students used.[512] Grimm, and only Grimm, was forced to use these restrooms, which resulted in humiliation and stigmatization for him.[513] Grimm contended that he alone was therefore "subjected to discrimination . . . on the basis of sex" under the policy.[514]

Grimm noted that he is "recognized as a [male] by his family, his medical providers, the Virginia Department of Health, and the world at large."[515] Consistent with his medical and social transition, Grimm is "receiving hormone therapy, has had chest reconstruction surgery, and changed his sex to male both on his state-issued identification card and birth certificate."[516] As a result, Grimm argued that the Board's assertion that he is permitted to use the girl's restroom is misguided.[517] Grimm argued that "if [he] attempted to enter the girls' restrooms, he would create a disturbance and possibly a confrontation with others students or staff who would (accurately) perceive him as a boy intruding upon the girls' restrooms."[518] Grimm argued that "[p]lacing him in the girls' restrooms would undermine the very privacy expectations regarding single-sex restrooms" the Board seeks to protect.[519] By excluding Grimm from using the boys' restroom, the Board's policy excludes Grimm from any common restroom.[520]

Grimm also noted that courts have held that under Title IX, the most obvious example of a violation is "the overt physical deprivation of access to school resources."[521] In Grimm's view, restrooms are such a critical school resource that deprivation of them constitutes an obvious example of a Title IX violation.[522] Furthermore, Grimm noted that when transgender students are not allowed to use the restroom that corresponds with their gender identity, they will often avoid using the restrooms they are allowed to because of the stigma associated with the restroom or because of the difficulty of access to the designated restroom.[523] Grimm admitted that his situation was similar to other transgender students because of the location of the limited number of single-stall restrooms and nurses station at

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512 *Id.*
513 *Id.*
514 *Id.*
515 *Id.* at 28.
516 *Id.*
517 *Id.*
518 *Id.*
519 *Id.*
520 *Id.*
521 *Id.* at 31 (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999)).
522 *Id.*
523 *Id.*

Gloucester High School in relation to the classrooms.[524] Grimm pointed out that the single stall restrooms and nurses station were located far from his classes. Accordingly, he was physically unable to take a restroom break between classes without being late to his next class or to take a restroom break during class because of the significant amount of class time he would miss.[525]

Grimm further argued that the discriminatory treatment of him was explicitly "on the basis of sex." The Board policy indicated the use of restrooms was to be limited to a student's biological gender, and students with "gender identity" issues would be provided alternative facilities.[526] In Grimm's opinion, the policy adopted by the Board did not define "biological gender", which is a sex based term used in order to exclude transgender students from restrooms other students use.[527] In Grimm's view, the sole purpose of the Board's policy was to target him because he is transgender. By targeting Grimm for different treatment because he is transgender, the policy impermissibly discriminated "on the basis of sex."[528]

Grimm maintained that a person's transgender status is an inherently sex-based characteristic.[529] Grimm claimed that his differential treatment was a direct result of him being born female at birth.[530] Grimm reasoned that treating a person differently because of the incongruence of his gender at birth and his gender identity is literally discrimination on the basis of sex.[531] Furthermore, Grimm argued that discrimination against transgender people is sex based discrimination because it rest on traditional sex stereotypes and gender based assumptions.[532] Unlike other males, Grimm was born a different biological sex than he identifies with.[533] Consequently, this upset traditional assumptions about boys. For that reason, Grimm asserted that the Board singled him out for the discomfort he created to those who believed

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[524] *Id.* at 32.

[525] *Id.*

[526] *Id.* at 33.

[527] *Id.*

[528] *Id.* at 34 n.25 ("The vast majority of lower courts have already recognized that discrimination against transgender individuals is discrimination 'on the basis of sex.' As Senior Judge Davis noted in his concurrence, '[t]he First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution.'" (citations omitted)).

[529] *Id.* at 35.

[530] *Id.*

[531] *Id.*

[532] *Id.* at 36.

[533] *Id.*

in traditional stereotypes and overbroad generalizations about men and women.[534]

Grimm noted that discrimination against him for upsetting the expectations of what it meant to be male or female was sex-based discrimination as it was analogous to the court reasoning in *Hopkins*.[535] In *Hopkins*, the Court recognized that "assuming or insisting that [individual men and women] match [t]he stereotype associated with their group" is sex based discrimination.[536] Thus, discriminating against Grimm because he is a transgender is discrimination against him on the basis of sex.[537] In Grimm's view, the fact that the sex discrimination by the Board was only targeted at transgender students did not change that discrimination from being "on the basis of sex" to being "on the basis of being transgender."[538]

Grimm asserted that the Court's precedent made it clear that sex discrimination need not have the same impact on all boys or all girls in the same manner in order to be "discrimination on the basis of sex."[539] Grimm contended the same is true in his case, since the Board's discrimination against him because he is a boy is discrimination based on sex, even if no other boy was affected.[540]

Grimm also took issue with the Board's argument that his claim fell outside the scope of Title IX, because the legislators who passed the legislation were primarily concerned with ending discrimination against women.[541] Citing *Oncale*, Grimm pointed out that a unanimous court held that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[542] Therefore, while the statute may have been "principally motivated to end discrimination against women," the statute itself "is not limited to discrimination against women and extends to sex discrimination

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[534] *Id.* ("Indeed, 'a person is defined as transgender precisely because' that person 'transgresses gender stereotypes.'"(quoting Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011))).

[535] *Id.*

[536] *Id.* (alteration in original) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

[537] *Id.* at 37.

[538] *Id.*

[539] *Id.* (citing *Hopkins*, 490 U.S. at 257-58; Phillips v. Martin Mareitta Corp., 400 U.S. 542, 544 (1971)).

[540] *Id.* at 38.

[541] *Id.* (quoting Brief for Petitioner at 6, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273)).

[542] *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

'of whatever kind.'"[543] Furthermore, Grimm argued that while the understanding of transgender people has grown since Title IX became law, "'changes, in law or in world may require [a statute's] application to new instances."[544] For example, Grimm noted that "Title IX protects students from sexual harassment, [but] when Congress enacted [Title IX], the concept of sexual harassment as gender discrimination had not been recognized or considered by the courts."[545]

Grimm also directly refuted the Board's claim that Section 106.33 authorizes their discriminatory policy.[546] Grimm noted that unlike the statutory exemptions in Title IX, Section 106.33 does not state the statute's ban on sex-based discrimination "shall not apply" to restrooms.[547] In fact, the regulation states that "single-sex restrooms may be provided only if the facilities are comparable for all students."[548] Grimm reasoned that interpreting Section 106.33 to authorize sex-based distinctions, as the board argued, would go beyond Section 106.33's plain text and bring it in direct conflict with Title IX.[549]

As further evidence that the Board's discriminatory policy was not permitted under Section 106.33, Grimm pointed towards the Board's own concession.[550] The Board admitted that if it created a restroom policy that limits access based on "behavioral peculiarities" related to biological sex, it would be admitting only boys who behave in traditionally masculine ways, violating Title IX's statutory language as interpreted by the Court in *Hopkins*.[551] For Grimm, the concession "illustrate[d] the error in [the Board]'s argument that it c[ould] create any policy for restroom access as long as it u[tilized] some dictionary's definition of the word sex."[552] The Board acknowledged that creating restroom policies based on sex stereotypes would impermissibly discriminate on the "basis of sex" in violation of Title IX.[553] Consequently, by singling out Grimm for different treatment because, as a transgender boy, he did not conform to traditional

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[543] *Id.* (quoting *Oncale*, 523 U.S. at 80) (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005)).

[544] *Id.* at 39 (quoting West v. Gibson, 527 U.S. 212, 218 (1999)).

[545] *Id.* (internal quotations and citations omitted).

[546] *Id.* at 41 (citing Brief for Petitoner at 21, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273)).

[547] *Id.*

[548] *Id.* (emphasis omitted) (citing 34 C.F.R. § 106.33 (2017)).

[549] *Id.*

[550] *Id.* at 42.

[551] *Id.*

[552] *Id.*

[553] *Id.* at 42-43.

sex stereotypes, the Board's policy discriminated on the basis of sex and, thus, violated Title IX.[554]

Grimm further argued that "[e]ven if the scope of 'sex' in the regulation were relevant . . . [the Board]'s argument about the meaning of 'sex' in 1972 . . . misapprehends history, [the Supreme Court] precedents," and the operation of the Board's own policy.[555] For starters, Grimm noted that the plain meaning of sex in 1972 extended beyond anatomy and chromosomes. In 1972, the term "sex" referred both to physical and cultural differences.[556] Further, the Supreme Court "has made clear that the statutory term 'sex' is not limited to physical traits."[557] In addition, Grimm noted that the Board offered no explanation for why the term "sex" should be interpreted more narrowly in Section 106.33 than Title IX.[558] In fact, the Board argued that "the two terms should be interpreted identically."[559] In Grimm's final point, he asserted, "as a factual matter, the Board's policy does not assign restrooms based on 'physiological sex.'"[560] This is problematic, as Grimm argued, because "many transgender individuals, including [himself], have physiological and anatomical characteristics typically associated with their [gender] identity, not the sex identified for them at birth."[561] Because of medical treatment, Grimm has a typically male chest and facial hair.[562] Grimm is viewed by the world at large as a male.[563] Therefore, allowing him to use the same single-sex restrooms as other boys is the only way that is consistent with the underlying requirements of Title IX.[564]

c. Shifting Position of the Trump Administration – DOJ / DOE February 22, 2017 Dear Colleague Letter

On February 22, 2017, the DOJ along with the DOE issued a short letter withdrawing the guidance given by the previous Obama administration DOJ/DOE letters regarding the rights of transgender students to use

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554 *Id.* at 43.

555 *Id.*

556 *Id.*

557 *Id.* at 44. (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Nev. Dep't of Human Res. V. Hibbs, 538 U.S. 721, 736 (2003)).

558 *Id.*

559 *Id.* (citing Brief for Petitioner at 47, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273)).

560 *Id.* (citing Brief for Petitioner at 27, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S.Ct. 1239 (2017) (No. 16-273)).

561 *Id.*

562 *Id.*

563 *Id.*

564 *Id.* at 44-45.

restrooms and other facilities consistent with their gender identity.[565] In particular, the DOJ and DOE specifically stated that they were withdrawing the guidance given in "Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015," as well as the "Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016."[566] As a basis for withdrawing the prior guidance, the agencies stated that the previous documents had taken the position that the language prohibiting discrimination "on the basis of sex" in Title IX, and Section 106.33 required access to sex-segregated facilities based on gender identity.[567] The DOJ and DOE noted that the guidance documents did not give sufficient legal analysis or explain how the position the agencies were taking was consistent with Title IX.[568]

The DOJ and DOE went on to assert that the result of the prior guidance had led to "significant litigation regarding school restrooms and locker rooms."[569] The agencies specifically pointed to Grimm's case, noting that "[t]he U.S. Court of Appeals for the Fourth Circuit concluded that the term 'sex' in the regulations is ambiguous and deferred" to the agencies' guidance.[570] The letter also noted that, by contrast, a United States District Court in Texas had held the term "sex" was, in fact, unambiguous and referred only to biological sex.[571] Further, the Texas court held that the guidance was "legislative and substantive" and that formal rulemaking should have occurred prior to the adoption of any such policy.[572] Furthermore, the agencies indicated that they now believed that "due regard for the primary role of the States and local school districts" must be given in establishing educational policies.[573] Consequently, the agencies stated:

> In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues

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[565] *See* U.S. Dep't of Justice Civil Rights Div. & U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter on Transgender Students, (Feb. 22, 2017).

[566] *Id.*

[567] *Id.*

[568] *Id.*

[569] *Id.*

[570] *Id.*

[571] *Id.*

[572] *Id.*

[573] *Id.*

involved. The Departments thus will not rely on the views expressed within them.[574]

d. Letters from the Parties to the Court Following the Change in Position by the Trump Administration

Following the new guidance given by the DOE and DOJ, the United States Supreme Court requested that counsel for the parties submit letters to the Court by March 1, 2017, addressing the new development and suggesting how the Court should proceed with the case.[575]

In the Board's view, the withdrawal of the previous DOE and DOJ guidance should not prevent the Court from hearing the arguments and answering the questions presented.[576] The board argued that it was particularly important that the Title IX question be answered by the court. The Board noted that in its previous brief it had anticipated the withdrawal of the previous DOE and DOJ guidance and still, at that time, stated that even if the guidance was withdrawn, "the question [remains] of whether the underlying interpretation [of Title IX and 34 C.F.R. § 106.33] was correct."[577] The Board further stated that the Court's grant of certiorari on the second question contemplated that the case could be resolved solely on that basis.[578]

The Board also asked the Court, in light of the case's unusual posture, to take three actions before proceeding.[579] First, the Board proposed that the Court ask the United States Solicitor General to file a brief expressing the views on the United States.[580] The Board argued that it would be unusual for the Court to address questions of the kind presented in this case without first hearing from the Solicitor General.[581] If the Solicitor General submitted a brief on the matter, the Board further recommended that the

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[574] *Id.*

[575] *See* Letter from Joshua A. Black, Counsel of Record for Respondent, to Denise McNerney, Office of the Clerk, U.S. Sup. Ct. of the U.S., (Mar. 1, 2017), http://www.scotusblog.com/wp-content/uploads/2017/03/16-273_Gloucester-v-Gavin-Grimm_Respondent27s-Letter-to-Clerk-Upon-Request.pdf; Letter from S. Kyle Duncan, Counsel of Record for Petitioner, to Scott S. Harris, Clerk of Court for the U.S. Sup. Ct., (Mar. 1, 2017), http://www.scotusblog.com/wp-content/uploads/2017/03/Pet-Clerk-Ltr-re-Guidance-Docs-2017-3-2-FINAL.pdf.

[576] Letter from S. Kyle Duncan, *supra* note 575.

[577] *Id.* at 1.

[578] *Id.* at 1-2.

[579] *Id.* at 2-3.

[580] *Id.* at 2.

[581] *Id.*

parties have an opportunity to respond to the brief.[582] Second, the Board suggested that the Court postpone the oral arguments that were scheduled for March 28, 2017.[583] Third, the Board suggested that "if the Court chooses not to resolve either question presented in light of the withdrawn [guidance,] the Court should vacate the decisions below and remand for further proceedings."[584]

The Board ended its letter by indicating that it "believe[d] the better course [of action was] to proceed with argument and a decision on the merits," especially in regards to the proper interpretation of Title IX.[585] The Board urged the Court to resolve the issue, as such a resolution would "save the parties—as well as public and private parties involved in similar disputes throughout the Nation—enormous litigation costs as well as needless and divisive political controversy."[586]

The letter submitted on behalf of Grimm began by noting that both Grimm and the Board had urged the Court in their respective merits briefs, regardless of how the Court resolved the first question presented, to resolve the second question presented relating to Title IX.[587] In Grimm's view, with the withdrawal of the opinion letter referenced in the Court's first question presented and without other specific guidance issued on § 106.33, the Court would inevitably have to decide the proper interpretation of Title IX and § 106.33.[588] Further, Grimm agreed with the Board that delaying the decision would have adverse effects, in that "[d]elaying resolution of that question will only lead to further harm, confusion, and protracted litigation for transgender students and school districts across the country" and cause "another few years of needless litigation would not help clarify the legal question facing the Court, and it would impose enormous costs on individual students until the Court provides additional clarity."[589]

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[582] *Id.*

[583] *Id.* at 3.

[584] *Id.* (citing 28 U.S.C. § 2106 (1948); Slekis v. Thomas, 525 U.S. 1098, 1099 (1999); Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606, 613, 616 (2012)).

[585] Letter from S. Kyle Duncan, *supra* note 575 at 3.

[586] *Id.*

[587] Letter from Joshua A. Block, Counsel of Record for Respondent, to Denise McNerney, Office of the Clerk for the Supreme Court of the U.S., (Mar. 1, 2017), http://www.scotusblog.com/wp-content/uploads/2017/03/16-273_Gloucester-v-Gavin-Grimm_Respondent27s-Letter-to-Clerk-Upon-Request.pdf.

[588] *Id.* at 2.

[589] *Id.*

e. Supreme Court Response

Despite both Grimm and the Board urging the Court to proceed with the case and resolve the case by answering the second question presented, the Supreme Court did not agree. The Court decided to vacate and remand the case to the United States Court of Appeals for the Fourth Circuit.[590] The Court, in a short, one-sentence summary-disposition, stated, "Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."[591]

4. Further Proceedings by the Court of Appeals

On remand, the Court of Appeals set a briefing schedule for the parties to address the appropriateness of the injunction and whether Title IX covers issues related to discrimination against transgender persons, particularly related to restroom access in schools.[592] Briefs have been filed in the case and a decision from the Court of Appeals is anticipated.

In its brief, the Gloucester County School Board argued the following:

1. The case is mooted by the graduation of Grimm, in that no continuing dispute exists.[593]
2. The existing school board policy separating bathrooms by physiological sex is valid under Title IX, in that under Title IX, "sex" is not intended to also mean "gender identity" and that equating "sex" with "gender identity" would undermine the very purpose of Title IX.[594]

On the other hand, Grimm argued the following in his brief:

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[590] Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (vacating and remanding the case to the lower court).

[591] *Id.*

[592] Briefing Order, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 4:15-cv-00054-RGD-DEM, (4th Cir. Apr. 13, 2017).

[593] *See* Brief for Defendant – Appellee at 18, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, (4th Cir. May 8, 2017).

[594] *Id.* at 20. The policy at issue states:

> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Id. at 12.

1. The injunction barring implementation of the school board policy regarding restrooms, if granted, was not moot simply because Grimm had graduated from high school.[595]
2. The Board's policy violates Title IX, in that discrimination based on transgender status is discrimination "on the basis of sex" under Title IX and excluding transgender boys or girls from using the same restrooms as other boys and girls violates Title IX.[596]
3. The Board's understanding of transgender persons and its speculation about how best to administer a transgender-friendly policy have no basis in fact.[597]
4. Allowing Grimm to use the men's restroom, consistent with his gender identity, does not invade the privacy of other students or other persons who use the restroom.[598]

B. Whitaker v. Kenosha Unified School District

While a decision is awaiting in *Grimm*, the United States Court of Appeals for the Seventh Circuit issued a landmark ruling on May 30, 2017 on this issue in the case of *Whitaker v. Kenosha Unified School District.*[599] In a unanimous decision, the court of appeals upheld a preliminary injunction, issued by a federal district court in September 2016, allowing Whitaker, a senior at Tremper High School in the Kenosha Unified School District in Kenosha, Wisconsin, to use the boys' restrooms at his school throughout his senior year without fear of discipline or invasive surveillance by school officials.[600]

Whitaker was born a female as indicated by his birth certificate.[601] In eighth grade, Whitaker revealed to his parents that he was transgender and identified as male.[602] From then on, he began openly identifying as a boy; dressing in masculine clothes, cutting his hair regularly and in a masculine style, and using a male name and male pronouns.[603] Whitaker also informed

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[595] Brief for Plaintiff – Appellant at 17, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (2016) (No. 15-2056).

[596] *Id.* at 21.

[597] *Id.* at 40.

[598] *Id.* at 44.

[599] Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).

[600] *Id.* at 1039-42.

[601] *Id.* at 1040.

[602] *Id.*

[603] *Id.*

his teachers and classmates during his freshman year of school that he was a boy.[604] During his public transition, Whitaker began to see a therapist who diagnosed him with gender dysphoria.[605] After the diagnosis, Whitaker began receiving hormone replacement therapy to aid in his transition.[606] Lastly, Whitaker legally changed his name on his birth certificate in September 2016.[607]

In the early period of Whitaker's transition, no one had been offensive or hostile towards him.[608] However, he began to run into problems in his sophomore year of high school.[609] Whitaker and his mother met with the counselor at school to ask permission for him to begin using the men's restroom at school as part of his transition.[610] The school district notified Whitaker that he could only use the women's restroom or the gender-neutral bathrooms.[611]

The gender-neutral bathrooms were located far away from all of his classes and he was the only one in the school who was allowed to use them.[612] Whitaker feared that using them constantly would draw attention to his transgender identity.[613] He was also afraid that using the men's restroom against the school district's demands would get him into trouble.[614] As a result of not being able to use the restroom consistent with his gender identity, Whitaker began limiting water intake, resulting in an exacerbation of his vasovagal syncope.[615] This condition makes Whitaker more prone to fainting and/or seizures if he is dehydrated.[616] In addition, Whitaker suffered from stress-related migraines, depression, anxiety, and contemplation of suicide.[617]

When Whitaker started his junior year, he began using the men's restroom despite the policy.[618] A teacher saw him in the bathroom on one occasion and reported it.[619] The school maintained that because Whitaker

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[604] *Id.*
[605] *Id.*
[606] *Id.*
[607] *Id.*
[608] *Id.*
[609] *Id.*
[610] *Id.*
[611] *Id.*
[612] *Id.*
[613] *Id.*
[614] *Id.*
[615] *Id.* at 1040-41.
[616] *Id.*
[617] *Id.*
[618] *Id.*
[619] *Id.*

was identified as a female in the official school records, he was only allowed to use the female restrooms or the gender-neutral bathrooms.[620] Whitaker's doctor provided the school with documentation stating that Whitaker should be regarded as a male and allowed to use the men's restrooms as part of his transition.[621] The school district stated that they would not allow Whitaker to use the men's restroom unless he completely transitioned via surgical transformation.[622] Regardless of the school's unwritten policy against him, Whitaker continued to use the men's restroom at school the rest of the year.[623] As a result, he was constantly pulled out of class to be reprimanded by the administrators.[624] This worsened his symptoms of anxiety and depression. Shortly after the end of his junior year, Whitaker filed his claims in court.[625]

Throughout this proceeding, Whitaker claimed that the unwritten bathroom policy violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. Whitaker asserted that the application of this policy to him impeded his treatment for his gender dysphoria and caused him stress, anxiety, and other health issues.[626] Whitaker sought a preliminary injunction preventing the school from denying him the use of the men's bathrooms at school and at school-sponsored events.[627] In response to these claims, the school district filed for a motion to dismiss.[628]

The district court denied the motion to dismiss and granted the preliminary injunction.[629] An appeal by the school district followed.[630] On appeal, the court of appeals addressed two separate issues that had been raised by the school district.[631] The first was whether the court of appeals should exercise pendent jurisdiction over the district court's denial of the motion to dismiss in order to consider it immediately in the appellate proceeding, even though it was an interlocutory ruling.[632] The second issue was whether the district court erred in granting the motion for preliminary injunction.[633]

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620 *Id.*
621 *Id.*
622 *Id.*
623 *Id.*
624 *Id.*
625 *Id.* at 1042.
626 *Id.* at 1041.
627 *Id.* at 1042.
628 *Id.*
629 *Id.*
630 *Id.*
631 *Id.* at 1043.
632 *Id.*
633 *Id.*

Addressing the question of the exercise of pendant jurisdiction regarding the motion to dismiss, the court of appeals noted, "[o]rdinarily, an order denying a motion to dismiss is not a final judgment and is not appealable."[634] Here, the court of appeals concluded that the exercise of pendent jurisdiction was not appropriate, in that pendent jurisdiction only allows review of an otherwise unappealable interlocutory order when that order is inextricably intertwined with an appealable order.[635] In this case, the court of appeals concluded that the legal issues presented were not so intertwined as to support a review of the denial of the motion to dismiss at this early stage in the litigation process.[636]

As to the appropriateness of the lower court's issuance of a preliminary injunction preventing the school from denying him the use of the men's bathrooms at school and at school-sponsored events, the court of appeals concluded that Whitaker had shown (1) that he would suffer irreparable harm if the injunction were not maintained, (2) that he had no adequate remedy at law for his injury, and (3) that he had a reasonable likelihood of success on the merits of his claim.[637]

As to the irreparability of the harm to Whitaker without the injunction, the school district argued that the district court erred in finding that Whitaker established that he would suffer irreparable harm.[638] The school district argued that the experts used in the proceeding below to establish harm done to Whitaker by the policy could not quantify the harm.[639] Further, the school district asserted that Whitaker failed to take advantage of the "readily available alternatives" that the school had provided him (via gender-neutral bathrooms).[640] Finally, the school district argued that Whitaker's delay in seeking injunctive relief is indicative of a lack of irreparable harm.[641]

The court of appeals rejected the argument that the lower court improperly relied upon the experts' testimony regarding the nature of the harm suffered by Whitaker.[642] The experts opined that being allowed to use the men's restroom at school was integral to Whitaker's treatment of his gender dysphoria.[643] One of the experts stated that the treatment that

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[634] *Id.* (citing 28 U.S.C. § 1291).

[635] *Id.* (citing Montano v. City of Chicago, 375 F.3d 593, 599 (7th Cir. 2004) (quoting Jones v. InfoCure Corp., 310 F.3d 529, 536 (7th Cir. 2002))).

[636] *Id.* at 1044.

[637] *Id* at 1045-54.

[638] *Id.* at 1045.

[639] *Id.*

[640] *Id.*

[641] *Id.*

[642] *Id.*

[643] *Id.*

Whitaker faced at school "significantly and negatively impacted his mental health and overall well-being."[644] The expert also noted that after each consecutive visit with school officials regarding bathroom usage, Whitaker's depression and thoughts of suicide worsened.[645] The expert further opined that it is not an exaggeration to conclude that the school district's bathroom policy was a direct causal link to Whitaker's health problems.[646]

The court of appeals also rejected the school district's argument that Whitaker's harm was self-inflicted because of his failure to take advantage of available alternatives.[647] As the court of appeals noted, Whitaker was already facing harm in dealing with his transgender identity, which is a struggle in itself.[648] The school district exacerbated this harm by "dismiss[ing] him to a separate bathroom where he was the only student who had access[,]" making Whitaker feel even more stigmatized.[649]

Additionally, the separate bathrooms were not located close to his classroom, leaving Whitaker with the impossible choice of either missing excessive class time to use the bathrooms across campus or to stop using them at the expense of his health.[650] Whitaker also suffered anxiety when using the gender-neutral bathrooms because his friends would often ask him why he had access to them and they did not.[651] Combined, these issues clearly made Whitaker distraught on an almost constant basis.[652]

Likewise, the court of appeals rejected the school district's argument that Whitaker delayed in seeking injunctive relief.[653] As the court of appeals noted, Whitaker promptly filed his administrative complaint with the Department of Education shortly after the school began enforcing the policy.[654] He only withdrew his complaint to amend it before going forward with litigation.[655]

Regarding the question of whether Whitaker had shown that he had no adequate remedies at law, the court of appeals rejected the argument that monetary damages could be a sufficient remedy to the harm suffered by

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644 *Id.* at 1045.
645 *Id.*
646 *Id.*
647 *Id.*
648 *Id.*
649 *Id.*
650 *Id.*
651 *Id.*
652 *Id.*
653 *Id.* at 1046.
654 *Id.*
655 *Id.*

Whitaker.[656] The court of appeals concluded that Whitaker alleged prospective harm in his claim -- a harm to be endured in the future that could not be adequately compensated for by monetary damages.[657] Thus, the court of appeals held that no adequate compensatory remedy exists to prevent or compensate for "life-long diminished well-being and life functioning."[658]

The court of appeals then agreed that Whitaker was likely to be successful on the merits on both his Title IX and Equal Protection claims.[659] As the court of appeals noted, Title IX prevents institutions receiving federal financial assistance from providing different aid, benefits, or services, denying aid, benefits or services, and subjecting any person to separate or different rules, sanctions, or treatment on the basis of sex.[660] The only exception to this is that an institution may provide separate but comparable bathroom, shower, and locker room facilities for privacy reasons.[661]

However, the court of appeals did not find a barrier to Whitaker's claim under Title IX.[662] As a transgender individual, Whitaker does not conform to traditional sex stereotypes.[663] *Hopkins* established the notion that sex discrimination encompasses both biological differences and gender differences (those based on a failure to conform to stereotypical gender norms).[664] The language of Title IX does not explicitly mention the word "transgender" or identify transgender persons as a protected class, nor has the Supreme Court expressly identified transgender persons for protection.[665] However, the lack of express action by the Supreme Court addressing transgender persons does not prevent Whitaker from bringing a successful Title IX claim.[666]

The school district's policy requires that an individual use a bathroom that fails to conform to his or her gender identity.[667] It also punishes those who fail to adhere to using the "correct" bathroom.[668] This in turn violates Title IX regardless of whether the statute specifically mentions

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656 *Id.*
657 *Id.*
658 *Id.*
659 *Id.*
660 *Id.* at 1046-47 (citing 34 C.F.R. § 106.31(b)(2)-(4) (2000)).
661 *Id.* at 1047 (citing 34 C.F.R. § 106.33 (1980)).
662 *Id.*
663 *Id.* at 1048.
664 *Id.* at 1047 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
665 *See id.* at 1049.
666 *Id.*
667 *Id.*
668 *Id.*

"transgender" as a protected class.[669] The policy also subjects Whitaker to different rules, sanctions, and treatment compared to non-transgender students in the district.[670] According to the court of appeals, this is also an outright violation of Title IX.[671] Providing a gender-neutral bathroom is not sufficient to constitute "comparable" facilities; it does not relieve the district of liability.[672] In fact, in this case, the bathrooms are located far from Whitaker's classes, unlike all other bathrooms.[673] They also are for Whitaker's use only, which increases the stigmatization that results from being forced to use them.[674] Thus, the court of appeals concluded that Whitaker's claim under Title IX is likely to be successful.[675]

Further, the court of appeals indicated that the Equal Protection Clause instructs us to treat all persons in similar situations as alike.[676] This protects against intentional and arbitrary discrimination.[677] An act is presumed to be lawful, and not violative of the Equal Protection Clause, if the classification (discrimination being claimed) created by the statute is rationally regulated to a legitimate state interest.[678] In this case, the court of appeals rejected the argument that the school district's policy satisfied the requirement of being rationally related to a legitimate state interest.[679] The court of appeals concluded that because Whitaker suffered from a type of sex discrimination consistent with the gender stereotyping analysis recognized by the Supreme Court in *Hopkins,* heightened scrutiny was warranted for assessing this claim.[680]

The school district claimed that its bathroom policy is in place to protect the privacy interests of its 22,160 enrolled students.[681] According to the school district, to allow Whitaker and other transgender individuals to use bathrooms consistent with their gender identity would violate the privacy of all other students.[682] First, the court of appeals noted that the school district claims that the presence of a transgender student in the bathroom consistent with the gender with which the student identifies somehow violates the

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669 *Id.*
670 *Id.*
671 *Id.*
672 *Id.*
673 *Id.*
674 *Id.*
675 *Id.* at 1050.
676 *Id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).
677 *Id.* (citing Vill. Of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam)).
678 *Id.* (citing Cleburne, 473 U.S. at 439).
679 *Id.* at 1052.
680 *Id.* at 1050.
681 *Id.* at 1052.
682 *Id.* at 1051-52.

privacy of other non-transgender students.[683] While a legitimate interest in protecting the privacy of students when using the restroom exists, that issue does not exist here, according to the court of appeals.[684] For almost six months, Whitaker used the men's restroom at school without complaint from anyone.[685] It was only after a teacher, not a student, witnessed him using "the wrong restroom" that the issue of restrooms became an issue for the school district.[686] Neither side has been able to find evidence of a complaint made by a student about Whitaker.[687] Additionally, the school district claims that in allowing Whitaker to use the men's restroom, it puts all of the 22,160 students at risk.[688] However, the court of appeals noted, "A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."[689] Allowing him to use the men's restroom would not, in any fashion, invade the privacy of every student within the school district.[690] Thus, the court of appeals concluded that no evidence existed showing that Whitaker's use of the restroom consistent with his gender identity was a violation of any student's privacy.[691]

Second, the school district stated that Whitaker would be able to use the men's bathroom if he could provide the school with a birth certificate stating that he was male.[692] However, as the court of appeals points out, the policy at issue never specified such a requirement, particularly considering that the bathroom policy at issue is unwritten.[693] Neither Whitaker nor his mother were ever required to produce a birth certificate in order for Whitaker to use the restroom at school.[694] If Whitaker wanted to use the men's restroom at school, he would have had to change his gender in the school records.[695] This would require legal or medical documentation.

With a birth certificate or other documentation, however, no affirmation beyond the document exists to show that the gender as certified is the actual

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683 *Id.*
684 *Id.* at 1052.
685 *Id.*
686 *Id.*
687 *Id.*
688 *Id.*
689 *Id.*
690 *Id.*
691 *Id.* at 1052-53.
692 *Id.* at 1053.
693 *Id.*
694 *Id.*
695 *Id.*

gender belonging to the person.[696] Furthermore, receiving a sex change is not universally necessary to change one's birth certificate.[697] As the court of appeals asserted, a person could get a birth certificate changed without surgery, move to the school district, and the administration would be none the wiser unless someone were to release that information.[698] The policy overall does not truly protect the privacy interest of all students in the district and does not account for specifics when referring to what sex-markers on documentation entail.[699]

Concluding that Whitaker had made the necessary showing to support the lower court's issuance of the injunction, the court of appeals noted that the relative harms to the parties were rightly balanced by the lower court.[700] The court of appeals held that the school district failed to show that it would suffer any harm if the injunction were granted, in that the school district cannot show that granting the injunction would violate the privacy of other students.[701] Lastly, the court of appeals noted that there are plenty of other examples of school districts across the United States that have effectively integrated transgender-friendly policies regarding bathroom use.[702]

VII. CONCLUSION

While *Grimm* and *Whitaker* together offer some potential direction and guidance in the manner in which the law related to Title IX and transgender students may develop, these cases represent only a small step -- a step that remains deeply rooted in the traditional binary understanding of gender.[703] While the focus of this paper has been both a gaze backward on the historical and doctrinal basis that led to our current experience of gendered restrooms in schools and a look forward to an alternative doctrinal approach that takes seriously the needs of transgender persons, it is critical that the present lived experience of transgender students not be ignored. For example, GLSEN's 2015 National School Climate Survey found that many school policies targeted the gender of students by prescribing certain rules

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[696] *Id.*
[697] *Id.*
[698] *Id.*
[699] *Id.* at 1053-54.
[700] *Id.* at 1054-55.
[701] *Id.* at 1054.
[702] *Id.* at 1054-55.
[703] G.G. *ex rel.* Grimm v. Glouster Cty. Sch. Bd. 822 F.3d 709 (4th Cir. 2016); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017).

or practices based on the sex assigned at birth, without regard to the gender identity or preferred gender expression of the student.[704]

The 2015 National School Climate Survey conducted by GLSEN found that forty percent of students (40.3%) experienced school policies that prevented students from wearing clothing seen as "inappropriate" to their gender (e.g., a boy wearing a dress).[705] Approximately twenty percent of students (22.2%) indicated that they personally had been prevented from wearing clothing seen as "inappropriate" to their gender.[706] The survey also found that approximately forty percent of students (38.6%) had experienced school policies that prevented students from using their preferred name or pronoun, with almost twenty percent (19.9%) indicating that they personally had been subjected to such a policy.[707]

Most importantly for the purpose of this article, over forty percent (42.6%) of students indicated that students at their school had been required to use the bathroom of their legal sex regardless of their gender identity, with over twenty percent (22.6%) of students in the survey reporting that they had personally experienced such policies.[708] Transgender students reported the following:

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[704] *See* JOSEPH G. KOSCIW ET AL., THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 35-39 (2015), https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf. *See also* Anna Lacey & Dewey G. Cornell, *School Administrator Assessments of Bullying and State-Mandated Testing*, 15 J. SCH. VIOLENCE 189, 206 (2016) ("[B]ullying prevention efforts can have a positive impact on the school as a whole." (*citing* Kenneth W. Merrell et al., *How Effective Are School Bullying Intervention Programs? A Meta-Analysis of Intervention Research*, 23. SCH. PSYCHOL. Q. 26 (2008))); Adam McCormick et al., *Gay-Straight Alliances: Understanding Their Impact on the Academic and Social Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning High School Students*, 37 CHILD. & SCH. 71, 76 (2015) ("Similarly, the process of normalization can be a very empowering and liberating experience."); Stephen T. Russell et al., *Adolescent Health and Harassment Based on Discriminatory Bias*, 102 AM. J. PUB. HEALTH 493, 495 (2012) (finding that students who were harassed because of bias against the students' race or sexual orientation had worse grades and greater truancy than students who received non-bias-based harassment); David Schwartz et al., *Victimization in the Peer Group and Children's Academic Functioning*, 97 J. EDUC. PSYCHOL. 425, 431 (2005) ("[O]ur findings suggest that peer group maltreatment can exert a negative influence on children's academic adjustment at school.").

[705] KOSCIW, *supra* note 704, at 38.

[706] *Id.*

[707] *Id.*

[708] *Id.*

- 60.0% of transgender students had been required to use the bathroom or locker room of their legal sex;[709]
- 50.9% of transgender students had been prevented from using their preferred name or pronoun;[710] and
- 28.0% of transgender students had been prevented from wearing clothes because they were considered inappropriate based on their legal sex.[711]

As discussed earlier, the historical development of gendered restrooms is about much more than just biological differences between men and women.[712] Fundamentally, the existence of gendered restrooms is rooted in historical, social, and cultural understandings of the gender roles of women and men, particularly the need for men to feel as if they are the protectors of some idealized image of womanhood. Gendered restrooms are designed not only to preserve this historical understanding, but also, through the architectural structure itself, to act as a mechanism for the preservation of those gender understandings through socialization. As Ruth Colker has written:

> Sexual stereotyping is at the core of the sex segregation of public restrooms. While state or commercial entities might justify the sex segregation of restrooms by noting the different ways that men and women urinate, those biological differences, in fact, have little to do with the sex segregation of restrooms. In the home, men and women are able to use the same restroom design. Outside the home, it might be convenient and efficient to offer urinals to men, and toilet stalls with small trash cans for men or women, but these design options have nothing to do with the need to sex segregate public restrooms. Urinals, like toilets, could have privacy barriers. Toilet stalls already have privacy barriers. While it may be true that men have been socialized to urinate standing up, that difference does not even require entirely different construction designs.[713]

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[709] *Id.*

[710] *Id.*

[711] *Id.*

[712] *See* discussion, *supra* Part II.

[713] Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 163 (2017). In her recent article, Colker argues that rather than trying to deal with the thorny legal problems addressed in this article, the more elegant solution is to "flip the default," so that gender segregated public restrooms are not the norm. As Colker states:

> At the present time, various federal and state policies mandate sex-segregated restrooms for large communal facilities while also permitting various family-style or single-stall restrooms for those people who choose to use alternative facilities. The default policy is sex-segregated restrooms. The exception is restrooms open to people of any sex.
>
> My suggestion is quite simple--we should flip the default rule. Public, communal restrooms should not be limited by sex. Within these restrooms, entities can provide a

Many have asserted since the advent of gendered restrooms that the primary purpose of these separate facilities is to respect biological differences and to protect the privacy of individuals, particularly women. However, a careful examination of the history underlying the development of gendered restrooms shows that, in fact, this privacy argument is merely "a pretext for the articulation of gender stereotypes about the inappropriateness of men being exposed to women's private, bodily functions."[714] As Shannon Minter has noted:

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range of toilet styles with appropriate privacy barriers between stalls, as well as disability accessibility. Currently, restrooms have several configurations to provide accessibility to people who use wheelchairs or canes. It is possible to have more than one toilet configuration within a restroom. The default rule should therefore be sex-integrated toileting facilities. If entities choose to *also* provide a limited number of single-stall restrooms for people who might prefer not to use the large, communal restroom, then they can do so. Those single-stall restrooms should be available to a wide range of people and therefore include fully accessible toilets.

Id. at 177-78. *See also* Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 215-16 (Harvey Molotch & Laura Noren eds., 2010); Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 J. PLAN LITERATURE 267, 283 (2007) (discussing the availability of family-style restrooms); Kelly Levy, Note, *Equal, But Still Separate?: The Constitutional Debate of Sex-Segregated Public Restrooms in the Twenty-First Century*, 32 WOMEN'S RTS. L. REP. 248, 251-52 (2011); Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297, 305-15 (2008); Nancy Steele & Linda H. Yoder, *Military Women's Urinary Patterns, Practices, and Complications in Deployment Settings*, 33 UROLOGIC NURSING 61, 66 (2013); JoAnn Hindmarsh Wilcox & Kurt Haapala, *How to Design School Restrooms for Increased Comfort, Safety and Gender-Inclusivity*, ARCH DAILY (Nov. 15, 2016), http://www.archdaily.com/799401/how-to-design-school-restrooms-for-increased-comfort-safety-and-gender-inclusivity?utm_medium=email&utm_source=ArchDaily%20List [https://perma.cc/8N3F-3EER]. Recently, scholars have begun to ask whether rules mandating gendered restrooms might be a violation of constitutional principles of freedom of speech or freedom of association.

[714] Colker, *supra* note 713, at 164. As Colker writes:

If all public restrooms had fully enclosed private stalls, akin to the current configuration of women's restrooms, many men would probably still be uncomfortable being in close proximity to a woman, especially as she might change a menstrual pad. Taboos against men being exposed to women's menstruation cycles are persistent and longstanding. In 2015, then-presidential candidate Donald Trump seemingly alluded to a woman's menstrual cycle when he insulted Republican debate moderator Megyn Kelly by saying she had "[b]lood coming out of her wherever." His comment reflected the continuing discomfort that men may feel in even thinking about women's private bodily processes. The history of public restroom construction suggests that men and women are not merely segregated to protect them from seeing each other's genitals. They are sex segregated to keep men and women protected from even hearing each other's "organic processes."

> In short, by casting gender-segregated restrooms as a mere reflection of biological truths, opponents of transgender equality seek to insulate certain laws and policies—such as those basing restroom access on a person's "biological sex"—from any meaningful scrutiny. But just as the Supreme Court ultimately recognized that appeals to biology could not justify laws excluding same-sex couples from marriage, it is likely that most courts will recognize that such appeals also cannot justify discrimination against transgender people in restrooms. Already, a growing number of courts have recognized that the question of how to incorporate transgender people within our culturally dominant system of gender-segregated restrooms is a real question that deserves serious consideration. And because gender-segregated restrooms are not simple reflections of biology, it cannot be answered simply by pointing to the physiological differences between men and woman [sic].[715]

The historical development of gendered restrooms discussed earlier was predicated on a binary understanding of gender or sex in humans, in that this historical development included only narrow and rigid concepts of "male" and "female."[716] Yet, experience over time with transgender individuals teaches us that transgender identity simply cannot be reduced to a simple binary understanding.[717]

Id. See generally Timothy Zick, *Bathroom Bills, the Free Speech Clause, and Transgender Equality*, 78 OHIO ST. L.J. (forthcoming 2017).

[715] Minter, *supra* note 34, at 1199 (footnote omitted).

[716] *See Public Restrooms*, *supra* note 34, at 1224-27. *See also* Lisa M. Diamond, Seth T. Pardo & Molly R. Butterworth, *Transgender Experience and Identity*, in HANDBOOK OF IDENTITY THEORY AND RESEARCH 629 (Seth J. Schwartz et al. eds., 2011).

> [T]he vast range of transgender-identified individuals who claim that they are "both" or "neither" male/female, or who adopt complex constellations of male/female identification and presentation, are not considered by the medical community to be appropriate candidates for sex reassignment. In fact, many such individuals do not seek complete sex reassignment at all, preferring instead to modify selected parts of their body (such as breasts or facial hair) or to forgo physical change altogether and focus on modifications in their social status and legal standing. This is consistent with the fact that such individuals typically reject the notion that they are simply "trapped in the wrong body" and hence do not view a wholesale substitution of one gender identification for the other as a personal goal or as a potential solution to any experiences of distress or discomfort they might face. It is this group of gender-fluid individuals that poses a fundamental dilemma to our attempts to develop broad-based models of transgender identity development.

Id. at 632.

[717] *Public Restrooms*, *supra* note 34, at 1224 ("Early understandings did adopt such a view, considering a transperson as either 'a man trapped in a woman's body' or a 'woman trapped in a man's body' and often referring to such individuals as 'transsexuals' who suffered from a mental illness, 'gender identity disorder.' The cure for this 'disorder' was sex reassignment surgery, altering external genitals and/or internal gonads to match the individual's sense of gender identity."). *See also* Joanne Meyerowitz, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 138-39 (2002); Susan Stryker,

As Kogan points out:

> For roughly the past decade, psychologists and other scholars have begun paying closer attention to the narratives of transgender people, and have realized that the tapestry of trans-identity is far richer than merely binary. Many transgender individuals do self-identify with the sex opposite that of their birth bodies. Others do not self-identify as either male or female, but in some other way entirely. Moreover, the latest volume of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") replaces "Gender Identity Disorder" with a new psychological category, "Gender Dysphoria," that applies only to those who experience suffering as a result of their gender disparity. In other words, trans-identity is, in and of itself, no longer a "disorder."[718]

Thus, the question moving forward is, are traditional biological and cultural understandings of women and men, particularly as related to what transpires in bathrooms, so critical to those understandings of gender that the binary must be maintained at all costs, even to the exclusion of those who do not claim the binary? More importantly, perhaps, is the question of whether the law should be seen as maintaining this traditional binary structure as related to bathroom facilities or as providing flexibility that allows for the creation of space for a multitude of gender expressions as related to bathrooms.[719]

TRANSGENDER HISTORY 34 (2008).

[718] *Public Restrooms*, *supra* note 34, at 1224-25.

[719] *See* David B. Cruz, *Getting Sex "Right": Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL. 203 (2010); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389 (2017). *See also* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMPLE POLIT. & CR. L. REV. 465 (2009); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 Berkeley J. GENDER, L. & JUST. 83 (2008); Julie Greenberg, Marybeth Herald, & Mark Strasser, *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 MICH. J. GENDER & L. 13 (2010); Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1 (2007); Julia C. Oparah, *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239 (2012); Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Darren Rosenblum, *"Trapped" in Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000); Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L., GENDER & SOCIETY 301 (2013); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMPLE POLIT. & CR. L. REV. 573 (2009); Wolff, *supra*

In her brilliant article, *The Numerus Clausus of Sex*, Sonia Katyal has argued for recognition of a much more robust understanding of gender pluralism in addressing the legal issues raised in this article and to center the power of determining gender identity in the individual, rather than in the law, the school, or the state in some other fashion.[720] Katyal notes that this notion of gender pluralism has long been embraced within the community of those who advocate on behalf of transgender persons, with this model being seen as a rejection of the medical model which forced individuals to check certain medically required boxes in order to define their gender identity. As Katyal writes:

> With this paradigm shift, a new model, a transgender model, was born, one that embraced the need for gender differentiation and pluralism and that also empowered trans individuals to view themselves as healthy, whole individuals. As Dallas Denny observes:
>
> > Gender-variant people were no longer forced to choose restrictive transsexual or cross-dresser or drag queen/king roles, each with its own behavioral script. Suddenly it was possible to transition gender roles without a goal of genital surgery, to acknowledge one's gender dysphoria and yet remain in one's original gender role, to take hormones for a while and then stop, to be a woman with breasts and a penis or a man with a vagina, to blend genders as if from a palette.
>
> In line with these observations, empirical research has shown an accompanying diversity of body modification choices within the transgender

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note 34, at 201-07.

[720] Katyal, *supra* note 719, at 479. As Katyal writes:

> Years ago, Professor Mary Dunlap noted, "If the individual's authority to define sex identity were to replace the authority of law to impose sex identity, many of the most difficult problems currently associated with the power of government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved." As Currah has brilliantly noted, Dunlap's transformative project has become obscured, largely due to the deployment of legal arguments that serve to reify, rather than challenge, the dominance of gender norms. The result of this approach risks what Currah describes as a "pyrrhic" victory, one that disadvantages not just gender nonconforming and transgender individuals, but many others who fall outside those categories as well.

Id. at 475. *See also* Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, *in* THE TRANSGENDER STUDIES READER 1, 14 (Susan Stryker & Stephen Whittle, eds., 2006); Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries*, *in* THE TRANSGENDER STUDIES READER 471, 479 (Susan Stryker & Stephen Whittle, eds., 2006); Paisley Currah, *Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1364 (1997); Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1132-39 (1979); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 133-48 (2002).

> community—some individuals desire surgery, others take hormones, and others choose to alter their hairstyle or makeup choices, bind their chests, or do nothing at all. Just as there is not a single age for coming out, transgender people discover their self-identity at different points along their lives—some know very early in age, while others know their gender only years later.[721]

Approaching the prohibition against discrimination based on sex contained in Title VII and Title IX from a stance of gender pluralism that allows an individual's claim of gender identity to emerge organically from his/her lived experience would allow the law to provide broader protection against discrimination based on sex. This broad protection would reject a rigid binary understanding of gender identity and embrace the myriad ways in which gender identity is experienced, defined and, ultimately, expressed. Tying together the plurality of gender identity and the manner in which that identity is expressed does not result in a wholesale rejection of current Title VII and IX jurisprudence. In fact, tying these ideas together is consistent with the gender stereotyping jurisprudence that the courts have developed in the context of Title VII and Title IX following *Hopkins*.[722] As Katyal asserts:

> [A] focus on expression starts from a wholly different vantage point. Rather than addressing the state as a benign protector, the state might be viewed through a comparably more suspicious lens. The concern about state regulation stems from a desire to protect expression and avoid the coercion of conformity, which is closely linked to traditional First Amendment jurisprudence. A more pluralist model would include the term "gender identity *and expression*," which broadens its protections beyond gender dysphoric individuals alone.[723]

As we have seen in the historical and legal development discussed throughout this article, society and courts are often frozen in a biological binary understanding of gender in attempting to place transgender individuals in the boxes that the law seems to require. However, the expansion of the protections provided by *Hopkins* and its progeny allow for a much broader view of gender and the protections provided by the law

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[721] Katyal, *supra* note 719, at 479 (quoting Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *in* TRANSGENDER RIGHTS 171, 172-82 (Paisley Currah, Richard M. Juang, and Shannon Price Minter, eds. 2006)). *See also* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 273-78 (2005) (discussing the need for a non-linear conceptualization of gender because "gender" is too multi-faceted to be constrained to lines–a "gender galaxy" is needed and is more appropriate).

[722] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[723] Katyal, *supra* note 719, at 491-92 (emphasis added).

against discrimination based on sex. The sexual stereotyping theory seen in *Hopkins* and its progeny transgresses traditional binary notions of gender by recognizing that the protections provided by antidiscrimination laws encompasses discrimination based on a nonconforming gender expression that flows organically from an individual's gender identity. This understanding lays waste to the argument that Title VII and Title IX do not protect transgender persons from discrimination, because, as the argument goes, discrimination against transgender persons is not discrimination based on sex.

To understand how wrong this argument is, one need only examine the case of Gavin Grimm. Grimm identifies as male and his presentation and expression of self that is made to the world is male. He desires to use the restroom assigned as the "men's restroom" because it is consistent with both his gender identity and his gender expression. However, because the traditional binary understanding of gender is rooted in some understanding of unchanging biological genitalia, rather than taking seriously the lived experiences of human beings, it gives undue power to biology, often specifically genitalia. The traditional biological binary understanding of gender identity holds that Grimm is female, because of the biological gender classification attached at birth, which, according to this argument, is immutable. Therefore, regardless of his perceived identity, his gender expression to the world, or any reassignment surgery he may or may not have, this argument would hold that Grimm always remains female.

Under this formulation, it would never be unlawful discrimination based on sex to force Grimm to use the restroom assigned as the "women's restroom," regardless of how masculine Grimm's gender expression becomes. Such a rigid theory is inconsistent with the lived experience of transgender persons, including Grimm, and places them in a category of otherness that the law is unable to recognize. By allowing identity and expression to be fully connected and included in the understanding of gender that drives the application of Title VII and Title IX, the law could balance the concerns of both transgender and non-transgender persons, allowing students to use the restroom in peace.[724]

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[724] As Katyal notes:

> [A] related possibility is to simply interpret gender identity to *include* gender expression, instead of describing it as a separate category. For example, gender identity, at least in an earlier version of the ENDA federal bill, is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

Katyal, *supra* note 719, at 492 (emphasis added).

How Much is Police Brutality Costing America?

Eleanor Lumsden*

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Abstract

The criminal law of the United States fails to stop the unlawful killing of minorities by law enforcement. In fact, it was never meant to do so. Civil tort law is also unequal to the task. The consequences of not correcting these legal failures have been underreported, and are far-reaching for the United States and its neighbors. This article explores the direct and indirect costs of these failings, identifies positive measures already underway, and outlines further suggestions for reform.

INTRODUCTION

> Now, what I have said about Harlem is true of Chicago, Detroit, Washington, Boston, Philadelphia, Los Angeles and San Francisco—is true of every Northern city with a large Negro population. [T]he police are simply the hired enemies of this population. They are present to keep the Negro in his place and to protect white business interests, and they have no other function. [The police] are, moreover—even in a country which makes the very grave error of equating ignorance with simplicity—quite stunningly ignorant; and, since they know that they are hated, they are always afraid. One cannot possibly arrive at a more surefire formula for cruelty.
>
> This is why those pious calls to "respect the law," always to be heard from prominent citizens each time the ghetto explodes, are so obscene. The law is meant to be my servant and not my master, still less my torturer and my murderer.[1]

The system of policing in the United States is broken. Police brutality—which in this article is defined as any situation where public officials use the power invested in them by law to unlawfully kill others[2]—has left an abiding stain that will be well remembered in the annals of U.S. history. One could argue that little has changed since James Baldwin wrote his

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[1] James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), https://www.thenation.com/article/report-occupied-territory/.

[2] Although this Article will focus on police brutality that results in death, police encounters that result in non-lethal injuries are very important as well—they are underreported and more numerous than the numbers of police encounters that result in death. *See* Rob Arthur et al., *Shot by Cops and Forgotten: Police Shoot Far More People Than Anyone Realized, A Vice News Investigation Reveals*, VICE NEWS (Dec. 11, 2017), https://news.vice.com/en_us/article/xwvv3a/shot-by-cops/ (In the "first attempt to count both fatal and nonfatal shootings by American police in departments across the country," the investigation found that in the largest local police departments, there were 1,378 fatal encounters versus 2,720 nonfatal encounters between 2010-16.). *See also* Tom Kertscher, *Fatal Police Shootings Occur in Tiny Percentage of Arrests in U.S., Milwaukee's Police Chief Says*, POLITFACT WIS. (Aug. 29, 2014, 5:00 AM).

"report" in 1966.[3] Yet the central thesis of this article is that the failure of U.S. federal and state laws to eradicate unlawful police action has even more pressing implications than those present 50 years ago. The primary issue is whether U.S. law, as currently enacted, can prevent these unnecessary deaths in the United States. If the answer to this question is no, a secondary question is what are the costs of failing to stop unlawful police killing in general, and the disproportionate rates at which unarmed black men are killed?[4] A third question is, what can be done to improve the current situation for all Americans, including for the police themselves?

These pressing issues require answers, and an immediate national response. They are just as significant as employment, immigration, or health care. In fact, and as described further below, police brutality is inextricably linked to the economy.[5] It is the position of this article that the current status quo is untenable and cannot stand in a nation that is committed to human rights and the rule of law. Our collective willingness to tolerate and not eradicate police misconduct in all its forms has increased social costs today. Poor and minority members of society do not bear these costs alone, although they are among the most directly affected.[6] Police

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[3] *See, e.g.*, Richard Wolf, *Equality Still Elusive 50 Years After Civil Rights Act*, USA TODAY (Apr. 1, 2014, 12:22 PM), http://www.usatoday.com/story/news/nation/2014/01/19/civil-rights-act-progress/4641967/ (noting it has been easier to end overt discrimination than to achieve economic, educational or social equality).

[4] A recent (but not yet public) academic study by Professors Justin Nix and Bradley Campbell at the University of Louisville, Kentucky and Professor Geoffrey Albert of the University of South Carolina, *Fatal Shootings by US Police Officers in 2015: A Bird's Eye View*, "found that unarmed black men were shot and killed last year [in 2015] at disproportionately high rates and that officers involved may be biased in how they perceive threats." Wesley Lowery, *Study finds police fatally shoot unarmed black men at disproportionate rates*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html?utm_term=.3459b10e273a. *See* Justin Nix et al., *Fatal Shootings by U.S. Police Officers in 2015: A Bird's Eye View*, POLICE CHIEF, http://www.policechiefmagazine.org/fatal-shootings-by-u-s-police-officers-in-2015-a-birds-eye-view/ (last visited Oct. 7, 2018).

[5] James Prumos, *Police Brutality: Economic Impact*, THE STILLMAN EXCHANGE (Nov. 18, 2015), https://thestillmanexchange.com/2015/11/18/police-brutality-economic-impact/ (underscoring that the costs of police brutality are paid by taxpayers); *see also* Terrance Heath, *Police Violence Against Blacks Has an Economic Context*, CAMPAIGN FOR AMERICA'S FUTURE (June 10, 2015), https://ourfuture.org/20150610/police-violence-against-blacks-has-an-economic-context (highlighting the fact that police encounters "occur in a socioeconomic context that goes back centuries.").

[6] *See* Kenneth C. Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 717 (Apr. 1974).

misconduct affects all segments of society,[7] and these costs are outlined more fully in Part IV of this Article. The failure of both the criminal justice and tort systems to bring about change is a problem that the broader society ignores at its peril.

Many Americans commonly use the word "America" to refer to the geographic boundaries of the United States. Often, those residing in Latin America or elsewhere outside of the U.S. feel that this is imperialistic and wrong. America refers to a continent composed of many autonomous countries, of which the United States is just one.[8] As used in the title of this article, "America" does not reflect this more limited use. Citizens of all of the Americas are impacted by this particular failure of justice in the United States.[9]

U.S. minorities and the so-called "underclass" suffer most from our collective inability and unwillingness to do better, but so do the citizens of other nations, including our closest southern neighbor. Recently, the U.S. Supreme Court considered the constitutional implications of a case where a U.S. border patrol agent fired a shot from El Paso, Texas that struck an unarmed 15-year-old boy in Juarez, Mexico: Sergio Adrián Hernández Güereca was standing a mere sixty feet away when he was killed.[10] According to legal documents filed by the boy's parents, there have been more than forty killings by border patrol agents, including ten cross-border shootings and six deaths.[11] In this case, the border control agent stated that he was under attack from youths who were throwing rocks. Cell phone

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[7] Black parents must delicately balance how to instruct their child to obey, but somehow not fear, police. Those same parents may be left grieving or bereft when despite their best efforts, their child nonetheless runs afoul of the criminal justice system and is incarcerated or killed. Schools must keep their students and teachers safe and must grapple with the decision of whether to allow armed security or police on campus. Such schools also must consider the role they may play in contributing to the school to prison pipeline. Communities must simultaneously grapple with attempts to reduce gun violence with attempts to monitor local law enforcement. Women must contend with the loss of partners to either prison or death, or the possibility of raising their children without partners.

[8] Chris Kirk, *I'm From America, Stop Complaining South America*, SLATE (Aug. 19, 2013), http://www.slate.com/articles/news_and_politics/a_fine_whine/2013/08/america_the_continent_vs_america_the_country.html.

[9] MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 65 (1963) ("Injustice anywhere is a threat to justice everywhere.").

[10] *See* Hernandez v. Mesa, 137 S.Ct. 2003 (2017); *see also* Robert Barnes, *Supreme Court Considers Case of a Shot Fired in U.S. That Killed a Teenager in Mexico*, WASH. POST (Feb. 19, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-considers-case-of-a-shot-fired-in-us-that-killed-a-teenager-in-mexico/2017/02/19/c2935c36-f548-11e6-8d72-263470bf0401_story.html?utm_term=.22c1ae87daab.

[11] *See* Hernandez, 137 S.Ct. 2003.

video contradicts that account and instead appears to show the youths playing a game where they ran back and forth along a culvert that separates the two countries.[12] Unlawful killings occurring within the strict confines of our geographic borders have implications further afield.

Righting these wrongs does not necessitate the assignation of blame. Change comes, whether beckoned or not. Erasing the debt collectively owed to the marginalized and the defenseless means not only an acknowledgment of the problem, which by now has been covered extensively by other writers, but also an awareness that the willful subjugation and subordination of any group of people has never been indefinite or without repercussions.

This Article seeks to challenge the idea that unlawful police killings boil down to a mere disagreement over whether "Blue Lives Matter" or "Black Lives Matter." I argue that there are significant and currently underestimated societal and economic costs that accrue when unaccountable public officials use the power granted to them by law to commit murder. Increased transparency and accountability over law enforcement will make it safer for all persons already living in the United States, for our immediate neighbors, and for those who intend to migrate to, or visit the country.

Part I begins by discussing the racial context in which policing developed in the United States, and lays the foundation for a narrative that explains the continuing racial tensions between law enforcement and African Americans in particular. Parts II and III explain and critique existing federal and state laws that allow racial killing to continue. Part IV explores and outlines the direct and indirect costs of police brutality. Part V discusses positive reforms and concludes with some thoughts and recommendations on how policing, police policy, and laws in the United States can be further improved to bring about meaningful change.

I. A BRIEF HISTORY OF POLICING

It's long past time we watched the watchmen.[13]

An abbreviated history of policing in the United States may help to place the current narrative in context. In 1704, the first slave patrols were formed.[14] Slave patrols were responsible for returning runaway slaves to

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[12] *See id.*

[13] *See* James Surowiecki, *Why Are Police Unions Blocking Reform?*, NEW YORKER (Sept. 19, 2016), https://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform/.

[14] The first slaves were brought to the U.S. in 1619. Slave patrols started in 1704 and

their masters, enforcing laws which prevented blacks from traveling without passes or permits, and preventing revolt.[15] Over time, these slave patrols eventually morphed into a form that is now recognized as modern-day law enforcement: "[t]he slave patrol, which began as an offshoot of the militia, and came to resemble the modern police, thus provides a transitional model in the development of policing."[16] It can be argued that from the beginning, law enforcement existed to control, not protect, blacks. Further, as African-Americans were literal property, policing that returned runaway slaves to their masters directly served the purpose of maintaining white property interests.

Slavery was formally abolished in the United States by the Thirteenth Amendment to the U.S. Constitution in 1865.[17] However, official control over black bodies continued even after the end of slavery. Contained within the 13th Amendment was an exception that allowed for the continued enslavement of those under government control.[18] Under the "convict-labor exception,"[19] a system of "convict leasing" emerged which allowed forced

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continued through 1861. Yet the birth of American policing really begins in 1631 with the establishment of the first night watch in Boston. Colonial cities included provisions in their articles of incorporation for night watches and constables whose duties included "keeping the peace, ensuring public safety, and law enforcement. BRYAN VILA & CYNTHIA MORRIS, THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY 3 (1999).

[15] KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 64 (Soft Skull Press, 2004) ("the slave patrols existed solely as a means of preserving the status quo through the enforcement of the slave codes "); see also Jeffrey R. Hummel, Slave Patrols: Law and Violence in Virginia and the Carolinas, Book Review, Hoover Institution, Stanford University (July 2002), http://eh.net/book_reviews/slave-patrols-law-and-violence-in-virginia-and-the-carolinas/ ("Slave patrols, rather than being desultory or inadequate, turn out to be one of the chief ways that the southern states enforced their peculiar institution. The patrols apprehended runaways, monitored the rigid pass requirements for blacks traversing the countryside, broke up large gatherings and assemblies of blacks, visited and searched slave quarters randomly, inflicted impromptu punishments, and as occasion arose, suppressed insurrections").

[16] *Id.* at 75; *see also* Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, POLICING PERSPECTIVES, AN ANTHOLOGY (EDS. LARRY K. GAINES AND GARY W. CORDNER) 79 (1999) (citing Samuel Walker, "slave patrols were precursors to the police . . . [and] . . . the slave patrols operated solely for the enforcement of colonial and state laws").

[17] *See* 13TH (Netflix 2016).

[18] THE LIBRARY OF CONGRESS, *Primary Documents in American History*, https://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html ("Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.") (emphasis added).

[19] Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 872 (2012).

labor to continue through the prison population.[20] Although African-Americans did see important gains during "Reconstruction," the period between 1865-1877 that immediately followed the Civil War, the accumulation of rights by African-Americans led to a "white rage" that "work[ed] its way through the courts, the legislatures, and a range of government bureaucracies."[21] In 1865, laws known as the "Black Codes" were enacted:

> Their aims were to control the activities of the free black population in the states of the South, and to preserve a captive labor force for the plantations. Their provisions hark back to the previous slave codes. The Black Codes remained in force only until military rule was established by Congress in the states of the former Confederacy and the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.[22]

In addition to the inequality written into U.S. laws, African-Americans simultaneously faced threats from both public officials and non-governmental agents. Non-state actors such as the Ku Klux Klan (the "KKK") also bolstered the legalized system of control: the KKK, a hate group founded and based on white supremacy in 1865,[23] participated in "night rides" to terrorize the freed black population.[24] Thousands of African-Americans were lynched, often with either the tacit or explicit approval of state authorities:

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[20] This fact of life was memorialized in the lyrics of Sam Cooke's famous song, released in 1960: "[t]hat's the sound of the men, working on the chain gang." SAM COOKE, CHAIN GANG (RCA Victor 1960); *see also* THE BLACK EXPERIENCE, 1865-1978: A DOCUMENTARY READER 38-39 (Anthony J. Cooper, ed., 1995) ("The penitentiary system of the South, with its infamous chain-gang and convict features, is not equaled in inhumanity, cruelty, and deliberate fraud in any other institution outside of Russian Siberia.").

[21] CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 3 (2016). Ms. Anderson also discusses (for example, during the Great Migration) how law enforcement officials assisted "mayors, governors, legislators, business leaders," and "city councils, state legislators" in the violent repression of African Americans. *Id.* at 42, 48.

[22] THE BLACK EXPERIENCE, *supra* note 20, at 6. Per W.E.B. DuBois, the Black Codes "were an astonishing affront to emancipation" and made "plain and indisputable" the "attempt on the part of the Southern States to make Negroes slaves in everything but name." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167 (2013).

[23] According to the Southern Poverty Law Center, "[t]he Ku Klux Klan, with its long history of violence, is the most infamous—and oldest—of American hate groups. Although black Americans have typically been the Klan's primary target, it also has attacked Jews, immigrants, gays and lesbians, and, until recently, Catholics." *Ku Klux Klan,* SOUTHERN POVERTY LAW CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan (last visited Oct. 2, 2017).

[24] WILLIAMS, *supra* note 15, at 88 (citing MARY F. BERRY, BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 73-74 (2d ed., 1994).

> Lynchings were violent and public events that traumatized black people throughout the country and were largely tolerated by state and federal officials. This was not "frontier justice" carried out by a few marginalized vigilantes or extremists. Instead, many African Americans who were never accused of any crime were tortured and murdered in front of picnicking spectators (including elected officials and prominent citizens) for bumping into a white person, or wearing their military uniforms after World War I, or not using the appropriate title when addressing a white person. People who participated in lynchings were celebrated and acted with impunity.[25]

The horrors of this often-under-reported period of American history were memorialized in the lyrics of *Strange Fruit*, a protest anthem that was famously and hauntingly performed by Billie Holiday: "Southern trees bear strange fruit; Blood on the leaves and blood at the root; Black bodies swinging in the southern breeze; Strange fruit hanging from the poplar trees. . . ."[26]

The dark days following the official end of slavery were not without legal triumphs. The Civil Rights Act (which will be discussed further in Part II) was passed in 1866, and the Fourteenth Amendment to the U.S. Constitution was ratified in 1868.[27] The 14th Amendment granted citizenship to all those who were born or naturalized in the United States, including former slaves.[28] Even with the passage of the Civil Rights Act, and despite the holdings of U.S. Supreme Court decisions like *Brown v. Board of Education*,[29] white resistance to integration in public schools and

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[25] *See, e.g.*, Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, EJI, https://eji.org/reports/lynching-in-america (last visisted Oct. 7, 2017) ("[EJI] researchers documented 4075 racial terror lynchings of African Americans in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia between 1877 and 1950. . . ."); *See also* Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, EJI (3rd ed.), https://lynchinginamerica.eji.org/report/ (last visited Oct. 5, 2017) ("Lynchings . . . were largely tolerated by state and federal officials.").

[26] *Strange Fruit*, THE BICYCLE CO., http://www.billieholiday.com/portfolio/strange-fruit/. The original poem was written by Abel Meeropol, a white, Jewish high school teacher. The poem continues:

> Pastoral scene of the gallant South; The bulgin' eyes and the twisted mouth; Scent of magnolias sweet and fresh; Then the sudden smell of burnin' flesh. Here is a fruit for the crows to pluck; For the rain to gather, for the wind to suck; For the sun to rot, for the tree to drop; Here is a strange and bitter crop.

Id.

[27] *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited Oct. 2, 2017).

[28] *Id.*

[29] 347 U.S. 483 (1954). In *Brown*, the U.S. Supreme Court declared state laws

in public life was widespread. Bull Connor, the Chief of Police in Birmingham, stated: "[w]e don't give a damn about the law. Down here we make our own law."[30]

A racial caste system buoyed by so-called "Jim Crow" laws operated to keep blacks separate and unequal in most key areas of life, including but not limited to housing, education, and public accommodations.[31] Demonstrating that the "line of progress is never straight,"[32] a series of U.S. Supreme Court decisions dealt a series of blows to the fight for racial equality, including for example, approving police stops for less than probable cause,[33] approving racial profiling,[34] upholding harsh mandatory minimum sentencing for drug offenses,[35] and requiring proof of overt, visible discrimination while ignoring evidence of racial bias in sentencing.[36]

During the Civil Rights Movement of the nineteen-fifties and sixties, Southern Blacks and their allies marched, conducted "sit-ins" at segregated lunch counters, and engaged in peaceful acts of civil disobedience to protest these injustices.[37] In fact, the rise of police unions in the nineteen-seventies can be traced to the fight against inequality and institutionalized racism.[38] Police unions today wield significant power and shield not only innocent, but culpable officers from scrutiny and discipline.[39] In fact, some argue that today, police unions serve to uphold the status quo and are standing in the way of necessary reforms:

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establishing separate public schools for black and white students to be unconstitutional. *See id.*

[30] FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 306 (1990).

[31] *Id.*

[32] MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (Beacon Press, 2010).

[33] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[34] *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 131 (2010).

[35] *See* Hutto v. Davis, 454 U.S. 370 (1982); *see also* ALEXANDER, *supra* note 34, at 90.

[36] *See* McClesky v. Kemp, 481 U.S. 279 (1987); *see also* ALEXANDER, *supra* note 34 at 109-11.

[37] *See* Davarian L. Baldwin, *The Civil Rights Movement*, AFRICANA AGE (2011), http://exhibitions.nypl.org/africanaage/essay-civil-rights.html; *see also A History of Racial Injustice*, EQUAL JUSTICE INITIATIVE (2014), http://racialinjustice.eji.org/timeline.

[38] *See* VILA & MORRIS, *supra* note 14 at xxxv.

[39] *See* Reade Levinson, *Protecting the Blue: Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017), http://www.reuters.com/investigates/special-report/usa-police-unions (noting that union contracts erase disciplinary records or allow police to forfeit sick leave for suspensions, and residents face hurdles in pursuing complaints).

> Indeed, most [police unions] were formed as a reaction against public demands in the nineteen-sixties and seventies for more civilian oversight of the police. Recently, even as the use of excessive force against minorities has caused outcry and urgent calls for reform, police unions have resisted attempts to change the status quo, attacking their critics as enablers of crime.[40]

Although beyond the scope of this Article, there is significant room for additional research on this subject. Without a deeper look at the role that police unions play in maintaining the status quo, increasing accountability and transparency in law enforcement will be difficult.

In June 1971, President Nixon declared a "War on Drugs."[41] Under the auspices of this so-called war, he dramatically increased the size and power of federal drug enforcement agencies.[42] According to Michelle Alexander in her ground-breaking book, *The New Jim Crow, Mass Incarceration in the Age of Colorblindness*, the Nixonian drug war precipitated a replacement system of state control that has led to the mass incarceration of people of color today at wildly disproportional rates.[43]

The point of this abbreviated historical survey is to demonstrate that issues of race, police brutality and mass incarceration form an unholy trinity. First, the origins of policing and police culture spring from white supremacy and the social construct of race.[44] Second, echoes of this history of policing can be seen today in increased surveillance and control of

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[40] *See, e.g.*, Surowiecki, *supra* note 13.

[41] *See* Frontline, *Thirty Years of America's Drug War: A Chronology*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/. *See also Timeline: America's War on* Drugs, NPR (Apr. 2, 2007, 5:56 PM), https://www.npr.org/templates/story/story.php?storyId=9252490; Richard Nixon, *203 - Special Message to the Congress on Drug Abuse, Prevention and Control*, THE AM. PRES. PROJECT (June 17, 1971), http://www.presidency.ucsb.edu/ws/?pid=3048/.

[42] John Ehrlichman, a Nixon advisor, was recorded as stating:

> We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.

Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), http://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html.

[43] ALEXANDER, *supra* note 34 at 105-08.

[44] Robette A. Dias, *Racism Creates Barriers to Effective Community Policing*, 40 S. ILL. U. L.J. 501, 503 (" . . . because policing developed in the milieu of white supremacy, racism still distorts the reality of the people who are perceived as vulnerable and needing to be protected and those who are perceived as dangerous and needing to be controlled.").

communities of color, including the institutionalized nature of racial profiling,[45] "which has the effect of limiting the mobility of people of color and restricting their access to resources."[46] Third, increased surveillance and control of communities of color often results in militarized police responses that may end in wrongful incarceration, injury, and/or death. For now, this triangle of terror disproportionately burdens black and brown people, but the lack of accountability in policing is a societal problem that must be eventually solved for the benefit of all.

In the United States, as in many other countries, the arc of state violence towards those viewed as "other" is long, but there is always cause for hope.[47] Just over seventy years ago, the U.S. government stripped Japanese-Americans of their constitutional rights and sent them to concentration camps.[48] The attack by Japan on Pearl Harbor was the pretext,[49] but being a hard-working and increasingly prosperous racial minority during a time of extreme racial hatred in the United States was a significant contributing factor.[50] While these innocent persons were hauled away, the majority

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[45] *See, e.g.*, Kirk Miller, *The Institutionalization of Racial Profiling Policy: An Examination of Antiprofiling Policy Adoption Among Large Law Enforcement Agencies*, 59 CRIME & DELINQ. 32, 36 (2013) ("The use of race in drug courier profiles used by several agencies along the I-95 corridor linking Miami to large urban markets in Washington, D.C., Baltimore, Philadelphia, New York, and Boston reflects the institutionalization of organizational assumptions about race and criminal suspicion, which sanctioned the legitimacy of considering race in law enforcement decisions.").

[46] WILLIAMS, *supra* note 15 at 90.

[47] According to Rev. Dr. Martin Luther King, Jr., in a quote originally attributed to 19th century abolitionist and Unitarian minister Theodore Parker, there is always cause for hope because "the arc of the moral universe is long, but it bends toward justice." *Theodore Parker and the 'Moral Universe,'* NPR (Sept. 2, 2010, 3:00 PM), http://www.npr.org/templates/story/story.php?storyId=129609461.

[48] Shannon M. Harris, *10 Shameful Facts About Japanese-American Internment*, LISTVERSE (Oct. 25, 2014), http://listverse.com/2014/10/25/10-shameful-truths-about-japanese-american-internment ("It's possible to be imprisoned in your own country without committing any wrongdoing. It happened in America within the last century. President Franklin D. Roosevelt signed Executive Order 9066 in 1942. His go-ahead allowed more than 100,000 Japanese Americans to be uprooted and relocated to isolated, high-security internment camps.") Also, while they are more commonly known as internment camps, President Roosevelt himself called them "concentration camps." *Id.*

[49] Toni Konkoly, *Korematsu v. United States, Supreme Court History: Law, Power and Personality, Famous Dissents*, PBS, http://www.pbs.org/wnet/supremecourt/personality/landmark_korematsu.html (last visited Oct. 2, 2017).

[50] Hannah Miles, *WWII Propaganda: The Influence of Racism*, ARTIFACTS JOURNAL (2012), ("[o]ne of the most repressive actions ever taken by the U.S. government was the incarceration of Japanese Americans during World War II, and it was the idea of eugenics and virulent racism that was partly responsible for the occurrence of one of America's worst civil liberty disasters.") (quoting Alison Dundes Renteln, *A Psychohistorical Analysis of the*

reaped the benefits of their forced removal. Whites took the personal and real property of Japanese-American citizens and the Issei, or first generation immigrants, without repercussion.[51] Those forcibly removed were made to live like animals,[52] and they suffered for several years before President Franklin Delano Roosevelt rescinded his executive order in 1944 and the last camp closed a year later.[53] In 1988, the U.S. government finally offered a formal apology for the indignities suffered by the Japanese through the Civil Liberties Act.[54] Although apologies may never be enough, words do have power.

More than 20 "truth commissions" have been established world-wide since 1973.[55] The most famous of these—South Africa's Commission of Truth and Reconciliation—was established by the government in 1995 and set the stage for an official acknowledgement of past human rights abuses committed in the name of apartheid.[56] Recently, Justin Trudeau, the Prime Minister of Canada, issued a (second) formal apology on behalf of the government to indigenous peoples who were forcibly removed from their homes and placed in state-run boarding schools: "It's time for Canada to acknowledge its history for what it is: flawed, imperfect, and unfinished."[57] The fact that the apology was preceded by a lawsuit does not diminish its

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Japanese American Internment, HUMAN RIGHTS QUARTERLY 618 (1995)).

[51] *See* Harris, *supra* note 48; *see also* ISABEL ALLENDE, THE JAPANESE LOVER 83-84 (2015) (stating that in 1988, the government awarded each surviving intern $20,000.).

[52] *See* Harris, *supra* note 48 ("Internees stayed in animal stables and stalls where livestock had been kept recently. Many of these units didn't even have roofs overhead. Health care, food, and general cleanliness were disgustingly low-quality. People who had done nothing wrong were kept behind barbed wire fences, in desolate camps patrolled by military police. Armed guards kept constant watch and shot anyone suspected of attempting escape.").

[53] *Japanese-American* Relocation, HIST. (2009), http://www.history.com/topics/world-war-ii/japanese-american-relocation.

[54] Harris, *supra* note 48.

[55] Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUST.: ANTHROPOLOGY, PEACE, AND HUM. RTS. 47 (2001).

[56] *Id.* ("In an interesting analysis of the South African case, Wilson (2000) underlines the value inherent in recognizing individual suffering and collectivizing it, as the South African TRC did through its televised hearings. *A new political identity was constructed, that of 'national victim.' In this way, individual suffering was brought into a public space to be shared by all, "made sacred in order to construct a new national collective conscience.*") (emphasis added).

[57] The first official apology was made in 2008 by Trudeau's predecessor, Stephen Harper, but excluded survivors from Newfoundland and Labrador. *See* Ian Austen, *Trudeau Apologizes for Abuse and 'Profound Cultural Loss' at Indigenous Schools*, N.Y. TIMES (Nov. 24, 2017), https://www.nytimes.com/2017/11/24/world/canada/trudeau-indigenous-schools-newfoundland-labrador.html.

power. Symbolic gestures have meaning. While not erasing the abuses of the past, such gestures may allow a nation to move forward.

Unless government officials publicly acknowledge wrongdoing and commit to change, a society may remain mired in its past hurts and wrongs. In what must be viewed as a tremendous step in the right direction, in 2016, the president of the largest police management organization in the U.S. issued a formal apology to minorities "for the actions of the past and the role that our profession has played in society's historical mistreatment of communities of color."[58] Again, apologies are not a panacea. Mere words cannot wash away the blood of the countless lives already lost,[59] and ultimately, they may not be accepted by everyone.[60] However, as it seems clear that the people of the United States need both change *and* reconciliation, such apologies should form the basis of any policing reforms.

Today, Occupy Wall Street ("OWS") and the Black Lives Matter ("BLM") Movement have emerged as protest movements that reflect attempts to change the status quo. OWS sheds light on worsening socioeconomic conditions in the U.S., and BLM challenges racial violence propagated by the state.[61] These movements are not without controversy,

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[58] Tom Jackman, *U.S. police chiefs group apologizes for 'historical mistreatment' of minorities*, WASH. POST (Oct. 17, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/10/17/head-of-u-s-police-chiefs-apologizes-for-historic-mistreatment-of-minorities/?utm_term=.6a0d6f603c82/.

[59] Charles M. Blow (Op-Ed), *The Flag is Drenched with Our Blood*, N.Y. TIMES (Sept. 28, 2017) https://www.nytimes.com/2017/09/28/opinion/the-flag-is-drenched-with-our-blood.html (quoting Fannie Lou Hamer: 'The flag is drenched in our blood.' "It is through that haze of hurt that black people see the flag, because the blood memory of the black man is long in this country.").

[60] *Id.* (How dare America say so cavalierly, 'Forgive us our sins and grant us our laurels,' when forgiveness has never been sufficiently requested—nor the sins sufficiently acknowledged—and the laurels are tainted and stained by the stubbornness of historical fact. How dare we even pretend that the offenses have been isolated and anomalous and not orchestrated and executed by the nation?").

[61] Alicia Garza, Patrisse Cullors, and Opal Tometi created the Black Lives Matter movement after the high-profile murder of Trayvon Martin. BLM, in their own words, "affirms the lives of Black queer and trans folks, disabled folks, black undocumented folks, folks with records, women, and all Black lives along the gender spectrum." The movement aims to broaden the conversation around state violence to include all the ways in which Black people are intentionally left powerless at the hands of the state and are deprived of basic human rights and dignity. *See About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/; *see also* Micah White, *The End of Protest: A New Playbook for Revolution*, END OF PROTEST (Jan. 29, 2016), http://endofprotest.com/news/occupy-black-lives ("Black Lives Matter and Occupy Wall Street are the manifestation of a collective awakening. Social movements are moments when people suddenly wake up and decide that something that has been happening all the time—

but like apologies, they serve an important role in society. Social movements may provide a much-needed measure of hope during troubling times.[62] Hope is necessary because the racial and ethnic make-up of the United States is slowly but inexorably changing.[63]

Although the U.S. has been a nation of immigrants from the start, we have often treated new immigrants with derision and dishonor.[64] Muslims are the latest targets for public anger.[65] In our times, a certain politician has called for a ban on all Muslims from entering the United States.[66] Negative perceptions of Islam, a religion encompassing some 1.6 billion people, roughly 23 percent of the global population, and the world's fastest growing major religion,[67] stubbornly persist. A dark take on the history recounted above is that the exercise of the police function depends on the continued

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like police officers unlawfully shooting black people without repercussion—suddenly becomes something that is no longer tolerated.").

[62] Rebecca Solnit, *Hope is an Embrace of the Unknown: Rebecca Solnit on Living in Dark Times*, GUARDIAN (July 15, 2016, 5:00 EDT), https://www.theguardian.com/books/2016/jul/15/rebecca-solnit-hope-in-the-dark-new-essay-embrace-unknown/ ("[P]atrice Cullors, one of the founders of Black Lives Matter, early on described the movement's mission as to 'Provide hope and inspiration for collective action to build collective power to achieve collective transformation, rooted in grief and rage but pointed towards vision and dreams.' It is a statement that acknowledges that grief and hope can coexist.").

[63] Laura B. Shrestha & Elayne J. Heisler, *The Changing Demographic Profile of the United States*, CONG. RES. SERV. (2011), https://www.fas.org/sgp/crs/misc/RL32701.pdf ("The United States [i]s [b]ecoming [m]ore [r]acially and [e]thnically [d]iverse, reflecting the major influence that immigration has had on both the size and the age structure of the U.S. population. . . . [T]he inexorable demographic momentum will have important implications for the economic and social forces that will shape future societal well-being.).

[64] Jessie Daniels, *Irish-Americans, Racism and the Pursuit of Whiteness*, RACISM REV. (Mar. 17, 2010), http://www.racismreview.com/blog/2010/03/17/irish-americans-racism-and-the-pursuit-of-whiteness/ (highlighting that when the Irish fled the repression of the British and arrived on our eastern shores during the first half of the 19th Century, they were the ones on the receiving end of vitriol and hate.); *see also* Ed Falco, *When Italian Immigrants Were 'the Other'*, CNN (July 10, 2012), http://www.cnn.com/2012/07/10/opinion/falco-italian-immigrants/ ("America has a proud tradition as an immigrant nation, but it also has a long history of marginalizing those it marks as 'other'. America's other heritage includes suspicion, hostility, abuse and even death, leveled against ethnic groups as they arrived one after another in waves over the past 2½ centuries.").

[65] *See* Falco, *supra* note 64 ("In earlier centuries, Catholics in America were in a position similar to today's Muslims.").

[66] Jeremy Diamond, *Donald Trump: Ban all Muslim travel to the U.S.*, CNN (Dec. 8, 2015), http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/.

[67] Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Dec. 7, 2015), http://www.pewresearch.org/fact-tank/2015/12/07/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

subordination of black, brown, and "other" bodies. However, if left unchecked, both our past, and our more recent history of willful ignorance regarding the plight of the poor and marginalized will eventually come home to roost.[68]

The law cannot solve all social ills. However, one must question whether a history of systematic racial discrimination, "lax legal standards,"[69] and a culture which appears to champion the possession of military-grade firearms by police and civilians alike,[70] all combine to create a toxic cloud of injustice for communities of color in the United States. To answer this question, we should begin by examining the federal and state laws that have brought us here.

II. FEDERAL LAW

A. The United States Constitution

Although the subject of gun rights and gun control is beyond the subject of this Article, given the significance of guns in crime and policing,[71] it seems like a mistake to not start with the Second Amendment. Congress

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[68] Martin Niemöller, *"First They Came for the Socialists . . . ,"* U.S. HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/wlc/en/article.php?%20ModuleId=10007392 (last updated Jan. 6, 2011) ("First they came for the Socialists, and I did not speak out— Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out— Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me."); *see generally* TAVIS SMILEY & CORNELL WEST, THE RICH AND THE REST OF US (2012).

[69] German Lopez, *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX (Aug. 26, 2016), http://www.vox.com/cards/police-brutality-shootings-us/us-police-shootings-statistics ("Perhaps it's the lax legal standards that allow cops to justify deadly force against suspects who pose no danger, and sometimes are only perceived to pose a threat to officers because cops hold racial biases that are endemic in the criminal justice system.").

[70] *See, e.g.*, Benjamin Studebaker, *Demilitarization of Police Requires Demilitarization of Civilians*, (Aug. 15, 2014), https://benjaminstudebaker.com/2014/08/15/demilitarization-of-the-police-requires-demilitarization-of-civilians/ ("So long as civilians insist on their right to bear extremely lethal weapons, [U.S.] police forces will continue to demand weapons still more lethal and equipment still more protective, and the militarization of our police forces will continue. In effect, American civilians and American police officers are engaged in an arms race that too often ends in tragedy for both sides.").

[71] The prevalence of guns in the U.S. is unmatched by any other country in the world: "The United States has 88.8 guns per 100 people, or about 270,000,000 guns, which is the highest total and per capita number in the world. 22% of Americans own one or more guns (35% of men and 12% of women)." *Should More Gun Control Laws Be Enacted?*, PROCON, https://gun-control.procon.org/ (last visited Oct. 7, 2017).

passed the Second Amendment to the U.S. Constitution in 1789, and it states: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."[72]

In the intervening years, much controversy has existed about what the words really mean, but in 2008 and 2010, the U.S. Supreme Court "settled several important controversies concerning the Second Amendment right to keep and bear arms," and also "left many vital questions unanswered."[73] In *District of Columbia v. Heller*, the Court held that the Second Amendment protects the right of private individuals to possess and use firearms unrelated to militia activities,[74] whereas in *McDonald v. City of Chicago*, the Court held that the right to keep and bear arms applies to state and local governments through the Fourteenth Amendment.[75]

When public officials violate constitutional rights, victims have several "weapons" under the law,[76] including the ability to make claims under the Constitution.[77] As this Article generally examines the misuse of guns by local officials, the Fourteenth Amendment is the relevant statute, yet:

> Holding law enforcers accountable to the commands of the law is an age-old challenge not yet fully met. To be sure, our legal system embodies substantive standards to curb the conduct of law-enforcement officials. But standards are not self-executing, even when endowed with the significance and permanence of explicit constitutional status.[78]

Still, under the Fourteenth Amendment, states cannot deny "equal protection of the laws" to any person; nor may they "deprive any person of life, liberty or property without due process of law."[79] In other words,

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[72] Nelson Lund & Adam Winkler, *The Second Amendment*, THE CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-ii/ (last visited Oct. 7, 2017).

[73] *See* Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 819 (2015).

[74] *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

[75] *See* McDonald v. City of Chi., 561 U.S. 742 (2010).

[76] Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the §1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 448 (Jan. 1978) ("Victims have three weapons, including 1) the 'exclusionary rule,' 2) a criminal prosecution of officials who willfully deny constitutional rights, and 3) a civil damage remedy brought via a) the U.S. Constitution (and via the 4th Amendment for federal officials), b) federal or state statutory law, or c) common law torts.").

[77] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[78] Newman, *supra* note 76, at 447.

[79] DAN B. DOBBS, THE LAW OF TORTS 84 (2000) ("Similar clauses in the 5th Amendment apply to the federal government.").

during the attempt to apprehend criminal suspects, law enforcement officers are not authorized to shoot first, and ask questions later.[80]

Further, a Fourteenth Amendment due process claim can be successfully brought if, for example: 1) a superior officer fails to investigate or discipline a subordinate officer who has been subject to claims of police brutality in the past but nonetheless continues to use excessive force;[81] or 2) a city fails to adequately train officers to avoid excessive force or to discipline those officers who inflict excessive force on others.[82]

An action may also be brought against federal officials for violating the Fourth Amendment to the U.S. Constitution.[83] Under the Fourth Amendment, (which also limits the power of states via the Fourteenth Amendment), law enforcement may not conduct "unreasonable" searches and seizures, or issue warrants without probable cause.[84] One type of unreasonable seizure happens when an officer applies excessive or unreasonable force when trying to take control of a suspect.[85] The question of whether the force that was used was excessive is a question of fact that is usually reserved for the jury, and the jury usually prefers the word of the officer.[86] The case may never get to the jury however because prosecutors frequently choose not to charge officers in the first place: prosecutors work closely with law enforcement and are disinclined to damage this relationship.[87] If a prosecutor does decide to charge an officer with wrongdoing, the prosecutor must not only show evidence that a constitutional right was denied, but must also prove, beyond a reasonable doubt, that the officer acted with the specific intent to deny such a right.[88] Even prosecutors who do decide to charge officers may be unable to meet this burden.

All of this means that the U.S. Constitution is unlikely to serve as much of a deterrent to police brutality. As we shall see, either federal statutory

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[80] Tennessee v. Garner, 47 U.S. 1 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.").

[81] *See, e.g.*, Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994).

[82] *See, e.g.*, Cox v. District of Columbia, 821 F. Supp. 1 (D.D.C. 1993).

[83] *See* Bivens, 403 U.S. 388.

[84] *See* DOBBS, *supra* note 79, at 87.

[85] *Id.* at 88.

[86] *Id.*; *see also* Davis, *supra* note 6, at 717 ("A jury frequently has to choose between the word of the plaintiff and the word of the officer, and it normally prefers the word of the clean-looking officer to that of a plaintiff against whom criminal charges are pending.").

[87] *See* Newman, *supra* note 76, at 450.

[88] *See* Screws v. United States, 325 U.S. 91, 104 (1945) (plurality opinion). *But see* Monroe v. Pape, 365 U.S. 167, 187 (1961) (underscoring that specific intent is not required for civil liability).

law or state common law should step into this gap, however neither appears able to meet the challenge.

B. Federal Statutory Law

A civil lawsuit for money damages may be the more realistic avenue for relief for the plaintiff who is charging a state official with misconduct.[89] Section 1983 was originally enacted as the Ku Klux Klan of 1871,[90] and its purpose was to stop acts of racial terror and killing committed by both white supremacists and by public officials.[91] It also targeted public officials who refused to enforce protective laws enacted during the Reconstruction.[92] During this period there were "unwritten codes" and institutionalized customs like the "police code of silence" that buoyed racially discriminatory policing that still persists today.[93]

The statute gave individuals a private right of action to bring a tort claim for civil damages for the violation of constitutional rights by an agent of the state.[94] Individuals may sue state or local officials, like police officers, or

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[89] *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("When government officials abuse their offices, action(s) for damages may offer the only reliable avenue for vindication of constitutional guarantees.") (internal quotations omitted) (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[90] Ch. 22, 17 Stat. 13,
codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988.

[91] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Civil Rights Act of 1971, ch. 22, 17 Stat. codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988 (commonly referred to as the Ku Klux Klan Act).

[92] *See Developments in the Law, §1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977)("[T]he Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."); *see also* Bell v. City of Milwaukee, 746 F.2d 1205, 1239 (7th Cir. 1984) ("One of the primary reasons §1983 was enacted was to remedy and deter racial killing and other acts violative of the Fourteenth Amendment. . . . The legislative history behind §1983 expresses an unequivocal concern for protecting life. . . ."); Wyatt v. Cole, 504 U.S. 158, 161 (1992) ("The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

[93] *See* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 63-71 (2000).

[94] 42 U.S.C. §§ 1981-88. The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in

local governments."[95] For example, a claim can be brought under §1983 if an officer shoots an "unarmed and nonviolent" suspect.[96]

The amount of force that an officer may use depends on the circumstances of each case, and courts will often examine the threat posed by the suspect and the seriousness of the crimes charged.[97] Often, police are given wide latitude regarding the reasonableness of their behavior in deciding to use force. Two U.S. Supreme Court decisions, *Tennessee v. Garner*[98] and *Graham v. Conner*,[99] articulate when the use of deadly force is reasonable. In general, police officers may only use deadly force to either protect their life, the life of another, or to prevent a suspect from escaping if the officer has probable cause to believe the suspect poses a danger to others.[100] On the one hand, this latitude protects officers who must make quick decisions. On the other hand, it may give officers too much discretion in deciding when to use force.

To state a cause of action under §1983, a plaintiff must prove that her damages were proximately caused by the defendant officer (and not by an independent decision of the prosecutor, a determination of probable cause by a court, or an indictment by a grand jury).[101] A plaintiff who succeeds in a §1983 claim for official conduct that results in death is entitled to compensatory damages, and sometimes punitive damages as well.[102]

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more limited situations, by private parties acting alone). *See* Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U. S. 1, 19 (1981) (§1983 provides an "alternative source of express congressional authorization of private suits). *See also* Maine v. Thiboutot, 448 U. S. 1, 4 (1980) (the Court construed 42 U. S. C. § 1983 as authorizing suits to redress violations by state officials of rights created by federal statutes). *See also* Robert P. Capistrano, *5.1.A Express Causes of Action, Section 1983, Elements of the Claim*, FED. PRAC. MANUAL FOR LEGAL AID ATTORNEYS (Updated 2013), http://www.federalpracticemanual.org/chapter5/section1a#footnote3_l3zukw3/.

[95] *See* DOBBS, *supra* note 79, at 82.

[96] *See id.* at 88.

[97] See *id.* (citing Graham v. Conner 490 U.S. 386 (1989)).

[98] *See* Tennessee v. Garner, 471 U.S. 1 (1985) ("[D]eadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. . . .").

[99] *Graham*, 490 U.S. 386. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

[100] *See Garner*, 471 U.S. 1 (1985).

[101] *See* Martin A. Schwartz, *Fundamentals of a Section 1983 Litigation*, TOURO L. REV. 525, 527 (2016).

[102] *See* David G. Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 VILL. L. REV. 363, 374-80 (1994).

In many tort cases, punitive damages are awarded to deter future tortious conduct.[103] To be awarded punitive damages however, a plaintiff first must prove that the officer acted with "reckless or callous indifference to [the plaintiff's] federally protected rights."[104] Successful plaintiffs are rare, and are usually awarded modest awards.[105] The law presupposes that rather than punitive damages, damages that compensate for actual harm will suffice to deter constitutional violations. In many cases, they do not.[106]

Punitive damages may be awarded against state actors acting in their individual, not official, capacities, but not against municipalities as a matter of policy.[107] While there may be good policy reasons to not punish cities vicariously for the acts of their wayward officers, the fact that punitive damages are unavailable against cities means that cities are not forced to "internalize the full costs of violations,"[108] and that §1983 cannot effectively serve as deterrent to unlawful conduct.

Some scholars argue that §1983 does serve a deterrence function and that tort remedies *can* alleviate police illegality: "[n]evertheless, constitutional damage remedies, although denominated in dollars, clearly translate into the political currency that moves political actors."[109] Section 1983 may

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[103] *See, e.g.*, 5.5 Punitive Damages, Model Jury Instructions, United States Courts for the Ninth Circuit ("The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff."), http://www3.ce9.uscourts.gov/jury-instructions/node/111/.

[104] Smith v. Wade, 461 U.S. 30, 56 (1983).

[105] *See* Newman, *supra* note 76, at 465. *Cf.* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 921 (2014) ("Juries have awarded punitive damages against New York City police department officers six times between 2006 and 2011, with punitive damage awards totaling over $28 million.").

[106] Even when a court finds against a police officer, the victim of police brutality is rarely able to collect on the judgment because the police officer may not have sufficient funds to pay. Further, cities may have to indemnify officers who are found to have acted in good faith. *See, e.g.*, CAL. GOV'T CODE § 825 (1995) ("[A] public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if . . . [t]he judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity [and at] the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.").

[107] City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) ("Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.").

[108] Eaton, *infra* note 111 (The argument made by Professor Levinson is that settling these types of claims "diverts resources that could be used for other more important public purposes, such as redistributing wealth through social spending."); *see also Schwartz, supra* note 101, at 888 ("There is no vicarious liability against municipalities when their officers violate the law.").

[109] Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of*

have limits that preclude fully effective avenues for relief in police brutality claims, but federal law does have several advantages over state-based common law tort claims (as outlined in Part III). These advantages include, but are not limited to: (1) plaintiffs can choose whether to sue in federal or state court; (2) successful plaintiffs are able recover reasonable attorney's fees; and (3) defendant officers cannot claim state law immunities (though they can claim the benefit of federal immunity).[110]

The defense of qualified immunity "insulates government officials from liability for most unconstitutional acts" and makes a finding of "liability and trials for liability the exception."[111] Public officials performing discretionary functions are qualifiedly immune from civil liability for money damages if their conduct "does not violate clearly established constitutional rights of which a reasonable person would have known."[112] Also, the prosecutor often decides not to prosecute.[113] Consequently, many potential plaintiffs are rebuffed procedurally before they can even raise their substantive claims.[114]

In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, another federal statute aimed at stopping unconstitutional police "pattern[s] or practice[s]."[115] Unlike §1983, there is no private right

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Constitutional Tort Remedies, 35 GA. L. REV. 845, 861 (2001); *see also* Newman, *supra* note 76 at 451 (a private tort suit is the "most promising weapon"); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 516 (1955) ("[T]ort remedies offer what is perhaps the best hope of achieving increased control over police illegality. By placing the initiative for enforcement in the hands of injured persons who are offered a selfish motive for prosecuting the actions, it is possible to by-pass the insoluble problem of how to make a police force police itself.").

[110] DOBBS, *supra* note 79, at 83 (emphasis added).

[111] In a study of all federal court cases over two years, qualified immunity motions were granted in approximately eighty percent of cases. *See* Thomas Eaton, *Symposium Foreword, Re-examining First Principles: Deterrence and Corrective Justice in Constitutional Torts,* 35 GA. L. REV. 837, 841 (2001) (citing Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 128 (1999)).

[112] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (holding that a police officer could be also immune from civil liability if acting in good faith and with probable cause even if the statute he believed to be valid was later held unconstitutional).

[113] *See, e.g.*, James McKinley, Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), https://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html.

[114] *See* Eaton, *supra* note 111.

[115] 34 U.S.C. § 12601 (1994). Eaton, *supra* note 111, at 879. The statute makes it "unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with

of action under the statute and only the Attorney General is authorized to sue for violations.[116] However, the statute gives the Department of Justice (the "DOJ") the power to investigate law enforcement agencies and to issue injunctions or provide equitable relief for misconduct. Where either constitutional or federal statutory law fails to prevent or deter unlawful policing practices, states should step into the breach.

III. THE COMMON LAW OF TORTS

Tort law is better understood when its limits are appreciated.

Law cannot effectively solve all problems.[117]

Liability under state tort law is generally imposed in order to: (1) correct wrongs that have already occurred; (2) prevent future wrongful conduct; (3) redistribute losses among various defendants; (4) provide a peaceful means of determining the rights of parties who might otherwise take the law into their own hands; and (5) encourage socially responsible behavior.[118] These functions are, in some ways, broader than the goals of the criminal law,[119] and are often analyzed by utilizing a cost-benefit approach to private conduct. The issue is whether a cost-benefit analysis can be properly applied to public or official conduct as well. It makes sense to believe that the government does not respond to financial incentives in the same way as private actors or enterprises.[120] While there is a serious need for further empirical research in this area, the purpose of this Article is to jumpstart a discussion on an underreported set of economic and societal costs that stem from unlawful conduct by state actors.

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responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States." The Act gives the Attorney General the power to investigate and stop police patterns and practices that deprive individuals of constitutional rights, but this too presents problems: "The federal executive can ill afford—politically and economically—to uncover, challenge, and seek to remedy unconstitutional policies and practices wherever they may be maintained in police departments around the country." *Id.*

[116] *See id.*

[117] DOBBS, *supra* note 79, at 29; *see also*, KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 1 (3d ed. 2007).

[118] ABRAHAM, *supra* note 117, at 14-20.

[119] In contrast, the goals of the criminal justice system seem to be limited to punishment, behavior correction, and deterrence. As a law professor, this author had hoped that tort law, with its focus on compensation and deterrence, could provide a better answer than criminal law in this area. As it turns out, tort law is also unable to properly address the problem of unlawful police shootings.

[120] Daryl Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 346, 350-52 (2000).

Derived as it is from the common law, judges (not legislatures) mostly set the bounds of tort law.[121] The word "tort" comes from the Latin word "tortus," which means twisted, and from the French word, "tort," which means injury or wrong.[122] The concept refers to "conduct that amounts to a legal wrong that causes harm, for which courts will impose civil liability."[123] A person who commits a crime may or may not be convicted and sent to jail, but such a person may still have to pay the persons harmed by any intentional, reckless, or negligent conduct.[124]

The common law of torts may also impose direct liability on employers who fail to train or supervise employees, or vicarious liability for negligent hiring or supervision.[125] This doctrine could be used to widen the net of responsibility for unlawful conduct by public officials.

One of the early goals of tort law was to encourage people to put away their dueling pistols.[126] Today, tort law is a broad, dynamic and ever-changing area that touches on many types of physical and non-physical harms, including harms that affect mental peace or reputation, privacy, and economic interests. Critics of this oft-maligned area should consider what the U.S. would look like if we did not have tort law. Would it be possible to accomplish the goals of compensation and deterrence in some other way? The answer is, probably not satisfactorily. Although plagued with persistent issues of proof, judicial and administrative efficiency, tort law often steps in to pick up where criminal law leaves off.

Police officers who act unlawfully are rarely prosecuted or convicted for killing civilians.[127] The National Police Misconduct Reporting Project found that out of 3,238 criminal cases filed against officers between April 2009 through December 2010, only 33% of the officers were convicted and only 36% who were convicted ended up serving prison sentences.[128]

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[121] DOBBS, *supra* note 79, at 1.

[122] ABRAHAM, *supra* note 117, at 1.

[123] DOBBS, *supra* note 79, at 1.

[124] FRANKLIN, RABIN & GREEN, TORT LAW AND ALTERNATIVES, CASES AND MATERIALS 1 (10th ed. 2017) ("The primary concern of tort law has been whether one whose actions cause harm to another should be required to pay compensation for the harm done.").

[125] Delfino v. Agilent Tech., Inc., 52 Cal. Rptr. 3d 376, 397 (Cal. Ct. App. 2006). *See also* CACI No. 426, https://www.justia.com/trials-litigation/docs/caci/caci-2017-edition.pdf.

[126] DOBBS, *supra* note 79, at 12 ("In medieval England, the law of torts, like the law of crimes, had modest aims, principally to discourage violence and revenge. Today's tort law has much grander aims . . . the dominant concern is not just justice to the individual; it is to provide a system of rules that, overall, works toward the good of society.").

[127] Cynthia Lee, *"But I Thought He Had a Gun", Race and Police Use of Deadly Force* 36, 2 HASTINGS RACE & POVERTY L. J. 1, 3 (2004) ("Less than one percent of all complaints referred to the Department of Justice alleging civil rights violations by law enforcement officers lead to the filing of an indictment in federal court.").

[128] Lopez, *supra* note 69.

Further, the U.S. criminal justice system is plagued with tremendous racial disparities in how the police use force. Generally, police shoot and kill more minorities,[129] but officers also shoot and kill more people of any race than their peers in other developed countries, including the United Kingdom and Germany, "where police officers might go an entire year without killing more than a dozen people or even anyone at all."[130] Admittedly, the U.S. does have higher rates of gun ownership and gun violence,[131] which may prompt police to feel compelled to use force in more cases. Research indicates that more guns are likely to lead to more overall gun violence.[132] Still, the fact that U.S. law enforcement uses deadly force far more often than their peers across the world should be concerning to all Americans.

Just looking at the goals of tort law might make one suppose that fashioning more robust civil remedies would be the best way to bring about change in this area. As it turns out, the various limitations on the availability of damages means that state tort law also cannot (and does not) fully address the magnitude of this problem.[133] Perhaps much like the criminal law, it was never meant to do so. Ending systemic oppression and holding law enforcement accountable for unlawful racial killings appears to be a much bigger job than can be handled by existing laws. Nevertheless, having a legal system that cannot remedy a major societal problem, whether through constitutional, federal or state statutory, or state common law, has, and will have significant economic and social costs.

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[129] Lee, *supra* note 127, at 3 ("It is undisputed that Blacks are disproportionately represented among the victims of police shootings. . . . On average, Blacks are more than six times as likely as Whites to be shot by police. . . . Latinos (or Hispanics) are about twice as likely as Whites, but only half as likely as Blacks, to be shot and killed by police.").

[130] Lopez, *supra* note 69 (citing THE ECONOMIST).

[131] Kara Fox, *How US Gun Culture Compares with the World in 5* Charts, CNN (Oc.t 4, 2017) http://www.cnn.com/2017/10/03/americas/us-gun-statistics/index.html/.

[132] *Id* ("[O]ne study found that every 10 percent increase in firearm ownership correlated with 10 additional officers killed at the state level over a 15-year period.").

[133] Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988) (arguing that there is little legislative support for using tort liability to limit constitutional harms inflicted by the police); *See also* DOBBS, *supra* note 79, at 18 (citing DEBORAH R. HENSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991) (concluding that "only 10% of all persons who get some kind of compensation for injuries receive payments under the tort system, that is, from the tortfeasor or his insurer.")).

IV. THE COSTS OF POLICE BRUTALITY

I can't breathe.[134]

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.[135]

Justice Sotomayor recognized that unlawful police action has costs that threaten the entire legal system. When people think of costs, they may consider the physical harm experienced by the "victims," people hurt or killed, or costs borne by particular communities. They may also consider the costs to the criminal justice system. The costs are in fact much broader. These costs have been greatly underestimated, and have serious consequences for all Americans.

A. Direct, Current Costs

1. Costs to Victims

Although there are no reliable government statistics on civilians killed by police, data compiled independently last year . . . have led to estimates of roughly 1,000 deadly shootings each year.[136]

First, let's begin where we should, and that is with the direct, immediate costs of unjustified police violence that result in death. How many victims are we talking about? Finding official figures for the total number of unarmed people killed by police officers is a difficult task because victims do not always sue,[137] and the police do not always track these numbers.[138] According to James B. Comey, Jr., former Director of the FBI:

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[134] Eric Garner's last words, repeated 8 times before he died, have become the rallying cry of the Black Lives Matter movement. Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), http://www.cnn.com/2014/12/04/us/garner-last-words/.

[135] Utah v. Strieff, 136 S.Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) (citing, in part, L. GUINIER & G. TORRES, THE MINER'S CANARY 274-83 (2002)).

[136] Matt Ferner & Nick Wing, *Here's How Many Cops Got Convicted of Murder Last Year for On-Duty Shootings*, HUFFINGTON POST (Jan. 13, 2016, 11:34 AM), http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da.

[137] Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863-64 (2012) (citing to a 2002 Bureau of Justice report stating that people mistreated by

> We can't have an informed discussion because we don't have data. People have data on who went to a movie last weekend, or how many books are sold, or how many cases of the flu walked in to an emergency room, and I cannot tell you how many people were shot by the police in the United States in the last month, last year, or anything about the demographics. And that's a very bad place to be.[139]

Comey further stated that it was embarrassing that the news media had more information on police killings than the F.B.I.[140] In 2014, Congress passed the Death in Reporting Custody Act, which required local law enforcement agencies to report police-involved shootings that resulted in death.[141] The DOJ is relying on local law enforcement officials to voluntarily report on "non-lethal encounters."[142]

Evidence suggests that police killings of unarmed citizens in the United States are both widespread and underreported.[143] In March 2016, the Bureau of Justice Statistics ("BJS") released a report that claimed that the current number, 930, is actually low and that the reality is actually closer to 1,240 killed per year.[144] Besides the data that is being compiled through various sources, including police departments, BJS, BLM, and the Centers for Disease Control and Prevention, it seems clear at least that the U.S. needs more reliable tracking in order to accurately assess the full scale of the problem.[145]

Under the Obama Administration, the Justice Department agreed to track killings by police officers: "the Justice Department said that it would ask law enforcement agencies and medical examiner's offices to fill out forms

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police only sue about one percent of the time).

[138] Carl Bialek, *A New Estimate of Killings By Police Is Way Higher—And Still Too Low*, FIVETHIRTYEIGHT (Mar. 6, 2015, 4:07 PM), http://fivethirtyeight.com/features/a-new-estimate-of-killings-by-police-is-way-higher-and-still-too-low/.

[139] Eric Lichtblau, *Justice Department to Track Use of Force by Police Across U.S.*, N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/14/us/justice-department-track-police-shooting-use-force.html; *see also* FBI Oversight, *FBI Director James Comey testified at a House Judiciary Committee oversight hearing of his agency*, C-SPAN (Oct. 22, 2015), https://www.c-span.org/video/?328793-1/fbi-director-james-comey-oversight-hearing-testimony.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] Bialek, *supra* note 138; *see also* Dara Lind, *The FBI is Trying to Get Better Data on Police Killings. Here's What We Know Now.*, VOX (Apr. 10, 2015, 10:31 AM), https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black ("[O]ne study in March 2015 estimated that more than half of people killed by police aren't counted in the FBI's statistics.").

[144] Bialek, *supra* note 138.

[145] *Id.*

when there is a news report or another indication that a person died while in police custody."[146] These offices would be asked to complete forms on the total number of police killings every three months. The FBI would also ask local law enforcement to provide more detailed, incident-based reports, but these reports are voluntary, not required.[147] These are steps in the right direction and should help both law enforcement agencies and activists have the same numbers while trying to find solutions. However, the fact that a national database for tracking police shootings of civilians doesn't exist (where law enforcement is required to report investigations)[148] will likely mean that the numbers will continue to be underreported.

In the meantime, statistical and anecdotal evidence compiled by various sources is being used to tell a story of tremendous racial disparities in police shootings. According to FBI data published in July 2016, African-Americans, who only make up 12.6 percent of the U.S. population, accounted for 24 percent of the 560 people killed in 2016.[149] According to ProPublica, "[b]lack teens were 21 times as likely as white teens to be shot and killed by police between 2010 and 2012."[150] All racial minorities comprise about 37.4 percent of the total U.S. population, but they make up 62.7 percent of unarmed people killed by police.[151] As another report stated, police officers appeared to shoot and kill unarmed civilians in a "steady drumbeat of bloodshed accentuated by higher profile-incidents that dominated headlines for days."[152]

One of those "higher profile-incidents" included the fatal shooting in 2015 of 50-year-old, engaged, father of four, Walter Scott, who was shot in the back while fleeing a traffic stop.[153] Cell phone footage supplied by a

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[146] Charlie Savage, *Justice Department to Streamline Tracking of Police Killings*, N.Y. TIMES (Apr. 10, 2015, 10:31 AM), http://www.nytimes.com/2016/08/10/us/politics/justice-department-to-streamline-tracking-of-police-killings.html?_r=0.

[147] Lind, *supra* note 143.

[148] *Id.*

[149] *Why Black Lives Matter*, RT (July 7, 2016, 9:06 PM), https://www.rt.com/usa/350024-why-black-lives-matter/; *see also* Lind, *supra* note 143; James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 189 (1988) ("[E]very study that has examined this issue [has] found that blacks are represented disproportionately among those at the wrong end of police guns."); Lee, *supra* note 127, at 3.

[150] Lopez, *supra* note 69.

[151] *Id.*

[152] Julia Craven & Nick Wing, *Cops are Still Killing People, But the Nation Stopped Paying Attention*, HUFFINGTON POST (Apr. 18, 2016, 2:00 PM), www.huffingtonpost.com/entry/police-shootings-2016_us_571.

[153] Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

bystander contradicted early official accounts that Scott was armed and presented a danger to the officer. The officer involved falsely claimed that Scott had taken his Taser and was threatening him with it. Similarly, a damning cell phone video also emerged in the 2014 police killing of 43-year-old, married father of six, Eric Garner. The footage showed Garner, who was initially confronted by police officers for selling illegal cigarettes, being tackled and placed in an illegal chokehold by police.[154] Garner can also be clearly heard gasping, repeatedly (11 times to be exact), "I can't breathe."[155] By the time the officer released his hold, it was too late.[156]

In their attempts to stem the violence, many African-Americans and others protesting in solidarity have adopted Garner's final words as a rallying cry. Within the past two decades, other victims of police violence are readily recognizable, including but not limited to, Abner Louima,[157] Amadou Diallo,[158] Sean Bell,[159] Oscar Grant,[160] Alton Sterling, and

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[154] *New York Police Sergeant Charged in Death of Eric Garner*, L.A. TIMES (Jan. 8, 2016, 3:02 PM), http://www.latimes.com/nation/nationnow/la-na-nn-chokehold-eric-garner-20160108-story.html/. *See also* Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html.

[155] *Why Black Lives Matter*, *supra* note 149. *See also* Baker, *supra* note 154.

[156] *Id.*

[157] Married, 30-year-old father of one, Abner Louima was an unarmed, Haitian immigrant who was falsely arrested after being mistakenly identified as someone who assaulted an officer at a night club. Louima was severely beaten and forcibly sodomized with a broom handle while in police custody in New York in 1997. Officer Justin Volpe pled guilty, received a 30-year sentence and was forced to pay restitution for his role in the attack; others received lesser punishments for lying or for helping to cover up the assault. *See* Sewell Chan, *The Abner Louima Case, 10 Years Later*, N.Y. TIMES: CITY ROOM (Aug. 9, 2007, 1:11 PM), https://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later/.

[158] Unarmed Amadou Diallo was killed (shot 41 times) in a New York City stairwell. *See* Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES (Feb. 5, 1999), http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html?pagewanted=all. Three of the four officers who shot him had been previously involved in shootings, and the officers who shot him were cleared of criminal charges. In the ensuing 17 years, one of the shooting officers has since been promoted to sergeant. *See Officer Involved in Amadou Diallo Shooting to be Promoted to Sergeant*, CBS N.Y. (Dec. 16, 2015, 7:14 PM), http://newyork.cbslocal.com/2015/12/16/amadou-diallo-officer-promotion/).

[159] Police officers killed engaged, unarmed, 23-year-old father of two, Sean Bell, hours before he was due to get married. *See* Julian Borger, *New York on Edge as Police Kill Unarmed Man in Hail of 50 Bullets on His Wedding Day*, GUARDIAN (Nov. 27, 2006, 4:32 PM), https://www.theguardian.com/world/2006/nov/27/usa.julianborger; *see also* A.G. Sulzberger & Tim Stelloh, *Bell Case Underlines Limits of Wrongful-Death Payouts*, N.Y. TIMES (July 28, 2010),

Philando Castile.[161] These deaths make it clear that police killings in the Post-Civil Rights era continue unabated and unchecked. In response to the Castile shooting, Kelly McCreary, a board member of the Equal Justice Initiative, tweeted a statement tinged by horror, anger and fear—and a sentiment shared by many African-Americans:[162] "[i]t's like waking up in a horror film. Stop killing us."[163]

These stories and others, now consumed and spread like wildfire by the ubiquity of social media, have dominated news headlines. However, many more have not received much attention at all. According to *The Washington Post*: "[n]early a thousand times per year, an American police officer has shot and killed a civilian."[164] The article goes on to cycle through a host of numbers that are visually jarring:

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http://www.nytimes.com/2010/07/29/nyregion/29bell.html?rref=collection%2Ftimestopic%2F.

[160] Unarmed Oscar Grant III, father of one, was shot in the back on a BART (Bay Area Rapid Transit) platform in Oakland, California by a transit officer. The shooting was captured in a cell phone video and became the subject of a widely-hailed independent film, Fruitvale Station. The officer claimed he made a mistake and grabbed his service revolver instead of his Taser; he was acquitted of murder but convicted of involuntary manslaughter in 2010. He was released in 2011. *See* Michael McLaughlin, *Ex-Transit Officer Who Killed Oscar Grant, Unarmed Black Man, Wins Lawsuit*, HUFFINGTON POST (July 1, 2014), http://www.huffingtonpost.com/2014/07/01/oscar-grant-lawsuit-bart-officer_n_5548719.html.

[161] Unarmed Philando Castile was shot in his car in St. Paul, Minnesota after being pulled over for a broken taillight and being asked to produce his license and vehicle registration. His girlfriend and her four-year-old daughter were in the car at the time of the shooting, and he later died in the hospital due to his injuries. Cell phone video of the incident, taken by his girlfriend from the passenger seat, was later broadcast on social media. Castile died two days after Alton Sterling, a thirty-seven-year-old father of five, was shot and killed by a police officer in Baton Rouge, Louisiana for selling CDs outside a convenience store. The officer claims that Sterling reached for a gun before being shot. Cell phone video at the scene appears to show Sterling's hands restrained and a bystander claims he was not reaching for a weapon when he was shot. *See* Leah Donnella, *Two Days, Two Deaths: The Police Shootings of Alton Sterling and Philando Castile*, NPR (July 7, 2016), http://www.npr.org/sections/codeswitch/2016/07/07/485078670/two-days-two-deaths-the-police-shootings-of-alton-sterling-and-philando-castile; *see also* Tom Cleary & Alton Sterling, *Top 10 Facts You Need to Know*, HEAVY (July 5, 2016), http://heavy.com/news/2016/07/alton-sterling-baton-rouge-louisiana-police-shooting-victim-suspect-video-photos-facebook-family-protests-officers-names/.

[162] *See* Russell Contreras, *Police Shootings of Black Men Stir Fears, Anger Among Blacks*, SALON (July 8, 2016), http://www.salon.com/2016/07/07/police_shootings_of_black_men_stir_fears_anger_among_blacks/.

[163] Donnella, *supra* note 161.

[164] Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015),

- 965 people were fatally shot by police in 2015;
- 564 were armed with a gun;
- 281 were armed with another weapon; and
- 90 were unarmed.[165]

In reviewing these statistics, it appears that in the majority of cases where people were killed, the victim was carrying a weapon of some kind. This would likely lead many to believe that police shootings are usually justified. These numbers might cause some to wonder whether these "victims" are really victims.

Significant controversy may surround these questions, but the fact remains that whether "victims" are engaged in unlawful activity or not, the guarantees of the Constitution still apply. The U.S. Constitution provides criminal suspects with the right to be first tried by a jury of their peers,[166] before being either convicted or released. When police officers shoot first and ask questions later, they substitute their own judgment, which is often flawed by racial bias, and subvert the judicial process. Instead of being guardians of the community, they become warriors—much like an occupying military force.[167]

The police will often say that they were "just doing their jobs." Indeed, they do have a dangerous job, and many lose their lives in their efforts to protect the public. According to the National Law Enforcement Officers Memorial Fund, there are more than 900,000 law enforcement officers serving in the U.S., and an average of 144 officers are killed in the line of duty each year.[168] In 2015, the same year that 965 people were fatally shot by police, 123 officers lost their lives.[169] Some would argue that individual officers should be not only commended for such service, but also should be granted great deference considering the dangers that they willingly confront each day. Others might claim that officers are not the problem, but

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http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/.

[165] Kindy et al., *supra* note 164.

[166] *See, e.g.*, Stephanos Bibas & Jeffrey L Fisher, *The Sixth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-vi/ (last visited Oct. 7, 2017).

[167] *See, e.g.*, Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. 225, 225 (Apr. 10, 2015) ("Modern policing has so thoroughly assimilated the warrior mythos that, at some law enforcement agencies, it has become a point of professional pride to refer to the 'police warrior.'").

[168] *Law Enforcement Facts: Key Data About the Profession*, NAT'L LAW ENFORCEMENT OFFICERS FUND, http://www.nleomf.org/facts/enforcement/ (last visited Oct. 6, 2017).

[169] *Id.*

supervisors who "look the other way" are to blame. Indeed, victims of police brutality may have a better chance of holding supervisors liable than rank and file officers.[170]

Either way, annual crime statistics show that on average, crime in the U.S. is decreasing, not increasing.[171] Also, the passage of time has been good to police officers. The 1920s and 1930s were apparently the deadliest (243 died on average per year in the 1920s, and in 1930, the deadliest year in history, 304 officers were killed), whereas the numbers dropped dramatically in the 1990s (average of 162 per year).

What are we to do with the fact that during a time when police officers are in fact safer than they ever have been in the history of the United States, more often than not they defend the shooting of victims with the common refrain that they "feared for their life?"[172] It seems that the question we must ask ourselves as a society is whether we should continue to allow courts to accept statements like this at face value despite mounting evidence to the contrary.[173] At the same time, the influence of fear as a driver of the use of force by police should not be minimized, and the issue of possible deficiencies in police training in this regard deserves additional attention.[174]

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[170] *See* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 276 (2012).

[171] Charles C. W. Cooke, *Careful with the Panic: Violent Crime and Gun Crime are Both Dropping*, NAT'L REVIEW (Nov. 30, 2015), http://www.nationalreview.com/corner/427758/careful-panic-violent-crime-and-gun-crime-are-both-dropping-charles-c-w-cooke.

[172] *See* Uzma Kolsy, *Are Today's Cops Too Quick to Shoot?*, ATLANTIC (Nov. 5, 2013), https://www.theatlantic.com/national/archive/2013/11/are-todays-cops-too-quick-to-shoot/281159/.

[173] *See* Carlo Allegri, *Cops Trained to Justify Use of Deadly Force – Former US Marshal*, RUSSIA TODAY (Apr. 9, 2015), https://www.rt.com/usa/248081-cops-trained-justify-shooting-suspects/. *Cf.* Joseph P. Williams, *When It Comes to Police Brutality, Fear is Also a Factor*, U.S. NEWS (Dec. 5, 2014), https://www.usnews.com/news/blogs/washington-whispers/2014/12/05/when-it-comes-to-police-brutality-fear-is-also-a-factor (arguing that blatant racism is not the problem, but rather "society's not-so-latent fear of black men") (paraphrasing interview with civil rights attorney Constance Rice); Keven P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killings*, 9 HARV. BLACKLETTER J. 1, 8-12 (1992) (concluding that racism, even if disguised, is often a factor in police shootings of African-Americans).

[174] Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014) ("In most police shootings, officers don't shoot out of anger or frustration or hatred. They shoot because they are afraid. And they are afraid because they are constantly barraged with the message that that they should be afraid, that their survival depends on it. Not only do officers hear it in formal training, they also hear it informally from supervisors and older officers. They talk about it with their peers. They see it on police forums and law enforcement publications."), https://www.theatlantic.com/national/archive/2014/12/police-

2. Broken Homes and Families

Meanwhile, the families of the victims are also suffering in myriad and demonstrable ways.[175] It is easy to forget the human cost to the families who are left behind to pick up the pieces after their loved ones are gone.

Survivors of police brutality and families of victims who are killed are accumulating scars that may last well past the swiftly shifting sands of the relentless 24-hour news cycle.[176] In fact, "families of police brutality victims experience a level of suffering that is typically ignored and misunderstood."[177] Some evidence suggests that minorities suffer post-traumatic stress at higher rates than other Americans:

> PTSD is a severe and chronic condition that may occur in response to any traumatic event. The National Survey of American Life (NSAL) found that African Americans show a prevalence rate of 9.1% for PTSD versus 6.8% in non-Hispanic Whites, indicating a notable mental health disparity. Incresed [sic] rates of PTSD have been found in other groups as well, including Hispanic Americans, Native Americans, Pacific Islander Americans, and Southeast Asian refugees. Furthermore, PTSD may be more disabling for minorities; for example, African Americans with PTSD experience significantly more impairment at work and carrying out everyday activities.[178]

More research should be conducted to ascertain the emotional toll of police brutality on communities of color, but at the very least, we know that the direct and immediate costs can include the loss of a breadwinner, the loss of consortium, emotional distress, and the loss of parental support. Some of these costs are readily ascertainable and compensable by the tort system through settlements, but those costs likely do not reflect the true costs of police brutality.[179]

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gun-shooting-training-ferguson/383681/.

[175] Williams, *infra* note 280 ("Mental health difficulties attributed to racist incidents are often questioned or downplayed, a response that only perpetuates the victim's anxieties. Thus, clients who seek out mental healthcare to address race-based trauma may be further traumatized by *microaggressions*—subtle racist slights—from their own therapists.") (internal citations omitted).

[176] Esther J. Cepeda, *Life in a Violent 24-Hour News Cycle*, STANDARD-EXAMINER (July 15, 2016), http://www.standard.net/National-Commentary/2016/07/15/violence-socialmedia-news-mentalhealth-column-Cepeda (stating that mental health experts say that "feasting yourself on images of traumatic events may lead to serious mental and physical aftereffects resulting from anxiety, panic and the feeling of helplessness.").

[177] Adam Hudson, *Families of Police Violence Victims Face Trauma Without Support*, TRUTHOUT (June 7, 2015), http://www.truth-out.org/news/item/31197-families-of-murdered-black-men-deal-with-trauma-channel-anger.

[178] Williams, *infra* note 280.

[179] Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the*

At the 2016 BET Awards, Jesse Williams, an actor and prominent BLM activist, received BET's "Humanitarian Award."[180] In his acceptance speech, he dedicated the award to:

> [T]he real organizers all over the country – the activists, the civil rights attorneys, the struggling parents, the families, the teachers, the students that are realizing that a system built to divide and impoverish and destroy us cannot stand if we do.[181]

His words seemed to reference a collective pain: "[j]ust because we're magic,[182] doesn't mean we're not real."[183] Many in the predominantly African-American audience rose, just a minute and a half into his nearly five minute speech, and then remained on their feet, clapping, for the duration. The speech became an instant viral sensation. Similarly, Erica Garner, the daughter of Eric Garner, stated, "[t]his is what families go through. We might seem like we're strong but . . . it hurts."[184]

Imagine that hurt on a massive scale: try multiplying the one thousand average deaths per year by the hundreds of relatives who are linked to those victims. The U.S. is creating a monster of a problem that will not stay hidden forever. Do we as a society have the resources or the political will to address this looming issue?

Missing Tort Claims, 52 BUFF. L. REV. 757, 760 (2004) (highlighting that details of lawsuits against the police, including settlement payments, are largely hidden from public view).

[180] Mr. Williams served as the executive producer on a documentary called, Stay Woke: The Black Lives Matter Movement. *See* Megan Lasher, *Read the Full Transcript of Jesse Williams' Powerful Speech on Race at the BET Awards*, TIME (June 27, 2016), http://time.com/4383516/jesse-williams-bet-speech-transcript/.

[181] Jesse Williams, *Acceptance Speech for the BET Humanitarian Award* (June 26, 2016) (transcript available at http://time.com/4383516/jesse-williams-bet-speech-transcript/). For a video of the speech, see Brotha Doug, *Jesse Williams' Speech (BET Awards 2016)* YOUTUBE (Jun. 26, 2016), https://youtube.com/watch?v=orXogk3euMA.

[182] The term "Black Girl Magic" was created by CaShawn Thompson "to celebrate the beauty, power and resilience of black women." Julee Wilson, *The Meaning of #BlackGirlMagic*, HUFFINGTON POST (Jan. 12, 2016, 9:37 AM), http://www.huffingtonpost.com/entry/what-is-black-girl-magic-video_us_5694dad4e4b086bc1cd517f4; *see also* Desiree Melton, *The Myth of the Magical Black Woman*, BALTIMORE SUN (July 5, 2016, 12:30 PM), http://www.baltimoresun.com/news/opinion/oped/bs-ed-black-magic-20160705-story.html.

[183] Lasher, *supra* note 180 (quoting Jesse Williams, Address at the 2016 BET Awards (June 26, 2016)).

[184] *Id.*

B. Indirect, Current Costs

1. Costs to States and Local Governments

It's the economy, stupid.[185]

There are many indirect, yet immediate costs to the legal system to investigate and litigate police brutality claims. Those costs include the costs to cities to prosecute the so-called "bad apples." However, just focusing on a few bad apples ignores the systemic nature of the problem and an institutional culture that allows this conduct to continue.[186]

Before liability can be imposed, plaintiffs wishing to sue cities for unconstitutional conduct by public officials need to prove that a municipal policy or custom caused constitutional injury.[187] Also, cities cannot be held vicariously liable for unconstitutional conduct committed by law enforcement.[188] Perhaps the time has come for a reconsideration of vicarious liability in this context?[189] Others argue that allowing the award of punitive damages will force the responsible officials and supervisors to sit up and take notice.[190]

Plaintiffs who choose to sue may be able to argue their way to a settlement, but settlements are an imperfect solution. They represent negotiated deals in which there are external pressures on both sides, and decisions are often being made by financially vulnerable parties. The city of Cleveland paid $6 million to settle the wrongful death lawsuit brought by the parents of Tamir Rice.[191] The number of the average civil settlement in

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[185] James Carville, presidential strategist for the eventually successful 1992 presidential campaign of Bill Clinton, first coined the phrase, "The economy stupid." *See* Caleb Galoozis, *It's the Economy, Stupid,* HARV. POL. REV. (Oct. 17, 2012), http://harvardpolitics.com/united-states/its-the-economy-stupid/.

[186] DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 24-25, 47 (1994).

[187] *See* Monnell v. Dept. of Social Services, 436 U.S. 658, 713 (1978).

[188] *Id.* at 692; *see also* Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of respondeat superior").

[189] *See* Schwartz, *infra* note 194, at 896; *see, e.g.*, City of Okla. City v. Tuttle, 471 U.S. 808, 835-42 (1985) (Stevens, J., dissenting) (highlighting that legislators would have assumed that the common law tort doctrine of respondeat superior applied, barring any specific provisions to the contrary); *see also* CATHERINE FISK & ERWIN CHEMERINSKY, CIVIL RIGHTS WITHOUT REMEDIES: VICARIOUS LIABILITY UNDER TITLE VII, SECTION 1983, AND TITLE IX, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (arguing in favor of using respondeat superior for cities).

[190] Myriam Gilles, *In Defense of Making Government Pay:*, 35 GA. L. REV. 845, 854, 871-75 (2001); *see also Ciraolo v. City of New York*, 216 F.3d 236, 247 (2d Cir. 2000) (Calabresi, J., concurring).

[191] Trymaine Lee, *Analysis: The Cost of a Black Boy's Life*, MSNBC, (April. 25, 2016),

a wrongful death case in the United States is between $1 million and $6 million.[192] These numbers are misleading, however, because settlements are exceedingly rare. Most families who do sue are unable to state a claim under §1983 and actually receive nothing for the loss of a loved one.[193]

In cases where cities *are* forced to pay out to tort victims, police officers themselves are "virtually always" indemnified for the costs of their brutality:

> Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9,225 civil rights damages actions resolved in plaintiff's favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases.[194]

Therefore, taxpayers bear second direct, and immediate cost themselves.

American taxpayers may not fully realize that while law enforcement officers are not paying anything out of their own pockets for any wrongdoing, state and local governments *are* paying enormous sums.[195]

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http://www.msnbc.com/msnbc/analysis-the-cost-black-boys-life-6-million.

[192] Here's the breakdown of a sampling of judgments received by families who lost loved ones: Freddie Gray ($6.4 million), Eric Garner (5.9 million), Walter Scott ($6.5 million), Philip Coleman ($4.95 million). *See* Cristina Silva, *What is a Black Life Worth?*, INT'L BUS. TIMES (Apr. 25, 2016), http://www.ibtimes.com/what-black-life-worth-tamir-rice-settlement-reflects-growing-trend-paying-families-6m-2359142; *see also* Kia Michette, *The Worth of Freddie Gray's Black Life: $6.4 Million*, URB. IMAGE MAG. (Sept. 8, 2015), https://urbanimagemagazine.com/the-worth-of-freddie-grays-black-life-6-4-million/.

[193] *Id. See also* Ben Rosenfeld, Evaluating Your Potential Police Misconduct Civil Rights Case, 3 CIVIL LIBERTIES DEF. CTR, https://cldc.org/wp-content/uploads/2014/04/Evaluating-Police-Misconduct-Cases.pdf (last updated Aug. 2014) ("[C]ivil rights cases are notoriously difficult to maintain and win.").

[194] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) ("During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in law-suits alleging civil rights violations by law enforcement. Law enforcement . . . never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments--even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct"); *see also* Susan Milligan, *Police Settlement Cases Rare*, U.S. NEWS (Sept. 9, 2015), https://www.usnews.com/news/articles/2015/09/09/police-settlement-cases-rare-and-rarely-deter-misconduct.

[195] Nick Wing, *We Pay A Shocking Amount for Police Misconduct, And Cops Want Us Just To Accept It. We Shouldn't*, HUFFINGTON POST (May 29, 2015), http://www.huffingtonpost.com/2015/05/29/police-misconduct-settlements_n_7423386.html. *See also* Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015), https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834 ("The 10 cities with the largest police departments paid out $248.7 million last year in settlements and court judgments in police-misconduct cases, up 48% from $168.3

Here is a random sampling of U.S. cities that have paid out more than $50 million on police brutality claims:

- Chicago: $521 million between 2004 and 2014
- New York City: $348 million between 2006 and 2011;
- Los Angeles: Approximately $101 million between 2002 and 2011; and
- Oakland: $74 million between 1990 and 2014.[196]

Oakland public schools are facing severe cuts and a $15.1 million deficit.[197] Los Angeles, as well as many other cities, have utterly failed to conquer homelessness. One wonders if cities would be better able to address such problems if these costs did not burden them. As one scholar notes, corrective justice is achieved only at the sacrifice of distributive justice.[198]

In addition, the true cost of investigating, disciplining, training, or firing problem officers is likely under-reported. On the one hand, litigation may serve an informational purpose: the discovery process during trial often unearths important information regarding police policy, training, and practices.[199] The public exposure that a trial often brings may shed light on a problem and spur needed reform in ways that public protest cannot. On the other hand, putting forth evidence of the amount taxpayers are paying because of unconstitutional conduct by state actors may not be enough:

> So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will **never** deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.[200]

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million in 2010 . . . [t]hose cities collectively paid out $1.02 billion over those five years in such cases, which include alleged beatings, shootings and wrongful imprisonment.").

[196] Wing, *supra* note 195.

[197] Jill Tucker, *Oakland schools face harsh cuts as another budget crisis hits*, SF CHRONICLE (Nov. 9, 2017), http://www.sfchronicle.com/bayarea/article/Oakland-schools-face-harsh-cuts-as-another-budget-12346142.php/.

[198] *See* Levinson, *supra* note 100, at 412-14; *see also* Eaton, *supra* note 111 ("[L]itigating and paying judgments to constitutional tort plaintiffs diverts resources that could be used for other more important public purposes, such as redistributing wealth through social spending." (footnote omitted)).

[199] *See* G. Flint Taylor, A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases, 48 DEPAUL L. REV. 747, 750-51 (1999).

[200] Levinson, *supra* note 100, at 370 (emphasis in the original).

Majoritarian public attitudes towards police brutality may only shift when the full measure of societal costs is analyzed through empirical study. At this point in time, such studies have not yet taken place but given the above, the costs of police brutality are likely much larger than can be demonstrated by numbers alone.

2. *Costs to Communities*

> *Compensation is also socially desirable, for otherwise the uncompensated injured persons will represent further costs and problems for society.*[201]

There are also indirect costs to communities that accrue from losing spouses, parents, teachers, mentors or friends. Absent black fathers leave children without adequate support. Such children may then be left to fend for themselves in a school system that often serves as a pipeline to prison instead of a path to higher education.[202]

Communities also pay the costs for additional police for marches, disruption of traffic and commerce, and any destruction to property that may result from riots. Poor, minority communities want law and order just as much as any other demographic, yet they are the ones who are most immediately affected by police brutality and individual or collective responses to it.

Another cost to communities that needs further exploration and discussion is the number of low income people with mental health problems that are killed by police. According to one study, a minimum of one in four, and up to *one half* of those killed by police are mentally ill.[203] The issue of untreated mental illness is a serious public health issue, and this issue especially affects homeless communities.[204]

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[201] DOBBS, *supra* note 79, at 17.

[202] Megan French-Marcelin & Sarah Hinger, *Bullies in Blue: The Origins and Consequences of School Policing*, ACLU 1, 5 (April 2017) ("Over the past 50 years, schools—particularly in poor Black and Latino communities—have become sites of increased criminalization of young people . . . . Programs that gave teachers and administrators, as well as law enforcement, the authority to identify students as "pre-delinquent" are at the origins of what is now called the "school-to prison pipeline.").

[203] *See* Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters,* TREATMENT ADVOC. CTR. 1 (Dec. 2015), http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.

[204] While only 6% of the general U.S. population suffers from severe mental illness, the number is between 20-25% for the homeless. *See* National Coalition for the Homeless, *Mental Health and Homelessness* (July 2009), http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf/.

San Francisco is taking an innovative approach to the problem and has a model that "has been widely lauded as the best community-oriented model in the country, known for reducing the use of deadly force nationwide."[205] The city's police force has expanded the number of mental health training units and the capacity of a crisis intervention team ("CIT"). The CIT is made up of "community members, mental health advocates, health service providers, consumers, The Public Defender's Office, The SF District Attorney's Office, and police officers working together to provide innovative training for law enforcement officers."[206] The involvement of these various constituencies is a positive step in the right direction.

Even with this progress, since 2010, San Francisco police officers still shot and killed 14 people who appeared to have mental health issues.[207] One wonders if it is possible to quantify the trauma to families who have lost loved ones because we as a society have not successfully prioritized this issue. Further research needs to be conducted to determine the indirect costs to communities of failing to address this issue in a timely and effective manner.[208]

Police brutality "serves as a lightning rod for widespread public fear and anger" and may lead to "deep societal chasms."[209] These societal chasms may be created when juries repeatedly fail to indict or convict police officers for brutality,[210] even when such unlawful conduct is recorded and seemingly unambiguous. Fear and anger may also stem from the fact that minority communities know that many police take civilian defense so seriously that they reject even the slightest resistance,[211] and will frequently

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[205] Vivian Ho, *Police Make Slow Progress in Confronting Mentally Ill*, SF CHRONICLE (Dec. 19, 2015), http://www.sfchronicle.com/bayarea/article/Police-and-the-mentally-ill-seeking-better-ways-6710369.php.

[206] The goal of the CIT is "to instruct officers on how to effectively manage behavioral crisis situations in the field using de-escalation techniques, time, distance and cover, while maintaining the safety of all individuals." *See* Lieutenant Mario Molina, Sergeant Donald Anderson, & Sergeant Laura Colin, *Crisis Intervention Statistics & Crisis Team Concept*, SF POLICE DEPT. (Nov. 3, 2016), https://sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/PoliceCommission122116-SFPDCITPresentation_0.pdf

[207] *See* Ho, *supra* note 205.

[208] *See* Fuller, *supra* note 203 at 1. For example, "[a]n estimated 1 in 3 individuals transported to hospital emergency rooms in psychiatric crisis are taken there by police." It would be interesting to know the cost of time and resources expended as police officers are taken away from their work on the streets in these situations.

[209] Freeman, *infra* note 223, at 683, 706 ("Police brutality contributes to a deepening racial divide, "including African-American alienation from the criminal justice system.").

[210] *See* Catherine H. Milton et al, Police Use of Deadly Force 85 (1977).

[211] *See* PAUL CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 68-83, 88-98 (1969) (affirming that verbal defiance and antagonizing attitudes trigger police brutality).

retaliate against those who complain.[212] This fear may lead victims of police brutality to refrain from making complaints in the first place.[213] Communities of color are not only fearful of individual officers, but they also do not trust the criminal justice system overall.

Another component of this fear likely stems from the well-documented over-militarization of local law enforcement agencies.[214] The right to protest and express grievances against the government is constitutionally protected. Yet lawful protestors who are confronted with armored vehicles and military-grade weapons (as they were in Ferguson, Missouri) may be deterred from exercising their constitutional rights. In the words of a former Seattle police chief:

> Many local law enforcement agencies are now outfitted and behave like small armies. This is not good, and the federal government shares much of the blame. With the advent of the drug war and especially since 9/11, the Department of Defense has been more than generous in gifts of surplus military items to the locals: armored personnel carriers, MRAP's (mine-resistant, ambush protected vehicles), and a wide assortment of military weaponry.[215]

Besides the proliferation of military-grade weaponry in the hands of local law enforcement, the ranks of these departments are often filled by veterans who are returning home from war, as "one in five police officers are literally warriors, returned from Afghanistan, Iraq, or other assignments."[216] While the majority reintegrate without issue and are valued by police

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[212] *See* April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 605 (2011) (noting that a consequence of reporting police brutality is retaliation by police officers and powerful police unions) (internal citations omitted).

[213] *See* ANTHONY M. PATE & LORIE A. FRIDELL, POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES 35-36, 38-40 (1993) ("[P]olice departments make reporting difficult by failing to establish and publicize citizen complaint procedures.").

[214] *See* THE HARV. L. REV. ASS'N, *Considering Police Body Cameras* 128 HARV. L. REV. 1794, 1811-12 (2015) ("Police departments in recent decades have become increasingly militarized, complete with intelligence departments, devices that mimic cell phone towers, and facial recognition software.").

[215] Norm Stamper, *Militarizing Ferguson Cops with Riot Gear is a Huge Mistake*, TIME MAGAZINE (Aug. 18, 2014), http://time.com/3136586/militarizing-ferguson-cops-with-riot-gear-is-a-huge-mistake/.

[216] Simone Weichselbaum & Beth Schwartzapfel, *When Veterans Become Cops, Some Bring War Home*, USA TODAY (Mar. 30, 2017, 1:42 PM), https://www.usatoday.com/story/news/2017/03/30/when-veterans-become-cops-some-bring-war-home/99349228/.

leaders, some evidence suggests that veterans are more likely to "get physical" in policing situations.[217]

There is a significant dearth of research on differences in the use of force between veterans and non-veterans on police forces, but other troubling conclusions *have* emerged, namely that:

- Veterans who work as police are more vulnerable to self-destructive behavior—alcohol abuse, drug use . . . and attempted suicide;
- Hiring preferences for former service members that tend to benefit whites disproportionately make it harder to build police forces that reflect and understand diverse communities; and
- Most law enforcement agencies, because of factors including a culture of machismo and a number of legal restraints, do little or no mental health screening for officers who have returned from military deployment, and they provide little in the way of treatment.[218]

The push by some law enforcement agencies to recruit guardians rather than warriors will be hampered unless these issues are studied and addressed.[219] In the end, whether the justification is the drug war, "law and order," or the fight against terrorism, all communities will eventually suffer if checks are not maintained on the misuse of police power.

Instead of militarizing police forces, a fundamental shift in attitudes and policing culture is needed. The President's Task Force Report on 21st Century Policing is a tremendous step in the right direction as it acknowledges that "law enforcement cannot build community trust if it's seen as an occupying force."[220] This report concludes with "59 concrete recommendations for research, action and further study," and proposes several recommendations for "immediate action" by the administration, including but not limited to recommendations that:

1. The President should direct all federal law enforcement agencies to read the report and adopt the recommendations; and

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[217] *Id.*

[218] *Id.*

[219] Victor Hwang, *Call for New Policing in San Francisco: Guardians, Not Warriors,* SF CHRONICLE (Feb. 8, 2016), http://www.sfchronicle.com/opinion/openforum/article/Call-for-new-policing-in-San-Francisco-6815656.php ("We need to end the deployment of officers as warriors in the 'War on Drugs,' the 'War on Terrorism,' or as federal immigration officers. Police officers must be officers of the peace, defenders of our constitution, and guardians of our communities.").

[220] Office of Cmty. Oriented Policing Servs. U.S. Dep't of Justice, Final Report of the President's Taskforce on 21st Century Policing 1 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

2. The DOJ should explore public-private partnerships to discuss and collaborate on implementing the recommendations.[221]

Again, this involvement at the federal level is essential for helping to bring about meaningful change.

C. Indirect, Future Costs

1. Distrust of Law Enforcement

There is another indirect cost when minorities feel that law enforcement is not held accountable for wrongdoing. That cost is reflected in mistrust of police officers: "[o]fficers who fatally shoot a suspect or even an unarmed civilian are overwhelmingly cleared of wrongdoing following a standard internal investigation of the incident."[222] To many, this seems like state sanctioned murder.[223] In the case of Eric Garner, an officer can walk "scot-free"[224] even when he violates the department's own internal rules.[225] That officer was not only *not* indicted or charged, he was given a raise.[226] The officers in the infamous beating of black motorist, Rodney King, were acquitted by a jury.[227] Finally, minority communities know that the so-called "Blue Wall of Silence" (discussed as the "code of silence" above), and the fear of retaliation by colleagues, keeps officers from "ratting out" fellow officers or coming forward with incriminating evidence that might support a victim's account of brutality.[228]

Further, officers know that even if they use excessive force against suspects like Garner, the broader public will often side with the officer who

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[221] *Id.* at 69.

[222] Kolsy, *supra* note 172.

[223] "In many instances, police officers manage to avoid prison altogether for criminal acts that, if committed by civilians, would lead to many years imprisonment." Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L. J. 677, 679 (1996).

[224] *Scot-free*, MERRIAM-WEBSTER DICTIONARY (10th ed. 1996) ("Completely free from obligation, harm, or penalty").

[225] The chokehold used by the officer responsible for Mr. Garner's death had been officially banned by department policy. *See* Baker, *supra* note 154.

[226] Sally Goldenberg, *Records Show Increased Earnings for Officer Involved in Garner Death*, POLITICO (Sept. 12, 2016), http://www.politico.com/states/new-york/albany/story/2016/09/officer-in-eric-garner-death-boosts-overtime-pay-105359.

[227] Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html.

[228] *See* Gabriel J. Chin & Scott Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. PITT. L. REV. 233, 252 (1998).

is trying to enforce the law: "[t]hat suspects pose little threat of becoming attractive plaintiffs in damage actions is precisely the reason why some police officers are unlikely to observe constitutional standards in apprehending them."[229] Seeing officers go unpunished for actions which violate official police policy may or may not inflame majority groups, but this lack of accountability exacerbates tensions between minority groups and the police.

As mentioned above, inadequate awards in tort suits likely have the same effect, and "defeat the compensatory and deterrent objectives of a §1983 damage suit."[230] One scholar suggests a small role for the judiciary here, including: setting "judicially required police rules" regarding "what the police must do to avoid unnecessary offense to the dignity and rights of minority groups" to lessen these tensions and to restore trust in law enforcement.[231] Indeed, utilizing the language of human rights may be useful.[232]

Distrust is also created between communities of color and law enforcement when tort claims are filed and the claimants face retaliation as a result. When officers are accused of a tort, such as assault, battery, or false imprisonment, the police may falsely charge the accused with a crime. It is often easier for the prosecutor to negotiate a plea bargain with the accused,[233] who will often accept the plea in return for agreeing to dismiss the tort claim.[234]

The denial of justice for victims of police misconduct strengthens the belief among communities of color that the police are corrupt and are willing and able to do anything to avoid liability for wrongdoing. Without trust, these community members might react by not calling the police in times of need, or will refrain from calling to report crimes that they may observe. Others may respond by choosing not to assist with investigations

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[229] Newman, *supra* note 76, at 455.

[230] *Id.*

[231] Davis, *supra* note 6, at 723-24.

[232] *See* United Nations High Commissioner for Human Rights Centre for Human Rights, *International Human Rights Standards for Law Enforcement* 3 ("Law enforcement officials are obliged to know, and to apply, international standards for human rights. Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."), http://www.ohchr.org/Documents/Publications/training5Add1en.pdf/.

[233] If the police misconduct or brutality occurred during efforts to apprehend a suspect for an offense that was in fact committed, the jury's knowledge of the plaintiff's criminal conduct prior to arrest will likely undermine a jury's impartial assessment of the plaintiff's claims, even if constitutional rights apply regardless of whether the plaintiff is guilty or innocent. *See* Newman, *supra* note 76, at 466.

[234] Davis, *supra* note 6, at 724.

when law enforcement asks the community for help, including refusing to serve as witnesses in criminal cases, refusing to accept as truthful the testimony of officers when serving as jurors, and to reject recruitment efforts.[235] Any of these outcomes increases costs and exacerbates relations between the police and communities of color.

2. *Lack of Trust in the Social Compact*

When prosecutors refuse to charge, and grand juries fail to indict officers, the criminal law suffers: "[i]t has frequently been observed that the mark of a civilization is the procedure by which it enforces its criminal law.[236] The failure of both the criminal law and tort law may lead communities of color to not only distrust police officers, but also to lose faith in the social compact.

According to political philosophers like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, a social compact is an implicit agreement between members of society to abide by certain societal rules, and to give up some measure of individual freedom in exchange for protection by the state.[237] Without a social compact, a society falters. Governmental misuse of the police power "threaten[s] the vitality of a system of ordered liberty,"[238] and may lead to distrust in the legal or political system.

Unfair police practices like racial profiling,[239] and a police code of silence may also lead to an "us against them" mentality.[240] Communities that lack trust in the social compact may become disengaged from the larger economy, and this disengagement threatens everyone: "[a]ny misuse of public authority threatens the equilibrium of a system resting so

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[235] Lee, *supra* note 127, at 5.

[236] Newman, *supra* note 76, at 466.

[237] *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT: OR, THE PRINCIPLES OF POLITICAL RIGHTS (1893); *see also* William O. Douglas, THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE 1 (1963) ("Today one measure of liberty is the extent to which the individual can insist that his government live under a Rule of Law.").

[238] Newman, *supra* note 76, at 447 ("Any misuse of public authority threatens the equilibrium of a system resting so fundamentally on the consent of the governed, but the threat is most acute when the misconduct injures a citizen directly—especially if it denies him a constitutionally protected right.").

[239] According to the Federal Bureau of Justice Statistics, Blacks and Hispanics are more likely to be ticketed for speeding or searched at traffic stops than their white counterparts. *See* Erica L. Smith & Matthew R. Durose, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002, NCJ 211471 DEPT. OF JUST. (June 1, 2006).

[240] *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 92, 106 (1993) (stating that local law enforcement display an "organizational culture" or "siege mentality" of "internal solidarity, or *brotherhood*" against outsiders).

fundamentally on the consent of the governed."[241] When communities feel disengaged, they may feel that there is no point to voting, for example.[242] Moreover, if there are citizens who are acting outside of the system, there is a cost of lost economic productivity.

Finally, "actual and perceived unfairness and racial bias in law enforcement undermines overall police effectiveness."[243] Riots like the ones that engulfed Los Angeles following the acquittal of four white officers who were videotaped beating Rodney King are a further cost to communities.[244] Such civil unrest threatens law and order and affects everyone.

3. The Cost to Law and Order

Some individuals may demonstrate their lack of trust in the social compact by refusing to "play by the rules" of a criminal justice system that they perceive as unfair or unjust: "citizens might fairly ask themselves why they should follow the law when those who are supposed to enforce it do not."[245] It is not just police brutality that plays into this narrative. Evidence of racial profiling, unequal drug enforcement in communities of color,[246] and excessive sentencing for drug offenses all support a system that appears designed to benefit one group at the expense of several others.

Another cost is the resulting failure of law and order caused when more and more citizens feel the law is ineffective, unfair, and incapable of righting historic and continuing wrongs. Increasing levels of civil unrest may lead to economic damage to all communities. Black flight, or a potential exodus of black, brown, or other marginalized groups seeking a better life elsewhere, is discussed below. Of course, not everyone has the

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[241] Newman, *supra* note 76, at 447.

[242] Eaton, *supra* note 111, at 843 ("Borrowing from the writings of contemporary French philosopher Paul Ricoeur, Dauenhauer and Wells argue that when governments or their officials deprive individuals of their constitutional rights, they diminish the victim's capacity to be a 'full-fledged participant in his or her political society.'") (quoting Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 907 (2001)).

[243] Lee, *supra* note 127, at 5.

[244] The 1992 riots that followed the beating of Rodney King caused over $1 billion in property damage, and left over fifty people dead. *LA Riots, Fast Facts*, CNN (Apr. 23, 2017) http://edition.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/.

[245] Freeman, *supra* note 223, at 709 ("Police brutality can, and already has for many communities, set into motion an unraveling of respect for law.").

[246] As Michelle Alexander argues, unequal drug enforcement occurs despite the fact that minorities use drugs at the same rates as whites. *See* MICHELLE ALEXANDER, THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 99-100 (2012).

means or inclination to leave. The only option left for the ones that remain is likely to be to fight.

Inspiring advocates like Bryan Stevenson of the Equal Justice Initiative have resolved to dig in and use the law to challenge injustice no matter the personal cost.[247] The struggle against oppression has spawned new awareness among minorities, and especially among black and brown youth. Many of these young people are becoming activists in their own right. They are showcasing their talents and claiming their own power through poetry and the spoken word.[248]

Others may be less able or willing to channel their frustration and rage:

> Now, what we've been doing is looking at the data and we know that police somehow manage to de-escalate, disarm and not kill white people every day. So, what's going to happen is we are going to have equal rights and justice in our own country or we will restructure their function and ours . . . we're done watching and waiting while this invention called whiteness uses and abuses us, burying black people out of sight and out of mind while extracting our culture, our dollars, our entertainment like oil . . . before discarding our bodies like rinds of strange fruit.[249]

In many communities, the anger is palpable, and the concern is that it will spill out into the streets. The seemingly never-ending stream of graphic, and uncensored cell phone footage released over social media may continue to stoke the flames of anger and fear.

The question is, whether society can commit to change so that progressive community responses will channel the spirit of forgiveness and reconciliation. During the Civil Rights Movement, an early rift developed between leaders who championed non-violence and those who felt more aligned to a creed of "by any means necessary," or so-called "militant self-defense."[250] How should community leaders get out ahead of the possibility

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[247] Bryan Stevenson is a lawyer, a professor of law at New York University School of Law and the director of the Equal Justice Initiative ("EJI") in Montgomery, Alabama (https://eji.org/). EJI is a non-profit that champions those who are wrongly sentenced to death and challenges racial discrimination and inequality in the criminal justice system. Mr. Stevenson is a charismatic and humble leader who is seen as a hero to many. Despite being the subject of racism by state actors, he has steadfastly committed himself to champion the rights of the powerless. His book, *Just Mercy*, is a New York Times bestseller and a triumph of the soul. (From EJI's website: The book "is as gripping as it is disturbing," wrote Nobel Peace Prize Laureate Desmond Tutu, "as if America's soul has been put on trial.").

[248] LaVendrick Smith, *In Tumultuous World, Spoken Words Help Youth Find Their Voice*, WASH. POST (July 15, 2016), https://www.washingtonpost.com/local/in-tumultuous-world-poetry-and-spoken-words-help-youth-find-their-voice/2016/07/15/39afacaa-492f-11e6-acbc-4d4870a079da_story.html.

[249] Lasher, *supra* note 183.

[250] *See, e.g.*, Hassam Munir, *Meeting in the Middle: The Forgotten Relationship of*

that some (and who knows how large the group will be) will be moved, not towards lawful protest, but towards the incitement of hatred and violence? What is the appropriate response to those who may feel that armed self-defense is the only option?

Many in communities of color have already concluded that if the "law" will not protect them, they will need to do it themselves:

> The growing sentiment around armed self-defense may be unable to be ignored. A survey by the Pew Research Center earlier this year showed that 54 percent of black people view gun ownership positively, describing it as a means of protection—an increase of 29 percentage points from just two years prior. . . . Particularly after the Charleston massacre and other acts of violence against black people, the focus among some African American clergy and civil rights officials has shifted.[251]

Considering that the gun ownership in the U.S. is as American as apple pie, perhaps this growing trend simply reflects an increasing commonality between African-Americans and the larger culture?

As with any group, care should be taken in trying to generalize African-American culture. However, as an institution, the Black church has historically held significant influence within the black community.[252] As the Rev. Dr. Martin Luther King, Jr. once argued, it is likely that the black church has a role to play in shaping nonviolent responses to police brutality.[253]

The problem is, not everyone is in church. In general, church attendance in America has been on the wane, and increasingly, religion holds less

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Malcolm X and MLK Jr, iHISTORY (2015), http://www.ihistory.co/meeting-in-the-middle-the-forgotten-relationship-of-malcolm-x-and-mlk-jr/ ("[T]he real differences between Malcolm and Martin were about the specific approach that would be most effective in achieving their shared dream. In 1963, Martin wrote in a letter from prison that African-Americans should "emulate neither the 'do-nothingism' of the complacent nor the hatred and despair of the black nationalist . . . "). Today, the rift is much the same. *See also*, Sam P.K. Collins, *We Will Shoot Back: Meet the Black Activists Who Aren't Ready to Forgive*, THINK PROGRESS (June 27, 2015), https://thinkprogress.org/we-will-shoot-back-meet-the-black-activists-who-aren-t-ready-to-forgive-d53101387c31#.2lcv0c1w1.

[251] Collins, *supra* note 250.

[252] African-American Registry, *The Black Church, A Brief History*, (Nov. 1, 1758) ("In African-American history, 'the church' has long been at the center of Black communities. It has established itself as the greatest source for African American religious enrichment and secular development."), http://www.aaregistry.org/historic_events/view/black-church-brief-history/.

[253] *See* Margarita A. Mooney, *The Black Church in America: Martin Luther King's Legacy*, SOCIAL GOSPEL AND THE PROSPERITY GOSPEL (Jan. 17, 2012), http://www.patheos.com/blogs/blackwhiteandgray/2012/01/the-black-church-in-america-martin-luther-kings-legacy-the-social-gospel-and-the-prosperity-gospel/.

sway.[254] For many, that is a good thing. Others are not so sure. Maybe without the ameliorating influence of a "forgive them for they know what they do" mindset, the #WeWillShootBack crowd will step into the breach.[255] In fact, there is evidence that some are losing patience with calls for forgiveness that are unaccompanied by action: "[a]s noble as that philosophy [forgiveness] might be, an often ignored but growing number of African Americans aren't buying into it."[256]

While numerous attempts have been made to intimidate Black communities by burning down their churches,[257] such communities have usually focused on rebuilding and have simply turned the other cheek. Still, the bombing of the 16th Street Baptist Church in Birmingham, Alabama, and the resulting deaths of four little girls who were inside, has never been forgotten. That single event supercharged a movement.[258] What will be our defining moment? Has it already happened?

When Dylan Roof, an avowed white supremacist, strolled into a black church in Charleston and opened fire on parishioners, many said "no more." When Bree Newsome climbed a flagpole in South Carolina to take down the Confederate flag flying at the state capitol,[259] her careful ascent was a symbolic act of resistance. Without words, her act suggested that white supremacy will no longer be borne in silence. Since the controversy first erupted, displays of that flag (and specialty license plates) has fallen in several states.[260] We are in uncharted territory, and it is hard to predict what will happen next. At a minimum, perhaps we can all agree that uncertainty,

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[254] *Public Sees Religion's Influence Waning*, PEW RES. CTR. (Sept. 22, 2014), http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2/.

[255] The hashtag, #WeWillShootBack, refers to a movement started by activists who believe that the path of forgiveness has not worked and no longer want to be pacified. *See* Collins, *supra* note 250.

[256] *Id.*

[257] *See* Fresh Air, *The 'Racial Cleansing' That Drove 1,100 Black Residents Out Of Forsyth County, Ga.*, NPR (Sept. 15, 2016), https://www.npr.org/2016/09/15/494063372/the-racial-cleansing-that-drove-1-100-black-residents-out-of-forsyth-county-ga/.

[258] *See* Danielle Cadet, *Vigilance and Victory: How the Birmingham Church Bombing Revealed America's Ugly Truths*, HUFFINGTON POST, (Sept. 15, 2013, 8:27 AM), http://www.huffingtonpost.com/2013/09/15/birmingham-church-bombing-50th-anniversary_n_3927128.html.

[259] *"This Flag Comes Down Today": Bree Newsome Scales SC Capitol Flagpole, Takes Down Confederate Flag*, DEMOCRACY NOW, (July 3, 2015), http://www.democracynow.org/2015/7/3/this_flag_comes_down_today_bree.

[260] *See* Eric Brander, *Confederate Flag Debate: A State-by-State Roundup*, CNN http://www.cnn.com/2015/06/29/politics/confederate-flag-state-roundup/index.html (last updated June 30, 2015, 2:35 PM).

distrust, fear, and anger are not the best bedfellows when it comes to promoting peace.

On July 7, 2016, 25-year-old military veteran, Micah Johnson, disrupted a peaceful protest with sniper-fire.[261] He killed five officers, and injured several others.[262] The attack was apparently the deadliest enacted on law enforcement since the September 11th terror acts in 2001.[263] Will we need to see another Dallas? More bridges shut down in major metropolitan areas? More protests in the streets? Or, are we ready to move this issue to the top of the list of pressing priorities that we need to face together as a nation? By now, hopefully everyone realizes that this is not just a problem for African-American men.[264] The use of excessive, and frequently deadly force by public servants who are beholden to the Constitution is an issue that concerns us all.

4. The Cost to our Reputation

A third cost is the loss of reputation suffered domestically by individual cities, or by the country as a whole on the world stage. Certain cities, like Chicago, Illinois or Los Angeles, California, may get better or worse reputations, which may become a drain on tourism to the area.[265] With the release of each new horrific cell phone video of an unarmed black man being shot (or choked) to death for various minor offenses (and the list of offenses seems to keep growing—from selling loose cigarettes, to driving

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[261] Dan Molinski, Dan Frosch, & Alejandro Lazo, *Five Police Officers Dead, Several Hurt at Dallas Protest,* WALL ST. J. (July 8, 2016), http://www.wsj.com/articles/shots-fired-at-dallas-protest-over-police-shootings-in-baton-rouge-and-minnesota-1467947604.

[262] *Id.*

[263] Manny Fernandez, Richard Perez-Pena, & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says,* N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0.

[264] "First they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out—Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out— Because I was not a Jew. Then they came for me—and there was no one left to speak for me." This is a famous quote that has often been changed to fit different needs, but the original has been attributed to Martin Niemöller, a Protestant pastor who came out swinging against Hitler and lived out his days in a concentration camp for his recalcitrance. *See* Niemöller, *supra* note 68

[265] *See* Robert Channick, *Can Chicago Tourism Overcome Image of Crime, Police Brutality?*, CHICAGO TRIB. (Jan. 13, 2016), http://www.chicagotribune.com/business/ct-chicago-tourism-image-0112-biz-20160112-story.html (explaining tourism is down due to violence); Chris Woodyard, *County's Tourism Industry Hurt by L.A. Violence: *Impact: Rioting is Prompting Some Foreign Visitors to Cancel Plans to Vacation in the Area,* L.A. TIMES (May 2, 1992), http://articles.latimes.com/1992-05-02/business/fi-1275_1_orange-county.

with a broken taillight, to playing with a toy gun in a park, to picking up a fake gun in a store), America's international reputation is taking a thrashing.

Following the death of Eric Garner and the decision to not indict the officer responsible, hundreds of people gathered in London to peacefully protest the killing.[266] Protestors gathered at the Westfield Shopping Centre to stage a "die-in," an event where people gather and lie down en masse. They "chanted and waved placards saying, 'no justice, no peace' and 'we can't breathe.' They then played dead, bringing the shopping centre to a standstill." A group of 76 less peaceful protesters were arrested at the same event.[267]

The citizens of the United Kingdom are not the only ones who have voiced concerns about the state of affairs in the United States. At one point, the Bahamas issued a U.S travel advisory for its young male citizens traveling here: "[u]se 'extreme caution' around police."[268] Canada, Germany, and others have also warned their citizens of U.S. gun violence.[269] Recently the United Nations ("U.N.") has also condemned police brutality in America:

> This [the shooting of Michael Brown] is not an isolated event and illustrates a bigger problem in the United States, such as racial bias among law enforcement officials, the lack of proper implementation of rules and regulations governing the use of force, and the inadequacy of training of law enforcement officials.[270]

The U.N. Committee on the Elimination of Racial Discrimination specifically called out the excessive use of force by police against "racial and ethnic minorities," in addition to persisting racial discrimination that touch upon "all areas" of American life, including "de facto school segregation, health care and housing."[271] The U.N. body acknowledged that

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[266] *See* Haroon Siddique & Dominic Smith, *76 People Arrested in Eric Garner Protest at Westfield Shopping Centre*, GUARDIAN (Dec. 11, 2014), https://www.theguardian.com/us-news/2014/dec/11/76-arrests-eric-garner-protest-westfield-london.

[267] *Id.*

[268] Aaron C. Davis, *The Bahamas' New U.S. Travel Advisory: Use 'Extreme Caution' Around Police*, WASH. POST (July 9, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/09/the-bahamas-travel-advisory-for-the-u-s-use-extreme-caution-around-the-police/?utm_term=.e0e9a4750870.

[269] *See id.*

[270] Stephanie Nebehay, *UN Condemns U.S. Police Brutality; Calls for 'Stand Your Ground' Review*, HUFFINGTON POST (Aug. 30, 2014), http://www.huffingtonpost.com/2014/08/30/un-police-brutality-stand-your-ground_n_5740734.html (quoting Noureddine Amir, U.N. Committee on the Elimination of Racial Discrimination committee vice chairman, in a news briefing).

[271] *Id.*

these disparities particularly impact African-Americans, and also called for a review of the so-called "Stand Your Ground" Laws of 22 states that bestow "far-reaching immunity."[272] The U.N. Human Rights Council and delegates from 117 countries also weighed in on this debate.[273]

For those who might be tempted to say, "[w]ho cares? Other countries have much worse problems with providing basic human rights than we do." However, even if the U.N. has no power to change our laws or impact public policy, it is likely that such keen international scrutiny and censure will have far-reaching consequences that extend well beyond our borders. U.S. citizens traveling abroad may experience a lack of good will, and become subject to derision, condemnation, or worse. Also, members of our military may be exposed to (further) ill will, hatred, and contempt. The tide of international opinion, which at present is generally favorable towards the U.S.,[274] may recede as those who are overseas question our commitment to equality and justice.

The U.S. may sometimes like to think of itself as a law unto itself, but that is not, and never has been, the case. We do not live in a vacuum. With technology, we are living in an interconnected and interdependent age. Actions taken in the U.S. ripple throughout the world.

5. Black Flight

> *America is on the verge of #Blaxit – a mass exodus of black people. Where we will go I don't know, but it's clear that black lives don't matter here, and it's even more apparent that the powers that be are doing everything possible to make America white again (except America was never white to begin with).*[275]

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[272] *See id.*

[273] *See* Claire Bernish, *117 Countries Slam American Police Brutality at U.N. Human Rights Council*, MINT PRESS (May 13, 2015), http://www.mintpressnews.com/117-countries-slam-american-police-brutality-at-un-human-rights-council/205588/; *see also* Na-tasja Sheriff, *US Cited for Police Violence, Racism in Scathing UN Review on Human Rights*, AL JAZEERA AMERICA (May 11, 2015), http://america.aljazeera.com/articles/2015/5/11/us-faces-scathing-un-review-on-human-rights-record.html ("Country after country recommended that the U.S. strengthen legislation and expand training to eliminate racism and excessive use of force by law enforcement."); *Police Violence, Executions, Gitmo: US Grilled by UN Human Rights Panel*, RUSSIA TODAY (May 11, 2015), https://www.rt.com/usa/257489-un-america-police-brutality/.

[274] Richard Wike et al., *U.S. Image Suffers as Publics Around the World Question Trumps Leadership: America Still Wins Praise for Its People, Culture, and Civil Liberties*, PEW RES. CTR. (June 26, 2017), http://www.pewglobal.org/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/ ("While the new U.S. president is viewed with doubt and apprehension in many countries, America's overall image benefits from a substantial reservoir of goodwill.").

[275] Ulysses Burley III, *#Blaxit: 21 Things We're Taking with Us if We Leave*, SALT

The standard populist response to those who question the status quo is: "[w]ell if you don't like it, why don't you just leave?" There are some who have responded to the current crisis by whimsically wondering if they should "go back" to Africa. Others wonder if Canada or Europe might provide better options. Although the desire to leave may be fleeting, the concerns underlying such desires are real. It makes sense that outsiders to the financial, political and social culture might wonder if another country would provide a safer alternative—better educational opportunities, a larger social safety net with more generous health care benefits, or safer communities to raise families. With open season seemingly being declared on unarmed black men, what mother of a black boy today isn't concerned for the safety of her child, or of her father, brothers, uncles, and nephews? Flight is a rational response.

Up until now, the assumption has been that no one would ever want to leave the United States. When people express dissatisfaction with the state of the world (or with politicians), it's usually just talk. No one actually moves to Canada, right?

The U.S. has experienced white flight in the past. White flight refers to a historical post-war phenomenon where White Americans, faced with the prospect of having to integrate with Black Americans in cities, chose instead to move to the suburbs.[276] They fled to save themselves from the oppression of having black people as neighbors, or as playmates for their children. White flight is often seen as the reason why many American neighborhoods are still so segregated today.[277]

Similarly, some Black Americans may choose to flee the oppression of seeing the murder of relatives or friends in their communities. Would anyone blame them? What happens if, or when, those who are perhaps more financially mobile decide that they should in fact, leave? Will the U.S.

COLLECTIVE http://thesaltcollective.org/6936-2/. For a week or two in July 2016, social media came alive in response to a tongue-in-cheek post playing on "Brexit," or the decision by the United Kingdom to leave the European Union. *See id.*

[276] *See* Report of the National Advisory Commission on Civil Disorders, EISENHOWER FOUND. http://www.eisenhowerfoundation.org/docs/kerner.pdf (last visited Oct. 5, 2017) ("Black in-migration and white exodus, .which have produced the massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs."). *See also* Alana Semuels, *White Flight Never Ended*, ATLANTIC (July 30, 2015), http://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980/.

[277] *See* Semuels, *supra* note 276; *see also*, Emily Badger, *White Flight Began a lot Earlier Than We Thought*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/17/white-flight-began-a-lot-earlier-than-we-think/.

lose a "talented tenth,"[278] or a group of potential leaders who might otherwise have been counted on to help make America a better place to live for everyone?

Of course, the great majority of people have families to support and jobs to tend and leaving is an unlikely option. These workers may grumble aloud and wonder at the state of the world over the water cooler or the dinner table, but given the necessity of caring for children and aging parents, their concerns may just represent idle talk. For this group, their singular goal may be to just put food on the table. They may have little time to follow protest movements, to participate in any protests themselves, or to indulge in fantasies of packing up their families to emigrate to exotic lands. So they are probably stuck, and perhaps feeling angry, afraid, disenfranchised, or powerless.

Trauma can be experienced vicariously.[279] Little empirical research has been conducted on the psychological toll on African-Americans from seeing and experiencing racism or police intimidation and violence.[280] However, some studies suggest that images of African-Americans being brutalized or shot has a major negative impact on black people in particular, especially when those images are uncensored.[281] Failure to censor these images may stem from a history of dehumanizing treatment towards African-Americans in this country.[282] One wonders why uncensored law

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[278] Henry Louis Gates, Jr., *Who Really Invented the 'Talented Tenth'?*, PBS http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/who-really-invented-the-talented-tenth/.

[279] *See* Caleb Lewis, *Videos of Police Brutality are Everywhere: What Does Watching Them do to us?*, VOX, (July 12, 2016), http://www.vox.com/2016/7/12/12147290/police-brutality-racial-trauma-castile-sterling.

[280] *See id.* Monnica Williams, a professor of psychology and director of the Center for Mental Health Disparities at the University of Louisville, notes that "little research recognizes the psychological effects of racism on people of color." Monnica T. Williams, *Can Racism Cause PTSD? Implications for DSM-5: Racism Itself May be a Traumatic Experience,* PSYCH. TODAY (May 20, 2013), https://www.psychologytoday.com/blog/culturally-speaking/201305/can-racism-cause-ptsd-implications-dsm-5. Of course, if there is so little research available on the effects of racism, it is reasonable to assume that even less research exists on the specific issue of the psychological impact of watching public servants kill unarmed citizens. *See id.*

[281] *See* Tanasia Kenney, *Frequent Exposure to Shootings of Black People Can Cause PTSD-Like Trauma, Research Says*, ATLANTA BLACK STAR (Sept. 22, 2016), http://atlantablackstar.com/2016/09/22/frequent-exposure-shootings-black-people-can-cause-ptsd-like-trauma-research-says/ ("White people used to have picnics at hangings and at lynchings, bringing their children to watch Black bodies suffer and die. We are not far removed from that, it's just being played out through technology now. And it hurts.") (internal quotations omitted).

[282] *See id.*

enforcement videos of black people being shot are often published, whereas in at least one instance, news footage of the on-air shooting of two white anchors was "selectively censored" out of respect and concern for their families?[283]

A credible argument could be made that the entire country, and those in the rest of the Americas and beyond, are heavily impacted. It seems almost impossible to avoid the horrific images that are spread in moments over social media. Whether through Twitter, Facebook ("Twitter and Facebook are teeming with anguish"[284]), Instagram, or a host of other online sources, we are all being buffeted by both personal and long-distance tragedies in a way that was never possible before. Technology has brought both progress and great distress. Do we really suppose that all of this will not have long-term effects on society as a whole?

For now, these costs have gone unmeasured. But someday soon, someone will start the process of quantifying these intangible harms. Many of these costs stem from police brutality, but other costs are increased exponentially by unfair or inadequate government responses to police violence. If victims were compensated fairly for losses through the civil system, and police were punished for bad acts, most of the societal costs mentioned above could be lessened. Minorities might still distrust the police, but might nonetheless trust "the system" to do the right thing in the end. The government could ease the overall societal burden by responding appropriately and fairly and in a timely manner. A mechanism should be developed to either redirect these costs to law enforcement, or more effort must be made to change their behavior through legislation, political pressure or a new federal mandate.

V. LEGAL & POLICY RECOMMENDATIONS

There is a "constant tension in our society between individual accountability and a measure of social responsibility."[285]

There were three issues presented at the outset of this article: (1) Can current U.S. law prevent the unjustified killing of racial minorities by law enforcement; (2) What are the costs of failing to stop this injustice; and (3) Is there anything that can be done to improve the outcome for all Americans? First, U.S. law, as currently enacted, is unequal to the task of preventing and deterring racial killing. The criminal law was never

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[283] *See id.*

[284] Jenna Wortham, *Racism's Psychological Toll*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html?_r=0.

[285] DOBBS, *supra* note 79, at 21.

designed for this purpose, and the available remedies in civil tort law are only designed to address the narrow class of injuries that can be addressed through state statutory wrongful death or survival actions or federal claims for money damages.

Second, the direct costs of these legal failures include approximately 1,000 deaths each year, in addition to broken homes and families. The indirect costs include significant financial impacts on state and local governments, costs to communities, distrust of law enforcement and lack of trust in the social compact, cost to our international reputation, Black flight, and an overall cost to law and order. Added up, these costs to society are much greater than is currently articulated in the scholarly literature. Third, increased reporting, data tracking, transparency and accountability will make it safer for everyone residing in the U.S, immediate neighbors, and those who wish to visit or move here in the future. Addressing these issues will make a stronger, and "more perfect" union.[286]

Accountability is a two-sided coin. Officers should not oversee policing themselves.[287] Law enforcement officers should be held accountable to those above (state legislators or Congress), and those below. As servants of the public, they must carry out the power of the state with responsibility. The vast majority of officers understands this responsibility and are a credit to their profession. This article is not meant to demonize or denigrate those who put their lives on the line for others every day. Individual citizens must respect law and order and the right of public officials to enforce state and federal laws. Preventing crime is a legitimate and important public interest.

Some cities have successfully implemented reforms to decrease the number of fatal encounters, and to increase transparency and accountability. The city of Camden, New Jersey started over with a new police force focused on community policing; after doing so, its rates of violent crime and murder fell.[288] The city of Cleveland, Ohio established a commission to connect local law enforcement with community groups, implemented changes in the training of officers, and involved civilians and watchdog

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[286] The purpose of the Federal Constitutional Convention of 1787 was the same as stated in the Preamble to the U.S. Constitution: "We the People of the United States, *in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity,* do ordain and establish this Constitution for the United States of America." *See* INDEPENDENCE HALL (Blog), *To Form a More Perfect* Union (emphasis added), *available at* http://www.ushistory.org/independencehall/history/indhall4.htm.

[287] *See* Newman, *supra* note 76, at 457 (positing that deterrence should not be in the hands of individual officers).

[288] *See* Lopez, *supra* note 69 (explaining community policing means that law enforcement takes a bottom up approach to policing and works with local institutions, such as churches and community organizations to rebuild trust).

agencies as part of an effort to increase oversight and accountability.[289] In the city of Seattle, Washington, community members developed a new policing policy regarding the use of force by local law enforcement.[290] The new policy in Seattle requires officers to "de-escalate" tense situations unless the circumstances require the use of force.

The Oklahoma City Police were recently praised by organizers for BLM for their deliberately non-confrontational approach to a large BLM protest that was held three days after the shooting in Dallas that saw five officers killed: "[t]he way (police) chose to be present helped people to see them as people and not as the flawed system."[291] According to a police captain supervising the event: "[The police] showed a lot of restraint and showed a lot of patience. They didn't react when it was unnecessary. They greeted people, they engaged with the crowd."[292] Similarly, law enforcement in Tulsa, Oklahoma acted decisively and deliberately after the unjustified police shooting of Terence Crutcher, an unarmed African-American man who was killed while standing beside his stalled vehicle: after reviewing the dashcam footage, they immediately released the video recording of the incident and promptly arrested and charged the officer involved.[293] Actions like these can go a long way to restoring public trust in law enforcement.

The Los Angeles and New York police departments have reformed their practices to ban officers from firing warning shots, from shooting at vehicles, or from firing unless they believe their lives are in danger.[294] As a

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[289] *See id.*

[290] Admittedly, this positive measure came about as the result of a settlement agreement executed between the Department of Justice and the Seattle Police Department. That fact does not negate the fact that residents of Seattle now have a say, jointly with police, in how law enforcement operates (especially since the new use of force policy went further than the mandates of the settlement agreement). In a promising development, the new use of force policy articulates a statement of principle on the Seattle Police Department's commitment to "Defending the Civil Rights and Dignity of All Individuals, While Protecting Human Life and Property and Maintaining Civil Order." *See* Samuel Walker, *The Community Voice in Policing: Old Issues, New Evidence*, CRIM. JUST. POL'Y REV., 1, 8-9 (2015).

[291] Ben Felder, *OKC Police Praised by Black Lives Matter Protest Organizers*, OKLAHOMAN (July 12, 2016, 12:00 AM), http://newsok.com/article/5509145.

[292] This strategy of de-escalation and engagement is a step in the right direction for civilian encounters with the police. *See id.*

[293] The officer has been ordered to stand trial for manslaughter due to her unreasonable behavior. Peter Holley & Katie Zezima, *White Tulsa Officer Charged in Death of Unarmed Black Man, Freed on Bond*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/22/tulsa-officer-who-fatally-shot-terrence-crutcher-charged-with-first-degree-manslaughter/?utm_term=.f519da80c77b.

[294] *America's Police Kill Too Many People. But Some Forces are Showing How Smarter, Less Aggressive Policing Gets Results*, ECONOMIST (Dec. 11, 2014),

result, "the number of shots fired by police in New York has fallen by more than two-thirds since 1995."[295] The Los Angeles Police Department now recognizes officers who "de-escalate," or "go above and beyond normal police work to avoid using deadly force during dangerous encounters" with the "Preservation of Life" medal.[296] Both New York and Los Angeles have also diversified their police forces so that "the police are now blacker than the populations they serve."[297] New York also adopted a pilot program to have officers wear body cameras.[298] Some say that body cameras have been responsible for the increased number of indictments of officers (while at the same time noting that just six percent of killings are captured by body cameras).[299] Generally, these efforts represent innovative approaches to minimizing the use of force, and should be lauded and supported.

There are still areas of policing and police culture that can be improved or changed. These recommendations spring from this article and from the accumulated research and experience of other experts in this area:

1. The federal government needs to increase its oversight of local law enforcement. Given the track record of failure, we need more government, not less. Citizens should have a means of making complaints directly to the federal government if state law enforcement agencies are unresponsive. The Department of Justice should regularly monitor departments that receive frequent complaints, and then proceed against the most egregious offenders. As discussed above, the federal government will require law enforcement to report all "arrest-related" deaths.[300] Public health scholars recommend that this data should be reported at both the local and national level.[301]

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https://www.economist.com/news/united-states/21636044-americas-police-kill-too-many-people-some-forces-are-showing-how-smarter-less.

[295] *Id.*

[296] Kate Mather, *LAPD honors officers for their bravery and, for the first time, their restraint*, L.A. TIMES (Sept. 9, 2016, 5:00 AM), http://www.latimes.com/local/lanow/la-me-ln-lapd-honors-20160908-snap-story.html.

[297] *America's Police Kill Too Many People. But Some Forces are Showing How Smarter, Less Aggressive Policing Gets Results*, *supra* note 294.

[298] *Id.*

[299] *See* Kindy, *supra* note 164.

[300] *See* Jon Swaine, *Police Will be Required to Report Officer-Involved Deaths Under New US System*, GUARDIAN (Aug. 8, 2016), https://www.theguardian.com/us-news/2016/aug/08/police-officer-related-deaths-department-of-justice ("Accurate and comprehensive accounting of deaths that occur during the process of arrest is critical for law enforcement agencies to demonstrate responsiveness to the citizens and communities they serve").

[301] Also, some scholars suggest that police brutality is a public health issue and therefore

These steps would go a long way to increasing transparency in this area. Transparency is the first step to accountability.

There should be a new federal watchdog (that perhaps operates under the authority of the DOJ) that is responsible for creating uniform policing standards and ensuring compliance with such policies.[302] Perhaps something along the lines of an enforcer for financial crimes. It could be called the Policing Review Board or the National Taskforce on Police Accountability.[303] Whatever the name, there should be a separate and distinct body that is not beholden to state law enforcement agencies and that reports to Congress. Even if a new federal watchdog is not established, "problem" cities with a history of serious and sustained public complaints should receive priority for oversight. The point here is to restore public trust and confidence in law enforcement to improve relationships with minority communities.

2. Citizen oversight boards should be established over all police departments to monitor local law enforcement. Like judges, police officers are public servants. Under the public supervision rationale, the public (taxpayers) pay their salaries and therefore should be allowed to play a supervisory function.[304]

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all law enforcement-related deaths should be reportable conditions "which would allow public health departments to report these data in real-time, at the local as well as national level, thereby providing data needed to understand and prevent the problem." *See, e.g.*, Nancy Krieger, Jarvis T Chen, Pamela D Waterman, Matthew V Kiang & Justin Feldman, *Police Killings and Police Deaths Are Public Health Data and Can Be Counted*, PLOS MED (Dec. 8, 2015), http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001915 (noting also that some scholars suggest police brutality is a public health issue and therefore all law enforcement-related deaths should be reportable conditions "which would allow public health departments to report these data in real-time, at the local as well as national level, thereby providing data needed to understand and prevent the problem.").

[302] *See, e.g.*, James Queally, *Newark Police to be Monitored by Federal Watchdog*, STAR LEDGER (Feb. 9, 2014, 6:06 AM), http://www.nj.com/essex/index.ssf/2014/02/justice_department_will_place_federal_monitor_over_newark_police_sources_say.html.

[303] Similar to the name of the non-profit, National Police Accountability Project, a project of the National Lawyer's Guild. *See* https://nlg-npap.org/.

[304] The Department of Justice already does this, in a one-off or piecemeal fashion for "problem" cities (for example, Newark, and New Orleans have received federal monitors after reports of serious abuses by law enforcement). In addition, it seems that the Supreme Court has alluded that there is a need to develop national standards for police conduct. *See*

3. Police departments need to properly train, supervise, and discipline problem officers. Police training should, like Seattle's new policy, encourage officers to make attempts at de-escalation before resorting to the use of force. This may increase trust of police by minority communities. Records should be maintained and there should be something like a "three strikes" policy for problem officers. Problem officers who are repeat offenders should be removed from duty without pay if they violate internal policies and procedures, or if they shoot someone without lawful justification.

4. Police culture needs to be addressed directly. As discussed above, an institutionalized code of silence persists today. This custom puts pressures on officers to either cover up or ignore wrong-doing by their colleagues or face abuse. There needs to a formalized system of checks that will bring red flags or unlawful conduct to the attention of supervisors and provide protection for whistle-blowers.

5. Body cameras are not a panacea, but they should be compulsory for all police departments. Again, assuming cost is an issue, funds should be prioritized for police departments with a history of problem officers or problematic citizen encounters. Police departments in the United Kingdom adopted body cameras several years ago and they have revolutionized policing.[305] Of course, body cameras can be switched off. Law enforcement should enhance training and adopt de-escalation policies around this issue. Failing any of the above, even if police departments do not have the resources to afford body cameras, members of the public who record police violence should not be punished.

6. Police departments need to become more diverse. Law enforcement agencies need to recruit diverse candidates to combat the "us vs. them" mentality discussed above. Running

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Vermont Agency of Nat. Res. v. U.S. ex rel Stevens, 529 U.S. 765 (2000). *See, e.g.*, Medico v. Time, 643 F.2d 134 (3d Cir. 1981).

[305] See THE HARV. L. REV. ASS'N, *supra* note 214 (citing Bracken Stockley, *First Police Force to Make Body Cameras Compulsory for Frontline Officers*, JUST. GAP (Feb. 14, 2014) http://thejusticegap.com/2014/02/britain-moves-towards-fully-digigalised-criminal-justice-system/).

a marketing and recruitment campaign that reaches women and minorities amid today's headlines may be difficult. Nonetheless, those confronted with the awesome weight of police power need to see that those upholding the law reflect a diverse cross-section of the community, and that the police are not akin to an occupying force in poor or urban communities. When looking for new officers, the focus should be on recruiting guardians, not warriors. Some scholars also argue that psychological testing should be conducted on candidates as part of the recruitment process to increase trust and minimize violence between officers and minorities.[306] More research is needed on the hiring of combat veterans as police officers and their use of lethal force in policing.[307]

7. The use of community policing should be further explored. As mentioned above, such measures are already being implemented with success in some communities. In cities where officers "walk the beat," there is less friction between law enforcement and the public. The trust that was once eroded can be rebuilt and earned.

8. Section 1983 needs to be revised. The statute should be revised to allow for respondeat superior or vicarious liability imposed on the unlawful state actor's employer—law enforcement agencies that fail to properly supervise, train or discipline subordinate officers.[308] This will also address the problem of juries who are unwilling to impose monetary damages against individual officers who may be underpaid, hard-working and "just doing their jobs." Police departments are not feeling the pain of any financial sanctions as a result of paying settlements: "[t]heir budgets are really very strongly insulated

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[306] Others suggest that such profiling is ineffective. *See* Michelle A. Travis, *Psychological Health Tests for Violence-Prone Officers: Objectives, Shortcomings, and Alternatives*, 46 STAN. L. REV. 1717, 1765 (1994) (providing that psychological profiling cannot identify officers who may be violence prone).

[307] *See* Weichselbaum & Schwartzapfel, *supra* note 216 ("But even those who advocate hiring combat veterans as police officers have raised alarms. The Justice Department and the International Association of Chiefs of Police put out a 2009 guide for police departments to help with their recruitment of military veterans. The guide warned, 'Sustained operations under combat circumstances may cause returning officers to mistakenly blur the lines between military combat situations and civilian crime situations, resulting in inappropriate decisions and actions — particularly in the use of less lethal or lethal force.'").

[308] *See* Newman, *supra* note 76, at 456.

from the financial effects of their actions."[309] As one scholar notes, statutory reforms should also allow not only individuals to sue, but to allow the U.S. government itself to intervene as a plaintiff and to initiate a suit on behalf of the wronged individual.[310] Allowing the government to sue would not require prosecutors to jeopardize their relations with local law enforcement agencies, and having the government as the sole plaintiff (or an additional plaintiff) would likely have a better chance of success than a criminal prosecution.[311] Finally, other types of damages, including punitive damages should be available against municipalities for tolerating police brutality.[312] Although juries may be unlikely to impose them, punitive damages should perhaps be imposed against individual officers as well.[313] This has not been the case in the past, but the time certainly seems ripe for a "New Deal" with respect to civil rights.

9. States need to step into the breach. Taxpayers should not have to fund murder. Already, there are areas where state law grants less immunity to public officials than does federal law. State-based indemnification provisions should be revised as necessary to not "dampen the deterrent effect of lawsuits on officers,"[314] and to not insulate officers from unlawful conduct. California has often led the nation in other important areas, including environmental and immigration reform. If the federal government is unable or unwilling to lead, progressive states

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[309] Milligan, *supra* note 194 ("Just 0.02 percent of dollars to plaintiffs in police misconduct suits were paid by the offending officers themselves.").

[310] Newman, *supra* note 76, at 454.

[311] This outcome is likely because as it stands, juries are more likely to sympathize with law enforcement over a §1983 victim. "At the defendants' table sit the police officers—well-groomed, in full uniform, and with the American flag figuratively wrapped around them and often literally displayed on their jackets. Except in those rare instances when the party injured is the white, middle-class victim of police mistake, the §1983 plaintiff is likely to be black, or Puerto Rican, poor, disheveled, a felon, and often a drug addict." If the plaintiff is the U.S. government, such considerations would presumably not come into play. Newman, *supra* note 76, at 454.

[312] Ciralo v. City of N.Y., 216 F.3d 236, 249 (2nd Cir. 2000) (Calabresi, J., concurring) (urging the Supreme Court to overrule City of Newport v. Fact Concerts, Inc., to allow the award of punitive damages against cities in order to deter unlawful killings by public officials) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)).

[313] "Civil rights doctrine relies heavily on the assumption that police officers pay settlements and judgments out of their own pockets." Schwartz, *supra* note 194, at 887.

[314] Schwartz, *supra* note 194, at 891.

concerned about stemming the violence should take the initiative.

10. More research must be conducted regarding the impact of fear (as distinct from overt or unconscious racism) as a driver of police violence towards African Americans, and especially towards black males. According to civil rights attorney Constance Rice, "cops can get into a state of mind where they're scared to death. When they're in that really, really frightened place they panic, and they act out of that panic."[315] Of course, fear of others who are different should not be used as an excuse to justify police violence. However, ignoring this reality is counterproductive as well.

VI. CONCLUSION

We cannot countenance a status quo where the police, meant to serve and protect, sometimes turn their guns toward the people instead. We must continue to be able to depend upon the law as an agent of change and a righter of wrongs. For those in the United States who have contributed their blood equity to building a better life for their families, we should make sure that they do not have to fear becoming targets of police violence. We must do this so that the "American Dream" does not turn into a nightmare.

What happens to a dream deferred?
Does it dry up
Like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
Like a syrupy sweet?
Maybe it just sags
like a heavy load.
Or does it explode?[316]

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[315] Zenobia Jeffries, *Fear: What Police Reform Doesn't Address*, YES MAG. (July 11, 2016), http://www.yesmagazine.org/peace-justice/for-police-and-black-citizens-the-real-problem-is-fear-20160711/ ("In her work in Los Angeles, she interviewed over 900 officers in 18 months and the overarching theme of their answers related to their fear—of Black men.").

[316] Langston Hughes, *Dream Deferred, in* The Panther & the Lash, 14 (1992).

There are reasons to hope that the dream can still become reality for minorities and communities of color. We can choose to act now to bolster our civil rights laws. We can remember the traditional tort law goals of compensation, deterrence, and fairness. We can revise our laws and policies to make sure that they meet and embody these goals. We can hold the police accountable without jeopardizing their lives or the lives of the people that they are meant to serve. If we do not, we will only see the costs continue to mount.

So too, the anger.

In Search of Smarter Homeowner Subsidies

Matthew J. Rossman*

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I. INTRODUCTION

The opportunity to own one's home has long been considered part and parcel of the American Dream. Homeownership, so it is contended, provides a pathway to upward mobility, fosters good citizenship, and is a reliable form of long-term savings.[1] Even in the wake of the recent foreclosure crisis, a complex phenomenon in which homes plunged millions of American households into financial distress, the nation has by and large kept the faith in homeownership.[2]

For the last century, the federal government has unabashedly promoted homeownership. It supports credit markets to help make home mortgages affordable, offers counseling and financial assistance to prospective low income homebuyers, and, most pertinent to this article, provides a collection of income tax breaks directly to homeowners. These tax breaks (which this article will refer to as "homeowner subsidies") are no small matter. In 2017 alone, it is estimated that the three principal homeowner subsidies—the mortgage interest deduction, the property tax deduction and the exclusion of home sale capital gains—will total $135 billion in forgone tax revenue.[3] This amounts to the country's second largest tax expenditure,

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[1] *See, e.g.*, *Social Benefits of Homeownership and Stable Housing*, NATIONAL ASS'N OF REALTORS (Apr. 2012), https://www.nar.realtor/sites/default/files/migration_files/social-benefits-of-stable-housing-2012-04.pdf.

[2] Eric S. Belsky, *The Dream Lives On: The Future of Homeownership in America* 2 (Joint Ctr. for Hous. Stud. of Harvard Univ., Working Paper No. 13-1, 2013), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w13-1_belsky_0.pdf.

[3] H.R. COMM. ON WAYS AND MEANS, S. COMM. ON FINANCE, AND STAFF OF THE J. COMM. ON TAXATION, 115TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, at 33 (Comm. Print 2017) [hereinafter 2017 TAX EXPENDITURE BUDGET]. It is worth pointing out that Congressional estimates of forgone revenue associated with homeowner subsidies, while useful in understanding their costs, are not equal to the gain to the federal budget that would result if Congress eliminated the subsidies. Taxpayer behavior would change to some extent upon elimination of the subsidies. *See, e.g.*, JOINT ECON. COMM., 106TH CONG., TAX EXPENDITURES: A REVIEW AND ANALYSIS 1, 8 (Comm. Print 1999). For example, a homeowner might move less frequently if she faced the prospect of capital gains tax on each sale.

and nearly triple what Congress budgeted for the U.S. Department of Housing and Urban Development and all of its programs in 2017.[4] The subsidies are premised on the rationale that homeownership is a good investment for homeowners and also creates spillover benefits for those who live around them (what are known as "positive externalities"[5]) because homeowners take better care of their properties and are more invested and involved in their communities.[6] Therefore, it is a choice that ought to be encouraged.

A great deal of criticism has already been directed at the homeowner subsidies for failing to do what they are ostensibly meant to accomplish. A veritable phalanx of economists, policy analysts, and academics have dissected and assailed the subsidies, contending that they neither increase the country's overall homeownership rate nor cause those who are on the fence about or face financial barriers to purchasing a home to do so.[7] Instead, the primary effect of the subsidies appears to be to encourage those higher income households that would already buy homes to buy larger and more expensive ones.[8] Perversely, they may even drive up home prices in those supply-limited housing markets where home affordability is most problematic.[9] These outcomes are due to some serious design defects in the subsidies and have led to a groundswell of calls for their reform so that they are better engineered to address the home affordability concerns of prospective low and middle income homebuyers.[10]

As this article will contend, the homeowner subsidies are problematic in another way that has attracted much less attention. While homeowner decisions can benefit those other than the homeowner, so too can they impose costs on others ("negative externalities"[11]). For example, a steady exodus of prospective home buyers from less affluent communities to more affluent and exclusive ones can decimate income tax bases and property values in the less affluent communities, making the marginalized populations left behind financially and otherwise much worse off. Home

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[4] *See* U.S. Dept. of Hous. & Urban Dev., *HUD's Proposed 2017 Budget* (2017), https://www.hud.gov/sites/documents/PROPOSEDFY17FACTSHEET.PDF.

[5] A positive externality occurs when one party's actions make another party better off, but the first party is not compensated for causing this benefit. *See, e.g.*, JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 128 (4th ed. 2013).

[6] *See, e.g.*, Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction* 22-24 (Nat'l Bureau of Econ. Research, Working Paper No. 9284, 2002.).

[7] *See infra* Part III.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] A negative externality occurs when one party's actions make another party worse off, but the first party does not bear the cost of doing so. *See, e.g.*, GRUBER, *supra* note 5, at 124.

purchases in newly built developments on greenspace far away from urban job centers can heighten damage to the environment, harming both present and future generations, through increased carbon emissions, decreased biodiversity, and watershed destruction.

Just as a housing decision might have positive and negative consequences for others ("housing externalities"), so are federal policies related to housing concerned with more than simply its availability. To varying degrees and at considerable expense, federal policies act to contain or offset negative housing externalities, especially those that impose significant or concentrated costs on others.[12] These policies are wide-ranging and evolving, and include: (i) ameliorating blight, deterioration and public health threats in disinvested communities, (ii) decreasing economic and racial housing segregation, and (iii) lessening environmental degradation that results from housing choices, while reducing the vulnerability of those who reside in environmental hotspots.[13]

The problem is that the homeowner subsidies are profoundly disconnected from these other policies and the negative housing externalities they seek to contain. The homeowner subsidies are facially neutral with respect to the location and type of home one lives in, rewarding homeownership decisions at large (assuming that a homeowner is affluent enough to benefit from them).[14] So, the subsidies do not aid in ameliorating these negative housing externalities, each of which bears some relationship to homeowner decisions about home location and type. Furthermore, as this article will explain, the subsidies actually encourage to some degree homeowner decisions that exacerbate these externalities.[15] In other words, the government pays for housing consumption that, at best, does little to support and, at worst, actually undermines several of its other key housing related policies.

Why the disconnect? Homeowner decisions are complex. So is the nation's housing market, which actually consists of thousands of much smaller local markets and submarkets that vary, sometimes dramatically, in their strengths and weaknesses. The homeowner subsidies, on the other hand, are simplistic and monolithic. This article offers three explanations for this design: an idealization of homeownership, administrative simplicity, and political intransigence.[16] The end result is that the homeowner subsidies have come to operate like entitlements, reserved primarily for higher income homeowners, rather than strategic investments

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[12] *See infra* Part IV.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *See infra* Part V.

capable of advancing multiple housing objectives. Meanwhile, lacking a demand-side supplement capable of meaningfully influencing homeowner behavior, federal policies meant to address negative housing externalities reflect a half-hearted, crisis management mentality rather than proactively seeking to contain them.

In addition to shining a light on this disconnect, this article explores whether "smarter" homeowner subsidies might be devised to lessen it.[17] Assuming that Congress chooses to continue financially inducing American households to own homes, it seems sensible to ask whether Congress can leverage these inducements to simultaneously encourage choices that impose fewer costs on others. As a starting point, this article offers a definition of smarter subsidies as those that are more precisely targeted, externality sensitive, and capable of adaptation across multiple housing submarkets. It then looks for lessons from the body of public finance research that has emerged on the experiences of state and local government in targeting demand-side tax subsidies to contain similar types of negative externalities.[18] Although success has been mixed and criticism plentiful, this article draws from the research that when these types of subsidies are tailored, limited, variable, and complementary, they can be successful and impactful.

Based on these qualities, this article identifies and scrutinizes three different conceptual legal models for smarter federal homeowner subsidies.[19] These models are: (i) creating a national map of subsidy eligible and ineligible zones based on the relationship between homeowner behavior in those zones and the reduction of negative housing externalities; (ii) offering a collection of a la carte subsidies, each rewarding a specific type of homeowner decision; and (iii) allocating subsidies on a community-by-community or project-by- project basis to support community housing plans and public sector programs that address prescribed negative housing externalities. It is important to emphasize that none of these models need work to the exclusion of improving the performance of homeowner subsidies in making homeownership more affordable. Again, the very question this article grapples with is whether it is possible to engineer the subsidies to simultaneously accomplish multiple housing policy objectives.

Each of these models has advantages, but presents challenges, not least of which follows from trying to accomplish multiple objectives across thousands of different U.S. housing markets.[20] At the same time, the article calls attention to the recent revolution in the quality, quantity, and

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[17] *See infra* Part VI.

[18] *See infra* Part VI.B.

[19] *See infra* Part VI.C.

[20] *See infra* Part VI.D.

accessibility of housing market and property specific real estate data, which is fueling a significant uptick in the sophistication of land use planning at the community level. Those advances may be the best reason to think that smarter federal homeowner subsidies are attainable.

This article closes by suggesting a path forward.[21] Congress should approve a HUD-administered pilot program for targeted homeowner subsidies using the third model, and through it foster community level innovation to identify models that are replicable throughout the country. Considering the significant political and practical challenges to undertaking immediate and wholescale reform of the current homeowner subsidies, a more gradual, less expensive, and pilot-based strategy should also make adoption by Congress more likely. For several practical reasons, and a potential constitutional one, a program like this probably belongs outside of the federal tax code.

This article proceeds as follows. Part II provides a short overview of the three principal homeowner subsidies. Part III summarizes criticism of the subsidies as to the principal rationale for their existence—encouraging and expanding access to homeownership. Part IV examines the subsidies through a different lens by identifying the negative housing externalities that other federal housing-related policies seek to combat and the complete disconnect between the subsidies and containing or offsetting these externalities. Part V introduces the concept of smarter subsidies and explains why the current subsidies miss the mark. Part VI explores in depth how smarter homeowner subsidies might be devised. It examines what research has revealed about the effectiveness of selectively available, demand-side subsidies at the state and local levels, how this might be reflected in the design of federal homeowner subsidies, and the recent advances in real estate data and analytics that may make this feasible. Part VII closes with this article's proposal for a path forward.

II. TAX CODE'S PRINCIPAL HOMEOWNER SUBSIDIES

This article focuses on the three principal tax breaks that the federal income tax code provides directly to homeowners—the mortgage interest deduction, the property tax deduction, and the exclusion from taxable income of capital gain on home sales. The tax code contains other subsidies for homeowners, but none are nearly as expensive nor as broadly utilized as these three.[22] For ease of reference, this article uses the term "homeowner subsidies" to mean just these three subsidies.

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[21] *See infra* Part VI.E.

[22] *See* Benjamin H. Harris, C. Eugene Steuerle & Amanda Eng, *New Perspectives on*

It is also worth noting that the U.S. income tax system provides homeowners a fourth substantial tax break by not taxing the imputed net rental income that results from them living in their own homes. Because the notion of taxing imputed home rental income is viewed as administratively very difficult, politically perilous, and inconsistent with how the tax code treats other imputed rental income, this article does not include it.[23]

As background, below are basic overviews of the three principal subsidies.

A. Mortgage Interest Deduction

Generally speaking, Section 163(h)(2)(D) of the Internal Revenue Code (the "Code") allows homeowners to deduct the interest they pay on their home mortgages from taxable income.[24] The mortgage interest deduction (the "MID") is an exception to the general rule that taxpayers may not deduct interest on personal debt (i.e. debt not attributable to a trade or business, or investment activity).[25] It is the largest of the homeowner subsidies. Congress estimates that the MID alone will cost the federal government $63.6 billion in forgone tax revenue in 2017.[26]

As with most deductions, the MID is subject to numerous statutory clarifications. Most of these are included in the definition of "qualified residence interest," which provides the actual parameters on what is deductible.[27] Qualified residence interest includes interest on debt up to $1,000,000 that is secured by a qualified residence and that is used to acquire, construct, or substantially improve the residence ("acquisition indebtedness").[28] It also includes interest on up to $100,000 in "home equity indebtedness," which is debt secured by a qualified residence and

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Homeownership Tax Incentives, TAX NOTES, Dec. 23, 2013, at 1315, 1317, http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/1001710-New-Perspectives-on-Homeownership-Tax-Incentives.pdf (identifying the cost of the three principal homeowner tax incentives in 2013 as $121.3 billion as compared to $7.8 billion for the cost of the Code's eight other housing related tax expenditures). Examples of other tax code homeowner subsidies include the deduction for premiums for qualified mortgage insurance and the exclusion of income attributable to the discharge of principal residence acquisition indebtedness.

[23] *See, e.g.*, Steve R. Johnson, *Imputed Rental Income: Reality Trumps Theory*, *in* CONTROVERSIES IN TAX LAW: A MATTER OF PERSPECTIVE 65 (Anthony C. Infanti ed., 2015).

[24] 26 U.S.C. § 163(h)(2)(D) (2017).

[25] *Id.* § 163(h).

[26] 2017 TAX EXPENDITURE BUDGET, *supra* note 3, at 32.

[27] 26 U.S.C. § 163(h)(3) (2017).

[28] *Id.* § 163(h)(3)(B)(ii). The limitation if the taxpayer is a married individual filing a separate return is $500,000.

used for any other purpose.[29] "Qualified residence" means the taxpayer's principal residence, as well as up to one additional home the taxpayer uses as a residence (e.g. a vacation or weekend home).[30]

An important feature of the MID is that it is an itemized deduction.[31] This imposes some very significant limitations on who can claim it. First, in order to take any deduction, a person must have taxable income from which to subtract the deduction.[32] Many U.S. households fall below the income thresholds for paying any federal income tax and, thus, cannot utilize the MID.[33] Second, because the Code automatically provides all taxpayers with a standard deduction that can be taken in lieu of itemized deductions, an itemized deduction is only worthwhile to those taxpayers whose total itemized deductions exceed their standard deduction.[34] For that reason, only about 30% of taxpayers itemize, most of whom are in the top income brackets.[35]

At the very high end of the income spectrum, the total amount of itemized deductions a taxpayer can claim is gradually reduced pursuant to what is commonly known as the Pease limitation.[36] The likelihood of the Pease limitation making the mortgage interest deduction entirely worthless, however, is virtually non-existent for all but the very richest of itemizers who would seek to claim it.[37]

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[29] *Id.* §163(h)(3)(C). Additional limitations apply to the definition of home equity indebtedness. It cannot exceed the difference between the fair market value of the home minus the acquisition indebtedness on the home. *Id.* § 163(h)(3)(C)(i). In the case of a separate return filed by a married individual, the limitation on home equity indebtedness for which interest is deductible is $50,000. *Id.* § 163(h)(3)(C)(ii).

[30] *Id.* § 163(h)(4)(A).

[31] *See id.* § 63(d).

[32] *See id.* § 63(a).

[33] Approximately 43% of the population, many of whom are lower income, did not owe any federal income taxes for 2013. Roberton Williams, *Who Doesn't Pay Federal Taxes?*, TAX POL'Y CTR. (Aug. 29, 2013), http://www.taxpolicycenter.org/resources/video-who-doesnt-pay-federal-taxes.

[34] *See* 26 U.S.C. § 63(c) (2017).

[35] SEAN LOWRY, CONG. RESEARCH SERV., R43012, ITEMIZED TAX DEDUCTIONS FOR INDIVIDUALS: DATA ANALYSIS 2 (2014), https://fas.org/sgp/crs/misc/R43012.pdf.

[36] 26 U.S.C. § 68 (2017).

[37] For fiscal year 2016, the Pease limitation only applied to taxpayers with an adjusted gross income (AGI) of more than $311,300 if married filing jointly or $259,400 if single (the "baseline"). INTERNAL REVENUE SERV., TAX GUIDE 2016, FOR INDIVIDUALS 205 (2016). Most taxpayers affected by the Pease limitation see their itemized deductions reduced by 3% of the difference between the taxpayer's adjusted gross income and this baseline. *See* 26 U.S.C.S. § 68(a)(1) (2017).

B. Property Tax Deduction

The Code also allows homeowners to deduct property taxes assessed on their homes from taxable income. The real property tax deduction is part of a broader deduction that the Code allows for most taxes a taxpayer must pay to state and local governments, which this article will refer to by its commonly known acronym "SALT" (deduction for State and Local Taxes).[38] Congress estimates that the real property tax deduction component of SALT will cost the federal government $33.3 billion in forgone tax revenue in 2017.[39]

Carved out of SALT are taxes assessed against a particular property for a benefit understood to increase that property's value, like the installation of a sidewalk or an irrigation system on that property.[40] But, so long as the real property tax is levied for the general public welfare, the taxpayer may deduct it.[41]

As with the mortgage interest deduction, SALT is an itemized deduction, and thus only claimed by those who have federal taxable income and also have enough qualifying expenses to make itemizing deductions worthwhile.[42] SALT may also be reduced for high income taxpayers by the Pease limitation, though as with the MID, this is only even potentially an issue for very high income households.[43]

SALT is potentially reducible in another way, which for the most part does not apply to the MID.[44] SALT is added back into taxable income when a taxpayer is subject to the Code's alternative minimum tax ("AMT").[45] The AMT is a parallel income tax system that applies an alternative tax rate to a broader base of income of a wealthier taxpayer whose taxable income under the normal rules has been so reduced by exemptions and deductions that her effective tax rate has reached an unacceptable level.[46] About 5% of

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[38] 26 U.S.C. § 164(a) (2017) (identifying "state and local, and foreign, real property taxes" as includable within the deduction).

[39] 2017 TAX EXPENDITURE BUDGET, *supra* note 3, at 32.

[40] 26 U.S.C. § 164(c)(1) (2017); 26 C.F.R. § 1.164-4(a) (2017).

[41] *See* 26 C.F.R. 1.164-3(b) (2017).

[42] *See* 26 U.S.C. § 63(d) (2017).

[43] *See* Williams, *supra* note 33.

[44] The alternative minimum tax does not apply to amounts deducted as acquisition indebtedness, which is the more substantial component of the MID. *See* 26 U.S.C. § 56(e) (2017). Interest on home equity indebtedness is, however, added back in to taxable income when calculating the AMT.

[45] *Id.* § 55.

[46] NORTON FRANCIS ET AL., TAX POL'Y CTR. BRIEFING BOOK (Peter Passell et al. eds., 2016), http://www.taxpolicycenter.org/briefing-book/how-does-deduction-state-and-local-taxes-work. (ebook).

taxpayers are subject to the AMT,[47] and it is good bet that many of them see the value of their SALT deduction reduced.[48] Nevertheless, this is far less than the total percentage of taxpayers claiming SALT, which is virtually all itemizers.[49]

C. Exclusion of Capital Gain on Home Sales

Section 121 of the Code also allows homeowners to exclude from federal income tax up to $250,000 (or $500,000 if married and filing jointly) of the gain they realize when selling their principal residences.[50] Forgoing tax on this income will cost the federal government an estimated $32.1 billion in 2017.[51]

Certain qualifications apply, of course. A taxpayer can use this exclusion no more than once every two years.[52] Also, generally speaking, the taxpayer must have owned and used the home in question as her principal residence for at least two of the five years prior to sale; there are, however, several statutory permutations of this requirement to address circumstances like subsequent marriages, spouses residing in separate homes, time spent in uniformed services, etc.[53]

As an exclusion from income rather than a deduction, Section 121 applies more broadly than a deduction. Most home sellers benefit from it. This is because the gain, subject to the monetary limits identified above, is not calculated as part of taxable income in the first place, and therefore is not subject to the limitations imposed on itemized deductions. For the same reason, it is not subject to offset by the Pease limitation or the AMT.

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[47] *T17-0149—Characteristics of Alternative Minimum Tax (AMT) Payers, 2016 – 2018 and 2027*, TAX POL'Y CTR. (Apr. 28, 2017), http://www.taxpolicycenter.org/model-estimates/baseline-alternative-minimum-tax-amt-tables-april-2017/t17-0149-characteristics.

[48] FRANCIS, ET AL., *supra* note 46.

[49] *See* CONG. BUDGET OFFICE, THE DEDUCTIBILITY OF STATE AND LOCAL TAXES 2 (2008).

[50] 26 U.S.C. § 121 (2017).

[51] 2017 TAX EXPENDITURE BUDGET, *supra* note 3, at 32. It is worth a reminder here that the tax revenue gained from eliminating Section 121, in particular, would fall short of the tax revenue currently forgone. It is reasonable to expect that fewer home sales would occur without the home sale capital gain exclusion. *See id.*

[52] 26 U.S.C. § 121(b)(3) (2017).

[53] *Id.* § 121.

III. RELATIONSHIP OF SUBSIDIES TO ENCOURAGING AND EXPANDING ACCESS TO HOMEOWNERSHIP

Judging by their origins, the homeowner subsidies are a motley crew. The mortgage interest deduction originates from a provision in the nation's original income tax code that at one time made interest on all personal debt deductible.[54] The property tax deduction is part of the broader deduction for most state and local taxes, which is available to homeowners and non-homeowners alike and is arguably separately justified as shielding taxpayers from the apparent inequity of paying income tax on dollars they must pay in taxes.[55] Even the exclusion of home sale capital gains did not originate from a global effort to promote homeownership. Rather, it came about piecemeal, through gradual accretion to the notion that gains realized on the sale of one's home can bring about large, untimely, and administratively challenging tax burdens, and that trying to relieve this tax only in certain circumstances causes distortions in the behavior of other homeowners and creates inequities.[56]

Origins notwithstanding, all three subsidies are now commonly justified as encouraging homeownership. The mortgage interest deduction survived the 1986 overhaul of the Code, when Congress repealed the rest of the personal debt interest deduction, because proponents spun it as essential to preserving the American Dream of homeownership.[57] SALT has been the object of multiple unsuccessful repeal efforts, and in each case Congress has considered carving out the property tax deduction component, in recognition of its link to homeownership.[58] And the periodic expansions of the home sale capital gains exclusion clearly would not have been possible without the understanding that homeownership, as a form of saving and investment, was something Congress sought to promote. Year after year,

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[54] This deduction may have resulted from Congress wishing to save taxpayers from what was then perceived as the difficult task of distinguishing between personal and profit-seeking debt. *See generally* Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233 (2010).

[55] MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 410 (Foundation, 7th ed. 2013).

[56] *See generally* Lily Kahng, *Path Dependence in Tax Subsidies for Home Sales*, 65 ALA. L. REV. 187 (2013).

[57] *See* Ventry, Jr., *supra* note 54.

[58] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2116. *See also*, Aaron Lorenzo & Rachel Bade, *First GOP Tax Reform Feud Erupts Over State, Local Tax Break*, POLITICO (Sept. 28, 2017), http://www.politico.com/story/2017/09/28/gop-tax-reform-feud-state-local-tax-break-243285.

Congress reports all three subsidies as housing expenditures, making no secret of what it believes they are meant to do.[59]

There is some irony then in the significant doubt cast on the link between the homeowner subsidies and encouraging or expanding access to homeownership. The MID, perhaps because it is the largest of the subsidies, has received the greatest scrutiny. Most strikingly, several policy experts have proclaimed that the MID has had no discernible effect on the homeownership rate.[60] Viewed over a half century, the American homeownership rate has remained relatively constant, even though the value of the MID has fluctuated significantly at times, indicating that an increased level of MID subsidy doesn't cause a greater percentage of Americans to become homeowners.[61]

This is not to say that the MID has no impact on home-buying decisions. In fact, numerous studies have shown that the MID does increase the amount Americans spend on housing.[62] But its primary impact is on high-income households who increase their housing consumption by buying larger and more expensive homes than they might have otherwise.[63] These are households that would likely already buy homes and thus don't need subsidies to encourage them to do so.[64] Low and middle income households, which are those likely to be on the fence between renting and buying a home, are by comparison largely unaffected by the MID.[65]

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[59] *See* 2017 TAX EXPENDITURE BUDGET, *supra* note 3.

[60] *See, e.g.*, Glaeser & Shapiro, *supra* note 6, at 3; Christian A. L. Hilber & Tracy M. Turner, *The Mortgage Interest Deduction and Its Impact on Homeownership Decisions*, 96 REV. ECON. & STAT. 618 (2013); Jonathan Gruber, Amalie Jensen & Henrik Kleven, *Do People Respond to the Mortgage Interest Deduction? Quasi-Experimental Evidence from Denmark* (Nat'l Bureau of Econ. Research, Working Paper 23600, 2017).

[61] Glaeser & Shapiro, *supra* note 6.

[62] *See* Andrew Hanson, *Size of Home, Homeownership and Mortgage Interest Deduction*, 21 J. HOUS. ECON. 195 (2012); Jeremy Horpedahl & Harrison Searles, *The Home Mortgage Interest Deduction*, MERCATUS CTR.: MERCATUS ON POL'Y SERIES (Jan. 8, 2013), https://www.mercatus.org/publication/home-mortgage-interest-deduction; Dean Stansel & Anthony Randazzo, *Unmasking the Mortgage Interest Deduction: Who Benefits and by How Much? 2013 Update*, REASON FOUND. (Dec. 18, 2013)), http://reason.org/news/show/mortgage-interest-deduction-benefit.

[63] Hanson, *supra* note 62; Horpedahl & Searles, *supra* note 62; Jeremy Horpedahl & Harrison Searles, *The Home Mortgage Interest Deduction*, MERCATUS CENT.: MERCATUS ON POL'Y SERIES (Jan. 8, 2013), https://www.mercatus.org/publication/home-mortgage-interest-deduction; Andrew Hanson, *Size of Home, Homeownership and Mortgage Interest Deduction*, 21 J. OF HOUS. ECON. 195 (2012).

[64] Hanson, *supra* note 62; Horpedahl & Searles, *supra* note 62. *See also*, ERIC TODER, ET AL., REFORMING THE MORTGAGE INTEREST DEDUCTION (2010), http://www.urban.org/sites/default/files/publication/28666/412099-reforming-the-mortgage-interest-deduction.pdf.

[65] *Id.*

The explanation for why the MID produces these results is no great mystery and has received considerable attention. The MID is a classic example of an upside-down subsidy. As discussed in Part II, the only homeowners who can take advantage of the MID are those who have taxable liability to offset and have sufficient qualifying expenses (mortgage interest, income taxes, charitable contributions, etc.) to make itemizing deductions worthwhile, as opposed to taking the standard deduction.[66] These requirements alone make nearly all of the lower two income quintiles of American households ineligible for the MID and leaves only roughly 30% of taxpayers, primarily those in the upper two income quintiles, as potential claimants.[67]

Furthermore, even among claimants, tax-code deductions are significantly more valuable to higher-income taxpayers than they are to middle and lower income taxpayers. This is partly due to the fact that a taxpayer's income is not taxed at a uniform rate, but rather at a series of escalating marginal rates that increase as a taxpayer's income increases.[68] The value of a deduction depends on the rate at which the deducted income would have been taxed. To illustrate, a married couple (filing jointly) with $280,000 in taxable income and $10,000 in deductible mortgage interest reduces their taxable income to $270,000, which is income taxed at 33%.[69] Accordingly, they receive a tax reduction of $3,300. An otherwise identical couple with $70,000 in taxable income also deducts $10,000, but gets a tax reduction of only $1,500 because this income is in the 15% tax bracket.[70] Add to this that higher income households own more expensive homes and so usually have larger mortgages and more mortgage interest to deduct, and it is little wonder that the lion's share of the benefits from the MID go to high income households.[71]

Although it has received less isolated scrutiny than the MID, the property tax component of SALT has similar consequences.[72] This is because SALT

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[66] Williams, *supra* note 33. *See* INTERNAL REVENUE SERV., TAX GUIDE 2016 FOR INDIVIDUALS 205 (2016).

[67] *See* Harris, Steuerle & Eng, *supra* note 22, at 1318-19. *See also* Eric J. Toder, Benjamin H. Harris & Katherine Lim, *Distributional Effects of Tax Expenditures*, TAX POL'Y CTR. 9 (July 21, 2009), http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/411922-Distributional-Effects-of-Tax-Expenditures.PDF.

[68] *See* GRAETZ & SCHENK, *supra* note 55, at 23-24.

[69] *See 2016 Federal Tax Rates, Personal Exemptions, and Standard Deductions*, US TAX CTR. (last visited July 24, 2017), https://www.irs.com/articles/2016-federal-tax-rates-personal-exemptions-and-standard-deductions.

[70] *See id.*

[71] Toder, Harris & Lim, *supra* note 67.

[72] *Id. See also*, Harris, Steuerle & Eng, *supra* note 22, at 1319.

is nearly identical in design to the MID and likewise an upside-down subsidy. Unsurprisingly, its benefits also inure disproportionately to those who have higher income and it is much less valuable to homeowners who have less income.[73]

The exclusion of home sale capital gains is a different animal than the deductions. But the benefits of this subsidy also flow primarily to higher income individuals. First, households in the 15% tax bracket and below pay no capital gains tax and, thus, receive no benefit from this subsidy.[74] For those not automatically exempt from this tax, marginal tax brackets play less of a role than with MID and SALT, since most taxpayers pay tax on capital gains at a rate of 15%.[75] However, those with very high incomes would pay capital gains tax at a 20% rate and so the break is larger at the high end of the income scale.[76] Furthermore, wealthier taxpayers tend to own more expensive homes, which, all other factors equal, generate larger gain.[77] Finally, wealthier homeowners tend to live in more exclusive and wealthier neighborhoods, where home values appreciate at greater rates and so, again, receive larger amounts of tax-free gain upon re-sale.[78]

Not only are the homeowner subsidies by design primarily beneficial to upper income households, they actually tend to inflate home prices, particularly in areas where housing supply is limited, and thus, paradoxically, often reduce home affordability. Several economists have studied whether the MID, in particular, reduces the cost of homeownership for prospective home buyers or is anticipated by the housing market and simply absorbed ("capitalized") into higher home prices.[79] The answer

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[73] Harris, Steuerle & Eng, *supra* note 22, at 1319, 1328 (referencing the Urban-Brookings Tax Policy Center Microsimulation Model at Table 1). *See* Toder, Harris, & Lim, *supra* note 67.

[74] *See* 26 U.S.C. § 1(h) (2014) (referring to the tax imposed on capital gains). *See also Topic Number: 409 - Capital Gains and Losses*, IRS: TAX TOPICS, https://www.irs.gov/taxtopics/tc409.html (last updated Sept. 21, 2017).

[75] *Id. Topic Number: 409 - Capital Gains and Losses*, IRS: TAX TOPICS, https://www.irs.gov/taxtopics/tc409.html (last updated Sept. 21, 2017).

[76] *Id.* Generally speaking, for 2016 returns, the 20% rate applies to single taxpayers with taxable income $415,050 or greater, and married taxpayers filing jointly with taxable income $466,950 or greater. *Id.*

[77] *See* Harris, Steuerle, & Eng, *supra* note 22, at 1319.

[78] *See, e.g.*, David Albouy & Mike Zabek, *Housing Inequality*, (Nat'l Bureau of Econ. Research, Working Paper No. 21916, 2016). *See also* Jim Tankersley & Ted Mellnik, *Exclusive Neighborhoods, Exclusive Recovery*, WASH. POST (May 4, 2016), https://www.washingtonpost.com/graphics/business/wonk/housing/charlotte/.

[79] *See* Hilber & Turner, *supra* note 60. *See also* DENNIS R. Capozza, Richard K. Green, & Patrick H. Hendershott, *Taxes, Mortgage Borrowing and Residential Land Prices in* ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM 171-98 (Henry J. Aaron & William G. Gale eds., 1996); Joseph Gyourko & Richard Voith, *The Tax Treatment of Housing and its*

appears to be that it depends. Where the supply of housing is limited, due to a combination of regulations that hamper construction and geographic factors, and housing demand is high, home prices fully capitalize the subsidy.[80] So the subsidy does not act to lower homeownership costs and instead increases the bar for lower income, down payment constrained households entering the market in those places where they most need a subsidy.[81]

In markets with lax land use regulations, fewer geographic barriers, and/or lower demand, the MID is not fully capitalized and does reduce homeownership costs.[82] But, as explained above, even in these areas the MID inures primarily to the benefit of high income households who would likely already purchase a home and, therefore, does not really improve homeownership attainment.[83]

In sum, as it relates to increasing homeownership opportunities, the track record of the homeowner subsidies is abysmal. It is more accurate to say that the subsidies reward the homeownership investments of certain homeowners, most of whom need no incentive to become homeowners, than to say that the subsidies encourage or expand access to homeownership.

IV. RELATIONSHIP OF SUBSIDIES TO NEGATIVE HOUSING EXTERNALITIES AND RELATED POLICIES

The homeowner subsidies are problematic in another way that has drawn significantly less attention. Decisions as to where and in what type of home a household lives have consequences not only for that household, but the surrounding community and society at large. The benefits to and costs on others that result from homeowner decisions can be thought of as a category of "housing externalities." To some degree and at considerable expense, the federal government intervenes through policies it adopts to contain or offset negative housing externalities, especially those that impose significant or concentrated costs on others.

As this Part will demonstrate, the homeowner subsidies, at best, provide very little support to these other housing related policies. At worst, they actually exacerbate the negative externalities that the policies try to contain and, in this sense, undermine these policies. Moreover, in the absence of a

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Effects on Bounded and Unbounded Communities (Fed. Res. Bank of Phila., Working Paper No. 98-23, 1998).

[80] *See* Hilber & Turner, *supra* note 60.

[81] *Id.*

[82] *Id.*

[83] *Id.*

demand-side supplement capable of meaningfully encouraging homeowner behavior that reduces negative housing externalities, the policies themselves are not very effective. This Part identifies several categories of negative housing externalities, the conditions that give rise to them, the federal policies that seek to contain them and their relationship (or, in actuality, the lack thereof) with the current homeowner subsidies.

A. Ameliorating Blight, Deterioration, and Public Health Threats in Disinvested Communities

1. Background

Communities throughout the country grapple with the collateral damage that results from chronic disinvestment.[84] Community disinvestment is a process by which residents, businesses, and other financially mobile economic actors extricate themselves from a community they perceive as deteriorating and too risky in which to invest capital, leading to further decline and, in some cases, large-scale abandonment.[85]

Illustrative of this phenomenon is the now familiar story of Midwestern and Northeastern "legacy" cities.[86] These are places where industry and manufacturing once flourished and supported thriving residential communities.[87] Persistent adverse economic forces subsequently turned the tide in these cities, causing the loss of many large employers and good paying jobs, lowering the overall standard of living, and stemming population growth.[88] As their economic fortunes turned for the worse, other forms of capital also fled. Highways, readily available mortgages, and a quest for greener, roomier, and more homogenous communities catalyzed the flight of more affluent residents, often times to newly-created suburbs just beyond the boundaries of legacy cities.[89] As more financially mobile residents left and new ones have looked elsewhere, stores have shuttered, community institutions like hospitals and schools have closed or consolidated, and banks have stopped lending.[90] Compounded over time, these decisions can dramatically shrink a legacy city's income base and

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[84] *See, e.g.*, Arthur J. Naperstek & Dennis Dooley, *Countering Urban Disinvestment Through Community-Building Initiatives*, 42 SOC. WORK 506 (1997).

[85] *See, e.g., id.*

[86] *See* ALAN MALLACH & LAVEA BRACHMAN, REGENERATING AMERICA'S LEGACY CITIES (2013).

[87] *See id.*

[88] *Id.* at 2.

[89] *Id.*

[90] *Id.* at 4-5.

decrease its property values, meaning local government receives less tax revenue and struggles to provide basic services. At the same time, sustaining an economically needier community and aging infrastructure increases the demands on government.

Left unchecked, disinvestment can cause a full-fledged, downward community spiral, spurring the remaining mobile capital to leave, overwhelming local resources and accelerating physical deterioration. Those residents who cannot afford to leave are left behind. More recently, older suburbs closest to the urban cores of legacy cities are encountering the next wave of disinvestment as developers and economically mobile homebuyers push out one ring farther to brand new suburbs and exurbs, or selectively re-populate more trendy sections of urban cores.[91]

This pattern of historically short periods of community settlement, expansion and abandonment in legacy cities is only one narrative (albeit a common one) of community disinvestment in the United States. A bird's eye view of the country reveals the wide-spread prevalence of disinvesting and disinvested communities, often within close proximity of communities that are prospering.[92] By one measurement, 22.1% of U.S. census tracts have significantly depressed property values and predominantly low income populations, which are hallmarks of community disinvestment.[93] So-called "middle neighborhoods" constitute another large category of communities that are less distressed at this point, but sit on the precipice of disinvestment due to their increasingly poorer and older populations, and aging housing stock.[94]

The physical condition of housing stock is a particularly visible and jarring manifestation of the consequences and costs of community disinvestment. Disinvested communities must manage increasing stockpiles

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[91] ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 5-9 (2014).

[92] *See, e.g.*, *Heat Maps*, TRULIA, https://www.trulia.com/home_prices/ (last visited July 28, 2017); *see also* Albouy & Zabek, *supra* note 78; Martin Burch et al., *Housing Prices Still Falling for Working-Class Families*, WALL ST. J. (June 23, 2015), http://perma.cc/NM6R-B6KC; Albouy & Zabek, *supra* note 78; *The 2016 Distressed Communities Index*, ECON. INNOVATION GROUP, http://eig.org/wp-content/uploads/2016/02/2016-Distressed-Communities-Index-Report.pdf (last visited Nov. 11, 2017).

[93] Neighborhood Homes Investment Act Coalition, Neighborhood Homes Tax Credit Presentation, Ohio Presentation (July 20-21, 2017), https://www.dropbox.com/s/048w8v0mygpihmt/NHTC_Ohio_presentation_FINAL.pdf?dl=0.

[94] *See generally* Ira Goldstein et al., *Demographics and Characteristics of Middle Neighborhoods in Select Legacy Cities*, *in* ON THE EDGE: AMERICA'S MIDDLE NEIGHBORHOODS ch. 3 (Paul Brophy ed., 2016) (indicating that between 37 and 51% of residents in sample legacy cities, like Baltimore, Detroit, Milwaukee and Philadelphia, live in middle neighborhoods).

of outdated, orphaned, devalued, and deteriorating homes. Direct costs associated with these properties include increased code enforcement, boarding, property maintenance (grass and trash), fire and police runs, and, ultimately, when they have reached an advanced stage of decay, demolitions.[95] Meanwhile, local government loses property tax revenue necessary to cover the direct costs as these properties deteriorate and lose value, the owners stop paying the taxes altogether, and/or the structures on them are demolished.[96] Then, there is the negative spillover effect that vacant and deteriorating homes have on the values of surrounding homes, which not only further reduces property tax revenue for the city, but also depletes the wealth of neighbors, sometimes dramatically.[97]

At work is severe market failure. Disinvestment decisions drive down property values to the point that they can no longer support private investment. Remaining homeowners hesitate to make improvements to their homes out of a concern they will not recoup these investments.[98] Developers, lenders, and prospective home buyers view rehabbing viable homes or demolishing and replacing those that are blighted as cost prohibitive or too risky, and so new capital also dries up.[99]

The costs of supporting flailing housing markets typically prove too much for local actors to bear alone, and the federal government steps in. In 1965, Congress created a cabinet level agency, the U.S. Department of

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[95] CMTY. RESEARCH PARTNERS & REBUILD OHIO, $60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES v (2008), https://www.issuelab.org/resources/3351/3351.pdf?download=true.

[96] *Id.* (studying eight Ohio cities, prior to the national foreclosure crisis that drastically increased property vacancy and deterioration in those cities, and "conservatively" estimating the annual costs of vacant and abandoned properties to those cities at $64 million—nearly $15 million in city service costs and over $49 million from lost tax revenues from demolitions and tax delinquencies).

[97] DAN IMMERGLUCK, CMTY. PROGRESS, THE COST OF VACANT AND BLIGHTED PROPERTIES IN ATLANTA: A CONSERVATIVE ANALYSIS OF SERVICE AND SPILLOVER COSTS 23 (2015) (estimating "conservatively" the costs of vacant and blighted properties in Atlanta to city government at between $2.6 million and $5.7 million annually along with a one-time cost to single family property values of $153 million).

[98] *See generally* Susie Chung, *The Geography of Home Improvement Activity: A Metropolitan-Level Analysis of Remodeling Expenditures During the 2000s*, JNT. CTR. FOR HOUS. STUD. (2011), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w11-6_chung.pdf.

[99] One example of this is known as the "appraisal gap." Due to a home appraisal that comes in at a price that is lower than what was agreed upon by a seller and buyer, a mortgage lender is unwilling to lend a sufficient amount to allow the transaction to move forward. *See, e.g.*, Brena Swanson, *Homeowner Expectations and Appraisal Values Divided as Gap Widens*, HOUSINGWIRE (Mar. 8, 2016), https://www.housingwire.com/articles/36481-homeowner-expectations-and-appraisal-values-divided-as-gap-widens.

Housing and Urban Development (HUD), largely as a response to disinvestment in U.S. cities and a heightening concern for those left to live in them.[100] While HUD has overseen an alphabet soup of different programs over a half century, its longest standing and primary program for addressing disinvestment is the Community Development Block Grant (CDBG) program.[101] Through CDBG, HUD annually transfers billions of federal dollars to cities, urban counties, and states, much of which goes to trying to stabilize and revitalize their disinvested housing markets.[102] Eligible expenses include strategic property acquisition, housing construction and rehabilitation, housing code enforcement, and community planning.[103]

Ultimately, however, the amount of assistance HUD provides is small compared to the scope of the problem.[104] Furthermore, CDBG rules effectively restrict funding to areas with high poverty and, thus, already highly distressed housing markets; in so doing, these rules exclude communities that are starting to deteriorate, but where intervention could enable a turnaround.[105] This is emblematic of the crisis-management mentality the federal government takes to disinvestment. This mentality was further exemplified by the Congressional response to communities hit hardest during the country's recent foreclosure crisis, a disinvestment event of mammoth proportions. Congress approved over $7 billion in Neighborhood Stabilization Program funds, administered through CDBG, over a five year period to try and stop the most severe bleeding in housing markets afflicted by concentrated numbers of foreclosures and vacancies.[106] But it refused to extend the program beyond this point, even though few of

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[100] Jill Khadduri, *The Founding and Evolution of HUD: 50 Years, 1965–2015* IN HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 7-8, 16 (2015).

[101] *Id.* at 20-21. The CDBG program was established by the Housing and Community Development Act of 1974 (P.L. 93-383) and codified, as amended, at 42 U.S.C. 5305.

[102] *See generally* George Galster et al., Measuring the Impact of Community Development Block Grant Spending on Urban Neighborhoods, Housing Policy Debate 15:4, 903-34 (Mar. 2004), https://pdfs.semanticscholar.org/0224/860d0b954e996986b18c728bf459dd1fd308.pdf.

[103] *Chapter 2: Activity Selection and Implementation*, in BASICALLY CDBG FOR ENTITLEMENTS, HUD EXCHANGE (May 2014), https://www.hudexchange.info/resources/documents/Basically-CDBG-Chapter-2-Activity.pdf.

[104] Goldstein et al., *supra* note 94, at 24.

[105] PAUL C. BROPHY ET AL., RETOOLING HUD FOR A CATALYTIC FEDERAL GOVERNMENT, A REPORT TO SECRETARY SHAUN DONOVAN 112 (Penn Inst. for Urb. Res., 2009).

[106] Paul A. Joice, *Neighborhood Stabilization Program*, 13 CITYSCAPE: A J. OF POL'Y DEV. AND RES. 135, 135 (2011).

the communities funded had begun to show signs of a meaningful turnaround.[107]

To this point, this section has focused on the housing market dysfunction that follows from community disinvestment, while ignoring the associated human costs. These are in fact quite staggering. Older communities with large numbers of distressed and vacant residential properties have remarkably higher incidences of public health issues, like lead paint poisoning among children,[108] asthma,[109] chronic health conditions,[110] and other environmental hazards.[111] They also correlate strongly with higher incidences of violent crime.[112] Local governments rely on a stable residential tax base to fund critical infrastructure like school systems, water line maintenance, sewage and storm water systems, road repair, and public transit. When tax revenue shrinks, all of these suffer.[113]

The federal government routinely directs billions of dollars annually to communities struggling to meet these types of costs through a wide array of programs.[114] Again, it is also the ultimate backstop when a crisis that traces

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[107] *See e.g.*, Gail R. Chaddock, *House looks to cut $62 billion for distressed homeowners, properties*, CHRISTIAN SCI. MONITOR, Mar. 11, 2011, https://www.csmonitor.com/USA/Politics/2011/0311/House-looks-to-cut-62-billion-for-distressed-homeowners-properties. Later efforts to extend and expand the Neighborhood Stabilization Program, via the Project Rebuild Act of 2013, stalled in Congress.

[108] *See e.g.*, *Exploring the Relationship Between Vacant and Distressed Properties and Community Health and Safety*, CTR. ON URB. POVERTY & CMTY. DEV. (June 7, 2017), http://povertycenter.case.edu/wp-content/uploads/2017/06/vacant_distressed_props_comm_health_safety.pdf [hereinafter *Distressed Properties Study*]; *A Hidden Problem: Lead-Poisoned Children in the U.S.*, CAL. ENVTL. HEALTH TRACKING PROGRAM (Apr. 2017), http://www.cehtp.org/page/lead/lead-report.

[109] *See* Jonathan J. Sheffield, *Resident Health and HUD's Choice Neighborhoods Initiative*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 117, 119 (2014).

[110] *See* Susan J. Popkin, *A Glass Half-Empty? New Evidence from the HOPE VI Panel Study*, 20 HOUS. POL'Y DEBATE 43 (2010).

[111] *See* Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 HARV. L. & POL'Y REV. S1, S1 (2017).

[112] *See Distressed Properties Study*, *supra* note 108; *see also* Erica Raleigh & George Galster, *Neighborhood Disinvestment, Abandonment, and Crime Dynamics*, 37 J. URB. AFF. 397 (2015).

[113] *See e.g.*, Jonathan Masters, *Why the Fiscal Health of States and Cities Matters*, COUNS. ON FOREIGN REL.: RENEWING AM. (Oct. 2, 2012), https://www.cfr.org/backgrounder/why-fiscal-health-states-and-cities-matters.

[114] Some examples include HUD's Lead-Based Paint Hazard Control Program, the Department of Transportation's Transportation Investment Generating Economic Recovery grant program, and the Department of Education's Title I and Title IV funding for low income school systems.

back to disinvestment arises. As simply one example, cost-cutting to meet municipal general fund shortfalls, recently resulted in contamination of the water supply of Flint, Michigan, long viewed as a poster child for urban disinvestment. With the city teetering on the brink of bankruptcy, Congress stepped in with $120 million to help replace lead water supply lines in all of Flint's homes and to make an initial down payment on the long-term health issues expected from the widespread lead poisoning of the city's residents that occurred.[115]

This is to say nothing of the considerable dollars Congress has spent or forgone in attempts to revitalize disinvested communities through economic development. These initiatives have varied from decade to decade and included Empowerment Zones, Enterprise and Renewal Communities, and New Market Tax Credits.[116] For the most part, they have sought to leverage federal grants and tax breaks to attract private capital to invest in businesses in distressed neighborhoods in order to put local residents to work and spark community reinvestment.[117]

2. *Relationship to Homeowner Subsidies*

As some of the federal interventions described above suggest, what disinvestment has wrought, the reinvestment of private dollars could help remedy. An influx of new homeowners would reduce stockpiles of vacant structures, invest capital in rehabilitated or new homes, increase tax revenue, and, by extension, offset negative housing externalities associated with disinvestment.[118] This has proven to be the case in communities throughout the country where disinvestment wrecked less damage and some combination of market dynamics and forward looking policies created the right mix of circumstances for reinvestment to occur.[119] It is also the

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[115] Todd Spangler, *Congress Approves at Least $120M for Flint Water Fix*, USA TODAY (Dec. 10, 2016, 8:04 AM), http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/12/10/congress-flint-water-funding/95243816/.

[116] *See* Linda Schakel, *Empowerment Zones and Enterprise and Renewal Communities*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICY MAKERS 117 (Roger A. Clay & Susan Jones eds., 2009); Herbert F. Stevens, *New Markets Tax Credits*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICY MAKERS 161 (Roger A. Clay & Susan Jones eds., 2009).

[117] *Id.*

[118] MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 14 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/gentrification.pdf.

[119] *Id.*

philosophy Congress has adhered to in creating federal tax breaks for businesses to locate in disinvested communities.

And yet the homeowner subsidies are, at least on their face, entirely neutral in this regard. They reward an investment in homeownership equally no matter where it occurs, whether it is in a thriving residential market or one that is highly disinvested. The result is that although the federal government absorbs significant costs in containing damage to and ostensibly laying the foundation for housing market recoveries in disinvested communities, its primary mechanisms for encouraging households to invest in homes do nothing to encourage prospective homebuyers to purchase there.

Furthermore, although facially neutral, the reality is that the subsidies to a large extent support homeowners who live in affluent, non-disinvested communities. Numerous studies have demonstrated that the geographic distribution of the subsidies is strongly tilted towards areas where housing prices, income levels, and homeownership rates are high[120]—the hallmarks of a healthy housing market. This is unsurprising considering the design of the subsidies. Home sale gains are more likely to occur (and in greater amounts) in robust housing markets, and, therefore, the savings yielded by excluding them from capital gains tax will also be greater.[121] Also, home prices are higher in stronger housing markets. Those with the most expensive homes not only are likely to have larger mortgages and higher property taxes, but also sit in higher marginal tax brackets and, therefore, receive a greater tax benefit for each dollar of mortgage interest and property tax they deduct.

Conversely, homeowners in disinvested communities will, generally speaking, have lower mortgage interest and property tax costs (due to the lower values of their homes), sit in lower marginal tax brackets, and yield smaller gains upon selling their homes, and, thus, yield less benefit from the homeowner subsidies. An exception to this rule exists for those who own more expensive homes in disinvested communities that have higher local property tax rates due to greater municipal costs. In this way, the property tax deduction may alleviate a barrier to homeownership in disinvested communities. But this subsidy is not designed to achieve this end and so its

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[120] *See, e.g.*, Fiscal Federal Initiative, *The Geographic Distribution of the Mortgage Interest Deduction*, THE PEW CHARITABLE TRUSTS (Apr. 30, 2013), http://www.pewtrusts.org/en/research-and-analysis/reports/2013/04/30/the-geographic-distribution-of-the-mortgage-interest-deduction; Joseph Gyourko & Todd Sinai, *The (Un)Changing Geographical Distribution of Housing Tax Benefits: 1980-2000*, 9 (Nat'l Bureau of Econ. Res., Working Paper No. 10322, 2004).

[121] Thomas Bier et al., *A Preliminary Assessment of the New Home Seller Capital Gains Law*, 11 HOUS. POL'Y DEBATE 645, 645-73 (2000).

impact on housing markets in disinvested communities is largely incidental and much less than it could be. The reality is that homes are typically worth less in disinvested communities and fewer residents are affluent enough to itemize their deductions, making the property tax deduction relatively much less valuable for homeowners in these communities than in more affluent communities.

The bottom line is that the homeowner subsidies do relatively little to encourage homeowners to invest in disinvested communities. While this again is unsurprising based on how deductions and exclusions operate, it seems difficult to justify a system in which the vast majority of the homeowner subsidies incentivize home purchases in housing markets that function well and in which the private market already rewards homeowners for their purchases, while doing little for struggling markets that present large disincentives to purchase and impose significant costs on the public sector. This is especially true given that, as Part III demonstrated, the subsidies do not even help lower-income households access thriving markets and, in fact, probably operate to exclude them.

To go one step further, the homeowner subsidies probably counteract the federal government's policy of containing the damage in disinvested communities by incentivizing higher income taxpayers to leave or stay away. This is because the principal impact of the subsidies is to cause these types of taxpayers to over-invest in housing by buying larger, more expensive homes and in higher income areas than they might otherwise so that they can maximize their tax benefits under the subsidies.[122] Especially when coupled with exclusionary land use restrictions (like large minimum lot size requirements) imposed in many high-end developments, the subsidies contribute to a form of income-level sorting, attracting more affluent prospective homeowners to higher income areas. This squeezes out low income entrants and contributes to capital flight and home price losses in declining housing markets.[123]

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[122] *See* RICHARD VOITH, DOES THE FEDERAL TAX TREATMENT OF HOUSING AFFECT THE PATTERN OF METROPOLITAN DEVELOPMENT?, FED. RES. BANK PHILA. 3 (Mar./Apr. 1999), https://pdfs.semanticscholar.org/9d66/8c1917d0c389593dbf4f37bf4834800b3bb8.pdf?_ga=2.228286557.1385482424.1510778488-1033708948.1510778488; Joseph Gyourko & Richard Voith, *The Price Elasticity of Demand for Residential Land* (Feb. 9, 2000), http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/329.pdf. Interestingly, this outcome conflicts with one of the objectives of the 1997 tax code amendments to the treatment of the home sale capital gain exclusion, which was to eliminate the incentive that the previous rules included to "buy up" to avoid the capital gain tax. *See, e.g.*, Amelia M. Biehl & William H. Hoyt, *The Taxpayer Relief Act of 1997 and Homeownership: Is Smaller Now Better?*, 52 ECON. INQUIRY 646 (2014).

[123] Gyourko & Voith, *supra* note 122; VOITH, *supra* note 122.

B. Decreasing Economic and Racial Segregation

1. Background

Housing in the United States is highly segregated by wealth and race. Economic segregation, in particular, is increasing dramatically. The percentage of poor households living in high poverty neighborhoods has grown from 43% to 54% in just the last 15 years; meanwhile, the percentage of high income households living in high income neighborhoods has also escalated (from 40% to 49% in the last 25 years).[124] These statistics are consistent with recent studies revealing that high income households are choosing with greater frequency to pay more to live in exclusive communities, and with the decrease in the size of the middle class.[125] This increasing stratification is facilitated by land use restrictions imposed by local ordinances and property developers and market-driven forces that drive up the cost of housing in affluent communities to the point where it effectively bars low income residents.

Racial segregation in housing is actually declining gradually, but remains quite high. A Brookings Institution study based on 2010-2014 census data showed that all fifty-two of the nation's largest metropolitan areas are significantly segregated by race.[126] This is especially true as it relates to black-white segregation. According to one common measurement of housing segregation, more than half of all blacks would have to move from their current communities to white communities for those communities to match the national ratio of white to black residents.[127] Racial segregation is the legacy of a legal system that for much of the country's history permitted discrimination in housing practices and a culture that has long stigmatized differences in race.[128] Race-based neighborhood stereotyping continues to

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[124] *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2017 17 (2017); *see also*, Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, PEW RES. CENT.: SOC. & DEMOGRAPHIC TRENDS (Aug. 1, 2012), http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/.

[125] Fry & Taylor, *supra* note 124. *See also* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 124, at 35; Albouy & Zabek, *supra* note 78.

[126] William H. Frey, *Census Shows Modest Decline in Black-White Segregation*, BROOKINGS INST.: THE AVE. (Dec. 8, 2015), https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/.

[127] *Id.* This is called the racial dissimilarity index. *See, e.g.*, John Iceland et al., U.S. Census Bureau, Racial and Ethnic Residential Segregation in the United States: 1980-2000, App. B (Aug. 2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf.

[128] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

be a common practice and an explanation for why many white homebuyers choose to avoid or leave neighborhoods with large or growing African-American populations.[129]

Because poverty rates are much higher among African Americans and Hispanics than among whites, it is difficult to separate a discussion of economic and race segregation.[130] Low income neighborhoods in the United States have disproportionately high minority populations.[131] In fact, not only poor African-Americans but all African-Americans are much more likely to live in high poverty neighborhoods than their white counterparts.[132] Perhaps most troubling, 66% of young African-Americans live in poor neighborhoods (10 times as many as young whites).[133]

Housing segregation imposes severe costs on those who live in high poverty communities.[134] To a large extent, these communities overlap with the disinvested communities discussed in Part IV.A and, thus, face many of the same problems. These include smaller tax bases and less private investment, resulting in poorer quality housing, institutions, infrastructure, and services for their residents.[135] High poverty communities also fare much worse in terms of safety, environmental quality, and health.[136] Part IV.A details these negative housing externalities and federal attempts to mitigate them.

Particularly germane to residential segregation and worth separate mention here is the opportunity gap, or a lack of access to pathways out of poverty, for those isolated in high poverty communities. These pathways include well-performing schools, positive role models, access to job

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[129] *See* Ingrid Gould Ellen, *Continuing Isolation: Segregation in America Today*, *in* SEGREGATION: THE RISING COSTS FOR AMERICA 270 (James H. Carr & Nandinee K. Kutty eds., 2008); Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 527-59 (2009).

[130] U.S. CENSUS BUREAU, P60-256(RV), INCOME AND POVERTY IN THE UNITED STATES: 2015 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf.

[131] Kathleen McCormick, *Planning for Social Equity*, LAND LINES, Winter 2017, at 26.

[132] PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARDS RACIAL EQUITY (2013).

[133] *Id.*

[134] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 124, at 35.

[135] Laura M. Tach, *Diversity, Inequality and Microsegregation: Dynamics of Inclusion and Exclusion in a Racially and Economically Diverse Community*, 16 CITYSCAPE 13, 14 (2014).

[136] *See, e.g.*, Catherine Cubbin et al., *Where We Live Matters for Our Health: Neighborhoods and Health*, COMM. ON HEALTH (Sept. 2008), http://www.commissiononhealth.org/PDF/888f4a18-eb90-45be-a2f8-159e84a55a4c/Issue%20Brief%203%20Sept%2008%20-%20Neighborhoods%20and%20Health.pdf.

opportunities, and examples of success.[137] Instead of these pathways, residents of communities with concentrated poverty must contend daily with unsafe streets, substandard housing conditions, and dysfunctional behavior.[138] Of foremost concern is the individual personal harm that follows. However, it is also important to recognize the resulting societal costs that compound over time. These include an increased reliance on entitlement programs, and high incarceration rates among residents in these communities, which imposes costs on all taxpayers.[139] On a macro level, high levels of residential isolation inhibit local labor markets, stunting a metropolitan area's economic growth and harming both marginalized and non-marginalized residents.[140] Spread across multiple metropolitan areas, it impairs the country's ability to compete in a global economy, running counter to national interests.[141]

As mentioned previously, explaining the costs of racial segregation, separate from economic segregation, is more challenging. And yet solid evidence exists. For instance, it has long been established that home prices and appreciation in predominantly African-American communities lag considerably behind homes in predominantly white communities with comparable resident income levels.[142] This disparity rises with increasing levels of segregation.[143] Lower home appreciation impairs wealth accumulation among African Americans, and the significance of this is magnified because the home is more likely to be the primary financial asset of an African American household.[144] The ripple effect of lower property values also manifests in less local tax revenue which negatively impacts school funding, educational achievement, and the delivery of public services in these communities, which in turn contributes to negative racial stereotypes and social polarization. A recent analysis of metropolitan

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[137] SHARKEY, *supra* note 132.

[138] *See, e.g.*, James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality, in* SEGREGATION: THE RISING COSTS FOR AMERICA 2 (James H. Carr & Nandinee K. Kutty eds., 2008).

[139] *Id.*

[140] Huiping Li, Harrison Campbell & Steven Fernandez, *Residential Segregation, Spatial Mismatch and Economic Growth across US Metropolitan Areas*, 50 URB. STUD. 2642 (2013).

[141] Carr & Kutty, *supra* note 138.

[142] *See, e.g.*, Gregory D. Squires, *Demobilization of the Individualistic Bias: Housing Market Discrimination as a Contributor to Labor Market and Economic Inequality*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2007). *See also* David Rusk, *The "Segregation Tax": The Cost of Racial Segregation to Black Homeowners*, BROOKINGS INSTITUTION (Oct. 2001), https://www.brookings.edu/wp-content/uploads/2016/06/rusk.pdf.

[143] *See* Squires, *supra* note 142. *See also* Rusk, *supra* note 142.

[144] REBECCA TIBBETT ET AL., BEYOND BROKE: WHY CLOSING THE RACIAL WEALTH GAP IS A PRIORITY FOR NATIONAL ECONOMIC SECURITY 4 (Ctr. for Global Policy Sols., 2014).

regions across the country demonstrated that a high level of racial segregation causes a much lower per capita income for African Americans and projected the cost to the Chicago region alone at an estimated $4.4 billion in annual regional income and more than $8 billion in annual gross domestic product.[145]

All of this said, federal policy on housing segregation has a complicated history. Racial discrimination was at one point the law of the land. Through at least the mid-twentieth century, federal agencies adhered to explicitly segregationist practices that have left an enduring mark on contemporary housing patterns.[146] These included, perhaps most notoriously, the Federal Housing Administration's mortgage underwriting standards, which prevented African American homeowners from getting mortgages to live in white communities, and vice versa, and the Public Works Administration's construction of racially designated public housing projects in neighborhoods with matching racial compositions.[147] These expressly discriminatory policies are fortunately now a relic of the past. Yet, federal agencies to this day face criticism that they do not do enough to address less overt forms of socioeconomic and racial discrimination in housing programs they design.[148]

The passage of the Fair Housing Act by Congress in 1968[149] was a monumental turning point, at least as it relates to express racial discrimination. The Act prohibited discrimination in any housing transaction based on race[150] and charged the Secretary of the U.S. Department of Housing and Urban Development (HUD) with enforcing the Act.[151] Of course, prohibiting discrimination and decreasing segregation are two different matters. The Act also obligated the HUD Secretary (in addition to all federal executive agencies and programs related to housing and urban development) to implement programs not just to prevent

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[145] *See* GREGORY ACS, ROLF PENDALL, MARK TREKSON & AMY KHARE, THE COST OF SEGREGATION: NATIONAL TRENDS AND THE CASE OF CHICAGO, 1990-2010 ix (2017).

[146] *See generally* ROTHSTEIN, *supra* note 128.

[147] *Id.* (discussing also a range of other agency and judicial practices that promoted housing discrimination against certain racial, religious and ethnic groups).

[148] For example, federal law allows private landlords to refuse to accept tenants who would pay rent with Section 8 housing vouchers, notwithstanding fairly clear evidence that this is a thinly veiled form of discrimination against the poor and largely minority population of voucher holders. *See* Evan F. Anderson, *Vouching for Landlords: Withdrawing from the Section 8 Housing Choice Voucher Program and Resulting Disparate Impact Claims,*— Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human relations Commission, *508 F.3d 366 (6th Cir. 2007)*, 78 U. CIN. L. REV. 371 (2009).

[149] *See* Fair Housing Act, 42 U.S.C. § 3604 (2017).

[150] *Id.*

[151] 42 U.S.C. § 3608.

discrimination against protected classes, but also to "affirmatively [] further" fair housing.[152] This mandate has proven more elusive. Its meaning, as well as how vigorously HUD has pursued it, has varied in the years since the Act's enactment, based in part on who has occupied the White House and Congress at the time and the level of opposition mounted by private interests regulated by it.[153]

Nevertheless, HUD has by and large embraced the mantle of fostering more economically and racially inclusive communities as a fundamental part of its mission, especially in recent decades. This goal consistently appears as a critical plank in HUD's mission statements and strategic plans.[154] Moreover, HUD and Congress have adopted some significant programs aimed squarely at encouraging residential integration. Perhaps the longest standing pro-integrationist program is the Section 8 rental housing voucher program which, at least in theory, enables low income voucher recipients to move outside their current neighborhoods to find housing.[155] In 1992, Congress authorized the HOPE VI program, a multi-billion dollar, two decade long initiative intended to deconcentrate poverty in public housing projects by demolishing and replacing many of them with mixed income developments.[156] Perhaps the most dramatic strides towards decreasing residential segregation were made during the Obama administration. During this time, HUD enlivened the long-standing obligation that all recipients of HUD funding (which includes many state and municipal governments) regularly assess the state of fair housing within their jurisdictions and report to HUD on their efforts and plans to further it as a condition of continued funding.[157] The Obama administration also introduced a new approach to rental formulas for the Section 8 program

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[152] *See* 42 U.S.C. § 3601 (formally stating, in the Act's preamble, that it is the policy of the United States to provide for fair housing); 42 U.S.C. § 3608 (charging agencies with the duty to affirmatively further the Fair Housing Act's purposes).

[153] *See* Khadduri, *supra* note 100.

[154] *See, e.g.*, Mission, U.S. DEP'T OF HOUS. & URB. DEV., https://portal.hud.gov/hudportal/HUD?src=/about/mission; *FY 2014-2018 HUD Strategic Plan Executive Summary*, U.S. DEP'T OF HOUS. & URB. DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/spm/strategicplan2014_2018 (last visited July 30, 2017).

[155] Ingrid Gould Ellen and Jessica Yager, *Race, Poverty and Federal Rental Housing Policy* IN HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY 113-16 (2015).

[156] SUSAN J. POPKIN ET AL., URBAN INST., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES 14 (2004).

[157] DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AFFIRMATIVELY FURTHERING FAIR HOUSING (2015), https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Final_Rule.pdf.

aimed at increasing options for voucher holders in more affluent neighborhoods.[158]

2. *Relationship to Homeowner Subsidies*

Homeowner subsidies would seem to be a potentially powerful mechanism for alleviating housing segregation. To the extent that traditional biases or development financing concerns stand in the way of affluent and racially homogenous communities accommodating mixed income housing, the carrot of homeowner subsidies could serve as meaningful leverage for these communities to decide to become more inclusive. Subsidies might also serve as tempting incentives to draw more affluent homeowners to less affluent communities, or to attract homeowners to a racially homogenous community that would improve its diversity. Poorer and racially marginalized communities would, in turn, presumably stand to benefit from increased tax bases, improved public services, and an overall reduction of the other negative housing externalities that follow from concentrated economic and racial isolation.

As designed, however, the current homeowner subsidies do very little to support residential integration. Not only are they facially neutral as to where a homeowner purchases, but also as to a prospective homeowner's race, ethnicity, and, at least in theory, income level. Thus, the subsidies do not explicitly reward or penalize a homeownership decision that promotes integration or enhances segregation.

Once again, however, the subsidies are also not actually all that neutral in terms of their impact. Because by design they inure primarily to the benefit of high income homeowners, who are typically found in affluent communities with high home prices, they by and large supplement spending on homeownership in communities that are inaccessible to lower income households (and by extension to the strong majority of minority households as well). Conversely, they are not of much value to those lower income (and oftentimes minority) households who wish to move from opportunity poor to opportunity rich communities.[159]

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[158] *See* Press Release, Brian Sullivan, HUD Announces New Approach to Expand Choice and Opportunity for Section 8 Voucher Holders in Certain Hous. Markets, U.S. Dept. of Hous. & Urban Dev. (Nov. 15, 2016), https://www.hud.gov/press/press_releases_media_advisories/2016/HUDNo_16-173 (announcing Small Area Fair Market Rent approach). The Trump Administration has since suspended this approach for the next two years.

[159] *See, e.g.*, Fiscal Federal Initiative, *supra* note 120; Gyourko & Sinai, *supra* note 120, at 9.

Stacked on top of this reality is the recognition that the subsidies encourage the type of income sorting discussed in Part IV.A, by which affluent homebuyers seek to live in higher yield, higher cost communities to maximize their tax benefits from the subsidies.[160] Accordingly, the subsidies probably serve to increase economic segregation. The one exception, as described in Part IV.A.2, is the property tax deduction, which helps alleviate a barrier to living in communities that have higher taxes due to the greater public expenses that follow from serving lower income populations in poorer cities. However, any positive benefit that follows from this deduction is largely incidental and not a reflection of its design.[161]

The homeowner subsidies probably heighten racial segregation for the same reasons they heighten economic segregation and another more race specific reason as well. As noted earlier, homes in majority African American neighborhoods do not appreciate as much as homes in predominantly white neighborhoods.[162] White prospective home buyers recognize this and factor it into their choice of neighborhood.[163] From this, it is not difficult to extrapolate that many white prospective homeowners view predominantly African American neighborhoods or neighborhoods with growing black populations as bad places to maximize their homeowner subsidies and avoid them.

C. Lessening Environmental Degradation Resulting from Housing Choices, While Reducing Vulnerability of Those Who Reside in Environmental Hotspots

1. Background

A homeowner's decisions as to where to live and in what type of home affect his or her relationship to the natural environment in a wide and complex variety of ways. One example is a home's carbon footprint. Homes are a major source of carbon dioxide (and other greenhouse gas) emissions, and greenhouse gas emissions are the principal cause of global warming.[164] A home built with energy efficient materials that is smaller,

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[160] Gyourko & Voith, *supra* note 122, at 25; VOITH, *supra* note 122, at 9.

[161] *See* Part IV.A.2.

[162] TIBBETT ET AL., *supra* note 144. *See also* Dorothy Brown, How Home Ownership Keeps Blacks Poorer Than Whites, FORBES (Dec. 10, 2012).

[163] *See* Squires, *supra* note 142; Ellen, *supra* note 129.

[164] Residential heating, cooling, and electrical consumption alone accounted for 17% of all greenhouse gas emissions, the principal cause of global warming, in the U.S. Transportation accounts for 27% of total emissions, and "household travel" accounts for over 80% of miles traveled on the country's roadways. ALEX F. SCHWARTZ, HOUSING POLICY

uses renewable energy, and requires less driving to get to and from a job center has a smaller carbon footprint. This type of home harms the environment less, all other things being equal, than one that does not use these materials, is larger, burns fossil fuels, and is further away. Some other examples of environmental conditions impacted by housing choices include wetlands protection, habitat and wildlife preservation, fresh and groundwater supply, and storm and sewer water management.[165]

Not only does housing impact the environment, the environment impacts housing. Homes built along coasts and in floodplains are more susceptible to damage by severe weather events and rising tides.[166] Likewise, homes near fault lines, mountains, and forests are more susceptible to damage from earthquakes, landslides, and forest fires, respectively.

Furthermore, housing can impact the environment in ways that in turn increase the vulnerability of that housing. Houston's recent encounter with Hurricane Harvey is a telling example. Long recognized as the epitome of booming development catalyzed by a lack of land use regulation, housing developers in Houston have constructed one low-density, concrete laden subdivision after another on top of former prairie.[167] At the same time, Houston sits close to the Gulf of Mexico exposing it to severe storms, which appear to be occurring with greater frequency in vulnerable regions due to climate change and rising sea levels.[168] By replacing 65 square miles of freshwater wetlands with impervious surfaces on which water can accumulate, Houston's housing development patterns have made it much more vulnerable to massive flooding.[169] This has occurred three times in just the last three years, most recently and tragically with Hurricane

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IN THE UNITED STATES 3 (3rd ed. 2015) (citing to U.S. ENVIRONMENTAL PROTECTION AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS, AND SINKS: 1990-2011 (2013)).

[165] JunJie Wu, *Land Use Changes: Economic, Social, and Environmental Impacts*, CHOICES (2008), http://www.choicesmagazine.org/magazine/article.php?article=49.

[166] *See Life's a Beach*, FREDDIE Mac (Apr. 26, 2016), http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html.

[167] *See, e.g.*, Douglas Belkin & Shibani Mahtani, *In Harvey's Wake, Houston Rethinks Real Estate Development*, WALL STREET J. (Sept. 11, 2017), https://www.wsj.com/articles/in-harveys-wake-houston-rethinks-real-estate-development-1505145759 ("Federal officials and scientists have long urged Houston, one of the nation's fastest-growing cities, to preserve more of its prairie and regulate development to mitigate the flooding that has plagued residents for decades. They haven't had the ear of the area's politicians who, by and large, have championed development to push economic growth.").

[168] *See, e.g.*, Manny Fernandez & Richard Fasset, *A Storm Forces Houston, the Limitless City, to Consider Its Limits*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/us/houston-flooding-growth-regulation.html; *see also*, Andreas F. Prein, et al., *The future intensification of hourly precipitation extremes*, NATURE CLIMATE CHANGE 7, 48–52 (2017).

[169] *Id.*

Harvey, which caused flooding that led to a loss of lives, inundated entire neighborhoods and damaged an estimated 200,000 homes.[170]

The negative externalities flowing from human behavior that degrades the environment, including housing choices, are wide-ranging and potentially severe. For example, if greenhouse gas emissions do not slow, global warming is expected to raise temperatures worldwide between 2 and 11.5 degrees Fahrenheit during the 21st century.[171] Such an increase is projected to raise sea levels, fully or partially submerge certain coastal cities, kill off 30% of the world species, increase human disease, decrease agricultural productivity, and lead to a dramatic increase in severe weather events and a significant impairment of the world population's overall quality of life.[172] Accurately pegging the costs imposed by global warming is a difficult task because it is forward-looking and involves many secondary impacts. Attempts to do so have estimated the price tag to the United States as reaching into the trillions of dollars annually if patterns do not change.[173] Although the economic, health, and social costs may potentially be enormous, many will not manifest for decades. This is part of why federal efforts to significantly scale back U.S. greenhouse gas emissions have not succeeded.[174]

Federal policies related to housing and the environment reflect this inability to gain serious traction. A good example is the federal response to suburban sprawl. Sprawl is commonly understood to mean low density, minimally controlled, single use residential development that outpaces population growth, occurs on urban fringes and is accessible almost exclusively by automobile.[175] Evidence has mounted in recent years of the

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[170] Tulsi Kamath, *Latest Numbers Show Extent of Harvey Damage in Houston and Texas*, HOUS. CHRONICLE (Sept. 6, 2017), http://www.chron.com/news/houston-weather/hurricaneharvey/article/Latest-numbers-show-extent-of-Harvey-damage-in-12175543.php.

[171] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATIONS AND VULNERABILITY 33 (Martin Parry et al. eds., 2007).

[172] *Id.* at 9, 41.

[173] *See, e.g.*, Matthias Ruth et al., *The US Economic Impacts of Climate Change and the Costs of Inaction*, THE CTR. FOR INTEGRATIVE ENVTL. RES. (Oct. 2007), http://cier.umd.edu/documents/US%20Economic%20Impacts%20of%20Climate%20Change%20and%20the%20Costs%20of%20Inaction.pdf; Frank Ackerman & Elizabeth A. Stanton, *The Cost of Climate Change: What We'll Pay if Global Warming Continues Unchecked*, NAT. RESOURCES DEF. COUNCIL (May 2008), https://www.nrdc.org/sites/default/files/cost.pdf.

[174] Vested business interests, skepticism as to government driven solutions to solve environmental problems, global competitiveness, and doubt among a segment of politicians and the U.S. population as to the existence of the problems are other reasons.

[175] *See, e.g.*, Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 345, 347 (1997).

many negative environmental externalities resulting from uncontrolled sprawl, including the loss of wetlands, increased storm water run-off, increased carbon consumption, and the destruction of wildlife habitats.[176] On the one hand, the federal government recognizes sprawl as a significant problem.[177] Congress has empowered the U.S. Environmental Protection Agency (EPA) to regulate certain aspects of land development particularly critical to managing sprawl such as local storm water management and wetlands protection.[178] The EPA, through its Office of Sustainable Communities, encourages local and state planners, through funding and educational resources, to implement "Smart Growth" techniques that minimize negative environmental impacts in constructing new residential communities and re-designing existing ones.[179] Other federal agencies, like HUD, the Department of Transportation, and FEMA, have recently forged partnerships with the EPA to coordinate their housing and infrastructure funding to provide more leverage for the construction of environmentally sustainable communities.[180]

On the other hand, the federal government leaves individual development decisions in the hands of state and local governments,[181] many of which pay no mind to and lack a significant incentive to adopt Smart Growth principles. The degree of attention that environmental sustainability receives has varied based on who leads the relevant federal departments and agencies, which has led to a lack of consistency in policy implementation. Furthermore, many have suggested that long-standing, pro-growth policies of the federal government, like the construction and expansion of federal highways, have been instrumental in encouraging suburban sprawl (a

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[176] *See* Todd Litman, *Analysis of Public Policies that Unintentionally Encourage and Subsidize Urban Sprawl* 20-21 (Mar. 2015) (unnumbered working paper) (on file with The New Climate Economy).

[177] *See, e.g.*, Al Gore, Vice President of the U.S., Livability Announcement by the Vice President at the Am. Inst. Of Architects (Jan. 11, 1999).

[178] *See Wetlands Protection and Restoration*, EPA: WETLANDS, https://www.epa.gov/wetlands (last updated Aug. 18, 2017).

[179] *See What are Some Environmental Benefits of Smart Growth Strategies?*, EPA: ABOUT SMART GROWTH, https://www.epa.gov/smartgrowth/about-smart-growth#environmental (last updated Aug. 15, 2017) [hereinafter SMART GROWTH].

[180] *See, e.g.*, *About Us*, PARTNERSHIP FOR SUSTAINABLY COMMUNITY (last updated Mar. 2, 2015), https://www.sustainablecommunities.gov/mission/about-us; Memorandum of Agreement Between the Dep't of Homeland Security/Fed. Emergency Mgmt. Agency (DHS/FEMA) & the U.S. Envtl. Protection Agency (Aug. 2016), https://www.epa.gov/sites/production/files/2016-08/documents/moa-between-fema-and-epa-signed-8-9-16.pdf [hereinafter EPA-FEMA MOU].

[181] SMART GROWTH, *supra* note 179.

contention that a comprehensive Government Accountability Office study on the topic has contested).[182]

Meanwhile, federal policy has been clearer and more consistent in mitigating the financial risks of those who choose to reside in environmental hot spots. Damages homeowners in these places incur due to severe weather events become negative housing externalities because of the federal government's long standing policy of providing taxpayer-funded disaster relief. For example, Congress and the executive branch have typically rushed to the aid of coastal areas hit hardest by hurricanes and super storms. This assistance has gone well beyond emergency assistance and included helping these higher risk communities rebuild homes and homeowners recover financial losses due to home damage.[183] The federal price tag for storm recovery packages since Hurricane Katrina in 2004 was $200 billion prior to Hurricane Harvey.[184] Estimates of projected damage from Hurricane Harvey alone are in the range of $180 billion, much of which the federal government will cover.[185]

Part of these federal aid packages cover deficits in the National Flood Insurance Program (NFIP), which insures homeowners in high flood risk areas due to the shortage of private insurance options. NFIP homeowner insurance premiums historically run far short of homeowner flood claims, resulting in a deficit of between $16 billion and $25 billion for years 2002 through 2013, which taxpayers ultimately have had to pay.[186] More recently, Congress has simply started buying out homeowners in high-risk coastal communities (termed "climate change refugees"), recognizing that it may be cheaper in the long-run to demolish the homes rather than having to continually bail them out. Congress has already allocated $1 billion in dollars to HUD for home purchase and resettlement programs, and Houston is expected to add to the demand.[187]

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[182] U.S. GOV'T ACCOUNTABILITY OFF., GOA/RCED-99-87, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON "URBAN SPRAWL" IS UNCLEAR 2 (1999).

[183] FRANCIS X. MCCARTHY, CONG. RESEARCH SERV., RL33053, FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING 1 (2011).

[184] Umair Ifran, *The Stunning Price Tags for Hurricanes Harvey and Irma, Explained*, VOX: EXPLAINERS (Sept. 18, 2017), https://www.vox.com/explainers/2017/9/18/16314440/disasters-are-getting-more-expensive-harvey-irma-insurance-climate.

[185] *Id.*

[186] FREDDIE MAC, *supra* note 166.

[187] *See, e.g.*, Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees,'* N.Y. TIMES (May 6, 2016), https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html; *see also* ROBERT FREUDENBERG ET AL., BUY-IN FOR BUYOUTS: THREE FLOOD PRONE

2. *Relationship to Homeowner Subsidies*

As just discussed, certain homeowner choices do greater harm to the environment than others, although a significant portion of these negative housing externalities will be borne by future generations. Also, certain choices place homeowners in more environmentally vulnerable locations, and a portion of these costs are incurred more immediately by all taxpayers as a result of federal disaster relief policies. The homeowner subsidies could serve as one way to discourage those decisions that impose more of these negative housing externalities and encourage those that impose less.

Yet, once again, the homeowner subsidies provide virtually no help. Neutral as they are to location and form, they neither encourage nor discourage a prospective homeowner's decisions to, for example, live in a community that is near or far from an urban center, public transportation, or an environmentally sensitive or vulnerable area, even though these decisions vary significantly in the price tag they impose on others. Federal policy focuses much more on responding to severe damage that follows from environmental and natural catastrophes, than on proactively influencing housing decisions that reduce environmental harm or susceptibility in the first place.

Some would go a step further and argue that the subsidies have encouraged certain negative externality producing choices like suburban sprawl.[188] Across almost all metropolitan areas, the benefits of tax subsidies are claimed with greater frequency by those living in suburban and exurban areas, where lot sizes and home are bigger.[189] Homeowners in these areas utilize the subsidies not as an incentive to purchase a home, but rather as an incentive to purchase a bigger home on a larger lot.[190] Accordingly, these studies contend that a primary effect of the subsidies has been the construction of larger, "McMansion" style homes that are an average of 250 to 1000 square feet larger than necessary.[191]

At the same time, it should be noted that federal tax policy has recently made some inroads in encouraging greater energy efficiency in homes, although they are often marketed primarily as ways to cut consumer energy

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COMMUNITIES OPT FOR MANAGED RETREAT 26 (Lincoln Inst., 2016).

[188] *See, e.g.*, Andrew Hanson, Ike Brannon & Zackary Hawley, *Rethinking Tax Benefits for Home Owners*, 19 NAT'L AFF. 40 (2014).

[189] *Id.* at 45. Interestingly, this outcome conflicts with one of the objectives of the 1997 tax code amendments in the treatment of the home sale capital gain exclusion, which was to eliminate the incentive the previous rules provided to "buy up" to avoid the capital gain tax. *See, e.g.*, Biehl & Hoyt, *supra* note 122.

[190] *Id.* at 47-48.

[191] *Id.* at 48-49.

bills rather than as reducing negative housing externalities. Congress has passed an array of tax incentives for home-builders, home appliance makers, and consumers aimed at spurring the supply of and demand for energy efficient homes and home products.[192] For homeowners, these have taken the form of federal income tax credits for the purchase of energy efficient appliances, certain home improvements that increase energy efficiency, and the installation of renewable energy systems.[193] Sustained commitment to the homeowner subsidies has been relatively weak, however. The homeowner energy tax credits have been small and subject to low overall caps, raising concerns that they did not act as much of an incentive.[194] Most of the credits recently expired, and there appears to be little political will in Congress to renew them.

V. UNDERSTANDING THE DISCONNECT (HOW AND WHY CURRENT HOMEOWNER SUBSIDIES ARE NOT SMART)

As Part IV demonstrated, a striking disconnect exists between the homeowner subsidies and other key federal housing-related policies as well as the negative housing externalities they seek to contain. Why? The current subsidies are not smart. This Part explains what "smart" means for purposes of this analysis, as well as how and why the subsidies fail to meet the mark.

A. What are "Smart" Subsidies?

When it comes to evaluating policies, rather than people, "smart" has a variety of possible meanings, several of which are relevant here. One use of the word is in connection with a system change that deploys resources more strategically to improve performance and reduce inefficiencies associated with its use. For example, "smart" energy grids deploy energy based on two-way communications with consumers in order to reduce waste, lower costs, and make power outages less likely.[195]

The current homeowner subsidies are inefficient in that they reward homeowner decisions at large, and without regard to the negative

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[192] *See* Steven Nadel, Energy Efficiency Tax Incentives in the Context of Tax Reform (July 2012) (unnumbered working paper) (on file with the Am. Council for an Energy-Efficient Econ.).

[193] 26 U.S.C. §§ 25C-25D (2017).

[194] MARGOT L. CRANDALL-HOLLICK & MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R42089, RESIDENTIAL ENERGY TAX CREDITS: OVERVIEW AND ANALYSIS 4-7 (2016), https://fas.org/sgp/crs/misc/R42089.pdf.

[195] *See, e.g., What is the Smart Grid?*, SMARTGRID.GOV, https://www.smartgrid.gov/the_smart_grid/smart_home.html (last visited Nov. 12, 2017).

externalities homeowner decisions impose. As a result, at best, the federal government gets very little bang in containing these externalities for the very significant buck it spends promoting homeownership.[196] At worst, it must pay to clean up damage resulting from homeowner choices it subsidizes.[197]

"Smart" subsidies would reduce these inefficiencies by targeting financial incentives at homeowner decisions that also offset or reduce negative housing externalities. For example, as explained in Part IV.C, homeowner decisions to build new homes in higher risk coastal and floodplain areas can increase federal taxpayer burdens due to the government's policy of providing disaster relief and increase flooding risk for those who already live in the area. A smarter homeowner subsidy in these areas might be limited to those who purchase homes that are built to maximize storm water absorption and/or minimize the likelihood of flooding damage.[198]

A separate, though not unrelated, use of "smart" is in connection with policies that advance "sustainable development." Development decisions that are sustainable take into account their impact on others, including future generations.[199] The replacement of combined sewer and storm water systems that discharge into fresh water sources during large rainfalls with those that can instead temporarily store this water underground is an example of sustainable development. "Smart" is frequently used synonymously with "sustainable" when referring to places that implement sustainability practices (e.g. "Smart Cities"), especially when those places use advances in information and communication technology to do so.[200]

When used in this way, "smart" has a normative component. Sustainable development has specific environmental, economic, and social goals. These include protecting the planet from environmental degradation, conserving natural resources, striving for economic growth that does not heighten socioeconomic segmentation, and creating places to live that are inclusive, safe, and resilient.[201] The federal housing policies that are the subject of

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[196] *See supra* Part IV.

[197] *Id.*

[198] An example is elevating a home above street level using a foundation or posts. FED. EMERGENCY MGMT. AGENCY, HOMEOWNER'S GUIDE TO RETROFITTING 5-1 (3rd ed. 2014), https://www.fema.gov/pdf/rebuild/mat/sec5.pdf.

[199] The most cited to definition of sustainable development is in the 1987 World Commission on Environment and Development ("Bruntland Report"). Gro Harlem Brundtland, Rep. of the World Comm'n on Env't & Dev.: Our Common Future, U.N. Doc. A/42/427, annex (1987).

[200] *See, e.g.*, Vito Albino et al., *Smart Cities: Definitions, Dimensions, Performance, and Initiatives*, 22 J. URB. TECH. 3 (2015).

[201] *Sustainable Development Goals*, UNITED NATIONS,

Part IV fit comfortably within these goals. So, as with the first meaning of the word discussed above, "smart" in this instance means policies that minimize the negative externalities associated with development. The current homeowner subsidies are not smart because they are completely insensitive to them.

Another definition of "smart" has emerged in the technology field. Smart devices are those that are capable of sensing a particular user's needs or a change in environment and modifying their performance accordingly.[202] Smart data refers to data that can be analyzed and converted to actionable insights to address a particular problem.[203] The key concepts are individualized, adaptable, and actionable.

These concepts are meaningful to crafting effective housing strategies. This is because housing markets are highly localized. The United States consists not of one nor even of fifty housing markets, but rather thousands of highly localized markets that vary significantly in strengths and challenges. For example, high density cities with robust economies have thriving real estate markets by most measures, but grapple with inadequate supply and affordability issues, particularly for low and middle income homeowners.[204] Post-industrial Rust Belt cities have more anemic housing markets with vast inventories of antiquated or deteriorating vacant homes that deplete surrounding home values and pose public health issues.[205] Certain coastal areas face rising tides, and need to re-think how, where, and whether housing exists.[206] New growth Southwestern cities face high demand, but limited natural resources to support this demand.[207] Within each of these local housing markets exist even smaller submarkets that reflect different amenities, job access, and housing stock, among other factors. Smart homeowner subsidies would be perceptive and adaptable

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http://www.un.org/sustainabledevelopment/sustainable-development-goals/ (last visited Nov. 12, 2017).

[202] *See, e.g.*, *What is Smart Technology*, IGI GLOBAL, https://www.igi-global.com/dictionary/smart-technology/38186 (last visited Nov. 12, 2017).

[203] Alissa Lorentz, *Big Data, Fast Data, Smart Data*, WIRED, https://www.wired.com/insights/2013/04/big-data-fast-data-smart-data/ (last visited Nov. 15, 2017).

[204] *See* EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY, 142-68 (2008).

[205] *See, e.g.*, Frank Ford, *Is the Cuyahoga County Foreclosure Crisis Over?*, W. RESERVE LAND CONSERVANCY (Mar. 18, 2016), https://www.wrlandconservancy.org/articles/2016/03/18/is-the-cuyahoga-county-foreclosure-crisis-over.

[206] *See generally supra* Part IV.C.1.

[207] N. Light Prods. & Lincoln Inst. of Land Policy, *Making Sense of Place—Phoenix, The Urban Desert*, YOUTUBE (Mar. 15, 2013), https://www.youtube.com/watch?v=y0qOD0l9dbQ.

enough to address different problems in different places. By this standard too, the current homeowner subsidies are clearly not smart. They are simplistic and monolithic with no intended sensitivity to the challenges faced by different housing markets and submarkets.

So a definition of smarter homeowner subsidies is emerging. They would be more carefully targeted, aiming to increase the social benefits (or reduce the social costs) that follow from homeowner decisions and capable of adaptation among and within different housing markets.

B. Why the Current Homeowner Subsidies Are Not Smart

Before considering whether and how smarter federal homeowner subsidies are feasible, it is helpful to understand why the current subsidies are designed as they are. This article offers three explanations.

1. Idealization of Homeownership

One explanation is a historic cultural attitude in which the homeowner subsidies are rooted that views all homeownership as "good" (in economist-speak, resulting only in positive internalities and externalities). The federal government has long idealized homeownership as possessing multiple virtues that have since gained popular acceptance. Perhaps foremost is the view first popularized in the 1920s and 1930s that homeownership promotes good citizenship and stable communities, appealing qualities during the social unrest and political radicalism that followed from mass urbanization in the early 20th century.[208] In the ensuing decades, the government saw the expansion of homeownership as the means to address a host of social, economic, and political problems, including post-World War II population expansion, slum removal, and racial unrest.[209] Towards the end of the century, in the context of rising home prices and a shift away from New Deal and welfare state policies, politicians cast homeownership as an ideal vehicle for household savings and the accumulation of wealth.[210]

From the perspective of the federal government, then, homeownership has typically been something to promote rather than regulate. This approach finds support in the U.S. Constitution's deference to state and local governments on matters of land use and sacrosanct view of private property rights.[211] Congress has occasionally intervened to legislate on certain land

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[208] *See* BRIAN MCCABE, NO PLACE LIKE HOME: WEALTH, COMMUNITY, AND THE POLITICS OF HOMEOWNERSHIP 21-44 (2016).

[209] *Id.*

[210] *Id.*

[211] *See, e.g.*, John R. Nolon, *Historical Overview of the American Land Use System: A*

use matters, like environmental protection and housing discrimination, when it has determined that relying on more localized levels of governmental to independently regulate will fail to consistently or adequately address significant harm to others.[212] It has also used its tax and spend authority to offer financial incentives to prompt state and local governments to take action that reflects federal concerns.[213] But as it relates to individual homeowners, federal policy has focused more on creating opportunities to own homes than on trying to meaningfully influence where or in what types of homes homeowners live. The design of the homeowner subsidies reflects this mindset.

2. Administrative Simplicity

Like many federal tax code adjustments to taxable income, the homeowner subsidies are tax incentives trapped in the bodies of exclusions and deductions from taxable income. Exclusions and deductions are different devices for accomplishing the same task—i.e. removing otherwise taxable dollars from tax.[214] The difference between them is primarily a matter of timing. An exclusion keeps otherwise taxable dollars from entering a taxpayer's pool of gross income in the first place, while a deduction subtracts them from a taxpayer's gross income in the process of tabulating her taxable income.

Exclusions and deductions are straightforward, effective, and easy to justify mechanisms for removing dollars from a household's tax base that Congress believes do not really constitute income (a "normative" adjustment).[215] They are also easy to administer as the taxpayer simply claims them on her return. The tax savings on exclusions and deductions

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Diagnostic Approach to Evaluating Governmental Land Use Control, 23 PACE ENVTL. L. REV. 821 (2006).

[212] *Id.*

[213] *Id.*

[214] GRAETZ & SCHENK, *supra* note 55, at 211.

[215] The most widely acknowledged definition of income, often considered "normative" in the sense of establishing the conceptual understanding of what ought to be taxable, is the Haig-Simons definition. GRAETZ & SCHENK, *supra* note 55, at 84. This definition is paraphrased as a person's change in wealth plus her consumption during a particular tax period. ROBERT M. HAIG, *The Concept of Income—Economic and Legal Aspects*, *in* THE FEDERAL INCOME TAX 1, 7 (Robert M. Haig ed., 1921); HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1st ed. 1938). Increases or reductions in a taxpayer's tax base in order to get closer to this definition of income are considered normative adjustments. As an example, the Code allows households to deduct certain unreimbursed job expenses on the belief that dollars a taxpayer must spend in order to make taxable income are not really income. 26 C.F.R. § 1.67-1T(a)(1)(i) (2010).

are greater for higher income taxpayers because, as explained earlier, the amount excluded or deducted would be taxed at a higher marginal rate.[216] But this should not be a concern from a policy perspective, because the amounts removed do not fall within a normative definition of income and so are not properly taxable in the first place.

More controversially, Congress has also employed exclusions and deductions to accomplish social policy. For example, the tax code provides a deduction for college tuition and fees up to $4,000 per year to encourage taxpayers (and their dependents) to go to college.[217] It is when influencing social policy that exclusions and deductions are susceptible to becoming upside down subsidies because they are more valuable to high income taxpayers than low income ones.[218] In fact, many have questioned why Congress, when its intent is to encourage certain social behavior, does not use a more flexible, less regressive mechanism like grants.[219] To address this problem, many exclusions and deductions come packaged with income caps, and other income-sensitive limitations.[220] If not carefully crafted, exclusions and deductions meant to encourage social behavior can be regressive, overbroad, and blunt instruments.

This is the case with the homeowner subsidies. The income and benefit limitations on homeowner subsidies do not meaningfully alter their regressive qualities.[221] It is the reason that the subsidies don't even do a good job of accomplishing their ostensible purpose of making homeownership more accessible. Some commentators have identified normative reasons or other justifications for each of the homeowner subsidies that could account for their packaging as deductions and exclusions.[222] The more plausible read is that they took the form of what

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[216] *See supra* notes 68-71 and accompanying text.

[217] 26 U.S.C. § 222 (2015).

[218] Stanley Surrey, former secretary of the Department of Treasury, is viewed as the principal architect of the "tax expenditure budget" and often credited with calling attention to "upside down subsidies" contained in the tax code. *See, e.g.*, Stanley S. Surrey, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C.L. REV. 679 (1976).

[219] *Id.*

[220] For example, among other limitations, the tuition and fees deduction cannot be claimed by a household whose adjusted gross income is greater than $160,000 (if married, filing a joint return) or $80,000 (if single, head of household or qualifying widow), and more than $2,000 or $4,000 (depending on a household's income) in total per year cannot be deducted. 26 U.S.C. § 222 (2015).

[221] *See generally supra* Parts II and III.

[222] *See* Boris Bittker, *Income Tax Deductions, Credits and Subsidies for Personal Expenditures*, 16 J.L. & ECON. 193, 200-01 (1973) (providing a non-normative defense of SALT). *See* MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION, 218-23 (13th ed. 2015) (showing how a normative argument might be made on behalf of the MID).

were, at the times they originated, the simplest and most conventional mechanisms for creating tax preferences, without much regard for their regressivity or effectiveness in actually promoting homeownership.[223]

3. Political Entrenchment

The final explanation is political. Once entrenched, tax expenditures are very difficult to modify, even in the face of substantial criticism. Taxpayers and industry groups come to expect the financial benefits associated with a particular tax break and, if those impacted are broad and powerful enough, any proposed significant cutback invites peril for those political actors who support it.

This has certainly been the case for the homeowner subsidies, often described as one of the "third rails" of American politics.[224] The subsidies benefit a powerful coalition of political interests. Those who receive the lion's share of the benefits are upper middle income households, who vote in high proportions and, even more significantly, make up the donor base of both major political parties.[225] Because housing prices are significantly higher in large coastal cities, homeowners in these areas also benefit disproportionately from the homeowner subsidies.[226] Interestingly, many of the more liberal politicians, who would otherwise push hardest against subsidies distributed so heavily in favor of the wealthy, represent these coastal cities and, in pursuit of their constituents' interests, defend the subsidies.[227] And then there is the highly vested and vociferous participation of two of the nation's largest and most broadly influential special interest groups—the National Association of Realtors and the National Association of Homebuilders.[228] At the first sign of any potential

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[223] *See* John R. Brooks, *Doing Too Much: The Standard Deduction and the Conflict Between Progressivity and Simplification*, 2 COLUM. J. TAX. L. 203, 214 (2011) (observing that the form some income tax deductions have taken reflect the era in which Congress adopted them more so than normative or other rationales). *See* Ventry, Jr., *supra* note 54 (tracing the history of the mortgage interest deduction and ascribing its survival to political forces and vested interests rather than to its effectiveness in promoting homeownership).

[224] *See, e.g.*, BRUCE KATZ, CUT TO INVEST: REFORM THE MORTGAGE INTEREST DEDUCTION TO INVEST IN INNOVATION AND ADVANCED INDUSTRIES 5 (2012), https://www.brookings.edu/research/cut-to-invest-reform-the-mortgage-interest-deduction-to-invest-in-innovation-and-advanced-industries/.

[225] *See, e.g.*, Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES MAG. (May 9, 2017), https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html.

[226] *See generally* Part IV.A.2.

[227] Desmond, *supra* note 225.

[228] *Id.*

roll back of the homeowner subsidies, these groups spring to action and let their dissatisfaction be known in ways that have caused even the staunchest of tax loophole closers to tread carefully.[229]

At first glance, political theorists would refer to the challenge of rolling back the homeowner subsidies as a case of reform that has concentrated costs and highly diffuse benefits, which is among the most difficult to enact.[230] That is to say that, in this instance, the losses resulting from eliminating all or part of the subsidies are concentrated among a distinct group who are highly motivated to vocalize opposition (and politically powerful).[231] Meanwhile, the resulting benefits would be spread out among the population at large, potentially simply through increasing the government's tax revenue. This means the potential beneficiaries have had little motivation to support reform.[232]

Some additional factors have added to the intractability of the status quo. The first is that even though the lion's share of the benefits go to upper middle and high income taxpayers, many households receive at least a small bump from the homeowner subsidies and, thus, see themselves as vested in their survival. For example, most homeowners can claim the capital gains exclusion on home sales, even if lower-income households see a much smaller benefit.[233] The second is that some economists and virtually all industry group experts have predicted a housing market Armageddon if the homeowner subsidies are removed.[234] This is predicated on the assumption that the subsidies have been capitalized into higher home prices, which will fall if the subsidies disappear, decreasing the value of the principal asset of many homeowners.[235] Although the extent to which home prices would fall (and exactly for whom they would fall) is unclear, the mere notion that it could happen has had a stifling effect on reform.[236]

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[229] *Id.*; Ventry, Jr., *supra* note 54.

[230] Susannah C. Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2686 (2013).

[231] *Id.*

[232] *Id.*

[233] *Supra* notes 74-78 and accompanying text.

[234] *See, e.g.*, Dennis R. Capozza et al., *Taxes, Mortgage Borrowing and Residential Land Prices*, *in* ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM 171-98 (Henry J. Aaron & William G. Gale eds., 1996).

[235] MARGERY AUSTIN TURNER, URBAN INST., ERIC TODER, ROLF PENDALL, & CLAUDIA SHARYGIN, HOW WOULD REFORMING THE MORTGAGE INTEREST DEDUCTION AFFECT THE HOUSING MARKET? (2013), http://www.urban.org/sites/default/files/publication/23431/412776-How-Would-Reforming-the-Mortgage-Interest-Deduction-Affect-the-Housing-Market-.PDF.

[236] *Id.*

The result is that the homeowner subsidies have come to function like entitlements, reserved primarily for upper two income quintiles of American households, rather than strategic investments, adaptable to different housing markets and capable of containing negative housing externalities. This is not to say that there is no hope for smarter homeowner subsidies. But the tasks of designing and implementing them are challenging ones.

VI. IN SEARCH OF SMARTER HOMEOWNER SUBSIDIES

While they have proven very difficult to roll back, calls for reform of one or more of the homeowner subsidies are virtually unceasing. A long line of policy analysts, economists, tax experts, and legislators from places that experience less benefit from the subsidies have turned the mortgage interest deduction, in particular, into a popular punching bag.[237] Three consecutive Presidential administrations have started down the path towards reform, although none to date have succeeded.[238]

A. An Assessment of Current Proposals

Variations abound, but the proposals for reform by and large fall into two principal camps. The first camp seeks to eliminate or reduce the homeowner subsidies without replacing them.[239] At the root of this approach are contentions that the subsidies either do not work or are not defensible, and should not be used.[240] Common to this line of criticism are claims that homeowner subsidies unfairly preference homeowners over renters, inflate home prices, and require all taxpayers to foot the bill for the housing preference of one segment of the population.[241] A more equitable approach would be to use the money spent on the subsidies to lower

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[237] *See supra* Parts III; *infra* Part VI.A.

[238] *See, e.g.*, CONNIE MACK III ET AL., THE PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM (2005), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Fix-Tax-System-2005.pdf; U.S. DEP'T OF THE TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2013 REVENUE PROPOSALS (2012), http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf; *Tax Reform That Will Make America Great Again*, TRUMP, https://assets.donaldjtrump.com/trump-tax-reform.pdf (last visited Aug. 7, 2017) [hereinafter Trump Tax Plan].

[239] *See, e.g.*, Horpedahl & Searles, *supra* note 62, Stansel & Randazzo, *supra* note 62.

[240] *Id.*

[241] *Id.*

everyone's taxes and let them make up their own mind as to whether to rent or own.[242]

Recent Republican tax reform proposals emanate from this camp, although they are mindful of the political risks of proposing a complete elimination of long-standing tax breaks.[243] They propose significantly increasing the standard deduction, which would reduce the number of taxpayers who would find the MID and SALT valuable (without making them worse off financially) while lowering marginal tax rates, which would reduce the value of these deductions to those who would still claim them.[244] Some proposals also call for imposing or lowering caps on one or more of the subsidies to limit to what extent homeowners, especially higher income ones, can claim them.[245] The tax revenue gained from these caps would be used to pay for lower overall tax rates.

The second camp wants to improve the performance of the homeowner subsidies and in particular the MID, in making homeownership more affordable for those who are financially constrained. The central contention in this camp is that the subsidies would work better if they were built better. Most of these proposals call for converting the mortgage interest deduction to a tax credit designed to ensure low and middle income homebuyers can take advantage of it.[246]

A tax credit is a dollar for dollar reduction in how much a taxpayer owes, as opposed to an exclusion or deduction, which reduces the amount of income on which the taxpayer must pay tax.[247] So a tax credit is potentially of equal value to all taxpayers, no matter their tax bracket, if they have tax liability to offset. Some tax credits go further and are "refundable," which means the IRS will pay the full amount of the credit to the person claiming it even if the credit exceeds the claimant's tax liability (or the claimant has

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[242] *Id.*

[243] TAX REFORM TASK FORCE, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf; Trump Tax Plan, *supra* note 238; TAX CUTS AND JOBS ACT (draft) (2017), https://waysandmeansforms.house.gov/uploadedfiles/bill_text.pdf.

[244] TAX REFORM TASK FORCE, *supra* note 243; Trump Tax Plan, *supra* note 238.

[245] *Id.*

[246] *See, e.g.*, WILL FISCHER & CHYE-CHING HUANG, CTR. ON BUDGET & POLICY PRIORITIES, MORTGAGE INTEREST DEDUCTION IS RIPE FOR REFORM: CONVERSION TO TAX CREDIT COULD RAISE REVENUE AND MAKE SUBSIDY MORE EFFECTIVE AND FAIRER 3 fig. 1 (2013), https://www.cbpp.org/sites/default/files/atoms/files/4-4-13hous.pdf (comparing five such proposals); ALAN D. VIARD, PROPOSAL 8: REPLACING THE HOME MORTGAGE INTEREST DEDUCTION (2013), https://www.brookings.edu/wp-content/uploads/2016/06/THP_15WaysFedBudget_Prop8.pdf.

[247] *See, e.g.*, GRAETZ & SCHENK, *supra* note 55, at 234.

no tax liability at all).[248] These features make the tax credit approach popular among reformers who seek to use the tax code to encourage homeownership without creating an upside-down subsidy. Capping the amount of a mortgage that qualifies for the credit goes even further in equalizing the benefit. For example, a 2005 tax reform panel established by President George W. Bush recommended converting the mortgage interest deduction to a flat tax credit equal to 15% of the mortgage interest a homeowner pays each year, but limiting the maximum amount of the mortgage eligible for the credit to 125% of a community's median local home price.[249]

This article agrees with both camps that the homeowner subsidies ought to be reformed. The evidence is overwhelming that the current subsidies primarily encourage those who are relatively affluent and would already buy homes to buy larger and more expensive ones. This is neither the purported objective of the subsidies nor responsive to a separate market failure.

This article agrees with the second camp but disagrees with the first camp as to the defensibility of the concept of homeowner subsidies. Ensuring that a sufficient supply of affordable housing exists to shelter citizens is a legitimate interest of government. Housing affordability is a persistent and growing challenge for low and middle income households throughout the country, especially in this era of growing income disparity. Moreover, although the subject of debate, many have cited to the positive internalities and externalities associated with homeownership.[250] So if the government is to be in the field of subsidizing housing at all, then making homeownership more attainable and affordable, as an alternative to renting, is defensible. The proposals from the second camp are undeniably more efficient and equitable ways of accomplishing that objective than the current homeowner subsidies and very likely more so than proposals from the first camp.[251]

However, the proposals from these two camps are not, on their face, smarter subsidies in the way Part V describes. One could speculate that either an elimination or roll back of the current homeowner subsidies or a conversion to an affordability oriented tax credit might incidentally reduce

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[248] *See, e.g.*, 26 U.S.C. § 32 (2012) (Earned Income Tax Credit).

[249] MACK III ET AL., *supra* note 238. *See also*, FISCHER & HUANG, *supra* note 246 (noting that other proposals for conversion to tax credit each include an upper limit on amount of mortgage eligible for credit).

[250] *See, e.g.*, Glaeser & Shapiro, *supra* note 6, at 3.

[251] One caveat, however, is that policymakers would need to consider whether broadly available tax credits would simply be capitalized into higher home prices in supply-constrained housing markets.

some of the negative housing externalities discussed in Part IV. For example, higher income households would either receive no or less mortgage based tax relief under any of those proposals and, thus, have less incentive to seek out larger and more expensive homes on low density lots or in exclusive neighborhoods. Also, lower and middle income and minority households might see lower housing prices (if one or more of the current homeowner subsidies are eliminated) or increased buying power (if affordability-oriented tax credits are adopted) and so presumably would have greater ability to move into and integrate neighborhoods of opportunity. On the other hand, one could also speculate as to how certain negative housing externalities might be exacerbated. The push of additional households into more affluent suburban and exurban areas could exacerbate sprawl and accelerate disinvestment and further isolation of marginalized communities. Furthermore, the proposals from the two main camps are not adaptable to address the varying range of strengths and challenges faced by different housing markets.

The bottom line is that none of the proposals from these two camps are specifically engineered to be "smarter" as this article envisions. In that sense, they represent missed opportunities to turn homeowner subsidies into tools for meaningfully reducing negative housing externalities. The aim of the rest of this article is to consider whether and how smarter homeowner subsidies might be engineered.

A critical starting point is to recognize that different homeowner choices as to home location and form result in different amounts and types of housing externalities. Accordingly, rather than rewarding homeowner decisions at large and in roughly equivalent ways, smarter homeowner subsidies should be equipped to reward certain decisions, but not others, or to do so in varying amounts according to the housing externalities they generate.

A smaller contingent of reformers has offered ideas on allocating homeowner subsidies more strategically and selectively. As part of a package of reforms aimed at improving affordability in inelastic, supply-constrained housing markets, Edward Glaeser and Joseph Gyourko have called for capping the mortgage interest deduction for homeowners in those markets and rebating the resulting tax revenue to local government in exchange for its efforts to increase housing supply.[252] The goal would be to reduce overall home prices and allow more households to access these opportunity-rich markets.[253] In the midst of cleanup efforts from the foreclosure crisis, Alan Mallach called for eliminating or scaling back the

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[252] GLAESER & GYOURKO, *supra* note 204, at 142-68.

[253] *Id.*

MID and investing the tax revenue gained into a package of investor and homeowner tax credits to encourage private reinvestment in "tipping point" neighborhoods.[254] Roberta Mann proposed replacing the MID with tax credits that incentivize the purchase of modest sized homes and those located near public transit as a strategy for reducing urban sprawl.[255] Meanwhile, Dorothy Brown, among others, has suggested limiting mortgage interest and property tax subsidies to those living in racially diverse neighborhoods.[256]

Each of these proposals is thoughtfully formulated for the housing market problem it seeks to address. In that sense, each calls for a smarter form of homeowner subsidy. That said, each drills down on only one type of problem or negative housing externality and some focus on a challenge unique to certain types of housing submarkets. The purpose of this article is to think more systemically and with the aim of identifying a viable approach for designing homeowner subsidies capable of addressing a collection of different housing externalities across many different types of markets and submarkets.

B. Examining Comparable Subsidies

Fortunately, the slate is not completely blank. State and local governments are increasingly using demand-side tax subsidies to influence business and homeowner location and form decisions when they believe doing so will generate sufficient public benefit within their boundaries to outweigh the forgone taxes. In fact, the driving force for doing so has often been to combat negative externalities, like those following from chronic economic or housing disinvestment. The body of public finance research that has emerged on the efficacy of these subsidies is worth examining.

A good starting point is the track record on demand-side tax subsidies meant to attract and retain businesses and encourage job creation. Although aimed at businesses rather than homeowners, the record is deeper and more established as many states and localities have engaged in this practice for

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[254] These are neighborhoods, which HUD would select, that would have experienced a large number of foreclosures but still have significant assets and market building potential. ALAN MALLACH, CUT TO INVEST: CREATE NEW BOND AND TAX CREDIT PROGRAMS TO RESTORE MARKET VITALITY TO AMERICA'S DISTRESSED CITIES AND NEIGHBORHOODS (2012), https://www.brookings.edu/wp-content/uploads/2016/06/06-land-use-bonds-taxes.pdf.

[255] Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000).

[256] Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 371-74 (2009). *See also*, Rothstein, *supra* note 130 (proposing the withholding of the mortgage interest deduction from racially homogenous communities with exclusionary zoning laws).

several decades.[257] In fact, the practice has become so pervasive that most businesses seeking to relocate (or simply considering whether to stay put) have come to expect generous state and local tax abatement to be a part of the package and often insinuate that they are prepared to go to the highest bidder. This has led to an unhealthy level of competition and a race to the bottom among states and cities, in which subsidies are so broadly available, overly generous and free of conditions that they become unhinged from accomplishing discernible, and justifiable public benefits.[258]

In this failure lies an important lesson about the value of carefully limiting and targeting demand-side tax subsidies. Among those economists and policy analysts who support business attraction and retention subsidies, the prevailing opinion is that subsidies for which the resulting benefits justify the costs are those that are carefully targeted and monitored.[259] This includes being: geographically limited (to those places under great fiscal stress or where a market failure truly acts as a barrier to entry); right-sized in terms of amount, scope, and class of eligible recipients to tie closely to the problem the subsidy seeks to overcome; periodically evaluated to make sure the subsidy works; and retractable if the business isn't holding up its end of the bargain.[260] Even many of those skeptical about such subsidies acknowledge that carefully constructed subsidies approved after a thorough and open cost-benefit discussion may sometimes be justified.[261]

Although the subject of less study, even more substantively relevant is the experience of local governments that have used property tax abatement to induce prospective homebuyers to buy new homes or substantially rehabilitate existing homes within their boundaries. Numerous cities have adopted policies like this in response to steep population declines.[262] Their stated objective is typically to combat the negative externalities that result from chronic disinvestment in their communities, like the decimation of the local tax base and the human, social, and economic costs associated with deteriorating neighborhoods.[263]

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[257] Esteban G. Dalehite, John L. Mikesell & C. Kurt Zorn, *Variation in Property Tax Abatement Programs Among States*, 19 ECON. DEV. Q. 157 (2005).

[258] *Id.*

[259] *Id. See also*, Gary Sand, Laura A. Resse & Heather L. Khan, *Implementing Tax Abatements in Michigan: A Study of Best Practices*, 20 ECON. DEV. Q. 44 (2006).

[260] Dalehite, Mikesell & Zorn, *supra* note 257; Sand, Resse & Khan, *supra* note 259.

[261] *See, e.g.*, William H. Bowen & Chang-Shik Song, *Reasons for Misgivings About Local Economic Development Initiatives*, *in* THE ROAD THROUGH THE RUST BELT.: FROM PREEMINENCE TO DECLINE IN PROSPERITY 245 (William H. Bowen ed., 2014).

[262] Mark S. Rosentraub, Brian Mikelbank & Charlie Post, *Residential Property Tax Abatements and Rebuilding in Cleveland, Ohio*, 42 ST. & LOC. GOV'T REV. 104 (2010).

[263] *Id.*

Here are some of the lessons learned concerning taxes, subsidies and homeowner decisions. First, tax rates and overall tax burdens associated with purchasing in different jurisdictions within a region are influential in homebuyer decisions as to where to locate, especially where supply is elastic (i.e. comparable alternatives exist in nearby communities).[264] Likewise, subsidies in the form of tax breaks are capable of influencing prospective homebuyer decisions.[265] However, they are not the exclusive, nor even necessarily the driving factor, as to where a homebuyer chooses to purchase.[266] Furthermore, although subsidies can influence behavior, the challenge is in achieving the desired results.[267] For example, residential property tax abatement in Cleveland, Ohio has been successful in attracting new high income residents to the city, improving neighboring property values and even in creating net fiscal gain for the city's tax base.[268] It has not, however, reversed overall population decline nor improved certain important neighborhood outcome measurements.[269]

Success appears to be a result of several factors. These include carefully tailoring the subsidies to attract the types of development and homeowners that the locality has determined are important to meet its objectives.[270] They also include vigilance in monitoring the impact of the subsidy to ensure it is at the correct price point and has the right other features to actually influence consumer decisions, and the adaptability to adjust the policy as needed based on this data.[271] Subsidies seem to be most viable when they are not designed in isolation but, rather, cognizant of other factors that affect homebuyer decision-making in that particular community (e.g., public school quality, proximity to metropolitan area, demographic trends) and ideally as part of a more comprehensive, community strategic

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[264] Erik B. Johnson & Randall Walsh, *The Effect of Property Taxes on Location Decisions: Evidence from the Market for Second Homes*, (Nat'l Bureau of Econ. Research, Working Paper No. 14793, 2009).

[265] Rosentraub, Mikelbank & Post, *supra* note 262.

[266] CENT. COLL. & PELLA AREA CMTY. & ECON. ALLIANCE, EXAMINING FACTORS THAT SHAPE THE RATE OF HOMEOWNERSHIP OF PELLA AND SIMILARLY SIZED MUNICIPALITIES (2017), http://kniakrls.com/wp-content/uploads/2017/05/Phase-3-Final-Report.pdf.

[267] Rosentraub, Mikelbank & Post, *supra* note 262; Doreen Swetkis, Residential Property Tax Abatement: Testing a Model of Neighborhood Impact (Dec. 2009) (unpublished Ph.D. dissertation, Cleveland State University), http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1285&context=etdarchive.

[268] *Id.*

[269] *Id.*

[270] CENT. COLL. & PELLA AREA CMTY. & ECON. ALLIANCE, *supra* note 266.

[271] Rosentraub, Mikelbank & Post, *supra* note 262, at 106 (referencing to Portland, Des Moines and Tacoma as cities that altered their residential abatement policies to better match homebuyer behavior).

development plan.[272] Finally, policymakers should take the long view in expecting results, as it may take several years to see the type of improvement that justifies the short-term costs of the subsidies.[273]

Collectively, these studies suggest the mix of qualities smarter homeowner subsidies should possess. These types of subsidies work best when they are tailored, limited, variable, and complementary. ***Tailored*** means crafted to encourage behavior that squarely addresses the identified problem. If the problem is deteriorating or antiquated housing stock and a market for housing exists, then appropriately tailored subsidies should fund home rehabilitation or new construction. If the problem is residential segregation, then tailored subsidies could include incentivizes for excluded homeowners to purchase in exclusive communities or non-excluded homebuyers to purchase in excluded communities.

Limited means not too broadly available. Instead, a subsidy should be restricted to those individual homeowner decisions demonstrated to achieve the subsidy's objective.. If the objective of a subsidy is to offset chronic community disinvestment, then it should not be available to a homebuyer seeking to purchase in a healthy housing market.

Subsidies should be ***variable*** in the sense that they allow for variations across housing markets and submarkets. As discussed earlier, different markets face different problems and possess different strengths, and often contain multiple submarkets. Furthermore, homeowners or prospective home buyers within one market or submarket may not respond in the same way as those within others.

In a similar vein, the subsidies should be ***complementary***, in that they should support, not counteract, other federal, state, and local efforts to address negative housing externalities. Ideally, subsidies should be designed so that they coordinate with appropriate community planning and the investment of other private, public, and philanthropic resources.

As a final note, it bears mention that state and local government tax abatement, as a means to attract development, is frequently criticized for being inequitable. This is because relieving the tax burden of one party typically means that other taxpayers within the jurisdiction must make up for this forgone revenue or that the jurisdiction simply goes without the revenue, meaning schools and other local services suffer. Equity objections may be less intense with federal subsidies, because the tax burdens at issue

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[272] CENT. COLL. & PELLA AREA CMTY. & ECON. ALLIANCE, *supra* note 270; *see also* CLAIRE DEWIND, JENNIFER DICKEY, ELLEN O'NEILL, & MOLLY W. METZGER, TAX ABATEMENT IN SAINT LOUIS: REFORMS COULD FOSTER EQUITABLE DEVELOPMENT (2016), https://csd.wustl.edu/Publications/Documents/PB16-21.pdf (Central for Social Development Policy Brief 16-21).

[273] Rosentraub, Mikelbank & Post, *supra* note 262.

are spread out across the entire country rather than across a city. Furthermore, the current homeowner subsidies are, in fact, highly inequitable and regressive, and so smarter subsidies may very well serve as an improvement.[274] Nonetheless, a desirable quality of virtually any subsidy is that it "pencil out"– i.e., demonstrate a net gain and return on investment for the community. A study of the previously mentioned Cleveland property tax abatement showed that over time it generated a dollar and a half of property tax for every dollar abated, and this finding aided significantly in its renewal.[275]

C. *Conceptual Models for Smarter Subsidies*

Part VI.B looked to state and local examples of smarter subsidies. This is because there are far fewer examples of federal-level, demand-side homeowner subsidies that aim to accomplish objectives other than rewarding homeownership at large or making it more affordable. Perhaps this is because it is challenging to conceive of a subsidy (or collection of subsidies) that works across thousands of different housing markets that experience and are responding to a range of different housing externalities in a variety of different ways. There is an inherent tension between the highly tailored qualities of the ideal subsidy and designing an approach that could work across the board. Nevertheless, three models present theoretically plausible approaches and are worth discussion here.

1. *Subsidy Eligible/Ineligible Zones*

The first model is to adopt a single homeowner subsidy aimed at reducing homeownership costs, but to make it only claimable by those whose homeownership decision also reduces other negative housing externalities. An example would be offering the subsidy to homeowners who live in communities that are disinvested or disinvesting. Or, to those who purchase median-sized homes in the built environment or within new development boundaries designed to reduce suburban sprawl. Or, to those who purchase homes in racially integrated neighborhoods. The latter two solutions are similar to those posed by Professors Mann and Brown, respectively.[276] In any of these scenarios, the end result would probably be a complicated national map of subsidy-eligible and ineligible zones.

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[274] *See infra* Part III.

[275] Thomas Bier et al., *Cleveland's Residential Tax Abatement Study: Its Impact, Effects and Value* (Feb. 2007); Swetkis, *supra* note 267, at 3.

[276] *See supra* notes 255-256, and accompanying text.

A model like this would have the potential to reduce whatever negative housing externality or externalities at which the subsidy was aimed on a grand scale. Take the example of a subsidy aimed at encouraging homeownership in disinvested communities. Homeowners in these communities would receive a considerable discount on their housing costs, while homeowners in communities with normally functioning housing markets would not. Using a hypothetical $4,000 annual subsidy,[277] a homeowner in a qualifying community would receive a $40,000 discount on housing costs over a ten-year period (the average homeowner tenure). This level of subsidy would presumably drive some segment of homeowners to purchase homes in disinvested communities and others to stay put. Demand for homes in qualifying communities would probably increase, as would private investment, home prices, and the tax base. Over time, increased tax revenue should help to improve public services while decreasing crime, public health risks, and infrastructure concerns.

There are, however, several challenges with a solution along these barriers. One challenge relates to the degree of tailoring that may be required to ensure that the subsidy accomplishes its objective. For example, what amount of subsidy would be necessary to impact homeowner decisions? Would that amount need to vary by community based on regional home prices? What constitutes a "disinvested community"? At what point is it no longer considered disinvested, such that subsidies can be eliminated? If a community reached that point, would a separate subsidy need to remain in place for lower income households to keep homes affordable as prices rise?

Moreover, how would policymakers account for other, more community-specific variations? For example, a disinvested community near a high growth area might turn around quickly, at which point gentrification becomes a concern. On the other hand, in a Rust Belt city with too much housing stock, the city might prefer to limit the subsidy to "tipping point" neighborhoods (those with greater turnaround potential) and redeploy

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[277] Merely for illustration's sake, I arrived at a $4,000 annual credit by dividing the amount of tax revenue currently forgone due to the mortgage interest deduction ($63.6 billion) among the percentage (22.1%) of current U.S. homeowners (75 million) who would live in disinvested communities if current U.S. homeowners were distributed evenly across U.S. census tracts. The quotient equals $3,837, which I rounded up to $4,000. *See supra* notes 26 and 93 for the forgone tax revenue due to the MID and the percentage of census tracts that are within disinvested communities, respectively. The number of U.S. homeowners came from a 2016 Pew Research Center analysis of U.S. Census Bureau data. *See* Anthony Cilluffo et al., *More U.S. households are renting than at any point in 50 years*, FACT TANK (Jul. 19. 2017), http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/.

largely abandoned neighborhoods to park space or wetland recovery. In dealing with thousands of communities, it is easy to imagine that many different types of development scenarios could emerge and that some level of variability in how a subsidy is deployed would be important. Analogous sets of questions would undoubtedly arise for subsidies targeted at other negative housing externalities.

Allowing for subsidies that are highly tailored to work in particular communities also raises the possibility of an unaddressed constitutional issue. The Uniformity Clause of the United States Constitution requires that federal tax code provisions apply uniformly throughout the United States.[278] Theoretically, this clause prohibits Congress from enacting tax provisions that distinguish taxpayers in one geographic area over those in another.[279] The very limited case law has applied the provision quite narrowly, allowing tax laws to stand provided they discuss the distinction in nongeographic terms or where it is at least possible that they could do so.[280] In other words, the Uniformity Clause does not prohibit Congress from making a tax distinction based on "geographically isolated problems"[281] (such as, presumably, community disinvestment, residential segregation, or environmental harm), as long as this distinction is motivated by the condition and not "actual geographic discrimination."[282] While this interpretation appears to provide a good deal of leeway for Congress to craft tax subsidies tailored to address negative housing externalities that occur in particular housing markets, it also indicates some theoretic outer limits on allowing specific housing market refinements to these subsidies.[283] To address this concern, Congress could provide the subsidies outside of the tax code (for example, as HUD-administered grants).

Another challenge is that the disinvested community subsidy addresses only one type of negative housing externality. Would it aid, hamper, or be inconsequential as it relates to other externalities? It is reasonable to speculate that some overlap exists. For example, incentivizing moves to racially integrated neighborhoods would probably reduce socioeconomic segregation, given that poverty rates are significantly higher among certain

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[278] *See* U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be *uniform* throughout the United States." *Id* (emphasis added).

[279] Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 78-84 (2006).

[280] *See, e.g.*, United States v. Ptasynski, 462 U.S. 74 (1983).

[281] *Id.* at 84.

[282] *Id.* at 85.

[283] *But see* Aprill & Schmalbeck, *supra* note 279 at 84 (explaining practical limitations on establishing standing to bring this type of a claim).

racial groups.[284] These incentives might also aid in the reduction of suburban sprawl, because minority households are disproportionately located in older, urban areas that white households may move into in order to obtain the subsidy. On the other hand, this type of subsidy may also have the opposite effect. More economically mobile minority households may move from older urban areas into newer, suburban, and exurban communities, increasing demand for this type of housing and further isolating those left behind. Policymakers would then be left either to determine which negative externalities matter most and prioritize accordingly, or to try and craft a map of subsidy eligible and ineligible areas that is responsive to each of the externalities or most socially beneficially in the aggregate. Then, there is the question of how to treat individual homes that cause fewer negative housing externalities (say a home fully powered by solar energy), but sit in non-qualifying communities (e.g., one with a thriving local housing market). Marshalling information to pinpoint areas and homes that represent socially optimal homeowner decisions would be daunting.

Yet another concern is the potential impact on homeowners living in areas or in homes that would no longer qualify for homeowner subsidies. As demand would increase for qualifying communities and homes, it inevitably would decrease for non-qualifying communities and homes. This would reduce home prices and homeowner equity in the latter, although the extent is unknown and depends to some degree on how fully capitalized the current homeowner subsidies are into a particular community's home prices. Nonetheless, some homeowners could see a significant drop in the value of their homes, which could call into serious question the fairness and political viability of this type of approach.

2. À La Carte Subsidies

A second model would involve Congress authorizing a broader range of separate subsidies, each targeted at a type of homeowner decision that serves to reduce a type of negative housing externality. Think of this as the à la carte approach. One subsidy, like a tax credit that offsets a percentage of a homeowner's mortgage interest expenses, could be widely available in order to promote affordability. On top of that, Congress could stack additional subsidies to encourage specific homeowner behavior, such as making qualifying home repairs in a community with older housing stock, purchasing a LEED certified home, and purchasing a home in an integrated neighborhood.

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[284] *See supra* note 130 and accompanying text.

Congress has actually used this model in the recent past. Between 2005 and 2016, it provided a collection of federal income tax credits to homeowners who purchased energy efficient appliances, made specified home improvements that increase energy efficiency, and installed renewable energy systems for their homes.[285] A principal underlying rationale was to encourage homeowner purchases that reduce the negative environmental externalities resulting from residential energy consumption.[286] Between 2008 and 2010, Congress also made available a tax credit of up to $8,000 for first-time homebuyers (later expanded to include many other homebuyers) to help stabilize the national housing market as home prices tumbled during the foreclosure crisis.[287]

The à la carte approach also has the potential to impact the behavior of a substantial number of homeowners and, therefore, reduce negative housing externalities on a large scale. The credits would offset the perceived or actual costs of certain socially beneficial homeowner behavior—like repairing an older home when the homeowner would otherwise be unlikely to fully recoup the costs. This helps not only the homeowner who receives the subsidy, but also has potential spillover effects on neighboring homeowners whose homes might increase in value as a result and who then would be more likely to make similar repairs.

One challenge with the presumably smaller,[288] à la carte subsidies is designing them so that they actually prompt the desired behavior and have the desired impact. Both the homeowner energy credits and first-time homebuyer credit faced questions as to whether they served as effective incentives.[289] The individual energy credits were relatively small and also subject to low overall caps raising concerns that they did not act as much of an incentive and instead were mostly claimed as a windfall by those who already planned to make the subsidized investments.[290] The homebuyer tax

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[285] *See* 26 U.S.C. §§ 25C, 25D (2017).

[286] *See* CRANDALL-HOLLICK & SHERLOCK, *supra* note 194, at 4-7.

[287] The Federal first-time homebuyer credit was first introduced as part of the Housing and Economic Recovery Act of 2008. It was modified and extended via the American Recovery and Reinvestment Act. The credit was expanded and extended a third time under the Worker, Homeownership and Business Assistance Act of 2009. *See* 26 U.S.C. § 36.

[288] I am assuming the overall pool of tax expenditures is not increasing, and thus a la carte subsidies would probably be smaller because that pool would have to be split up across several subsidies, rather than delivered as one larger subsidy.

[289] *See, e.g.*, CRANDALL-HOLLICK & SHERLOCK, *supra* note 194, at 8-9; *see also* Karen Dynan, Ted Gayer & Natasha Plotkin, *The Recent Homebuyer Tax Credit: Evaluation and Lessons for the Future*, BROOKINGS INST. (June 28, 2013), https://www.brookings.edu/research/the-recent-homebuyer-tax-credit-evaluation-and-lessons-for-the-future/.

[290] CRANDALL-HOLLICK & SHERLOCK, *supra* note 194.

credit was larger, caused home purchases to rise over a two year period, and probably helped keep the national housing market from total freefall.[291] But whether it increased the overall homeownership rate or even had a sufficient long-term stabilizing impact on housing prices are largely in question. Because the credit had an expiration date, many analysts wondered if it simply caused those who already planned to purchase a home to do so earlier.[292]

Moreover, the à la carte approach is potentially a scatter shot strategy. Unless carefully coordinated, a subsidy might support a homeowner decision that reduces one negative externality while simultaneously increasing others. For example, a homeowner might claim a renewable energy tax credit for putting solar panels on a new McMansion built on a floodplain.

Finally, as with the first approach, policymakers would face the challenge of crafting subsidies at the national level to work in thousands of different housing submarkets. A home rehabilitation tax credit that incentivizes the repair of a historic home in a tipping point neighborhood with rebound potential may make perfect sense. On the other hand, the use of that subsidy to repair an antiquated home in a mostly abandoned neighborhood where new construction or re-purposing is a better strategy may make much less sense.

3. Community and Project Level Subsidies

A third model represents the other side of the coin, in that it is more bottom up than top down. Congress could authorize homeowner subsidies to be allocated on a community-by-community or project-by-project basis and in coordination with other community or public sector efforts to address negative housing externalities in a comprehensive way.

This type of subsidy could be deployed in a couple of different scenarios. One scenario would be in support of housing development proposed as part of locally driven, community planning that meets federally prescribed standards. For example, in Cleveland, Ohio, a coalition of community organizations, city and county agencies, and local technical assistance providers have prepared a comprehensive land use plan in response to a recognition that regional population decline and changing land-use patterns means the city has more developed property than it can sustain in the

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[291] *See* Dynan, Gayer & Plotkin, *supra* note 289; *see also* Tricia Snyder & Elizabeth Ekmekjian, *What are the Impacts of the Home Buyer's Tax Credit on Housing and the Economy?*, RES. BUS. & ECON. J. (last visited Nov. 3, 2017), http://www.aabri.com/manuscripts/131478.pdf.

[292] Dynan, Gayer & Plotkin, *supra* note 289, at 9.

foreseeable future.[293] The plan, called "Re-imagining a More Sustainable Cleveland," has been adopted by the Cleveland City Planning Commission and it proposes strategic redeployment of land in ways that stabilize and begin to revitalize neighborhoods with development potential, while devoting other land to green infrastructure (e.g. parks and storm water management), agriculture and energy generation.[294]

If a plan like this meets prescribed standards for community participation, sustainability, and the reduction of negative externalities, the federal government could approve homeowner subsidies for use in those neighborhoods that the plan targeted as having the potential for residential revitalization. In this way, the subsidies would be more selectively available in circumstances where informed local actors could demonstrate that spurring homeownership or a particular type of homeowner behavior would be highly beneficial. The subsidies would serve as one arrow in a quiver of strategies that a community might use to engage in strategic development. When used in this scenario, the homeowner subsidy should almost certainly take the form of grants rather than tax code subsidies to avoid the potential Uniformity Clause concerns identified in the discussion of the first model.[295]

Another scenario could be in support of other government-funded housing development programs aimed at reducing one or more negative externalities. For example, over the past few decades, two major federal programs—HOPE VI and now the Choice Neighborhoods Initiative—have sought to replace distressed public and assisted housing projects with better quality mixed-income housing in order to reduce residential segregation and break up concentrations of poverty.[296] Very recently, a coalition of community development advocates launched a campaign for a new form of financing called the Neighborhood Housing Tax Credit, aimed at incentivizing developers and lenders to finance the construction and rehabilitation of housing that would attract moderate and middle income households to disinvested neighborhoods.[297] These are both examples of

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[293] Neighborhood Progress, Inc. & Cleveland City Planning Comm'n, RE-IMAGINING A MORE SUSTAINABLE CLEVELAND, CLEVELAND PLANNING COMM'N (adopted Dec. 19, 2008), http://www.reconnectingamerica.org/assets/Uploads/20090303ReImaginingMoreSustainableCleveland.pdf.

[294] *Id.*

[295] *See supra* notes 278-283, and accompanying text.

[296] *See* Taryn Gress, Seungjung Cho & Mark Joseph, *HOPE VI Data Compilation and Analysis*, OFFICE OF POL'Y DEV. & RESEARCH 7 (Sept. 2016), https://www.huduser.gov/portal/sites/default/files/pdf/HOPE-VI-Data-Compilation-and-Analysis.pdf.

[297] *See What is the Neighborhood Homes Investment Act?*, NEIGHBORHOOD HOMES INVESTMENT ACT, https://neighborhoodhomesinvestmentact.org/about/ (last visited Aug 8,

supply side initiatives aimed at reducing negative housing externalities. Offering homeowner subsidies directly to potential homebuyers in developments like these would provide a corresponding demand side incentive that could significantly increase the likelihood of success of these programs.

This third approach is also the flipside of the other two in terms of its advantages and challenges. It serves as a much better vehicle for incorporating the unique aspects of each particular community's housing market and submarkets into the allocation of subsidies. It coordinates with community planning and the investment of other public resources, and thus is likely to be highly complementary to local efforts to impact housing conditions. Because targeting of the subsidies originates at the local level where knowledge of the housing market is greatest identifying development that addresses all or most of the negative housing externalities also seems more achievable. The involvement of local policymakers might make monitoring the impact of the subsidies over time and adapting them as necessary much easier.

Of course, there are challenges as well. This model would not catalyze substantial changes in homeowner behavior in one fell swoop as the other models potentially would. Changes would come about more gradually and sporadically. Deciding on and overseeing the allocation of subsidies on a project-by-project basis would also be more administratively burdensome and necessarily require significantly more federal time, attention and expense.

This approach also assumes, especially in the scenario in which the subsidies would complement community planning, capacity at the local level across the country to generate comprehensive and useful plans that meet federal standards and take into account multiple forms of housing externalities. Federal funds and involvement to help interested, but capacity lacking, communities achieve this would probably be necessary. This is to say nothing of the increased susceptibility of locally driven processes to political and private interest influence and corruption. Coordinating this type of a program across such a large and diverse landscape could be a tall task.

On the other hand, the federal government does have experience in overseeing similarly structured programs. Of particular relevance is the Community Development Block Grant program, which involves the allocation of federal investments in community development to local governments for implementation in response to planning priorities

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2017) (summary of its recent campaign).

identified at the local level.[298] Using the infrastructure of an existing program, like CDBG, to allocate homeowner subsidies, rather than starting from scratch, could help overcome some of the administrative concerns.

D. Data and Innovation as Gateways to Smarter Subsidies

As noted throughout this article, a significant challenge to making homeowner subsidies smarter under any model is understanding the housing externalities at play within thousands of different housing markets and submarkets, and engineering the subsidies to be precise and sensitive enough to address these externalities. In this respect, the world is changing rapidly and in ways that portend success.

The real estate industry, like many others, is in the midst of a data revolution. Online sources are compiling and making readily accessible property specific data on everything ranging from owner, parcel and building information, mortgages and liens, code violations, past sales history, crime and fire history, and more.[299] Simultaneously, a data analytics industry has emerged. Firms in this industry have developed sophisticated algorithms and valuation models, which, coordinated with geographic mapping technology, can process spools of available data and translate it into digestible, real time, accurate market assessments of local housing conditions.[300]

Predictably, much of the data analytics industry serves banks, insurance companies and mortgage servicers.[301] However, a separate and growing segment of the industry, consisting of both nonprofit and for-profit entities, focuses on community planning and revitalization.[302] Community leaders and local governments are working with these service providers to incorporate property and neighborhood specific data into more sophisticated, forward looking, and sustainable development plans.

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[298] *See supra* notes 101-103 and accompanying text.

[299] *See, e.g.*, NEO CANDO: PROPERTY DATA, http://neocando.case.edu/cando/housingReport/interface.jsp http://neocando.case.edu/ (last visited Aug. 8, 2017).

[300] *See infra* text accompanying notes 301-309.

[301] *See, e.g.*, CORELOGIC: DATA, http://www.corelogic.com/about-us/data.aspx (last visited Aug. 8, 2017).

[302] *See, e.g.*, DYNAMO METRICS, http://www.dynamometrics.com/ (last visited Aug. 8, 2017); LOVELAND TECHNOLOGIES, https://makeloveland.com/company (last visited Aug. 8, 2017); THE CENTER CTR. FOR COMMUNITY PROGRESS, http://www.communityprogress.net/the-help-you-need-pages-7.php (last visited Aug. 8, 2017).

There are many examples of this type of planning. Cities like Detroit,[303] Cincinnati,[304] Kansas City,[305] and Memphis,[306] each confronted by large stockpiles of vacant and distressed properties, are creating data infused mapping interfaces covering every property within their boundaries. This visual mapping technology allows community leaders and agencies to more efficiently determine what code enforcement, demolition and rehabilitation strategies for which properties make the best (i.e. smartest) use of their resources. In Cleveland, a community development funding intermediary recently hired a "spatial econometrics" firm to use hedonic pricing models to determine which types of homes, if rehabilitated, would yield the highest increases in surrounding property values.[307] This is another data-based mechanism for prioritizing the spending of a city's limited public and philanthropic revitalization funds, in this case specifically to maximize positive externalities on neighbors and the local tax base.

Smaller cities are getting into the game as well. Danville, Virginia, a former mill town, is just one example of a city with a size, location and economic base that suggests continued population stagnancy and perhaps even further contraction. Rather than simply letting development happen as it will and spread out further, Danville's planning department worked with an urban development consulting firm to create a multi-tiered housing plan within the city's current footprint. The plan delineates separate areas for targeted demolition, rehabilitation and growth based on what future homeowners are likely to seek and population projections.[308] Meanwhile, the Center for Neighborhood Progress, a national nonprofit, has begun offering publications and technical assistance aimed at helping communities

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[303] John Gallagher, *Start-Up Firm Mines Data to Aid Detroit Blight Fight*, DETROIT FREE PRESS (Jan. 16, 2016, 10:55 PM), http://www.freep.com/story/money/business/michigan/2016/01/16/blight-detroit-econometrics/78645606/.

[304] Janis Bowdler, Opinion, *Mapping Blight at the Parcel Level in Cleveland, Columbus and Cincinnati*, CLEVELAND.COM (Apr. 9, 2017), http://www.cleveland.com/opinion/index.ssf/2017/04/mapping_blight_in_cleveland_co.html

[305] Ellie Moxley, *To Tackle Blight Kansas City, Kansas, Will Crunch the Numbers*, KCUR (June 14, 2016), http://kcur.org/post/tackle-blight-kansas-city-kansas-will-crunch-numbers#stream/0.

[306] Madeline Faber, *Memphis Property Hub Using Micro-Level Data to Drive Solutions*, THE DAILY NEWS (Aug. 8, 2016), https://www.memphisdailynews.com/news/2016/aug/8/memphis-property-hub-using-micro-level-data-to-drive-solutions/.

[307] *Rehab Impacts in Cleveland 2009-2015*, DYNAMO METRICS, http://www.rehabimpact.com/ (last visited Aug. 8, 2017).

[308] Sandy Smith, *How to Shrink a Housing Market So It Can Grow Again*, NEXT CITY (Oct. 24, 2016), https://nextcity.org/daily/entry/shrink-housing-market-growth.

large and small develop the capacity to use data to shape planning and revitalization decisions.[309]

For sake of illustration, the above examples have focused on the use of property data, technology, and analytics to address community disinvestment. But these advances are also taking place with respect to the other negative housing externalities this article addresses. For example, HUD developed data-infused mapping tools for its fund recipients (state and local governments, and housing agencies) to use in measuring residential segregation within their boundaries and developing strategies to address it.[310] The EPA has developed "smart location" maps, designed to reveal block-by-block characteristics like proximity to jobs, transit options and walkability, to encourage home seekers to make choices that lessen greenhouse gas emissions and improve their health and access to amenities.[311]

E. A Path Forward

Demand-side subsidies can influence homeowner behavior. As discussed throughout Part VI, if properly constructed, this can include encouraging homeowner decisions that impose fewer negative housing externalities (and create more positive ones). Rapid, recent advances in housing data, analytics and planning make the prospect of smarter homeowner subsidies increasingly more plausible.

So how to proceed? While each model discussed in Part VI.C has potential advantages, the third would probably be the best starting point. This is due to its flexibility. It is the most adaptable to community-by-community variations, can be integrated as a complement to other federal, state and local programs that subsidize housing, and lends itself most easily to experimentation and adjustment. In these ways, it holds the greatest potential for "smarter" subsidy design in the way this article envisions.

Certain features are important to include if proceeding with the third model. First, community or project-level homeowner subsidies should take the form of homeowner grants or loans allocated through HUD, rather than

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[309] *See* ALAN MALLACH, CTR. FOR CMTY. PROGRESS, NEIGHBORHOODS BY NUMBERS: AN INTRODUCTION TO FINDING AND USING SMALL AREA DATA (2017), http://www.communityprogress.net/filebin/Center_for_Community_Progress_Alan_Mallach_Neighborhoods_by_Numbers__FINAL_DIGITAL_MARCH_2017.pdf.

[310] *See, e.g., Affirmatively Furthering Fair Housing Data and Mapping Tool*, DEP'T OF HOUS. AND & URB. DEV. https://egis.hud.gov/affht/# (last visited Aug. 8, 2017).

[311] *See, e.g., Smart Location Mapping*, U.S. ENVTL. PROT. AGENCY EPA: SMART GROWTH, https://www.epa.gov/smartgrowth/smart-location-mapping (last visited Aug. 8, 2017).

as tax breaks provided through the Internal Revenue Code. HUD, after all, is a housing agency. It has a great deal of experience allocating federal funding in response to community planning processes that identify localized funding needs. Just a few examples include the CDBG program,[312] the Neighborhood Stabilization Program,[313] and the HOME Investment Partnerships Program.[314] The Internal Revenue Code, on the other hand, is not a good vehicle for delivering on social policy with as many moving parts as this would entail. Furthermore, there is a risk, discussed at various points in Part VI.C., that highly tailored, community specific subsidies delivered as tax breaks could violate the Uniformity Clause of the U.S. Constitution or at least appear to do so.[315]

Second, local governments should serve as the applicants for and the ultimate distributer of homeowner subsidies within their boundaries. Congress and HUD would set the parameters for the housing objectives and types of homeowner decisions that the subsidies could support, and these would correlate closely with the negative housing externalities discussed throughout this article. But local communities would identify the specific instances in which they would deploy the subsidies.

For example, a city grappling with disinvestment might identify several tipping point neighborhoods where an influx of new homeowners could provide the foundation for stabilization and a turnaround. This city might then propose in its application purchase grants for home buyers and local property tax offset grants for existing homeowners. HUD standards might additionally require that these grants advance (or at least not undermine) residential integration and environmental objectives. In addition, a community planning process should support the application for these types of subsidies. This is similar to the design of already existing HUD programs like CDBG, NSP and HOME.[316] The basic premise is that HUD provides oversight, but communities are given significant leeway in proposing the best specific uses of the funds.

Third, given that this type of a subsidy model represents a significant departure from the current model, it would be best initiated as a pilot program, limited in scope and subject to review, until its merits are demonstrated and its preliminary kinks are worked out. In addition,

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[312] *See supra* notes 101-103 and accompanying text.

[313] Congress authorized three 'phases of the Neighborhood Stabilization Program ("NSP"). NSP 1 was authorized by the Housing and Economic Recovery Act (2008), NSP 2 by the American Recovery and Revitalization Act (2009), and NSP 3 by the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010).

[314] The statute codifying HOME is at 42 U.S.C. 12722.

[315] *See supra* Part VI.C.

[316] *See supra* notes 312314 and accompanying text.

Congress should strongly consider making this program competitive in its pilot phase in order to encourage innovation and to identify communities with the capacity to succeed.

Federal agencies have significant recent experience launching new funding programs in this manner. The second round of Neighborhood Stabilization Program funding involved a competitive application process in which local governments and nonprofit applicants had to demonstrate to HUD that their proposed use of the funds would help to stabilize targeted neighborhoods (while achieving a number of other objectives, including environmental ones), resulted from a planning process and that they possessed the capacity to carry it out.[317] In a similar vein, the American Recovery and Reinvestment Act of 2009 provided $4.35 billion for a competitive grant fund for state plans that accomplished a broad range of objectives related to improving educational outcomes, and might be used as models for other states.[318] This approach to funding has become a useful method for spurring innovation and reform within the public sector, as local actors are highly motivated by available funds to get creative in designing plans capable of success. Ultimately, a pilot phase may reveal that it is actually feasible and more efficient to allocate homeowner subsidies using the first or second models, or that some type of hybrid model would work best.

A pilot phase would also allow policymakers to determine the impact of the third model on housing affordability and equity concerns. Smarter homeowner subsidies, as discussed throughout this article, would involve direct, selectively available subsidies to private individuals, the allocation of which is influenced by data analytics, market factors, and local leaders who are also focused on keeping or making their communities competitive. This raises well-merited and significant concerns regarding housing access and equity, especially as it relates to politically marginalized groups. Congress should include standards and safeguards to address these concerns, which HUD should be charged with implementing. Yet, it is reasonable to expect that this will not be a perfect science, and will take time.

A pilot model would make sense for another reason as well. It may match best with the political challenges certain to follow from tackling reform as charged as that involving the homeowner subsidies. As Part V discussed, any effort at changing the current homeowner subsidies will encounter immediate and stern resistance from the powerful interests benefiting from

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[317] Joice, *supra* note 106, at 139.

[318] U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009), https://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

them. This resistance may include invoking, not without merit, the potential for a drop in home prices that could result from a significant roll back of the subsidies. A more politically feasible scenario for reform would involve an incremental roll back of one or more of the current homeowner subsidies, by lowering the existing caps on the amount of gain that qualifies for the capital gains exclusion or the value of the mortgage or property that qualifies for the MID or property tax deduction. Proceeding in this way would primarily only affect the tax breaks of wealthy homeowners (and only on a portion of their tax breaks), be unlikely to significantly disrupt home prices and yield significant tax revenue for the federal government.[319] A portion of this revenue could then be devoted to piloting smarter homeowner subsidies.

It bears repeating here that the quest for smarter homeowner subsidies is not a call for abandoning homeowner subsidies that seek to make homeownership more affordable. The calls for more thoughtfully constructed tax credits aimed at low and middle homeowners, in what Part VI.A described as the second camp of proposals, is in a sense a smarter homeowner subsidy as it relates to home affordability. The goal of this article is not to work to the exclusion of this objective, but rather to advocate for subsidy reform that is also smarter as it relates to negative housing externalities. These two goals can and should be complementary.

VII. CONCLUSION

The prospect of smarter homeowner subsidies is tantalizing. When considering the sheer scale of what the federal government currently invests in homeowner subsidies that inure primarily to the benefit of higher income households and are completely insensitive to negative housing externalities, it is difficult not to wonder what a more carefully considered system of allocating subsidies might yield. If done right, a powerful tool could be added to the mix of federal housing strategies.

At the same time, the challenges to successfully implementing smarter subsidies on a nationwide basis are daunting, as this article identifies. In earlier eras, the potential for inequities, inefficiencies and problems in administration would likely have proven too difficult to overcome. Rapidly advancing technology and corresponding increases in planning sophistication at the community level should ultimately provide the opportunity for the federal government to persevere and get a much better

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[319] *See* FISCHER & HUANG, *supra* note 246, (citing to proposals that would limit the mortgage interest deduction to 28% for all claimants or that would alternatively provide all homeowners with a 15% tax credit, limited to a $500,000 mortgage, and result in tens of billions of dollars of additional tax revenue).

return on its massive investment in homeownership. Participation and innovation at the community level in designing these subsidies would be important catalysts to success.

VIII. POSTSCRIPT—TAX CUTS AND JOBS ACT OF 2017

In a year that challenged political convention in almost every respect, the unexpected also happened with federal income tax reform. As this article advanced through the final stages of the publication process, Congress introduced, considered and passed a far-reaching package of changes to the federal income tax code called the Tax Cuts and Jobs Act of 2017 (the "Act").[320] The entire process took less than two months—warp speed by Congressional standards, especially for tax reform.

As it relates to the homeowner subsidies, the Act represented a victory for those this article described in Part VI.A as belonging to the first camp of reformers. The Act approximately doubled the size of the standard deduction, meaning millions of additional taxpayers will no longer itemize deductions.[321] This greatly reduces the number of those who will claim two of the three principal homeowner subsidies: the mortgage interest deduction and the deduction for state and local taxes.[322] At the same time, the Act reduced the amounts of mortgage interest and state and local taxes that are deductible, and eliminated the MID for home equity debt (i.e. mortgage financing used for purposes other than to acquire, construct, or substantially improve a home).[323] A primary goal of the Act's proponents was to reduce

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[320] Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). It was signed into law on December 22, 2017.

[321] *Id.* § 11021. As with many of the individual income tax provisions in the Act, this one is due to expire on December 31, 2025. *Id.* § 11021(a).

[322] *See supra* notes 32-36, and accompanying text. Estimates as to what percentage of taxpayers will itemize deductions with the Act in effect have ranged from between 5% and 10%. *See, e.g.*, *Comparison of Key Provisions in House/Senate Tax Reform Bills*, NAT'L COUNCIL OF NONPROFITS 1, 2 (Dec. 15, 2017), https://www.councilofnonprofits.org/sites/default/files/documents/comparison-house-senate-tax-bills-nonprofits.pdf; *see also* Alexander Casey, *Tax Reform With $750k Cap on Mortgage Interest Deduction Would Leave 1 in 7 U.S. Homes Eligible*, ZILLOW RESEARCH (Dec. 12, 2017), https://www.zillow.com/research/mortgage-interest-deduction-750k-17620/ (estimating the percentage of homes for which taking the mortgage interest deduction would be worthwhile drops from 44% to 14% as a result of the Act).

[323] For mortgage debt incurred after December 15, 2017, Section 11043 limits the amount of mortgage interest that may be deducted to the interest paid on the first $750,000 of mortgage debt. Tax Cut and Jobs Act § 11043. It also eliminates the interest deduction for new or existing home equity debt. *Id.* Section 11042 limits the itemized deduction for state and local income, sales, and property taxes to $10,000. *Id.* § 11042. Each of these provisions expires on December 31, 2025. *Id.* §§ 11042(a), 11043(a).

long-standing tax expenditures in order to pay for across the board corporate and individual income tax rate reductions. This made the homeowner subsidies an obvious target, although not all of the attempted reductions of the subsidies succeeded.[324]

This is not to say that the homeowner subsidies are no longer relevant. All three of the principal subsidies survived, and the exclusion of capital gains on home sales did so entirely intact. The federal government will continue to invest substantially in the homeowner subsidies,[325] and it is even possible the subsidies will return to their previous form in 2026 after certain provisions of the Act expire. Because a smaller percentage of taxpayers will itemize and a greater percentage of those that do will be in the highest income brackets, an even greater percentage of the homeowner subsidies will go to those who need no encouragement to purchase a home.[326]

Most pertinent to this article is the question of whether the Act makes the homeowner subsidies any smarter. The immediate response is "no." Proponents of the Act approached the homeowner subsidies principally as opportunities for cost savings, rather than as housing policy tools, and sought simply to reduce them as much as politically feasible. Knowing that, it is difficult to assert that the reformed subsidies are any smarter except to the extent that they do less to fuel certain homeowner behavior that exacerbated negative housing externalities. This is not smarter design as this article envisions it.[327]

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[324] The exclusion of capital gains on home sales survived in its previous form despite efforts to further limit who can qualify for it. *See The Tax Cuts and Jobs Act – What it Means for Homeowners and Real Estate Professionals*, NAT'L ASS'N OF REALTORS 1, 1 (Dec. 20, 2017), *available at* http://narfocus.com/billdatabase/clientfiles/172/19/3062.pdf. Up to $10,000 of SALT will still be deductible, notwithstanding a proposal to completely eliminate it. *Id.* at 4; *see also* Heather Long, *The Final GOP Tax Bill is Complete*, WASH. POST: WONKBLOG (Dec. 15, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/15/the-final-gop-tax-bill-is-complete-heres-what-is-in-it/?utm_term=.d9e4fac05792.

[325] At the very least, Congress will continue to forgo more than $30 billion per year on the home sale capital gain exclusion. *See supra* note 52. Preliminary estimates suggest that, taken together, the MID and SALT will continue to cost close to $100 billion per year in forgone tax revenue. *Compare* 2017 TAX EXPENDITURE BUDGET, *supra* note 3, at 32, 40, *with* STAFF OF THE J. COMM. ON TAXATION, 115TH CONG., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT," FISCAL YEARS 2018–2027, at 2 (Comm. Print 2017).

[326] In addition, the Act eliminated the Pease limitation, which means high income households face one fewer barrier to claiming itemized deductions like the MID and SALT. Tax Cut and Jobs Act § 11046; *supra* notes 36-37 and accompanying text.

[327] In fact, it is possible that the reduction of SALT, without a replacement, could negatively impact disinvested communities with higher local tax rates. *See, e.g.*, Matthew J.

Looking toward the horizon, however, there may be room for hope. Using a larger standard deduction and lower individual tax rates to blunt the loss of the mortgage interest deduction for most claimants was perhaps the only feasible way of loosening the decades long political stranglehold this deduction has had on housing policy. Reducing reliance on what is probably the least smart and certainly the most expensive of all of the current homeowner subsidies may actually help to clear a path for smarter subsidies if the political will to design and approve them can be mustered. Time will tell.

Rossman, *Cutback of State and Local Tax Deductions in GOP Tax Bill Would Harm Ohio's Legacy Cities*, CLEVELAND PLAIN DEALER (December 15, 2017), http://www.cleveland.com/opinion/index.ssf/2017/12/gop_tax_bills_state_and_local.html.

"Completely Instructing the Jury on the Law": Lesser-Included Offenses in Hawai'i

Thomas J. Michener*

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I. INTRODUCTION

> THE COURT: I don't make this law, Mr. --
>
> . . . .
>
> You know this is going to be reversed if somebody has three votes and thinks that Assault 1 . . . should have been there. And I -- . . . You do not want to try this case again.
>
> . . . .
>
> [DEFENSE COUNSEL]: But if that's what the Court -- if the Court believes there's a rational basis to think that, then I guess -- I guess you're going to give the instruction.
>
> THE COURT: It's not that I want to give it, it's that I have to give it. The Supreme Court, they're the boss, okay, and we have to follow what they say.[1]

In the retrial of Special Agent Christopher Deedy for the shooting death of Kollin Elderts, in addition to the charged crime of murder in the second degree, the presiding judge, Karen S. S. Ahn, instructed the jury to consider reckless manslaughter, extreme mental or emotional disturbance (EMED) manslaughter, and assault in the first and second degree.[2] These additional offenses were not considered by the jury in the first trial.[3] The judge's instructions in the retrial were almost certainly added because of three Hawai'i Supreme Court decisions handed down between the first trial and the retrial.[4] In fact, the two cases relating directly to lesser-included offenses, *Flores* and *Kaeo*, originated in Judge Ahn's courtroom.[5]

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[1] Transcript of Proceedings at 38, 39–40, 44, 57, State v. Deedy, (Aug. 1, 2014) (Cr. No. 11-1-1647).

[2] *New Charges Added to Deedy Re-Trial*, KHON2 (Aug. 4, 2014), http://khon2.com/2014/08/04/new-charges-added-to-deedy-re-trial/.

[3] Nelson Daranciang, *Deedy to Face Third Trial in September 2015*, STAR-ADVERTISER (Aug. 29, 2014), http://www.staradvertiser.com/2014/08/29/breaking-news/deedy-to-face-third-trial-in-september-2015/ (explaining that in the first trial jurors were only instructed to consider a murder charge).

[4] The cases handed down between *Deedy I* and *Deedy II* were *State v. Flores*, 314 P.3d 120 (Haw. 2013) (holding that failure to instruct the jury on unlawful imprisonment as a lesser-included offense of kidnapping was not harmless), *State v. Adviento*, 319 P.3d 1131 (Haw. 2014) (holding that the trial court has a duty to instruct the jury on the EMED defense when it is raised by the evidence), and *State v. Kaeo*, 323 P.3d 95 (Haw. 2014) (holding that failure to give assault in the first degree instruction as a lesser-included offense of murder in the second degree was not harmless).

Extreme mental or emotional disturbance manslaughter is not a lesser-included offense of manslaughter but a "mitigating factor," though the manslaughter statute, HAW. REV. STAT. § 707-702(2), refers to it as a defense, *State v. Dumlao*, 715 P.2d 822, 825 n.2 (Haw. 1986). As such, this paper will not discuss EMED manslaughter jury instructions. However,

The lesser-included offense doctrine involves different ways to determine what constitutes a lesser-included offense and the doctrine implicates important constitutional issues. This piece attempts to explain the varying approaches and the constitutional issues they pose in Hawai'i.

II. THE LESSER-INCLUDED OFFENSE DOCTRINE

The lesser-included offense doctrine "provides that a criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution."[6] In deciding what offenses are included in the charged offense, "different jurisdictions use different approaches."[7] The differing approaches are "essentially a matter of what is examined in order to determine the existence of [a lesser-included offense,]"[8] ranging from the elements of the statute, the contents of the pleadings, the evidence adduced at trial,[9] and the state of mind or the injury inflicted.

A. History and Purpose of the Lesser-included Offense Doctrine

The authority of the jury to consider lesser-included offenses "according to the Nature of the Evidence" was recognized as early as 1721, at least when the charge was murder.[10] Juries could find a defendant "guilty of part,

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Adviento does lend credence to the notion that the trend is to give more instructions to the jury, as discussed in this piece. *Adviento* held that a trial court must instruct the jury on the EMED manslaughter defense when raised by the evidence and that a defendant cannot waive that instruction. 319 P.3d at 1135. The majority also reasoned "that to allow a defendant to waive an EMED defense impairs the jury's truth finding abilities and promotes an 'all or nothing' approach[,]" based on case law surrounding lesser-included offenses. *Id.* at 1165–1166 (Nakayama, J., dissenting). By applying lesser-included offense jurisprudence to defenses, the court seems to indicate that juries ought to have all applicable instructions to consider.

[5] *Flores*, 314 P.3d at 121 n.1; *Kaeo*, 323 P.3d at 96 n.1. *Flores* and *Kaeo* changed the state of the law in this area. Judge Ahn's instructions to the jury in those two cases were within the bounds of the law as it was at the time.

[6] James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV 1, 6 (1995).

[7] *Id.* at 7.

[8] *Id.* at 8.

[9] *Id.*

[10] WILLIAM HAWKINS, 2 A TREATISE OF THE PLEAS OF THE CROWN 439–40 (London, E. Nutt, R. Nutt & R. Gosling 1721) ("That where the Jury find a Man not guilty of an Indictment or Appeal of Murder, they are not bound to make any Inquiry, whether he be guilty of Manslaughter, *&c.* But that if they will they may, according to the Nature of the

and not guilty of the rest, or [could] find [a] defendant guilty of the fact, but vary in the manner."[11] This flexibility allowed a jury to acquit on a charge of burglary and still to find guilt on a simple felony or to acquit on a type of statutory murder and find guilt on common law manslaughter, for example.[12] Thus, "without the addition of several counts, the jury [could] . . . find the prisoner guilty only of a minor offence included in the charge"[13] As Justice John Paul Stevens noted, "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged."[14]

As early as 1821, courts in the United States upheld jury verdicts of manslaughter when the charge was murder,[15] and as early as 1827, judges held that a jury could return a verdict of a lesser-included offense on offenses besides murder.[16] Two centuries later, according to the United States Supreme Court, "it ha[d] long been 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'"[17] In the United States, then, "[t]he

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Evidence, find him guilty of Manslaughter or Homicide *se defendendo*, or *per infortunium*; for the killing is the Substance, and the Malice but a Circumstance, a Variance as to which hurts not the Verdict." (footnotes omitted)). The article by Professor Shellenberger and the late Professor Strazzella, *supra* note 6, helpfully discussed many early treatises and some other authorities, essential to the author in finding them.

[11] MATTHEW HALE, 2 THE HISTORY OF THE PLEAS OF THE CROWN 301–02 (London, E. Nutt & R. Gosling, 1736).

[12] *Id.* at 302.

[13] JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 249a (New York, Banks, Gould & Co.1847).

[14] Beck v. Alabama, 447 U.S. 625, 633 (1980).

[15] *See* Commonwealth v. Gable, 7 Serg. & Rawle 423, 424 (Pa. 1821). Later opinions were specific. *E.g.*, Dynes v. Hoover, 61 U.S. 65, 80 (1857) ("[U]pon an indictment for murder, there may be a verdict of manslaughter . . . ."); Brown v. Commonwealth, 76 Pa. 319, 339 (1874) ("It was no substantial injury to the prisoner . . . to omit to instruct the jury that, as an abstract principle of law under a count for murder, there may be a conviction of manslaughter."). Courts of the colonies also allowed a verdict of manslaughter on a charge of murder, as happened in the Boston Massacre trial in 1770. *See* THE TRIAL OF THE BRITISH SOLDIERS OF THE 29TH REGIMENT OF FOOT 143 (Boston, William Emmons 1824) (finding some soldiers not guilty of murder but guilty of manslaughter).

[16] State v. Coy, 2 Aik. 181, 182–84 (Vt. 1827) (upholding a jury verdict of common assault on a charge of assault with intent to commit murder). The *Coy* court also stated, without attribution, "It is a general rule at common law, 'where the accusation in the indictment includes an offence of inferiour degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious.'" *Id.* at 182.

[17] *Beck*, 447 U.S. at 635 (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)). *Beck* was discussing lesser-included offenses in federal courts, but went on: "Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled

right to a lesser included offense is well established[,]"[18] in both federal and state courts.[19]

The doctrine "originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged."[20] Early authorities support this approach, stating that "the jury ha[s] the authority to convict of a lesser offense, without mentioning that the defendant had a right to insist that the jury be told it could consider the alternative of acquitting on the greater and convicting on the lesser only."[21]

Whatever the historical origins of the doctrine, "it has long been recognized that it can also be beneficial to the defendant."[22] As the U.S. Supreme Court has said, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense," the option of a lesser-included offense may aid the defendant because "the jury is likely to resolve its doubts in favor of conviction"[23] rather than decide on acquittal. This "availability of a third option"[24] avoids the "all or nothing choice when the evidence justifies another option"[25]—a lesser offense carrying a lesser punishment.

B. Differing Approaches

Articulating a "definitive statement of applicable rules" for lesser-included offenses "has challenged the effective administration of criminal

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to a lesser included offense instruction where the evidence warrants it." *Id.* at 635–36 (collecting forty-six cases from various state courts).

[18] Crace v. Herzog, No. C12-5672 RBL/KLS, 2013 WL 3338498, at *3 (W.D. Wash. July 2, 2013), *aff'd*, 798 F.3d 840 (9th Cir. 2015).

[19] *See Beck*, 447 U.S. at 635–36 n.12; *cf. Dynes*, 61 U.S. at 79–80 ("[T]he finding of the court against the prisoner was what is known in the administration of criminal law as a *partial verdict*, in which the accused is acquitted of a part of the accusation against him, and found guilty of the residue. As when there is an acquittal on one count, and a verdict of guilty on another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a *partial verdict* of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault.").

[20] *Beck*, 447 U.S. at 633.

[21] Shellenberger & Strazzella, *supra* note 6, at 99–100 (discussing early treatises).

[22] *Beck*, 447 U.S. at 633.

[23] Keeble v. United States, 412 U.S. 205, 213 (1973) (emphasis omitted). This proposition has been cited favorably by the Hawai'i Supreme Court. *E.g.*, *Kaeo*, 323 P.3d at 111–12 (citing *Keeble*, 412 U.S. at 212–13).

[24] *Keeble*, 412 U.S. at 213.

[25] Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 462 (1984).

justice for centuries." [26] It is a problem "as old as the common law."[27] Judges have taken multiple approaches to determine which crimes are included within other crimes, and their differing approaches often go by various names and contain overlapping definitions.[28] Broadly speaking, the approaches are 1) the statutory elements or common law approach; 2) the pleadings-cognate approach; 3) evidence approach; and 4) Model Penal Code (MPC) or inherent relationship approach.

C. Statutory Elements/Common Law Approach

The common law theory, better known as the statutory elements approach,[29] "considers only the elements of the crimes as set forth in the criminal statutes."[30] "[O]ffenses are compared by laying the statutes defining the crimes side by side and comparing these statutory elements in the abstract, without regard to the allegations of the charging document or the evidence presented at trial."[31] Accordingly, "a lesser crime may or may not be [a lesser-included offense] depending on the crime charged and how the statute defines it."[32]

Using this approach, "all of the elements of the lesser included offense must be contained in the greater offense such that it is impossible to commit the greater offense without first having committed the lesser."[33] In other

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[26] Brown v. State, 206 So. 2d 377, 380 (Fla. 1968).

[27] *Id.*

[28] *See, e.g.*, Jerrold H. Barnett, *The Lesser-Included Offense Doctrine: A Present Day Analysis for Practitioners*, 5 CONN. L. REV. 255, 256–60 (1972) (discussing differing approaches); Blair, *supra* note 25, at 447–51 (naming the approaches as strict statutory interpretation/common law, cognate theory, and Model Penal Code Approach); John W. Davis, Commentary, *Lesser Included Offense Instruction—Problems with Its Use*, 3 LAND & WATER L. REV. 587, 592–94 (1968) (discussing differing approaches and their problems); Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 197–209 (1984) (naming the approaches as the strict statutory standard, the intermediate standard, and the lenient factual standard); Edward G. Mascolo, *Procedural Due Process and the Lesser-Included Offense Doctrine*, 50 ALB. L. REV. 263, 273-77, 300–01 (1986) (naming the approaches as pleadings/cognate theory and statutory theory and noting an "inherent-relationship test" for "lesser offenses that are related, but not necessarily included, within the elements of the charged offense"); Shellenberger & Strazzella, *supra* note 6, at 7–13, 8 n.11 (naming approaches as statutory elements test, pleadings test, and evidence test, while noting that the MPC approach combines aspects of these three).

[29] Blair, *supra* note 25, at 447 (referring to "the common law theory" and "the strict statutory approach").

[30] Shellenberger & Strazzella, *supra* note 6, at 8.

[31] *Id.* at 10.

[32] *Id.*

[33] Blair, *supra* note 25, at 447.

words, "the lesser offense must not require any additional element which is not needed to constitute the charged greater crime."[34] So, "an offense cannot be [a lesser-included offense] 'if the proof of one offense does not invariably require proof of the other.'"[35] Stated simply, the core of the statutory elements approach is whether "under all the possible circumstances, the commission of the greater crime will also entail the commission of the lesser offense."[36]

D. Pleadings-Cognate Approach

The pleadings-cognate approach is "a hybrid between the stricter statutory elements test and the more open-ended evidentiary approach."[37] Using this approach, "the examination of the greater offense charged is broadened to include consideration of the allegations of the charging document . . . , not just the abstract statutory definitions."[38] Within the pleadings-cognate approach, "[i]t is sufficient that the lesser offense have certain elements in common with the higher offense, which thereby makes it a 'cognate' or 'allied' offense even though it also has other elements not essential to the greater crime."[39]

To allow examination of the pleadings to determine which crimes to compare "expands the possible [lesser-included offenses] beyond those reflected only by consideration of the statutes in the abstract" because the crime in the charging document "may be more narrow or more specific than the general elements stated in the statute."[40] In addition to lesser-included offenses that are "included within the abstractly defined statutory crimes[,]" lesser-included offenses may also exist "based on the prosecution's theory as alleged in the pleading."[41]

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[34] Barnett, *supra* note 28, at 256.

[35] Shellenberger & Strazzella, *supra* note 6, at 10 (quoting Schmuck v. United States, 489 U.S. 705, 717 (1989)). "For example, discharging a dangerous weapon is [a lesser-included offense] if the charged crime is assault with a deadly weapon, because the statute defining that crime includes the elements of the weapons offense. If the crime charged is simple assault, however, the weapons offense is not [a lesser-included offense], because the simple assault statute would not mention discharging a weapon." *Id.*

[36] Blair, *supra* note 25, at 448.

[37] Jane A. Minerly, *The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape*, 82 TEMP. L. REV. 1103, 1109 (2009) (citing WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 24.8(c) (4th ed. 2004)).

[38] Shellenberger & Strazzella, *supra* note 6, at 11.

[39] WAYNE R. LAFAVE ET AL., 6 Crim. Proc. § 24.8(e) (4th ed., 2016), Westlaw (database updated Dec. 2016).

[40] Shellenberger & Strazzella, *supra* note 6, at 11.

[41] *Id.* In the weapon example, *supra* note 35, "under the statutory elements approach

E. Evidence Approach

The evidence approach expands what is examined "to include the evidence actually presented at trial[,]"[42] rather than "the pleadings alone, to assess the relationship between the lesser and higher offense."[43] A "lesser offense may have elements that are not part of the higher offense; all that is required is that some or all of the proof actually admitted to establish elements of the higher offense also establish the lesser offense."[44] This may benefit the public[45] by being "more closely related to the actual criminal conduct shown by the facts proven at trial."[46] In this situation, fewer defendants will be released due only to the fact that the jury could not consider a lesser-included offense.[47]

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discharging a weapon is not [a lesser-included offense] of simple assault but it is [a lesser-included offense] of assault with a deadly weapon. Under the pleading approach, however, if the indictment or information charging simple assault alleges that the defendant used a weapon to commit the crime ("the defendant caused bodily injury to the victim by shooting her in the leg with a handgun"), then discharging a weapon would be [a lesser-included offense] of simple assault." *See supra* note 35; Shellenberger & Strazzella, *supra* note 6, at 12.

[42] Shellenberger & Strazzella, *supra* note 6, at 11.

[43] WAYNE R. LAFAVE ET AL., *supra* note 39, § 24.8(e).

[44] *Id.*

[45] Stuart S. Yusem, Comment, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 DICK. L. REV. 125, 126 (1979).

[46] Shellenberger & Strazzella, *supra* note 6, at 13. Again using the weapon example, *supra* notes 35, 41: "[I]f evidence presented at trial shows that the defendant shot the victim in the leg, then discharging a weapon would be [a lesser-included offense] of simple assault, even though the statute defining simple assault does not mention weapons and the charging instrument does not allege the precise means of committing the assault." *Supra* notes 35, 41; Shellenberger & Strazzella, *supra* note 6, at 13.

[47] *See* State v. Kupau, 620 P.2d 250, 251 (1980) (citing Yusem, *supra* note 45, at 126). There are some concerns, though, about giving more lesser-included offense instructions to jurors. *See, e.g.*, State v. Abdon, No. CAAP–13–0000086, 2014 WL 4800994, at *6 (Haw. Ct. App. Sept. 26, 2014) (mem.) (quoting the trial court: "I don't believe there is a rational basis upon which a reasonable juror could acquit of the charged offense, yet convict of Sexual Assault in the Third Degree in this case. I think if something like that were to happen, it would be a compromise, and that's an inappropriate basis upon which a jury should convict anyone . . . "), *aff'd*, 364 P.3d 917 (Haw. 2016). Some interviewees also raised concerns of a compromise verdict. One cited the danger that a jury might compromise on a verdict by finding a defendant guilty when not convinced beyond a reasonable doubt, saying that this danger was "always a really big concern." Interview with F, in Honolulu, Haw., at 1–2 (Feb. 5, 2016). Another interviewee said that, in the interviewee's experience, lesser-included offenses "provide a sound basis" for a jury to compromise. Interview with I, in Honolulu, Haw., at 1 (Feb. 8, 2016). Yet another said that lesser-included offenses allow the jury "to compromise readily." Interview with J, in Honolulu, Haw., at 2 (Feb. 13, 2016). One interviewee was skeptical that compromises do "adversely affect[] criminal justice."

F. Lesser-Culpability/Lesser-Injury or Model Penal Code/Inherent Relationship Approach

The MPC includes, in addition to the above approaches,[48] "a novel and broad test for determining when a lesser included offense exists."[49] An offense is a lesser-included offense under Section 1.07(4)(c) of the MPC when "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[50] This approach, which is "by far the broadest approach to determining the existence of a lesser-included offense[,]"[51] "focuses solely on the evidence presented at trial" rather than the statutory elements of the offense or the charging document.[52] It is also known as the "inherent relationship" test.[53] This piece shall refer to it as the MPC approach in later discussion.

Interview with K, in Honolulu, Haw., at 4 (Feb. 15, 2016). For information on giving juries more choices and the effect it may have on verdicts, see, for example, Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1575–83 (2011).

[48] Section 1.07(4) of the MPC provides:

> Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . . .

Model Penal Code § 1.07(4)(a) (Am. Law Inst. 2014) [hereinafter MPC] (brackets in original). At least one commentator has noted that this "formula is equally compatible with the elements test, the pleadings test, or the evidence test" and that it "embrace[s] the same ambiguity that gave birth to competing tests for lesser included offenses." Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 410–11 (2005).

[49] Blair, *supra* note 25, at 450.

[50] MPC, *supra* note 48, § 1.07(4)(c).

[51] Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 268 (1999).

[52] *Id.*

[53] James Benzoni, Note, *Courts Must Instruct on Lesser-Included Offenses That Fit Within the Elements of the Greater Charged Offense, Regardless of the Evidence*—State v. Jeffries, *430 N.W.2d 728 (Iowa 1988)*, 39 DRAKE L. REV. 549, 554 (1990); *see* Blair, *supra* note 25, at 454. For those wishing to avoid a footnote rabbit hole, it seems worth noting that the MPC approach in paragraph (c) and the inherent relationship approach actually may not be the same. For purposes of this piece, however, the potential differences are not so important. Continuing after the White Rabbit: The term "inherent relationship" appears to have come from *United States v. Whitaker*: "[T]here must also be an 'inherent' relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the

Section 1.07(4)(c) clearly covers two distinct situations, both of which may apply in the same case.[54] One arises when "the offense differs from the offenses charged only in that it requires a lesser degree of culpability."[55] The other occurs when "the offense differs from the offense charged only in that a less serious injury or risk of injury is necessary to establish its commission."[56]

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showing of the commission of the greater offense." 447 F.2d 314, 319 (D.C. Cir. 1971). *Whitaker* seems to be citing the MPC circuitously. *See id.* at 317 n.5. The opinion only cites language coming from paragraph (a) (the statutory elements/common law approach paragraph), not (c). *Id.* at 317. However, its caveat regarding an inherent relationship seems to come from Section 1.07(4)(c). *Compare id.* at 319, *with* MPC § 1.07(4)(a) (An offense is included when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."), *and* MPC § 1.07(4)(c) (An offense is included when "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.").

Commentators also seem to agree that *Whitaker* was considering Section 1.07(4)(c) of the MPC. *See, e.g.*, Blair, *supra* note 25, at 450–51 (discussing Section 1.07(4)(c) of the MPC and then quoting *Whitaker* for the inherent relationship caveat). At any rate, it seems safe to say that Section 1.07(4)(c) of the MPC and the inherent relationship approach are closely related, if not the same. *See* State v. Jeffries, 430 N.W.2d 728, 732 (Iowa 1988) ("The Model Penal Code approach as limited by *Whitaker* has been described in subsequent cases adopting it as the 'inherent relationship test.'"); Hall v. State, 225 S.W.3d 524, 526 (Tex. Crim. App. 2007) (One "view is the one reflected in the Model Penal Code, which permits a lesser-included offense instruction on any offense that is 'inherently related' to the greater offense."); State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993) ("The Model Penal Code approach 'has not been widely adopted, but it is partially incorporated in the 'inherent relationship' standard."); Warren v. State, 835 P.2d 304, 324 (Wyo. 1992) (A previous concurring opinion "discussed [*Whitaker*] which is intrinsically related to the [M]odel [P]enal [C]ode, inherent relationship methodology for establishing the lesser included offense instruction." (citing Balsley v. State, 668 P.2d 1324, 1329 (Wyo. 1983) (Brown, J., concurring)); Blair, *supra* note 25, at 454; Benzoni, *supra* note 53, at 554. *But see* United States v. Browner, 937 F.2d 165, 167–68, 168 n.4 (5th Cir. 1991) (enumerating separately the inherent relationship test and the MPC approach and classifying the latter as "combin[ing] the strict statutory approach with a broader 'injury to the same interest' approach").

[54] MODEL PENAL CODE AND COMMENTARIES PART 1: GENERAL PROVISIONS SECTIONS 1.01–2.13 133, (Am. Law Inst. 1985).

[55] *Id.* at 134. The Commentary states that:

> [t]he most common circumstances are likely to involve offenses that are less serious types of homicides than the one charged; offenses that are the same as the one charged except that they require recklessness or negligence while the offense charge requires a purpose to bring about the consequences, or, finally, offenses that are the same as the offense charged except that they require only negligence while the offense charged requires either recklessness or a purpose to bring about the consequences.

Id.

[56] *Id.* at 133.

Though usually discussed as a method for determining lesser-included offenses, it may be that this approach also determines "lesser *related*" offenses, not "true [lesser-*included* offenses]."[57] The difference between the two is that "[l]esser-related offenses have some elements that the greater offense does not have, whereas lesser-included offenses have all of the elements that the greater offense has."[58] Use of a "lesser related" approach "may greatly expand the range of possible lesser included offenses" on which a jury could be instructed.[59]

III. CONSTITUTIONAL CONSIDERATIONS AND THE LESSER-INCLUDED OFFENSE DOCTRINE

When dealing with lesser-included offenses, "at least three different constitutional principles may interact, under certain circumstances, to limit how, and if, each lesser included offense theory may be applied."[60]

A. Notice

The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[61] The right to notice is "basic in our system of jurisprudence[,]" a denial of which is a denial of due process.[62] This requirement "generally prohibits jury consideration of any offense not specifically charged in the indictment."[63] A problem involving notice, then, is "potentially raised in every case in which a lesser included offense instruction may be given" because a defendant will not know exactly what instructions the jury will have until after the opportunity to act on them has passed.[64]

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[57] *E.g.*, Shellenberger & Strazzella, *supra* note 6, at 13 n.23 (emphasis added). An offense is a lesser related when "it shares either by inherent relationship or by some shared elements, a nexus between the lesser and greater charges." Carpenter, *supra* note 51, at 302.

[58] Patrick D. Pflaum, *Justice Is Not All Or Nothing: Preserving The Integrity Of Criminal Trials Through The Statutory Abolition Of The All-Or-Nothing Doctrine*, 73 U. COLO. L. REV. 289, 297 (2002).

[59] Blair, *supra* note 25, at 452.

[60] *Id.* at 446.

[61] U.S. CONST. amend. VI.

[62] *See* In re Oliver, 333 U.S. 257, 273 (1948); *cf.* State v. Bani, 36 P.3d 1255, 1263 (Haw. 2001) ("[P]rocedural due process of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant liberty interest.").

[63] Ettinger, *supra* note 28, at 191.

[64] Blair, *supra* note 25 at 452.

In facing this problem, some courts have decided that the charging document provides notice sufficient to satisfy constitutional requirements.[65] This is because, if the statutory elements approach is used to determine lesser-included offenses—and therefore, what instructions the jury could consider—the charge ought to be enough notice,[66] as all of the elements of the lesser-included offense are already contained in the charged crime.[67] Thus, any lesser-included offense would only contain elements that the charged crime also had[68] and a defendant would already be defending against all of the elements of the lesser-included offense.

Adequate notice of possible lesser-included offenses becomes more problematic, however, when more flexible approaches are used.[69] In such cases, a "defendant may not have reasonable notice of the charges against which he is being forced to defend."[70] Yet, there are two ways in which a defendant actually could have adequate notice. First, when a court has previously determined what offenses are lesser-included offenses of a crime, that determination should act as constructive notice that instructions on those lesser-included offenses may go to the jury.[71] For example, if an appellate court determines that assault in the first degree is a lesser included offense of murder in the second degree,[72] all defendants charged with murder in the second degree from then on should have constructive notice that the jury may also be instructed on assault in the first degree. Second,

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[65] *See* Blair, *supra* note 25 at 452. One example that Blair gives is *Walker v. United States*: "[T]he indictment is, for legal purposes, sufficient notice to the defendant that he may be called to defend the lesser included charge." Blair, *supra* note 25 at 452 (quoting Walker v. United States, 418 F.2d 1116, 1119 (D.C. Cir. 1969)). Another is *Mildwoff v. Cunningham*: "It is axiomatic that an indictment for one crime carries with it notice that lesser offenses included within the specified crime are also charged and must be defended against." Blair, *supra* note 25 at 452 (quoting Mildwoff v. Cuningham, 432 F. Supp. 814, 817 (S.D.N.Y. 1977). More recent courts agree. *E.g.*, State v. Gipson, 277 P.3d 189, 191–92 (2012); People v. Tardy, 6 Cal. Rptr. 3d 24, 27 (Cal. Ct. App. 2003); State v. Clark, 794 A.2d 541, 546 (Conn. App. Ct. 2002).

[66] *Schmuck*, 489 U.S. at 718 ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge.").

[67] *Cf. id.* ("[T]he defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment.").

[68] *Id.* at 716 (An offense is not included "in another unless the elements of the lesser offense are a subset of the elements of the charged offense."); *see also* State v. Woicek, 632 P.2d 654, 656 (Haw. 1981) ("[A]n offense is included if it is impossible to commit the greater without also committing the lesser.").

[69] Blair, *supra* note 25, at 452.

[70] *Id.*

[71] *See* Blair, *supra* note 25 at 453 (citing Yusem, *supra* note 45, at 145).

[72] *E.g.*, State v. Kaeo, 323 P.3d 95,460–61 (Haw. 2004) (so holding).

crimes that differ only in their degree of injury or culpability are usually grouped together in the criminal code.[73] "Thus," as one commentator has said, "trial counsel will not have to search the entire Crimes Code in order to determine which crimes stand in the relationship of greater and lesser offense."[74]

The reliance on the structure of the code to protect a right "basic in our system of jurisprudence"[75] seems dubious, however. On the other hand, notice in the form of an appellate court decision stating that one offense is the lesser-included of another seems to be more than adequate notice for future defendants.[76] In cases of first impression, though—one in which the jury is instructed on a lesser-included offense that has not yet been determined to be a lesser of the charged crime—a defendant may not have sufficient notice.[77]

B. Double Jeopardy

The Fifth Amendment to the U.S. Constitution states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." This clause "protects against a second prosecution for the same offense after [an] acquittal" or conviction and "against multiple punishments for the same offense."[78] To determine if an offense is the same in terms of double jeopardy, the U.S. Supreme Court declared in *Blockburger v. United States* that "where the same act or transaction

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[73] Yusem, *supra* note 45, at 145. For example, see HAW. REV. STAT. ch. 707, entitled "Offenses Against the Person."

[74] Yusem, *supra* note 45, at 145. The location in the code of different offenses has been referred to as the "legislative scheme" by some Hawai'i cases. *E.g.*, State v. Kupau, 620 P.2d at 250, 253 (Haw. 1980). In those cases, the legislative scheme is used to determine what *constitutes* a lesser included offense of a crime under the statutory elements approach section of the statute. *See, e.g.*, *id.* What is currently under discussion, however, is adequate *notice* in advance of a court potentially giving an instruction on a lesser-included offense.

[75] *In re Oliver*, 333 U.S. 257, 273 (1958).

[76] While courts in Hawai'i do not seem to have explicitly said so, courts in other jurisdictions have stated as much. *See, e.g.*, Asherman v. Meachum, 739 F. Supp. 718, 723 (D. Conn.), *aff'd*, 923 F.2d 845 (2d Cir. 1990) ("In view of . . . the jurisprudence of Connecticut's highest court at the time of petitioner's indictment, trial, and conviction, petitioner had constitutionally sufficient notice that he could be expected to defend against a charge of manslaughter in the first degree while under extreme emotional distress."); State v. Ellis, No. 99830, 2014 WL 3697681, ¶ 10 (Ohio Ct. App. July 22, 2014) ("[T]he court of appeals ruled that a charge of murder necessarily apprises the defendant that he must defend against lesser included offenses. Thus, Ellis had sufficient notice.")

[77] *See* Yusem, *supra* note 45, at 145.

[78] North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."[79] By emphasizing the elements of the offense, this double jeopardy rule is similar to the statutory approach used for determining lesser-included offenses.[80]

Later U.S. Supreme Court decisions expanded the *Blockburger* rule by looking beyond the elements in the statute to the evidence adduced at trial.[81] The rule was further expanded to look at the actual conduct proved by the prosecution, not the evidence used to prove that conduct.[82] However, this "same conduct" test was later overruled.[83] In so doing, the Court returned to the element-based approach used in *Blockburger*.[84] Under the U.S. Constitution,[85] then, the test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."[86]

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[79] 284 U.S. 299, 304 (1932).

[80] *See* Blair, *supra* note 25, at 455.

[81] *See id.* at 457 (citing Missouri v. Hunter, 459 U.S. 359 (1983)); Brown v. Ohio, 432 U.S. 161 (1977)).

[82] Grady v. Corbin, 495 U.S. 508, 521 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). This so-called "same conduct" test has been adopted by the Hawai'i Supreme Court. State v. Lessary, 865 P.2d 150, 156 (Haw. 1994).

[83] *Dixon*, 509 U.S. at 704; *see also id.* at 711 ("Having encountered today yet another situation in which the pre-*Grady* understanding of the Double Jeopardy Clause allows a second trial, though the 'same-conduct' test would not, we think it time to acknowledge what is now, three years after *Grady*, compellingly clear: the case was a mistake. We do not lightly reconsider a precedent, but, because *Grady* contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion, we do so here." (footnote omitted) (some internal quotation marks omitted)).

[84] *See Dixon*, 509 U.S. at 700–02 (plurality opinion); *Lessary*, 865 P.2d at 155 ("*Dixon* overruled *Grady* and reestablished the 'same elements' test as the sole protection against double jeopardy . . . .").

[85] States, using their own constitutions, are free to adopt greater protections for criminal defendants. *See, e.g., Lessary*, 865 P.2d at 156 ("We believe that the application of the *Grady* rule is necessary to afford adequate double jeopardy protection, and, therefore, we adopt the 'same conduct' test under the Hawai'i Constitution.").

[86] *Dixon*, 509 U.S. at 696; *see also id.* ("In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies."). It may be helpful to use a chart:

Crime	Elements	Analysis under *Blockburger*
1	A B C D	Crimes are different offenses because each has an element that the other does not, "A" and "E."
2	B C D E	
3	A B C D	Crimes are the same offense because Crime 4 does not have an element that Crime 3 lacks.
4	B C D	

Successive prosecution occurs "when the defendant is prosecuted for an offense, then is prosecuted a second time for the same offense after acquittal or conviction."[87] Successive prosecution is precluded by the Clause: "[P]rosecution for a greater offense . . . bars prosecution for a lesser included offense[,]"[88] and vice-versa.[89] Thus, if a charged crime is the "same" under *Blockburger* as a crime for which a defendant was previously acquitted or convicted, the subsequent charge will be dismissed.[90]

Additional or multiple punishment cases are those in which more than one punishment is imposed for the same offense in a single proceeding.[91] Generally, where two offenses are the same under the *Blockburger* test, multiple punishments are not permitted,[92] but where two offenses are different, multiple punishments can be imposed.[93] "This is so because the 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the [legislature].'"[94] For the same reason,[95] when "there is a clear indication of . . . legislative intent[,]" multiple punishments *are* permitted,[96] "regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*."[97] In other words, when it is clear that the legislature intended multiple punishments to be imposed for the same offense, those sentences do not violate the Constitution.[98]

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[87] State v. Feliciano, 115 P.3d 648, 655 (Haw. 2005).

[88] *Dixon*, 509 U.S. at 705.

[89] Brown v. Ohio, 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense.").

[90] *See Dixon*, 509 U.S. at 697–703 (plurality opinion).

[91] *See* Jones v. Thomas, 491 U.S. 376, 381 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

[92] *See* Whalen v. United States, 445 U.S. 684, 693 (1980).

[93] *See id.*

[94] Albernaz v. United States, 450 U.S. 333, 344 (1981) (quoting *Whalen*, 445 U.S. at 689).

[95] *See* Missouri v. Hunter, 459 U.S. 359, 368–69 ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." (footnote omitted)).

[96] *Albernaz*, 450 U.S. at 340; *see also Whalen*, 445 U.S. at 693 ("And where the offenses are the same under [the *Blockburger*] test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.").

[97] *Hunter*, 459 U.S. at 368.

[98] *Albernaz*, 450 U.S. at 344.

C. *Due Process and the Reliability of Fact-Finding Process*

When a lesser-included offense instruction is *not* given, there are potential concerns about a defendant's right to due process[99] because of the fear that "the jury is likely to resolve its doubts in favor of conviction"[100] rather than to decide on acquittal, thereby interfering with the reliability of the fact-finding process.[101]

While the U.S. Supreme Court has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process" except in capital cases,[102] the Court has said that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."[103] In fact, "failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction[,]"[104] that is, voting for conviction despite not being convinced of guilt beyond a reasonable doubt.[105] The Court has also noted:

> [I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he

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[99] Blair, *supra* note 25, at 462.

[100] Keeble v. United States, 412 U.S. 205, 213 (1973).

[101] *See* Beck v. Alabama, 447 U.S. 625, 637–38 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case." (footnote omitted)).

[102] *See id.* at 637; *see also* Turner v. Marshall, 63 F.3d 807, 818–19 (9th Cir. 1995) *overruled on other grounds by* Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) ("There is no settled rule of law on whether *Beck* applies to noncapital cases . . . ."); Davis v. Biter, No. 12CV3001-BEN(BLM), 2015 WL 4545787, at *6 (S.D. Cal. July 28, 2015) ("[T]here is no clearly established Supreme Court authority requiring lesser included offense instructions in noncapital cases."). Some courts, however, have decided that this principle extends to non-capital cases. *See, e.g.*, Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988); Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984).

[103] *Beck*, 447 U.S. at 637.

[104] *Id.*

[105] Blair, *supra* note 25, at 462; *see also* In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

should not be exposed to the substantial risk that the jury's practice will diverge from theory.[106]

To avoid this "substantial risk" that the jury might diverge from the instruction it received to return a verdict of acquittal unless each element has been proved beyond a reasonable doubt, "a defendant is entitled to a lesser offense instruction."[107]

IV. THE LESSER-INCLUDED OFFENSE DOCTRINE IN HAWAI'I

As early as the 1850s, the Kingdom of Hawai'i allowed juries to find a defendant guilty of manslaughter when the charge was murder,[108] and courts in the Kingdom instructed juries accordingly.[109] After the 1893 Overthrow,[110] judges in the Republic period,[111] in the Territorial days,[112] and after Statehood[113] continued to instruct juries that they could find a defendant guilty of a lesser-included offense. Such instructions were in accordance with the statutes of the time.[114]

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[106] Keeble v. United States, 412 U.S. 205, 212 (1973).

[107] *Id.*

[108] PENAL CODE OF THE HAWAIIAN ISLANDS (1850), ch. VII, § 9 ("Under an indictment for murder, the jury may return a verdict for murder in either degree or for manslaughter.").

[109] *E.g.*, The King v. Greenwell, 1 Haw. 85, 86 (1853) (instructing the jury that "under an indictment for murder, the jury may return a verdict for manslaughter."); The King v. Sherman, 1 Haw. 88, 88 (1853) (instructing the jury "it is for you to determine whether [the defendant's] . . . conduct was such as affords evidence of malice" for murder, or, if there was no malice, to consider manslaughter); *see also* The King v. Naone, 2 Haw. 746, 748 (1865) ("[I]t is said that the jury may return a verdict for any lesser degree of the same offence; this is provided for by statute, when the evidence will not warrant a verdict of guilty in the degree for which the prisoner is indicted. The proof, however, must sustain the charge of the lesser degree.").

[110] In 1893, the Kingdom of Hawai'i was overthrown by a group of foreigners supported, in part, by U.S. military forces. *See generally* HELENA G. ALLEN, THE BETRAYAL OF LILIUOKALANI 281–94 (1982); LILIUOKALANI, HAWAII'S STORY BY HAWAI'I'S QUEEN LILIUOKALANI 265–318 (2013); James Blount, Exec. Doc. No. 47, 53d Cong., 2d Sess. (1893) (often known as the "Blount Report").

[111] *E.g.*, Republic of Hawaii v. Kapea, 11 Haw. 293, 312 (1898).

[112] *E.g.*, In re Gamaya, 25 Haw. 414, 416 (1920).

[113] *See, e.g.*, State v. Travis, 368 P.2d 883, 886 (Haw. 1962).

[114] *E.g.*, HAW. PENAL LAWS § 47 (1897) ("Manslaughter is of three degrees, and the jury under an indictment for murder or manslaughter may return a verdict of manslaughter in either degree, or of assault and battery, as the facts proved will warrant.") (Republic); REV. LAWS HAW. § 3898 (1915) ("Under an indictment charging a defendant with rape or with carnal abuse of a female child under the age of twelve years or with assault with intent to commit either of said offenses, the jury may find the defendant guilty of indecent assault if the facts so warrant.") (Territory); REV. LAWS HAW. § 264-8 (1955) ("Upon the trial of any person charged with [various assault or battery offenses], he may be found guilty of any

A. Determining Whether a Crime is a Lesser-Included Offense

In 1972, the Hawai'i Legislature adopted portions of the Model Penal Code.[115] The Legislature passed the section concerning lesser-included offenses almost verbatim.[116] The Hawai'i statute reads, "When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element."[117] But he or she may not be convicted if "[o]ne offense is included in the other."[118]

> An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> . . . .
>
> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.[119]

Paragraph (a) thus codifies the common law rule,[120] also now known as the statutory elements approach.[121] Under this paragraph, "an offense is

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offense necessarily included in that with which he is charged, as the facts may warrant.") (State).

[115] 1972 Haw. Sess. Laws 32–142.

[116] *See* State v. Kupau, 620 P.2d 250, 252 (Haw. 1980). The MPC version reads

> Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:
>
> (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

MPC § 1.07(4) (brackets in original).

[117] HAW. REV. STAT. ANN. § 701-109(1) (West, WestlawNext through Act 7 of the 2015 Regular Session).

[118] *Id.* § 701-109(1)(a).

[119] *Id.* § 701-109(4). Paragraph (b) concerns attempt: "It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein . . . ." *Id.* § 701-109(4)(b).

[120] *Kupau*, 620 P.2d at 252 (citing HAW. REV. STAT. § 701-109 cmt.); State v. Feliciano, 618 P.2d 306, 308 (Haw. 1980) (citing MPC § 1.08(4) cmt., at 40 (AM. LAW. INST., Tentative Draft No. 5 1956)). The Commentary classifies paragraph (a) as "the standard

included if it is impossible to commit the greater without also committing the lesser."[122] When considering whether an offense is a lesser-included offense, however, "factors which can be considered in determining whether an offense is included in the charged offense [are] degree of culpability, end result, and legislative scheme."[123] Paragraph (c) "expands the doctrine of lesser included offenses" and "include[s] as lesser included offenses crimes that require a lesser degree of culpability or a less serious injury or risk of injury."[124] This is the lesser-culpability/lesser-injury or MPC approach.[125] The two paragraphs differ in that "although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense."[126] Some of the factors considered under paragraph (c) are "[t]he degree of culpability, degree of injury or risk of injury and the end result[,]"[127] though the "end result" is not dispositive.[128] Comparing the factors considered under the two paragraphs, the only differences are the legislative scheme in (a) and the degree of injury or risk of injury in (c).[129]

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definition." HAW. REV. STAT. ANN. § 701-109 cmt.

[121] Blair, *supra* note 25, at 447.

[122] *Feliciano*, 618 P.2d at 308 (citing Olais-Castro v. United States, 416 F.2d 1155, 1157 (9th Cir. 1969)).

[123] *Kupau*, 620 P.2d at 252–53 (citing *Feliciano*, 618 P.2d at 308). The "legislative scheme" factor may be dispositive. *See* State v. Matautia, 912 P.2d 573, 579 (Haw. Ct. App. 1996) (To be a lesser-included offense, "the offenses being compared *must* be treated similarly in the statutory scheme enacted by the legislature, *e.g.*, be part of the same Hawai'i Penal Code chapter." (emphasis added) (citing State v. Alston, 865 P.2d 157, 166 (Haw. 1994)); *cf.* State v. Kaeo, 323 P.3d 95, 109 (Haw. 2014) ("Separate classification of offenses under the Penal Code 'indicates that different societal interests were intended to be protected[.]'") (quoting *Kupau*, 620 P.2d at 254) (alteration in original).

[124] *Kupau*, 620 P.2d at 254 (citing HAW. REV. STAT. § 701-109(4)(c) and MPC § 1.08(4), cmt., at 41–42 (AM. LAW. INST., Tentative Draft No. 5, 1956)).

[125] *See supra* notes 48–59 and accompanying text. *See also* MPC § 1.07(4)(c) (2014).

[126] HAW. REV. STAT. ANN. § 701-109 cmt. (When "(a) would not strictly apply . . . [,] (c) is needed to fill the gap."); *see also* State v. Freeman, 774 P.2d 888, 892 (Haw. 1989) ("[Paragraph] (c) differs from (a) in that there may be some dissimilarity in the facts necessary to prove the lesser offense, but the end result is the same.") (citing HAW. REV. STAT. § 701-109 cmt.).

[127] *Kupau*, 63 Haw. at 7, 620 P.2d at 254; *Kaeo*, 132 Haw. at 461, 323 P.3d at 105 (2014) (citing *Kupau*, 63 Haw. at 7, 620 P.2d at 254).

[128] *Kaeo*, 323 P.3d at 108 ("[T]his court has never stated that the 'end result' factor is dispositive. The end result is only one of the factors that can be considered in determining whether one offense is included in another.") (citing State v. Woicek, 632 P.2d at 654, 656 (Haw. 1981)).

[129] *See Alston*, 865 P.2d at 167 (noting in the court's discussion of paragraph (c) that the factors of culpability and end result were already analyzed in the court's discussion of paragraph (a)).

Judges analyze offenses under these two paragraphs to determine what other crimes may be lesser-included offenses of the crime charged.[130] First, courts analyze an offense under (a) and then, if applicable, paragraph (c) to find lesser-included offenses.[131] If a crime is found to be a lesser-included offense under either paragraph, courts go on to examine the evidence.[132]

B. The "Rational Basis" Standard

Section 701-109(5) of the Hawai'i Revised Statutes states that trial courts are "not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[133] When to give instructions under this standard has changed over time.[134]

As of 1994, trial courts were not obliged "to give all possible included offense instructions supported by the evidence[,]"[135] but they could exercise "discretion as to whether the included offense instructions should be given[,]" guided, in part, by the nature and weight of the evidence.[136] This changed with the Hawai'i Supreme Court's decision in *State v. Haanio*.[137] There, the court held that "trial courts *must* instruct juries as to any included offenses when 'there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense'"[138] and added that trial courts should

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[130] *Freeman*, 774 P.2d at 890 ("In determining whether an offense is included in another, HRS § 701-109(4) provides a two-prong test.").

[131] *Id.* The goal of this analysis seems to find a lesser-included offense. For example, in *Flores*, the court first analyzed the offense under paragraph (a) and found that first-degree unlawful imprisonment was not a lesser-included offense of kidnapping. 314 P.3d at 129 (Haw. 2013). But, the court went on, analyzed the offense under paragraph (c), and found that first-degree unlawful imprisonment was a lesser-included offense of kidnapping. *Id.* at 130.

[132] *See, e.g.*, *Kaeo*, 323 P.3d at 109; State v. Waterhouse, No. CAAP-13-0006254, 2015 WL 775034, at *7–8 (Haw. Ct. App. Feb. 24, 2015) (SDO).

[133] HAW. REV. STAT. ANN. § 701-109(5). The Commentary is a little more direct: "The jury need not be bothered with an instruction on a lesser included offense unless there is a rational basis in the evidence . . . ." HAW. REV. STAT. ANN. § 701-109 cmt.

[134] Some interviewees disagreed. Interview with K, in Honolulu, Haw., at 3 (Feb. 15, 2016); Interview with D, in Honolulu, Haw., at 1 (Feb. 3, 2016).

[135] State v. Kupau, 879 P.2d 492, 500 (Haw. 1994), *overruled by* State v. Haanio, 16 P.3d 246 (Haw. 2001).

[136] *Kupau*, 879 P.2d at 501 n.14.

[137] 16 P.3d 246 (Haw. 2001), *overruled by* State v. Flores, 314 P.3d 120 (Haw. 2013).

[138] *Id.* at 254 (quoting HAW. REV. STAT. § 701-109(5) (1993)) (emphasis added). *Haanio* explicitly overruled *Kupau*. *Id.*

issue appropriate instructions *sua sponte* if not requested by either party.[139] *Haanio* also held that failure to give appropriate instructions would be harmless "when the jury convicts the defendant of the charged offense or of an included offense greater than the included offense erroneously omitted from the instructions."[140]

Change came again with the Hawai'i Supreme Court's decision in *Flores*. The court overruled *Haanio* to the extent that *Haanio* would hold harmless a failure to give lesser-included offense instructions if the defendant was convicted of the charged offense or of an included offense greater than the included offense erroneously omitted.[141] After *Flores*, if a trial court fails to instruct the jury on a lesser-included offense for which the evidence provides a rational basis, the conviction will be vacated and the case remanded for retrial.[142] The change made by *Flores* regarding the type of error indicates that lesser-included offense instructions should be given to the jury. But, neither *Flores* nor *Haanio* explicitly states how much evidence constitutes a rational basis in the evidence, which has caused difficultly for practitioners.[143]

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[139] *Id.* at 256.

[140] *Id.* This holding may not have been so clear-cut, however. *See* State v. Gunson, No. 24209, 2003 WL 23310876, at *8 (Haw. Dec. 17, 2003) (Acoba, J., dissenting from denial of certiorari) ("If *Haanio* were to stand for the proposition that the failure of the trial court to instruct the jury on a lesser included offense that was rationally based on the evidence is harmless error any time a defendant is convicted of the charged offense, the central holding of *Haanio* would be rendered meaningless.... [T]he failure to give a lesser included instruction that has a rational basis in the evidence must be viewed as plain error, subject to our discretion not to apply the rule under the circumstances of a particular case."). Justice Acoba's dissent from denial of certiorari presaged his decision in *Flores*. *See* 314 P.3d at 134 ("Instead of continuing to follow *Haanio's* harmless error holding, *Haanio* is overruled to the extent that it holds the trial court's error in failing to give included offense instructions is harmless if the defendant was convicted of the charged offense or of a greater included offense.").

[141] *Flores*, 314 P.3d at 134.

[142] *See id.* at 135.

[143] For example, even in a fairly recent case, decided a few years since *Flores* and even longer since *Haanio* was decided, the Intermediate Court of Appeals found that the trial court erred in not giving a lesser-included offense instruction because there was, in fact, a rational basis in the evidence for the instruction. State v. Domingo, No. CAAP-14-0000988, 2015 WL 6508435, at *3 (Haw. Ct. App. Oct. 27, 2015) (SDO). One interviewee said that what a rational basis is might be different to different people and added, "It's a morass right now." Interview with G, in Honolulu, Haw., at 1 (Feb. 5, 2016). Another also expressed concern with the lack of guidance: "This is a system that can go awry if we don't pay attention to the standards." Interview with I, in Honolulu, Haw., at 2 (Feb. 8, 2016). This interviewee went on to say that the any evidence test "is capable of pernicious misapprehension." *Id.* at 3. On the term "rational basis," yet another interviewee said "What the heck does that mean?" Interview with B, in Honolulu, Haw., at 3 (Dec. 3, 2015).

A "rational basis in the evidence," however, may actually be a scintilla of evidence, or "*any* evidence."[144] As the Intermediate Court of Appeals (ICA) said in *State v. Redulla*:

> In *Haanio*, the supreme court explained that the point of the "rational basis" test is that the trial court does *not* have to make any judgments with regard to the weight or sufficiency of the evidence. The trial court must simply examine the record for *any* evidence that could lead the jury to reasonably acquit the defendant of the charged offense, yet convict under the lesser included offense. If such an outcome is possible, the lesser-included-offense instruction must be given.[145]

Juries are to be "the sole judge of witness credibility and the weight of the evidence."[146] Therefore, "[t]he question is not whether, in the mind of the *court*, the evidence as a whole excludes the idea that the defendant is guilty of an inferior degree of the offense charged,"[147] but rather whether there is any evidence tending to prove a lesser-included offense.[148]

While the *Redulla* opinion is cited only occasionally, it appears still to be good law and subsequent decisions support its "any evidence" approach. In *State v. Stenger*,[149] for example, the defendant was indicted for Theft in the First Degree[150] for wrongfully obtained benefits totaling $23,034.00.[151] The defendant and various witnesses testified about the defendant's finances, her children's living arrangements, and her job.[152] The trial court instructed the jury on the lesser included offense of Theft in the Second Degree,[153] but not on Theft in the Third[154] or Fourth Degrees.[155] The instructions explained to the jurors that they were the judges of the "effect and value of the

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[144] One interviewee described the standard as "one little grain." Interview with B, in Honolulu, Haw., at 4 (Dec. 3, 2015).

[145] 92 P.3d 1027, 1041 (Haw. Ct. App. 2004) (citation omitted) (citing *Haanio*, 16 P.3d at 252–255).

[146] State v. Estrada, 738 P.2d 812, 828 (Haw. 1987) (citing State v. Kim, 645 P.2d 1330, 1334 (1982)).

[147] Territory v. Alcantara, 24 Haw. 197, 208 (1918) (emphasis added) (quoting State v. Buffington, 72 P. 213, 214 (Kan. 1903)).

[148] *See id.*

[149] 226 P.3d 441 (Haw. 2010).

[150] HAW. REV. STAT. ANN. § 708-830.5. For Theft in the First Degree, the value of the property or services must exceed $20,000. *Id.*

[151] *Stenger*, 226 P.3d at 446.

[152] *Id.* at 444–46.

[153] HAW. REV. STAT. ANN. § 708-831 (value exceeds $300).

[154] *Id.* § 708-832 (value exceeds $100).

[155] *Stenger*, 226 P.3d at 464. The value for Theft in the Fourth Degree is not in excess of $100. HAW. REV. STAT. ANN. § 708-833.

evidence" and the "credibility of the witnesses."[156] These instructions, the *Stenger* Court declared, "countenanced" an instruction on the lesser degrees of theft because "the jury could determine, based on its evaluation of the witnesses' testimony and evidence, that varying amounts of less than $20,000 had been obtained by deception."[157] Thus, "[i]f the jury could determine that [the defendant] obtained less than $20,000 by deception but more than $300, it was free, on the same evidence, to determine alternatively that even less was obtained by deception."[158] Therefore, the instructions on Theft in the Third Degree and Theft in the Fourth Degree should have been given.[159]

In *Flores*, the defendant was charged with Kidnapping[160] and the trial court declined to instruct on the lesser-included offense of Unlawful Imprisonment in the First Degree.[161] The difference between the two is that the requisite state of mind for Unlawful Imprisonment indicates a lesser degree of culpability than the state of mind for Kidnapping.[162] There was a rational basis in the evidence, the court concluded, for a verdict acquitting on the charged crime and finding guilt on the lesser-included offense.[163] Based on the testimony from the victims and from co-defendants, the jury could infer that the defendant restrained the victim with the intent to terrorize him (required for Kidnapping) because he and a co-defendant had their faces covered and at least one of them was holding a gun.[164] On the other hand, a co-defendant testified that he and the defendant went to the scene because the defendant "wanted to 'beat someone up' who supposedly owed him money from a drug deal[;]"[165] others testified that the man with the gun held it pointed down and did not wave it around or make threats.[166] From this testimony, the jury could have determined that the defendant did

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[156] *Stenger*, 226 P.3d at 465 (internal quotation marks omitted).

[157] *Id.*

[158] *Id.*

[159] *Id.* at 466.

[160] State v. Flores, 314 P.3d 120, 121, 129 (Haw. 2013). The defendant was charged under HAW. REV. STAT. § 707-720(1)(e): "A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to . . . (e) Terrorize that person or a third person . . . ."

[161] *Flores*, 314 P.3d at 125–26. "A person commits the offense of unlawful imprisonment in the first degree if the person knowingly restrains another person under circumstances which expose the person to the risk of serious bodily injury." HAW. REV. STAT. ANN. § 707-721.

[162] *See Flores*, 314 P.3d at 130.

[163] *Id.* at 132.

[164] *Id.* at 130.

[165] *Id.* at 131.

[166] *Id.* at 132.

not intend to terrorize the victims; therefore, the instruction on Unlawful Imprisonment should have been given.[167]

In these examples, a judge is not supposed to engage in any credibility determinations or to weigh any evidence.[168] The court is to look only at the evidence presented at trial to determine if there is "a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[169] At least part of that rational basis inquiry seems to rest on inferences that the jury could draw.[170] The role of the jury is to decide credibility of witnesses and to weigh the evidence,[171] so that by submitting factual determinations "to the jury if there is any evidence upon which the jury may act[,]" courts will avoid "invad[ing] the jury's province."[172]

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[167] *See id.*

[168] One interviewee agrees that the court should not weigh evidence. Interview with A, in Honolulu, Haw., at 2 (Nov. 18, 2015).

[169] HAW. REV. STAT. ANN. § 701-109(5).

[170] *See Flores*, 314 P.3d at 132; *see also id.* ("It is well-established that '[t]he law permits an inference of the requisite intent from evidence of the words or conduct of the defendant.'" (quoting State v. Stuart, 466 P.2d 444, 445 (Haw. 1970)) (alteration in original)); *id.* at 54, 314 P.3d at 131 ("From the testimony adduced at trial, a jury could infer that Flores acted in restraining Aaron with the intent to terrorize him. Therefore, there was evidence from which a jury could conclude that Flores committed the charged offense of Kidnapping . . . ."); State v. Stenger, 226 P.3d 441, 465 (Haw. 2010) ("Because the jury was the exclusive judge of the value of evidence and credibility of witnesses, it had the ultimate discretion to decide to what extent a witness should be believed and whether to discredit testimony." (internal quotation marks omitted)); State v. Haanio, 16 P.3d 246, 258 (Haw. 2001) ("From the foregoing evidence, *it may reasonably be inferred* that Petitioner was under the influence of intoxicating liquor at the time of the incident. As a consequence of such influence, Petitioner may have possessed a reckless, rather than an intentional, state of mind with respect to his conduct, the result of his conduct, or both. . . . Consequently, there was a rational basis in the evidence to support the conclusion that Petitioner acted recklessly in inflicting such injuries and, thus, for the court to give a second degree robbery instruction." (emphasis added)).

[171] *See Estrada*, 738 P.2d at 828 (citing State v. Kim, 645 P.2d 1330, 1334 (Haw. 1982)).

[172] *See* State v. Riveira, 577 P.2d 793, 797 (Haw. 1978) (per curiam). There is additional—if somewhat tenuous—support for the notion that "rational basis" means "any evidence." Justice Acoba, in 2001, wrote the opinion in *Haanio*, which the *Redulla* Court cited for its "any evidence" proposition. State v. Redulla, 92 P.3d 1027, 1041 (Haw. Ct. App. 2004). In 1982, then-Circuit Judge Acoba, assigned to the Intermediate Court of Appeals, wrote a dissent in which he used the standard for instructing on *defenses* ("*any* support in the evidence") to justify instructions on *a lesser-included offense*, the standard for which, at the time at least, was different. *See* State v. Halemanu, 650 P.2d 587, 593 n.1 (Haw. Ct. App. 1982) (majority opinion). Judge Acoba wrote in dissent:

> Where a rational basis for acquitting the defendant of a charge and convicting him of an included offense exists, the court should give an instruction relating to that offense. HRS § 701-109(5). Robbery in the second degree may be proved by the same elements as robbery in the first degree, except being armed with a dangerous instrument is not

Apart from keeping the roles of courts and juries separate,[173] there may be a good policy reason for making "rational basis" a low standard: "the truth seeking function of the judicial system."[174] The *Haanio* Court said, "[C]ourts are not gambling halls but forums for the discovery of truth .... A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function."[175] When "the evidence may admit of an offense of lesser magnitude than the charged offense[,]"[176] giving the appropriate instructions to the jury allows for more than the two options of guilty as charged or not guilty and enables juries to "reach the result that best conforms with the facts" at trial.[177]

Allowing juries to reach results that better conform to the facts may benefit both the defendant and the public.[178] As noted above, not giving an

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> an element of the former. *See* HRS § 708-841(a) and (b). The parties did not request a second degree robbery instruction. However, Rule 1102, [Hawai'i Rules of Evidence], mandates that "the court shall instruct the jury regarding the law applicable to the facts of the case." And the defendant "is entitled to an instruction on every defense ... having *any* support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive or unsatisfactory the evidence may be." [State v. O'Daniel, 62 Haw. 518, 527–28, 616 P.2d 1383, 1390 (1980)] (emphasis in original). Hence, the error resulting from the failure to give the correct instruction on the "dangerous instrument" instruction was magnified by the failure to give an instruction on the lesser-included offense of robbery in the second degree.

Id. at 597 (footnote omitted) (Acoba, J., dissenting). *Haanio* thus would not have been the first time that Justice Acoba maintained that "any evidence" was the standard for giving instructions on lesser-included offenses.

[173] "A trial court's role is to instruct the jury on the relevant law and the jury's role is to render verdicts based on the evidence presented." State v. Abdon, No. CAAP–13–0000086, 2014 WL 4800994, at *6 (Haw. Ct. App. Sept. 26, 2014) (citing State v. Adviento, 319 P.3d 1131, 1145) (Haw. 2014).

[174] *Haanio*, 16 P.3d at 256.

[175] *Id* (alteration in original) (quoting People v. Barton, 906 P.2d 531, 536) (Cal. 1995). While one interviewee agreed that allowing the court to decide the instruction takes "game playing out of the picture," Interview with H, in Honolulu, Haw., at 2 (Feb. 8, 2016), one interviewee took issue with the description of a gambling hall, saying that the court calls it gambling, but litigants call it strategy: "I'm a strategist, not a poker player," Interview with G, in Honolulu, Haw., at 2–3 (Feb. 5, 2016).

[176] State v. Flores, 314 P.3d 120, 133 (Haw. 2013).

[177] *Id.* Not all interviewees agreed. One interviewee described the instructions that juries are now given as "a buffet" and posited that juries may reach a verdict by looking at all of the instructions and figuring out on which crime they all agree, rather than considering each crime individually. Interview with E, in Honolulu, Haw., at 1 (Feb. 3, 2016). Another interviewee described the instructions now given as being "like a menu." Interview with G, in Honolulu, Haw., at 2 (Feb. 5, 2016).

[178] One interviewee does not believe that more instructions are better, saying that giving

instruction on a lesser-included offense can trigger due process concerns.[179] If the only option is the charged offense, the jury may not follow the court's instructions to find guilt beyond a reasonable doubt,[180] and jurors "may prefer to find the defendant guilty as charged, rather than to acquit him or her of the offense entirely[,]"[181] thereby violating the defendant's constitutional rights.[182] Conversely, "if the lesser-included offense instruction is not given where there is a basis in the evidence for such an instruction, the jury may determine that although the defendant is guilty of 'something,' it will not convict the defendant of the charged offense and elect acquittal instead."[183] Though the jury may have found the defendant guilty of that "something" if properly instructed, the accused goes free.

Finally, there is a pragmatic reason for finding the "rational basis" to be a lower standard, at least for trial judges: If a defendant is found guilty of a greater offense when there was a rational basis to find guilt of the omitted lesser-included offense, the error will not be harmless, the conviction will be vacated, and the case will be remanded for a new trial.[184] The prospect of having to retry a case is a fairly strong incentive to err on the side of caution. Yet the possibility of invading the jury's province, violating the defendant's constitutional rights, and retrying a case can be avoided by "completely instructing the jury on the law."[185]

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more instructions is a "diminution of [the] right to [a] jury trial." Interview with J, in Honolulu, Haw., at 2 (Feb. 13, 2016).

[179] *See supra*, notes 99–107 and accompanying text.

[180] *See Flores*, 314 P.3d at 134; *cf.* Territory v. Alcantara, 24 Haw. 197, 208 (Haw. 1918) ("The fact that the jury found the defendant guilty of murder in the first degree, while under the instructions given by the court it might have found him guilty of murder in the second degree, tends to refute the likelihood that had the instruction requested been given the jury would have found any different verdict than it did. *But this at best is a mere matter of conjecture* and having found that the court should have given the instruction covering manslaughter it is not for us to speculate upon the effect the refusal of the court to give the instruction might have had upon the jury.") (emphasis added)).

[181] *Flores*, 314 P.3d at 134.

[182] *See In re Winship*, 397 U.S. 358, 364 (1970).

[183] *Flores*, 314 P.3d at 134.

[184] *Id.* at 135 (overruling State v. Haanio, 16 P.3d 246 (Haw. 2001)); *see, e.g.*, State v. Waterhouse, 344 P.3d 361 (Haw. Ct. App. 2015). Judge Ahn recognized this possibility in deciding instructions in the Deedy retrial. *See* Transcript of Proceedings *supra* note 1, at 39–40 ("You know this is going to be reversed if somebody has three votes and thinks that Assault 1 . . . should have been there. And I -- . . . . You do not want to try this case again.").

[185] *Flores*, 314 P.3d at 134 (citing *Haanio*, 16 P.3d at 256).

C. The "Rational Basis" Standard—How Far Does it Go?

As discussed above, the quantum of evidence needed for when a jury should get instructions on lesser-included offenses seems to be *any* evidence. If this is, in fact, the standard, it is low one: The court should examine the record, consider how much weight, if any, the jury could give certain evidence[186]—including believing or disbelieving witnesses[187]—consider any inferences that the jury could draw,[188] and then decide if the jury could "acquit[] the defendant of the offense charged and convict[] the defendant of the included offense."[189] Having undertaken this examination, if the trial court decides that the jury could acquit the defendant of the charged offense, and convict of the lesser-included offense, the instruction must be given.[190]

It seems clear that taking these steps will lead courts to conclude that an instruction should be given more often than not. Yet, there remain some situations in which an instruction on a lesser-included offense may not be warranted. For example, in a fairly recent case considered by the Intermediate Court of Appeals ("ICA"), the defendant was charged with, and convicted of, second-degree theft for stealing merchandise valued at over $300.[191] On appeal, the defendant contended that the trial court should have *sua sponte* instructed the jury on fourth-degree theft,[192] which is theft of property not exceeding $250.[193] The State presented undisputed evidence through the store owner that the retail and wholesale value of the merchandise "far exceeded" $300, the amount required for the charged crime of second-degree theft.[194] The defendant did not challenge or contest this evidence because his defense was that he did not steal the merchandise.[195] The ICA concluded "that there was no rational basis in the

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[186] *See* State v. Stenger, 226 P.3d 441, 465 (Haw. 2005).

[187] *See* State v. Kaeo, 323 P.3d 95, 109 ("Had the jury believed [Defendant's] testimony, the jury would have had a rational basis for finding that [Defendant] did not intentionally or knowingly cause [the victim's] death.").

[188] *See Haanio*, 16 P.3d at 258–59.

[189] HAW. REV. STAT. ANN. § 701-109(5).

[190] *Flores*, 314 P.3d at 128.

[191] State v. Presas, No. CAAP-13-0002508, 2015 WL 3476399, at *1 (Haw. Ct. App. May 29, 2015) (citing HAW. REV. STAT. ANN. § 708-831(1)(b)) (mem.), *cert. denied*, 2015 WL 6410178.

[192] *Id.* at *7.

[193] HAW. REV. STAT. ANN. § 708-833(1) (West, WestlawNext through Act 3 (End) of the 2017 1st Special Session).

[194] The store owner testified that the merchandise had a retail value of $1,415. *See Presas*, 2015 WL 3476399, at *7.

[195] *See id.*

evidence for the jury to acquit [Defendant] of the charged second-degree theft but convict him of fourth-degree theft" and held that omitting the instruction was not plain error.[196] In this case, the only point separating the greater and lesser offenses (the value) was undisputed and it was not linked to the defense.[197] On these facts, it seems possible to conclude that when a point is undisputed and the defense is unrelated to that point, an instruction on lesser-included offenses need not be given.

That conclusion, however, is not exactly in line with previous cases that state that "jurors are at liberty to believe all, none, or part of the evidence as they see fit."[198] In *Presas*, the store owner presented the value of the stolen merchandise.[199] It may have been possible to call into doubt the veracity of that testimony by asking a question or two about insurance, for example. Those questions would leave the issue of value undisputed, in that there was no evidence conflicting with the stated value (*e.g.*, there was not any witness saying that the merchandise was only worth $5.00). But, questions might have elicited enough evidence to argue the possibility that the owner was inflating the cost of the merchandise and, therefore, the jury could disbelieve her testimony and find that the value was actually lower, in which case the lesser theft instruction should have been given.

Apart from the quantum of evidence issue, an additional major concern is how far down the "chain" of possible lesser-included offenses can or must a court go in its instructions. On a charge of second-degree murder, for example, should a court give additional instructions on the lesser-included offenses of manslaughter and first-, second-, and third-degree assault?[200] The answer seems to be simply, "Yes, if there is any evidence that the jury could acquit of the greater offense and find guilt on the lesser offense."[201]

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[196] *Id.* (citing *Flores*, 314 P.3d at 130).

[197] *See id.*

[198] State v. Kaeo, 323 P.3d 95, 109 (Haw. 2014) (quoting State v. Haanio, 16 P.3d 246, 256 (Haw. 2001)).

[199] *Presas*, 2015 WL 3476399, at *7.

[200] Courts have done so. *E.g.*, State v. Culkin, 35 P.3d 233, 241 (Haw. 2001) ("The circuit court instructed the jury regarding the elements of murder in the second degree and the lesser included offense of reckless manslaughter, as well as first, second and third degree assault."); *see also Man Found Guilty of Assault in Salt Lake Blvd. Death*, KHON2 (Nov. 20, 2015), http://khon2.com/2015/11/20/man-found-guilty-of-assault-in-salt-lake-blvd-death/ (defendant found guilty of assault on a charge of murder) [https://web.archive.org/web/20160220215143/http://khon2.com/2015/11/20/man-found-guilty-of-assault-in-salt-lake-blvd-death/]. One interviewee expressed visceral discomfort with courts instructing the jury on assault in the third degree when the charge is murder: "[I]n your stomach, Hawaiians call it na'au, like in your na'au, . . . I just thought, 'This isn't right, this just doesn't feel right,' . . . it didn't feel like justice, because I thought, 'We have a decedent, somebody's dead.'" Interview with C, in Honolulu, Haw., at 1 (Jan. 29, 2016).

[201] For example, in a case in which the defendant was charged with first-degree theft, the

But, may a court instruct a jury on an offense, skip the next lesser in the chain, and then instruct on following lesser-included offense? For example, could the jury consider murder and first-degree assault but not manslaughter? The Hawai'i Supreme Court has declared first-degree assault a lesser-included offense of murder.[202] That opinion's analysis appears to require an instruction on assault if there is a rational basis in the evidence for acquitting of murder and convicting of assault.[203] By skipping manslaughter, it thus seems possible to instruct on one offense, skip a lesser-included offense, and give the next offense down the chain. Yet, it remains difficult to imagine a set of facts that would allow skipping an intermediate lesser-included offense.[204]

As the court held in *Haanio*: "[T]rial courts must instruct juries as to *any* included offenses when 'there is a rational basis in the evidence . . . ,'"[205] a point reiterated in *Flores* as "axiomatic."[206] Additionally, given the jury's truth-seeking function[207] and given that there is "no constitutional or substantial right of a defendant *not* to have the jury instructed on lesser included offenses[,]"[208] it seems unlikely that an appellate court will determine that *giving* an instruction in the context of lesser-included offenses will be an error requiring a retrial.

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court held that, based on the evidence presented at trial and the fact that the jury was free to decide the weight of the evidence, instructions on third- and fourth-degree theft were required. State v. Stenger, 226 P.3d 441, 465–66 (Haw. 2010); *see also Flores*, 314 P.3d at 132 n.10 (On a charge of kidnapping, "there may have been a basis in the evidence for an instruction on Unlawful Imprisonment in the Second Degree [in addition to the holding that an instruction on Unlawful Imprisonment in the First Degree should have been given]. However, in light of this court's disposition to remand the case for a new trial, this issue need not be reached.").

[202] *Kaeo*, 323 P.3d at 108–09.

[203] *Id.* at 113 (Recktenwald, C.J., dissenting) ("[T]he majority's analysis nevertheless would appear to require an instruction on assault if there was a rational basis in the evidence for acquitting Kaeo of second degree murder and convicting him of first degree assault. Respectfully, in my view, this analysis is incorrect . . . ." (citation omitted)).

[204] One interviewee agreed that, though hard to imagine, the interviewee would not rule out the possibility. Interview with B, in Honolulu, Haw., at 5 (Dec. 3, 2015). The interviewee also said that courts are not tied into a certain progression and that the courts put themselves in the shoes of the jury to determine what the jurors could think. *Id.* at 5.

[205] State v. Haanio, 16 P.3d 246, 254 (Haw. 2001) (quoting HAW. REV. STAT. § 701-109(5)) (emphasis added); *see also id.* at 255 ("We now conclude that the better rule is that trial courts must instruct juries on *all* lesser included offenses as specified by HRS § 701-109(5), despite any objection by the defense, and even in the absence of a request from the prosecution." (emphasis added)).

[206] *Flores*, 314 P.3d at 128 (citing *Stenger*, 226 P.3d at 466).

[207] *Haanio*, 16 P.3d at 256.

[208] *Id.* at 255–56 (emphasis added) (citing Commonwealth v. Matos, 634 N.E.2d 138, 142 (Mass. App. Ct. 1994)).

V. CONSTITUTIONAL CONSIDERATIONS IN HAWAI'I

When contending with lesser-included offenses, there are three different constitutional principles that require consideration: notice, double jeopardy, and due process.[209] In Hawai'i, these three principles are properly followed through state court decisions on when lesser-included offense instructions should be given and because of how state courts have interpreted the Hawai'i Constitution.

A. Notice

The Sixth Amendment of the U.S. Constitution and Section 14 of the Hawai'i Constitution guarantee that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[210] Jury instructions are only settled after the presentation of all of the evidence and after both parties have rested. For this reason, potential notice issues may arise whenever lesser-included offense instructions are given.

Courts in Hawai'i use both the statutory elements approach[211] and the lesser-culpability/lesser-injury approach from the MPC[212] to determine what constitutes a lesser-included offense. As discussed above, if the statutory elements approach is used to determine lesser-included offenses, the charge should constitute sufficient notice. As said by the ICA, "[I]f the defendant's alleged conduct constitutes a lesser-included crime within the offense charged, and the defendant has received sufficient notice thereof to adequately prepare his defense, he will have received that quantum of fairness to which he is entitled under the principles of due process."[213] That is, if the defendant has sufficient notice of the charged crime, he or she will have sufficient notice of the lesser-included offenses.

Likewise, if an appellate court has declared one offense a lesser-included offense of another, that should be constructive notice for subsequent defendants that that lesser-included offense may be a charge against which they have to defend.[214] This is a point on which it seems the Hawai'i

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[209] Blair, *supra* note 25, at 446.

[210] U.S. CONST. amend. VI; HAW. CONST. art. I, § 14.

[211] *See* State v. Kupau, 620 P.2d 250, 252 (Haw. 1980) (citing HAW. REV. STAT. § 701-109 cmt.); *Feliciano*, 618 P.2d at 308 (citing MPC § 1.08(4) cmt., at 40 (AM. LAW. INST., Tentative Draft No. 5 1956)).

[212] *See Kupau*, 620 P.2d at 254 (citing HAW. REV. STAT. § 701-109(4)(c) and MPC § 1.08(4), cmt., at 41–42 (AM. LAW. INST., Tentative Draft No. 5, 1956)).

[213] State v. Kupau, 879 P.2d 559, 565 (Haw. Ct. App. 1994) (quoting Mascolo, *supra* note 28, at 299–300).

[214] *See* Blair, *supra* note 25, at 453 (citing *Yusem*, *supra* note 45, at 145).

appellate courts have yet to rule explicitly. Yet, Hawai'i courts have noted what lesser-included offenses are included within a charge in previous decisions, ruled that there was a rational basis for that lesser-included offense instruction to go to the jury, and remanded for retrial.[215] Implicitly, these decisions support the notion that a determination by an appellate court that one offense is a lesser-included of another serves as constructive notice for future defendants.

If there is inadequate notice however, in cases of first impression[216] or otherwise, judges in Hawai'i will be in a position to protect a defendant's right to be informed of the charges against him or her.[217]

B. Double Jeopardy

The double jeopardy clause protects against a second prosecution for the same offense after either an acquittal or a conviction and against multiple punishments for the same offense.[218] Despite the seemingly simple wording of the clause,[219] Chief Justice Rehnquist described decisional law surrounding it as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[220] Accurate navigation is further complicated by the fact that the U.S. Constitution and the Hawai'i Constitution chart two slightly different courses.

Under the federal Constitution, "[i]n both the multiple punishment and multiple prosecution contexts," the test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same

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[215] *E.g.*, State v. Ito, 936 P.2d 1292, 1293–97 (Haw. Ct. App. 1997) (noting that third-degree assault is a lesser-included offense of second-degree assault, deciding that there was a rational basis in the evidence for instructing the jury on third-degree assault, and remanding).

[216] *See* Blair, *supra* note 25, at 453 ("[A] defendant convicted of an offense which is found to be a lesser offense of the offense charged, in a jurisdiction in which that determination is one of first impression, should be deemed not to have had adequate notice.").

[217] *See* State v. Arlt, 833 P.2d 902, 910 (Haw. Ct. App. 1992) ("We believe there is . . . sufficient evidence on the record to find Defendant guilty of Assault in the Third Degree. However, since Defendant was not specifically charged with Assault in the Third Degree, and since, as we have previously concluded, Assault in the Third Degree is not a lesser-included offense of Robbery in the First Degree . . . , *Defendant was never fairly put on notice that he could be convicted of assault.* Therefore, we are unable to direct an entry of a judgment convicting Defendant of Assault in the Third Degree.") (emphasis added) (citation omitted).

[218] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[219] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[220] Albernaz v. U.S., 450 U.S. 333, 343 (1981).

offence' and double jeopardy bars additional punishment and successive prosecution."[221] This is the *Blockburger* test,[222] which Hawai'i employs in the multiple punishment context.[223] When deciding whether or not a second prosecution is barred, on the other hand, Hawai'i takes a different tack. As noted above, the *Blockburger* test bars successive prosecutions under the U.S. Constitution.[224] The Hawai'i Supreme Court declined to follow this approach, however, concluding "that the interpretation given to the double jeopardy clause by the United States Supreme Court . . . does not adequately protect individuals from being 'subject for the same offense to be twice put in jeopardy.'"[225] Instead, the Hawai'i Supreme Court adopted the same-conduct test[226] laid out in *Grady v. Corbin*,[227] a test abandoned by the U.S. Supreme Court.[228]

Under this test, the double jeopardy clause "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[229] In other words, if the *actus reus* of a charge can be established by proof of acts *independent* of the acts alleged a previous prosecution, the two offenses are not barred by the same-conduct test and therefore subsequent prosecution will not be barred by the double jeopardy clause of the Hawai'i Constitution.[230] If the *actus reus* could only be established by proof of acts that are the same as those alleged in a previous prosecution, the second prosecution is barred.[231] Thus, the same-conduct test sweeps more broadly than the protections offered by the *Blockburger* test.[232] So, by following the

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221 U.S. v. Dixon, 509 U.S. 688, 696 (1993).

222 *Id.*

223 State v. Feliciano, 115 P.3d 648, 660 (Haw. 2005) ("We consequently hold that the double jeopardy clause does not constrain the legislature from intentionally imposing multiple punishments upon a defendant for separate offenses arising out of the same conduct. In conclusion, we believe that the protections afforded by the United States Constitution, as set forth in the *Blockburger* 'same elements' test, adequately protect against double jeopardy in 'multiple punishments' cases.").

224 *E.g.*, *id.*; State v. Lessary, 865 P.2d 150, 154 (Haw. 1994).

225 *Lessary*, 865 P.2d at 155.

226 *Id.* at 156 ("[W]e adopt the 'same conduct' test under the Hawai'i Constitution.").

227 495 U.S. 508, 509 (1990), *overruled by Dixon*, 509 U.S. 688.

228 *See Dixon*, 509 U.S. 688.

229 *Grady*, 495 U.S. at 521.

230 *See Lessary*, 865 P.2d at 157.

231 *Cf. id.*

232 *See Lessary*, 865 P.2d at 157 ("[T]he double jeopardy clause of the United States Constitution does not bar the prosecution of . . . the Unlawful Imprisonment . . . charge[]. . . . Under the 'same conduct' test, prosecution of the Unlawful Imprisonment charge is barred . . . .").

federal approach in the multiple punishments context and expanding beyond the federal approach[233] in the successive prosecutions context, a defendant's rights in Hawai'i are protected at least to the minimum required by the U.S. Constitution.

C. Due Process and Reliability of the Fact-Finding Process

Due process issues relating to the reliability of the fact-finding process are often raised when a lesser-included offense instruction is *not* given.[234] In Hawai'i, this risk seems low. The court in *Flores* held that "jury instructions on lesser-included offenses *must* be given where there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[235] The court in *Flores* also held that failure to give such an instruction was not harmless beyond a reasonable doubt, overruling a decision that had held it to be harmless when a defendant was convicted of the charged offense.[236]

In reaching that holding, the court noted that in previous cases in which not giving an instruction was held to be harmless relied "heavily on the supposition that a jury will always follow[] the court's instructions."[237] Acknowledging that "[w]hile this assumption is generally applied," the court stated that "it would be imprudent to ignore the 'reality of human experience,' that a jury, faced with an 'all or nothing' option, may determine that the defendant was guilty of 'something.'"[238] If the jury has

> only the charged offense as an option, the jury may prefer to find the defendant guilty as charged, rather than to acquit him or her of the offense entirely. On the other hand, if the lesser-included offense instruction is not given where there is a basis in the evidence for such an instruction, the jury

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[233] As states are free to do when such a departure affords greater protection under state constitutions. *See* State v. Kaluna, 520 P.2d 51, 59 n.6 (Haw. 1974) ("While this results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law."); *cf.* Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."). *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[234] Blair, *supra* note 25, at 462.

[235] State v. Flores, 314 P.3d at 120, 128 (Haw. 2013) (emphasis added).

[236] *Id.* at 134, *overruling* State v. Haanio, 16 P.3d 246 (Haw. 2001).

[237] *Id.* (citing State v. Knight, 909 P.2d 1133, 1142 (Haw. 1996); State v. Holbron, 904 P. 2d 912, 931 (Haw. 1995)).

[238] *Id.* (citing Alabama v. Beck, 447 U.S. 625, at 642 (1980)).

> may determine that although the defendant is guilty of "something," it will not convict the defendant of the charged offense and elect acquittal instead.[239]

In either scenario, the court concluded, "the jury's verdict would not reflect the actual criminal liability of the defendant[,]"[240] thereby potentially interfering with a defendant's due process rights.

By no longer considering a failure to give the jury an instruction on any lesser-included offenses for which there is a basis in the evidence as harmless, cases in which the jury was not instructed properly will be remanded for retrial.[241] This change by the *Flores* Court also ensures that lesser-included offense instructions will be given in a more practical way: the prospect of retrying a case is a strong incentive for trial judges to give instructions on lesser-included offenses.[242] *Flores*, in conjunction with the fact that the quantum of evidence required seems to be any evidence, as discussed above, ensures that instructions will very often be given to the jury. Thus, because juries will be able to consider a range of offenses, a defendant's due process rights are likely to be well-protected in Hawai'i.

VI. CONCLUSION

In Hawai'i, the evidentiary standard for when juries should be able to consider lesser-included offenses is low: Where there is *any* evidence that could lead the jury to reasonably acquit the defendant of the charged offense yet convict of the lesser-included offense, the instruction must be given.[243] And in making the determination on what lesser-included offenses the jury can consider, the trial court should look at the inferences that the jury could draw.[244] If a defendant is convicted of a greater offense, and there was any evidence that could have lead the jury to acquit of the greater

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[239] *Id.* at 134.

[240] *Id.*

[241] *Id.*

[242] According to one interviewee, judges will "err on the side of being cautious." Interview with B, in Honolulu, Haw., at 3 (Dec. 3, 2015). Another interviewee agreed, saying that it's safer for judges to "throw in the kitchen sink." Interview with D, in Honolulu, Haw., at 2 (Feb. 3, 2016). That interviewee continued: "What you do know is you're not going to get reversed." *Id.* at 1. A different interviewee also said judges sometimes throw in "the kitchen sink." Interview with K, in Honolulu, Haw., at 2 (Feb. 15, 2016). Yet another also thought that judges were erring on the side of giving lesser-included offense instructions and that judges were not putting thought into the giving of instructions. Interview with F, in Honolulu, Haw., at 2 (Feb. 5, 2016). One was a little blunter, saying that giving more instructions was "a knee-jerk reaction by a timid judiciary." Interview with E, in Honolulu, Haw., at 1 (Feb. 3, 2016).

[243] *E.g.*, State v. Redulla, 92 P.3d 1027, 1041 (Haw. Ct. App. 2004).

[244] *See id.*; *Flores*, 314 P.3d at 132.

and find guilt on the uninstructed lesser, the case will be remanded for retrial.[245] As a result, juries will often have to consider lesser-included offenses.

Giving additional lesser-included offense instructions to juries protects a defendant's right to due process.[246] The other constitutional considerations are also protected by Hawai'i courts. The charge will indicate potential lesser-included offenses,[247] as will previous court decisions in which an offense was declared to be included in a greater charge, thereby protecting a defendant's right to notice. On double jeopardy, because Hawai'i uses a test in which more offenses are considered to be the "same" offense than is the case under the federal test, additional successive prosecutions are barred, shielding defendants from subsequent trials.[248]

"Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be."[249] Judges in Hawai'i, in "completely instructing the jury on the law[,]"[250] enable members of the jury to carry out their responsibility and to fulfill their unique role while also protecting defendants' constitutional rights.

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[245] *See Flores*, 314 P.3d at 135.

[246] *See id.* at 134.

[247] *See* State v. Kupau, 879 P.2d 559, 565 (Haw. Ct. App. 1994) (citing Mascolo, *supra* note 28, at 299–300).

[248] *See* State v. Lessary, 865 P.2d 150, 155–56 (Haw. 1994).

[249] Sparf v. United States, 156 U.S. 51, 102 (1895).

[250] *Flores*, 314 P.3d at 134.

Up In The Air: The Status & Future of Drone Regulation in Hawai'i

Adam N. Miller*

INTRODUCTION

California State Senator Hannah-Beth Jackson was vacationing in Hawai'i, on the island of Kaua'i, when a neighbor's drone[1] flew onto her balcony and recorded her conversation.[2] "People should be able to sit in their backyards and be in their homes without worrying about drones flying right above them or peering in their windows," she later remarked.[3] Inspired by the events on Kaua'i, which occurred in December 2014,[4] Jackson authored and introduced Senate Bill 142 in the California legislative session shortly thereafter.[5] California was one of forty-five states considering drone-related bills in 2015, and one of twenty states, including Hawai'i, which passed some form of drone legislation that year.[6] California enacted a law expanding liability for constructive trespass to include knowingly entering into the airspace of another, through the use of any device, without consent.[7]

Hawai'i's new drone law failed to address the risk of invasion of privacy that drones pose to people on private property and in private spaces—the

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[1] Alternately deemed *unmanned aerial vehicles* (UAVs), and *small unmanned aircraft systems* (sUAS), a "drone," for our purposes, shall refer to any multirotor, remotely-operated flying system, weighing under fifty-five pounds, and equipped with cameras, listening, or recording equipment of any kind. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 332(a)(1)-(5), 126 Stat. 11, 73-74 (codified at 49 U.S.C. § 40101 note).

[2] Halima Kazem, *Drone No-Fly Zone in California Will Stifle Innovation, Say Industry Advocates,* GUARDIAN (Aug. 24, 2015), https://www.theguardian.com/technology/2015/aug/25/drone-no-fly-zone-in-california-will-stifle-innovation-say-industry-advocates.

[3] *Id.*

[4] *Id.*

[5] S.B. 142, 2015-2016 Reg. Sess. (Ca. 2015).

[6] *State Unmanned Aircraft Systems (UAS) 2015 Legislation,* NAT'L CONF. OF ST. LEGISLATURES, (Sept. 30, 2016), http://www.ncsl.org/research/transportation/state-unmanned-aircraft-systems-uas-2015-legislation.aspx.

[7] A.B. 856, 2015-2016 Reg. Sess. (Ca. 2015) (amending [Ca. Civ. Code] § 1708.8 (West)).

very reason Jackson complained about the drone hovering near her vacation home lanai.[8] Jackson had no better luck in her home state of California; although she persuaded the California legislature to pass Senate Bill 142, Governor Brown vetoed Jackson's legislation on the grounds that it "could expose the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation and new causes of action."[9]

The intrusion of privacy posed by drones in Hawai'i will likely continue until Hawai'i passes legislation to protect its citizens against unwelcome surveillance. For example, in August 2015—shortly after Hawai'i's failed effort to pass drone-related privacy regulations—a Hawai'i Kai resident awoke in the early morning to the sound of a drone hovering outside her window just above her privacy curtain.[10] The woman reported the incident to the police and was told the occurrence was not a crime.[11] She later remarked, "watching somebody sleep[;] that's pretty incredible what an invasion of privacy that is . . . . Were they looking at us, or looking at the house to maybe burglarize it later?"[12]

The Hawai'i Legislature has recognized the economic potential of drones, even if it has failed to curtail invasions of privacy.[13] In its 2015 legislation, the Hawai'i Senate found that integration of drone technology into the national airspace was estimated to be worth more than $82 billion between 2015 and 2025, creating approximately 103,776 new jobs by 2025.[14] In addition to commercial use, the Senate recognized drone technology's potential for wide-ranging legitimate government purposes, including: "emergency search and rescue operation; wildfire detection and management; fisheries management; agricultural monitoring; reef health surveys; hazardous spills monitoring; dam and reservoir overflow protection; tsunami damage surveys and assessment; algal bloom detection

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[8] *See* S.B. 661, 2015 Leg., 28th Sess. (Haw. 2015) (codified as HAW. REV. STAT. § 201-72.7). The legislation enables a chief operating officer to manage operations of Hawai'i's unmanned aerial systems test site in order to "enhance public awareness of the benefits and opportunities that unmanned aerial systems . . . can bring to the State." *Id.* The act does not address privacy concerns. *Id.*

[9] Veto Message from Governor Edmund G. Brown Jr. to Members of the Cal, State S., (Sept. 9, 2015), https://www.gov.ca.gov/docs/SB_142_Veto_Message.pdf.

[10] Lynn Kawano, *Drone Hovers Outside Hawaii Kai Woman's Bedroom, but No Crime Was Committed,* HAW. NEWS NOW (Aug. 11, 2015), http://www.hawaiinewsnow.com/story/29765309/drone-hovers-outside-hawaii-kai-womans-bed%20room-but-no-crime-was-committed.

[11] *Id.*

[12] *Id.*

[13] S.B. 661, 2015 Leg., 28th Sess. (Haw. 2015).

[14] *Id.*

and mapping; air quality monitoring . . . [and] motor vehicle traffic management."[15] Given these potential applications, it is not surprising that the State's only existing legislation on drones has sought to promote their use.

This is not to say that Hawai'i legislators are unaware of the privacy implications of increased government and civilian drone use.[16] Local legislators introduced over a dozen bills addressing privacy concerns specific to drone use in the 2015-2016 session, none of which reached the Governor's desk.[17] Written testimony cited the incidents in Kaua'i and Hawai'i Kai[18] as rationale for supporting one such bill, HB 314.[19] Like its predecessors, the bill seeks to establish "some minimum baseline legislation . . . necessary to protect the public and enshrine privacy interests" while recognizing that drones have legitimate, beneficial applications.[20]

Opponents of state drone legislation in Hawai'i claim the Federal Aviation Administration (FAA)'s regulatory scheme preempts state law and that Hawai'i should leave drone regulation to the federal government.[21]

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[15] *Id.*

[16] *See e.g.*, S.B. 2608, 2014 Leg., 27th Sess. (Haw. 2014) (proposing to prohibit use of unmanned aircrafts, except by law enforcement agencies, to conduct surveillance; establishing reporting requirements for law enforcement agencies, and exempting the use of "model aircrafts" for commercial, hobby, or recreational purposes); S.B. 579, 2015 Leg., 28th Sess. (Haw. 2015) ("The purpose of this Act is to ensure that unmanned aircraft systems technology will not be used in a manner that will impede the right to privacy); H.B. 637, 2015 Leg., 28th Sess. (Haw. 2015) (proposing to amend the offenses of violation of privacy in the first and second degrees to specifically address the use of unmanned aerial vehicles in the commission of those offenses); H.B. 1522, 2016 Leg. 28th Sess. (Haw. 2015) (prohibiting drone use less than five hundred feet above ground level above residential property without express consent of landowner or lessee) *see also* S.B. 2095, 2016 Leg. 28th Sess. (Haw. 2016) (proposing mandatory drone operator liability insurance).

[17] Search Results for Keyword Search "Unmanned," HAW. LEG,, http://www.capitol.hawaii.gov/advreports/advreport.aspx?year=2016&report=subject&strInput=unmanned&title=Search%20Results%20for:%20unmanned (there are 20 search results showing bills introduced in 2016 relating to "unmanned").

[18] *Hearing on H.B. 314 Before the Haw. H. Comm. on Consumer Prot. and Commerce*, 2017 Leg., 29th Sess. (Haw. 2017) (statement of Brandon Elefante, Councilmember, Honolulu City Council).

[19] H.B. 314, 2017 Leg., 29th Sess. (Haw. 2017).

[20] H.B. 314, Relating to Unmanned Aerial Vehicles, passed through the House of Representatives and is still alive entering the second year of the biennial session. *Id.*

[21] *See e.g., Hearing on H.B. 314 Before the Haw. H. Comm. on Consumer Prot. and Commerce*, 2017 Leg., 29th Sess. (Haw. 2017) (statement of Ford N. Fuchigmai, Dir., State of Haw. Dep't. of Transp.); *Hearing on H.B. 314 Before the Haw. H. Comm. on Consumer Prot. and Commerce*, 2017 Leg., 29th Sess. (Haw. 2017) (statement of Luis P. Salaveria,

There is some merit to this federal preemption argument. As a general matter, courts have held that federal law preempts state law in the field of aviation safety.[22] To that end, Congress has asserted "exclusive sovereignty of airspace of the United States," and placed regulatory authority of all "navigable" airspace in the FAA.[23] In 2012, the United States Congress tasked the FAA with providing a comprehensive regulatory response to increased drone use in order to "safely accelerate the integration of [drones] into the national airspace system."[24] In response, the FAA promulgated a 2015 rule requiring all recreational and commercial drone owners to register their craft with the FAA.[25] The D.C. Circuit Court recently invalidated the registration requirement,[26] leaving federal drone regulation up in the air.

Given that recreational or "hobby" drones—representing a full two-thirds of drone aircraft in the skies—fall outside the purview of the FAA unless the drone operator "endanger[s] the safety of the national airspace system,"[27] the Hawai'i legislature should exercise its traditional police power in the upcoming session and fulfill its state constitutional[28] mandate to protect the privacy of its citizens against invasion by both public and private actors. This article focuses on the scope of the FAA's preemptive regulatory power, and the manner in which traditional principles of federalism provide states with the authority to protect their own citizens against the abusive application of an emerging technology.

Part I defines drones for the purposes of this article, discusses the technological capabilities of these controversial aircraft, and demonstrates the incredible rate at which they are proliferating in U.S. airspace. Part II analyzes the history and uncertain status of federal drone legislation as applied to consumer drones. Part III examines the courts' approach to federal preemption in aviation law and how that analysis has been applied to seemingly conflicting Hawai'i state laws. Part IV reviews the FAA's non-binding response to widespread uncertainty at the state and municipal

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Dir., Dep't. of Bus., Econ. Dev. & Tourism).

[22] *See e.g.*, Abdullah v. American Airlines, Inc., 181 F.3d 363, 365 (3d. Cir. 1999); *In re* Air Crash Near Clarence Center, New York, 798 F. Supp. 2d 481, 485 (W.D.N.Y. 2011).

[23] Sovereignty and Use of Airspace, 49 U.S.C. § 40103 (1994).

[24] FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 332(a)(1)-(5), 126 Stat. 11, 73-74 (codified as amended at 49 U.S.C. § 40101 note).

[25] Taylor v. Huerta, 856 F.3d 1089, 1091-93 (D.C. Cir. 2017).

[26] *Id.*

[27] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(b), 126 Stat. 11, 77 (codified at 49 U.S.C. § 40101 note).

[28] HAW. CONST. art. I, § 7.

level concerning traditional police powers as applied to drones and reviews pending congressional legislation responding to that uncertainty. Part V address traditional state-level privacy protections that can be extended to drones in Hawai'i and Part VI provides a proposal for the coexistence of federal and state drone regulations.

I. DRONES

This article focuses on readily available consumer drones purchasable online or at retailers, which fall within the FAA definition of small unmanned aircraft systems (sUAS).[29] The FAA defines a small unmanned aircraft system (hereinafter "drone") as any remotely controlled aircraft operating without the possibility of direct human intervention from within or on the aircraft. They may weigh up to 55 pounds, which includes everything that is on board or otherwise attached to the aircraft.[30]

Consumers now have relatively unfettered access to technology that was the stuff of science fiction only a decade ago and this technology is advancing rapidly. *PC Magazine's* Editor's Choice for the best consumer drone of 2018 is the Chinese-made DJI Phantom 4, available on amazon.com for $750.00.[31] DJI accounts for approximately 70 percent of the global drone market,[32] even as its entry-level drones price at just under $500.[33] The Phantom 4 is one of DJI's most popular models, making it an apt exemplar for the technical capabilities of readily purchasable drones.[34] Like nearly every consumer drone, the Phantom 4 is equipped with four independent rotors for stability.[35] The drone sports a 12 megapixel camera, captures high-definition video in 4K resolution, and features totally automated takeoff and landing functions.[36] The device can be flown with a smartphone or tablet, allowing the remote pilot to trace a line around any

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[29] FAA, DOT Small Unmanned Aircraft Rule, 14 C.F.R. § 107.3 (2017).

[30] *Id.*

[31] Jim Fisher, *The Best Drones of 2018*, PC MAG. (Jan. 18, 2018), http://www.pcmag.com/roundup/337251/the-best-drones [hereinafter *Best Drones*].

[32] Tom Standage, *Taking Flight, Technology Quarterly*, ECONOMIST (June 8, 2017), https://www.economist.com/news/technology-quarterly/21723003-most-drones-today-are-either-cheap-toys-or-expensive-weapons-interesting.

[33] *Best Drones*, *supra* note 31.

[34] Ben Chapman, *11 best drones*, THE INDEPENDENT (Dec. 14, 2017; 15:00 GMT), http://www.independent.co.uk/extras/indybest/gadgets-tech/cameras-accessories/for-kids-with-camera-under-100-200-500-parrot-dji-for-beginners-9681235.html.

[35] *Best Drones*, *supra* note 31.

[36] *Id.*

subject on the phone's screen with their finger– engaging Active Track.[37] The Active Track feature then follows the identified subject's movement and captures the video footage without any additional pilot input.[38]

The drone's obstacle avoidance features are so advanced that *PC Magazine's* experienced reviewer was unable to fly the drone into a wall—"[i]t stopped and hovered in place, refusing to press onward."[39] DJI drones also support geo-fencing, which uses satellite positioning to prevent pilots from flying their drones into restricted airspace, such as within 5 miles of an airport.[40]

The Phantom 4 Pro model can travel up to seven kilometers from the pilot with lag free video control[41] and may be flown upwards of 1,640 vertical feet before GPS settings within the drone's app prevent further climbs in altitude.[42] The app settings may be overridden; a European pilot recently posted a video of his older model Phantom 2 purportedly exceeding 11,000 feet in altitude.[43] Every flight is logged, allowing the pilot to review past flight paths overlaid on a world satellite map, with statistics for total flight time, total distance traveled, and maximum altitude.[44] Flight time on a full battery clocks at 23 minutes and the drone will automatically return home when the battery dips to 10 percent.[45] The battery may be quickly replaced with a full unit, or the battery can be recharged in about an hour.[46] If the pilot was tracking a subject, the drone can quickly return to its original destination by engaging Sport mode, which allows it to fly at 45 mph.[47]

If the pilot finds use of their phone too burdensome, DJI offers DJI Goggles with Head Tracking Flight mode.[48] This feature allows the pilot to control both aircraft yaw and camera tilt with hands-free head movements

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[37] Jim Fisher, *DJI Phantom 4*, PC MAG. (Mar. 15, 2016, 11:32 AM), https://www.pcmag.com/review/342895/dji-phantom-4 [hereinafter *DJI Phantom 4*].

[38] *Id.*

[39] *Id.*

[40] Standage, *supra* note 32.

[41] Vito Dronelli, *8 Drones That Can Return Home Automatically*, DRONES GLOBE (June 4, 2017), http://www.dronesglobe.com/guide/return-home/.

[42] *DJI Phantom 4*, *supra* note 37.

[43] Jay Bennett, *Drone Breaks Record (and the Law) by Allegedly Flying to 11,000 Feet*, POPULAR MECHANICS (Mar. 9, 2016) http://www.popularmechanics.com/flight/drones/a19854/drone-flown-11000-feet/.

[44] *DJI Phantom 4*, *supra* note 37.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] DJI GOGGLES, http://www.dji.com/dji-goggles (last visited Oct. 27, 2017).

while viewing live footage from an immersive first-person viewing (FPV) perspective.[49]

Drone capabilities are advancing at a blistering pace, as DJI's research and innovation department alone employs 1,500 people in China.[50] Domestically, drone enthusiasts anxiously awaited the fall 2017 production release of the weatherproof Utah-made Teal drone, which accelerates from 0-60 mph in 1.1 seconds, clocks speeds over 85 mph, and shoots in 4K with a flying weight of 1.6 pounds.[51] Teal is developing a thermal-imaging function for its onboard camera which shoots electronically-stabilized 13 megapixel images at a range of up to two miles from the pilot's FPV-optional controller.[52] The drone performs self-stabilized stationary hovers in winds up to 40 mph and processes footage with the NVIDIA Jetson TX1, an artificially-intelligent "airborne supercomputing platform" capable of machine learning, autonomous flight, and image recognition.[53] The drone fits in a standard student backpack and ships at $1,300.[54] If basic image recognition is insufficient for the operator's needs, FA6Drone facial recognition programming "allows drones to identify people from any range, provided that faces are of decent quality and have minimal size (60 pixels)."[55]

According to the *New York Times*, typing "I want to buy a . . . " into Google auto-filled "drone" as the third most likely choice during the 2014 holiday season.[56] That same year, Martha Stewart contributed a piece to *Time Magazine* expounding upon the virtues of drone use for capturing aerial shots of vegetable gardens.[57] Americans purchased 2.5 million

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[49] *Id.*

[50] April Glaser, *DJI Is Running Away with the Drone Market*, RECODE (Apr. 14, 2017), https://www.recode.net/2017/4/14/14690576/drone-market-share-growth-charts-dji-forecast.

[51] Tim Moynihan, *Flying at 85MPH* [sic] *Isn't Even the Teal Drone's Best Trick*, WIRED (July 20, 2016), https://www.wired.com/2016/07/speedy-modular-drone-designed-pretty-much-everything/all/1.

[52] *Id.*

[53] Noah Kravitz, *18-Year-Old's Startup Rolls Out Teal, World's Fastest Commercial Drone*, NVIDIA BLOG (July 20, 2016), https://blogs.nvidia.com/blog/2016/07/20/teal-worlds-fastest-drone/.

[54] Moynihan, *supra* note 51.

[55] sUAS NEWS, *Face Recognition Software for Drones Released by Face-Six*, sUAS NEWS (Dec. 12, 2017), https://www.suasnews.com/2017/12/face-recognition-software-drones-released-face-six/.

[56] Kate Murphy, *Things to Consider Before Buying That Drone*, N.Y. TIMES (Dec. 6, 2014), https://www.nytimes.com/2014/12/07/sunday-review/things-to-consider-before-buying-that-drone.html?_r=0.

[57] Martha Stewart, *Martha Stewart: Why I Love My Drone*, TIME (July 29, 2014), http://time.com/3053003/martha-stewart-drone/.

recreational drones in 2016[58] as the price threshold for drone ownership plummeted.[59] The CEO of DJI's closest sales rival, 3D Robotics, estimates DJI dropped its prices as much as 70 percent between 2015 and 2016 alone.[60]

The FAA forecasts upwards of 4.5 million "hobbyist" drones in regular use in United States airspace by 2021,[61] increasing at a compounded annual growth rate of 68%.[62] In addition to hobbyist numbers, the FAA projects 1.6 million commercial drones in flight by 2021, a ten-fold increase from the 2016 fleet.[63] In less than four years, an annual average of 120,000 individual drones will fly above the skies of each state in the union.

II. DRONES AND THE FEDERAL AVIATION ADMINISTRATION

"The Constitution creates a federal government of enumerated powers."[64] Those powers not granted to the federal government remain with the states in a "mandated division of authority [that] 'was adopted by the Framers to ensure protection of our fundamental liberties.'"[65] Pursuant to those limitations, the FAA derives its constitutional authority to regulate airspace from the Commerce Clause, which grants Congress the power "to regulate commerce with foreign nations, and among the several states."[66] The Framers intended for Congress to regulate interstate commerce in order to provide federal uniformity in commercial regulation such that state laws do not "work to the detriment of the [n]ation as a whole."[67]

The Commerce Clause grants Congress the power to regulate (and therefore limit states' power to legislate) within "three broad categories of activity."[68] First, "Congress may regulate the use of the channels of interstate commerce,"[69] and protect such channels from injurious use.[70]

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[58] Glaser, *supra* note 50.

[59] *Id.*

[60] *Id.*

[61] FAA, TC17-0002 at 31, AEROSPACE FORECAST: FISCAL YEARS 2017-2037 (Mar. 24, 2017) [hereinafter FAA, AEROSPACE FORECAST].

[62] *Id.*

[63] *Id.* at 32.

[64] United States v. Lopez, 514 U.S. 549, 552 (1995) (citing U.S. CONST. art. I, § 8, cl. 3).

[65] *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

[66] U.S. CONST. art. I, § 8, cl 3.

[67] Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 8 (1986) (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945)).

[68] United States v. Morrison, 529 U.S. 598, 608-09 (2000) (quoting Lopez, 514 U.S. at 558).

[69] *Id.* at 609 (quoting Lopez, 514 U.S. at 558).

Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[71] Third, Congress may regulate "those activities having a substantial relation . . . or substantially affect[ing] interstate commerce."[72] Accordingly, as instrumentalities of interstate commerce that fly in the channels of interstate commerce, the majority of aircraft have traditionally been regulated by the FAA.[73]

To that end, navigable drone airspace,[74] commercial drone flights,[75] and non-commercial drone flights affecting navigable commercial airspace[76] have been defined and regulated by the FAA. On the other hand, non-commercial hobbyist drone flights occurring at low altitudes have been treated consistent with "the FAA's longstanding hands-off approach to the

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[70] Caminetti v. United States, 242 U.S. 470, 491 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained[,] and is no longer open to question.").

[71] United States v. Lopez, 514 U.S. 549, 558 (1995) (citing Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914); S. Ry. Co. v. United States, 222 U.S. 20, 26 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); Perez v. United States, 402 U.S. 146, 150 (1971) (alteration in original) ("For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659).")).

[72] Morrison, 529 U.S. at 609 (quoting Lopez, 514 U.S. at 558-59).

[73] Morrison, 529 U.S. at 609 (quoting Lopez, 514 U.S. at 558-59).

[74] *See, e.g.*, Operating limitations for small unmanned aircraft, 14 C.F.R. §§ 107.51(b)-(d). § 107.51(b) limits the altitude of drone flights to 400 feet above ground level, unless they are flown within a 400-foot radius of a structure and are not higher than 400 feet above the structure's immediate uppermost limit. Additionally, § 107.51(c) provides that "[t]he minimum flight visibility, as observed from the location of the control station must be no less than 3 statute miles. For purposes of this section, flight visibility means the average slant distance from the control station at which prominent unlighted objects may be seen and identified by day and prominent lighted objects may be seen and identified by night." § 107.51(d) provides that "[t]he minimum distance of the small unmanned aircraft from clouds must be no less than: (1) 500 feet below the cloud; and (2) 2,000 feet horizontally from the cloud."

[75] *See, e.g.*, FAA Modernization and Reform Act of 2012, Pub. L. No 112-95, § 336(a)(1), 126 Stat. 11 (2012) (codified at 49 U.S.C. § 40101) (limiting the model aircraft exemption to flights which are strictly for hobby or recreational use).

[76] *See, e.g.*, Operation near aircraft; right-of-way rules, 14 C.F.R. §§ 107.37(a)-(b). § 107.37(a) provides that "[e]ach small unmanned aircraft must yield the right of way to all aircraft, airborne vehicles, and launch and reentry vehicles. Yielding the right of way means that the small unmanned aircraft must give way to the aircraft or vehicle and may not pass over, under, or ahead of it unless well clear." § 107.37(b) provides that "[n]o person may operate a small unmanned aircraft so close to another aircraft as to create a collision hazard."

regulation of model aircraft,"[77] as the type of non-commercial local activity falling outside of Congress's regulatory authority under the Commerce Clause.[78]

Phantom 4 and Teal drones are classified for FAA purposes as either "commercial" aircraft or "model" aircraft, not according to the drones' physical characteristics or technical capabilities, but with regard to the intent of their operators and the presence of manned aircraft.[79] Any drone weighing under 55 pounds may be exempt from FAA regulations so long as: (1) compensation is not provided to its operator incidental to the flight itself or with connection to the footage captured during flight;[80] and (2) the drone does not endanger manned aircraft operating in a protected channel of interstate commerce.[81]

For example, a videographer flying a Teal drone at Pipeline with the intent to sell ("for business purposes")[82] any captured surf footage would be required to comply with the FAA's comprehensive regulatory scheme. This is because footage captured in this way, at any altitude, would constitute an act of commerce, regardless of the presence of other aircraft.[83] In contrast, a person standing one foot away, operating an exactly similar Teal drone at 1,000 feet of altitude and capturing virtually identical footage would be

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[77] Taylor v. Huerta, 856 F.3d 1089, 1091 (2017).

[78] *See* Morrison, 529 U.S. at 608-09 (discussing the three categories of activity that Congress is limited to regulate under its commerce power).

[79] *See* FAA Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. 122,36172, 122,36173-74 (June 25, 2014) (to be codified at 14 C.F.R. 91) (discussing the meaning of the requirements that the model aircraft is flown within the visual line of sight of the operator and that the operator's intent is recreational); *see also* FAA Modernization and Reform Act §§ 336(c)(1)-(3) ("[T]he term 'model aircraft' means an unmanned aircraft that is (1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes.").

[80] *See* FAA Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. at 122,36174 ("Clearly, commercial operations would not be hobby or recreation flights. Likewise, flights that are in furtherance of a business, or incidental to a person's business, would not be a hobby or recreation flight.").

[81] Operating limitations for small unmanned aircraft, 14 C.F.R. §§ 107.51(b)-(c); 14 C.F.R. § 107.37.

[82] *See* Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 29,6689, 29,6690 (Feb. 13, 2007) (to be codified at 14 C.F.R. 91) (discussing that the standards are meant to "provid[e] guidance to persons interested in flying model aircraft as a hobby or for recreational use," as distinguished from commercial use and "only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes").

[83] *See id.*; *see also* FAA Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. at 122,36174.

exempt from FAA regulations so long as: (1) the drone "is operated in a manner that does not interfere with and gives way to any manned aircraft;"[84] (2) the footage is never sold or posted to an internet forum with a nexus to paid advertising;[85] and (3) the drone is not flown within 5 miles of any airport.[86] The distinction between commercial and recreational flight is likely to be dispositive as to whether states may regulate a particular drone's use without federal preemption pursuant to the Commerce[87] and Supremacy Clauses[88] of the U.S. Constitution.

The United States Congress has regulated air traffic since 1926, beginning with the Air Commerce Act. This Act vested in the Secretary of Commerce, *inter alia*, the power to establish airways, issue and enforce air traffic rules, and provide pilot licensing.[89] Congress increased its regulatory powers over airspace by establishing the FAA in 1958[90] in response to the collision of two DC-7 airliners above the Grand Canyon two years prior.[91] The Federal Aviation Act vested in the FAA Administrator the authority to prescribe regulations on the flight of aircraft to protect individuals both in the sky and on the ground.[92] The Act additionally established in the federal government "exclusive sovereignty of airspace of the United States" and recognized in U.S. citizens a public right of transit through FAA defined and regulated navigable airspace.[93]

The FAA defines "navigable airspace" for manned aircraft as "airspace needed to ensure safety in the takeoff and landing" and airspace "above the

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[84] FAA Modernization and Reform Act of 2012, Pub. L. No 112-95, § 336(a)(4), 126 Stat. 11 (2012) (codified at 49 U.S.C. § 40101).

[85] *See* Unmanned Aircraft Operation in the National Airspace System, 72 Fed. Reg. at 29,6690 ("The FAA recognizes that people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority of AC 91-57. [The Model Aircraft Operating Standards] only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes.").

[86] *See* FAA Modernization and Reform Act § 336(a)(5).

[87] U.S. CONST. art. I, § 8, cl 3.

[88] U.S. CONST. art. VI, cl 2.

[89] *See* Air Commerce Act, Pub. L. No. 69-254, 44 Stat. 568 (1926) (establishing that it is the duty of the Secretary of Commerce to foster air commerce).

[90] Federal Aviation Act of 1968, Pub. L. No. 85-726, 72 Stat. 731 (1958).

[91] *See* 49 U.S.C. § 40103 (1994); Westside Prop. Owners v. Schlesinger, 597 F.2d 1214, 1222 (9th Cir. 1979) (quoting United States v. Christensen, 419 F.2d 1401, 1404 (9th Cir. 1969)) ("[T]he legislative history of this provision indicates that it was enacted . . . in response to a 'series of fatal air crashes between civil and military aircraft operating under separate flight rules.'").

[92] 49 U.S.C. §§ 40103(b)(2)(A)-(B) (1994).

[93] *Id.* at § 40103(a)(1)-(2).

minimum altitudes of flight,"[94] which are currently set at a minimum of 500 feet for fixed wing aircraft in non-congested areas and at least 1000 feet over cities, towns or "open air assembl[ies] of persons."[95] Drones' closest analogous aircraft—helicopters—may fly at lower altitudes so long as "the operation is conducted without hazard to persons or property on the surface"[96] and rotorcraft "must avoid the flow of fixed-wing aircraft."[97] Pursuant to those defined "air highways,"[98] unmanned aircraft generally may not fly above 400 feet without an FAA waiver,[99] so as not interfere with manned aircraft in the (air)stream of commerce.

The FAA did not address unmanned civilian drones until 2007, when it published a notice of policy acknowledging the numbers and uses for unmanned aircraft were growing dramatically.[100] The notice distinguished between: "public aircraft" primarily used for military operations in Iraq and Afghanistan; "civil aircraft" employed for diverse domestic commercial and government purposes; and "recreational" drones, which the FAA likened to model airplanes.[101] Since they are not being flown for business purposes, two-thirds of drones purchased by U.S. consumers still fit within the recreational "model aircraft" category.[102]

The 2007 rules for recreational drones were offered only as suggested guidance,[103] "encourag[ing] voluntary compliance" with the anachronistic "model aircraft" operating standards promulgated in 1981.[104] Those voluntary standards—*suggesting* that drone pilots navigate below 400 feet, avoid flying in the proximity of full-scale aircraft, and use observers to help if possible[105]—are still largely in place and largely without teeth, as discussed *infra*. The policy notice clarified that the recommendations for

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[94] 49 U.S.C. § 40102(32) (2012).

[95] FAA Minimum safe altitudes: General, 14 C.F.R. § 91.119 (2010).

[96] 14 C.F.R. § 91.119(d) (2010).

[97] FAA Operating on or in the vicinity of an airport in Class G airspace, 14 C.F.R. § 91.126(b)(2) (2004).

[98] *See, e.g.*, United States v. Causby, 328 U.S. 256, 264 (1946) ("We have said that the airspace is a public highway.").

[99] Operating limitations for small unmanned aircraft, 14 C.F.R. §§ 107.51(b)-(c) (2016).

[100] *See* Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007) (to be codified at 14 C.F.R. 91) [hereinafter Unmanned Aircraft Operations].

[101] *See id.*

[102] *See* FAA, AEROSPACE FORECAST, *supra* note 61, at 31-32.

[103] *See* Unmanned Aircraft Operations, *supra* note 100.

[104] FAA, AC 91-57, ADVISORY CIRCULAR: MODEL AIRCRAFT OPERATING STANDARDS (June 9, 1981) (superseded by FAA, AC 91-57A, ADVISORY CIRCULAR: MODEL AIRCRAFT OPERATING STANDARDS (Sept. 2, 2015))).

[105] *Id.* at ¶¶ 3(a)-(e).

model aircraft drones "specifically exclude[s] [drones flown] by persons or companies for business purposes."[106] The FAA's updated 2015 circular states that "[m]odel aircraft operators should follow best practices including limiting operations to 400 feet above ground level."[107] However, so long as the flight occurs at least three miles from an airport, such compliance is noncompulsory.[108]

As of 2007, the FAA recognized the impending explosion of drone technology but still treated drones as experimental "model aircraft" for exhibition, research and development, and "air racing."[109] The FAA required "civil" drone pilots to fill detail-intensive[110] applications for airworthiness certificates which subjected non-hobby drones to mandatory FAA regulatory compliance but precluded any use of the drones for compensation or hire.[111]

The FAA Modernization and Reform Act of 2012[112] reauthorized the FAA through fiscal year 2015. It also required the FAA Administrator and the Secretary of Transportation to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system"[113] and provide for such integration no later than September 30, 2015.[114] Section 336 of the act precluded the promulgation

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[106] Unmanned Aircraft Operations, *supra* note 100, at 6690.

[107] FAA, AC 91-57A, ADVISORY CIRCULAR: MODEL AIRCRAFT OPERATING STANDARDS 1, 3 (Sept. 2, 2015), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_91-57A.pdf.

[108] Model aircraft must be "operated in accordance with a community-based set of of safety guidelines and within the programming of a nationwide community-based organization[.]" FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(a)(2), 126 Stat. 11 (2012) (codified at 49 U.S.C. § 40101). Accordingly, the Academy of Model Aeronautics has promulgated its National Model Aircraft Safety Code, providing in relevant part that: "Model aircraft pilots will . . . not fly higher than approximately 400 feet above ground level within three (3) miles of an airport without notifying the aircraft operator." NAT'L MODEL AIRCRAFT SAFETY CODE ¶ 2(c) (ACAD. OF MODEL AERONAUTICS, 2014), https://www.modelaircraft.org/files/105.pdf.

[109] *See* 14 C.F.R. § 21.193 (2016).

[110] Henry H. Perritt, Jr. & Albert J. Plawinski, *One Centimeter Over My Back Yard: Where Does Federal Preemption of State Drone Regulation Start?*, 17 N.C. J.L & TECH 307, 321 (2015) (arguing the process for receiving the special airworthiness certificate was overly burdensome and "borrowed irrationally from the requirements for experimental airplanes and helicopters").

[111] 14 C.F.R § 21.193 (2016).

[112] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (codified as 49 U.S.C. § 40101 note).

[113] *Id.* § 332(a)(1).

[114] *Id.* § 332(a)(3).

of any rule or regulation regarding "model aircraft" drones flown strictly for hobby or recreational use.[115] As a result, all FAA restrictions on altitude and safety remained strictly voluntary unless the drone operator flew commercially or failed to give way to manned aircraft in such a way that endangered the safety of the national airspace system.[116]

Just in time for the 2015 holiday season, the FAA and Department of Transportation (DOT) circulated a "Registration Rule" requiring national registration for all drones weighing between 0.55 and 55 pounds and flown for recreational purposes.[117] Registrants were only required to be 13 years of age, yet failure to complete the $5 registration process prior to flight for any drone received as a gift after December 21, 2015 could subject unsuspecting new pilots to civil penalties up to $27,500, criminal fines up to $250,000 and/or up to three years imprisonment.[118] Recreational drone compliance with any other FAA regulations remained voluntary, notwithstanding the registration requirement, so long as the drone did not endanger national airspace or engage in commercial activity.[119]

The FAA issued the rule in response to the "unprecedented proliferation" of consumer drones, arguing that the registration process provided a "direct and immediate opportunity to educate [drone] owners."[120] Additionally, the FAA justified the rule because it would allow the "FAA and law enforcement agencies to address non-compliance by providing the means by which to identify an aircraft's owner and operator."[121] The effectiveness of the "identification" justification was suspect, as drone operators were allowed to mark their registration numbers on the drones' battery compartments with a permanent marker, rendering the identification number "visible," but illegible at any appreciable distance.[122]

The 2012 Reauthorization Act created a "Special Rule For Model Aircraft" seeking to further distinguish between commercial drones and

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[115] *Id.* § 336(a)(1).

[116] *See id.* § 336(a)-(b).

[117] Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78, 594 (Dec. 16, 2015).

[118] *Id.* at 78, 630.

[119] *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(a)(1), 126 Stat. 11, 77 (2012).

[120] Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. at 78, 597.

[121] *Id.*

[122] *See* FAA, *How to Label Your UAS*, https://www.faa.gov/uas/getting_started/fly_for_fun/media/UAS_how_to_label_Infographic.pdf.

recreational drones.[123] Specifically, any drone meeting the requirements for the Registration Rule would also be considered commercial if "not flown strictly for hobby or recreational use."[124] The FAA has interpreted this provision to qualify as commercial any flight with a "nexus" between the operator's business and the operation of the drone.[125] For example, posting amateur drone footage to YouTube may constitute a sufficient nexus with commercial activity to disqualify a drone from the model aircraft exemption because the site regularly posts advertisements on videos and users may receive a portion of YouTube's proceeds from the advertisement.[126] A Connecticut-based attorney specializing in drone issues stated, "the FAA is claiming that drone-obtained art created by a hobbyist becomes retroactively 'commercial' if it is ever sold or . . . displayed on a website that offers monetization in the form of advertising."[127]

The FAA Chief Counsel acknowledged "uncertainty in the model aircraft community about when an unmanned aircraft is a model aircraft operated for hobby or recreation or is an operation requiring FAA authorization" in a 2016 interpretative memorandum.[128] The FAA interpretation clarified that drone use qualifies as hobby or recreational so long as the pilot is: (1) not compensated; or (2) any compensation received is neither directly nor incidentally related to that person's operation of the aircraft.[129] The interpretation did not expand on what type of compensation might be incidental to operation of a drone. To further cloud the skies, the FAA provided the following circular interpretation of its own regulations

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[123] *Id.*

[124] *Id.*; *see also* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(a)(1), 126 Stat. 11, 77 (2012).

[125] Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. 36, 172, 36, 174 (June 25, 2014).

[126] *See* Jason Koebler, *The FAA Says You Can't Post Drone Videos on YouTube*, VICE: MOTHERBOARD (Mar. 12, 2015), https://motherboard.vice.com/en_us/article/gvykaq/the-faa-says-you-cant-post-drone-videos-on-youtube (reporting on the FAA's letter to Tampa-based drone hobbyist Jayson Hanes. The letter cited YouTube postings as evidence that Hanes was not operating his drone as a "model aircraft," thus subjecting him to the full regulatory provisions of commercial drones under Part 107).

[127] *Id.*

[128] Memorandum from FAA Chief Counsel Reginald C. Govan to Earl Lawrence, Director, Unmanned Aircraft Integration Office, AUS-1 and John Duncan, Director, Flight Standards Service, AFS-1 (May 4, 2016), https://www.faa.gov/uas/resources/uas_regulations_policy/media/Interpretation-Educational-Use-of-UAS.pdf.

[129] *Id.*

"rel[ying] on common definitions of the terms 'hobby' and 'recreational:'"[130]

> Any operation not conducted strictly for hobby or recreation purposes could not be operated under the special rule for model aircraft. Clearly, commercial operations would not be hobby or recreation flights. Likewise, flights that are in furtherance of a business, or incidental to a person's business, would not be a hobby or recreation flight.[131]

A 2014 interpretation suggests the distinction between a commercial and recreational drone turns not only upon intent of the drone's pilot,[132] but extends to the operation of the drone in relation to the activity occurring on the ground.[133] For example, the FAA has stated that a farmer is flying a *commercial drone* over crops "grown as part of [a] commercial farming operation," but is flying a *hobby drone* over crops "grown for personal enjoyment."[134]

FAA "Part 107"[135] regulations for "commercial" drones are mandatory and comprehensive.[136] Owners of "commercial" drones are required to obtain the FAA's $150 remote pilot airman certificate with a small UAS rating.[137] Obtaining a remote airman certificate requires that aspiring pilots be at least sixteen years of age, pass an aeronautical knowledge test at an FAA-approved testing center, and be vetted by the TSA.[138] Commercial drones may only fly in daylight or twilight and must be equipped with anti-collision lighting.[139] Flight is restricted to 400 feet above the ground or within 400 feet of structures and the drone may only be flown when weather visibility is at a minimum of three miles from the pilot control station.[140]

Maximum allowable ground speed for commercial drones under Part 107 is 100 mph and drones must maintain a minimum distance of 500 vertical feet and 2,000 horizontal feet from any cloud.[141] Non-goggled pilots must

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130 *Id.*

131 *Id.* (citing Interpretation of the Special Rule For Model Aircraft, 79 Fed. Reg. at 36, 174).

132 *See* Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. at 36, 174.

133 *See id.*

134 *Id.*

135 14 C.F.R. § 107 (codified at 49 U.S.C. § 106(f)).

136 *See id.*

137 *Id.* § 107.12.

138 *Id.* § 107.61.

139 *Id.* § 107.29(a)-(b).

140 *Id.* § 107.51(b)-(c).

141 *Id.* § 107.51(d)(1)-(2).

fly their aircraft within unaided visual line-of-sight.[142] Any pilot using FPV goggles must use an additional visual observer that is only responsible for that drone.[143] Commercial drones may not be flown over anyone not directly participating in their operation unless the person is under a stationary covered structure.[144] Operators may only fly in unrestricted Class G airspace unless specific clearance into other airspace is provided by air traffic control.[145]

Commercial pilots may apply for temporary waivers of Part 107 regulations by providing the FAA with a complete description of the proposed operation and justification establishing that the operation can safely be conducted under the terms of the waiver.[146] The FAA recommends waiver applicants submit their proposed flight plans at least 90 days prior to the day of flight and recipients may be subject to further restrictions than those listed in Part 107.[147] The FAA proposed a $1.9 million fine against a New York aerial photography firm for failing to obtain waivers for Part 107 violations in crowded airspace although the company eventually settled for $200,000 in early 2017.[148]

All Part 107 restrictions remain mere suggested guidelines for recreational hobbyist pilots and these regulations do not address privacy. The FAA's most recent advisory circular states that Part 107 operators "should be aware that state and local authorities may enact privacy-related laws specific to [drone] operations."[149] The circular advises, but does not require, that Part 107 operators review and comply with state privacy laws.[150] Surprisingly, the circular does not even encourage hobbyist drone pilots to voluntarily comply with state privacy regulations.[151]

On May 19, 2017, the United States Court of Appeals for the District of Columbia Circuit upended the regulatory landscape for recreational drone

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[142] *Id.* § 107.31.

[143] *Id.* § 107.33.

[144] *Id.* § 107.39.

[145] *See id.* § 107.41.

[146] *Id.* § 107.200.

[147] FED. AVIATION ADMIN., WAIVER APPLICATION INSTRUCTIONS (2017), https://www.faa.gov/uas/request_waiver/media/waiver_application_instructions.pdf.

[148] *See Press Release—FAA and Skypan International Inc., Reach Agreement on Unmanned Aircraft Enforcement Cases,* FED. AVIATION ADMIN. (Jan. 17, 2017), https://www.faa.gov/news/press_releases/news_story.cfm?newsID=21374.

[149] FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 107-2: SMALL UNMANNED AIRCRAFT SYSTEMS (sUAS), ¶ 1.1.3 (2016), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_107-2.pdf.

[150] *See id.*

[151] *See id.*

pilots by vacating the FAA's 2015 Registration Rule for non-commercial sUAS.[152] In *Taylor v. Huerta,* the D.C. Circuit held that the FAA's promulgation of the 2015 Registration Rule exceeded the statutory authority vested in the FAA by the 2012 Modernization and Reform Act, which provided in relevant part that the FAA "may not promulgate any rule or regulation regarding a model aircraft."[153] The court concluded that "[s]tatutory interpretation does not get much simpler. The Registration Rule is unlawful as applied to model aircraft."[154] The court noted that the FAA expressly preserved authority to "pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system" pursuant to § 336(b) as a valid exercise of the FAA's vested authority to regulate airspace safety.[155]

Taylor seemingly left the approximately eighty percent of American drone owners operating as hobbyists outside the regulatory reach of FAA guidelines so long as they did no endanger the national airspace or "engage in commerce" by posting their footage online.[156] For a time, the FAA webpage stated the agency was in the process of considering its response to *Taylor v. Huerta*, declaring, "[i]n the meantime, we encourage registration for all drone operators."[157] On July 5, 2017 however, the FAA began allowing deregistration for hobbyists and offering refunds of the $5 registration fee.[158]

On December 13, 2017, President Donald Trump signed into law the National Defense Authorization Act for 2018, imbuing the FAA with authority to reimplement the registration rule.[159] Under the rule, drone owners may receive one identification number, valid for three years,

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[152] *See* Taylor v. Huerta, 856 F.3d 1089, 1093 (D.C. Cir. 2017).

[153] *Id.* at 1090 (citing FAA Modernization Reform Act of 2012, PUB. L. NO. 112-95, § 336(a) (codified 49 U.S.C. § 40101 (2012))).

[154] *Id.* at 1092.

[155] *Id.* at 1094, n.2.

[156] U.S. DEPT. TRANSP., *FAA Drone Registry Tops One Million* (Jan. 10, 2018), https://www.transportation.gov/briefing-room/faa-drone-registry-tops-one-million [hereinafter *Drone Registry*].

[157] *See Registration Deletion,* FED. AVIATION ADMIN., https://www.faa.gov/uas/getting_started/registration_deletion/ (last modified July 13, 2017).

[158] *See id.*

[159] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1092(d), 131 Stat. 1283 (Dec. 12, 2017) ("The rules adopted by the Administrator of the Federal Aviation Administration in the matter of registration and marking requirements for small unmanned aircraft (FAA-2015-7396; published on December 16, 2015) that were vacated by the United States Court of Appeals for the District of Columbia Circuit in Taylor v. Huerta (No. 15-1495; decided on May 19, 2017) shall be restored to effect on the date of enactment of this Act.").

applicable to all the non-commercial drones they own.[160] Over one million drones have been registered to date, 122,000 of which are designated as "commercial" or non-hobbyist.[161] The registration rule and its enabling legislation fail to address the cloudy distinction between hobbyist and commercial drones, leaving compliance with Part 107 regulations largely at the discretion of over 800,000[162] registered hobbyists operators. Inexplicably, registration numbers may be posted *inside* the drones' battery compartments[163], lending nothing to the identification efforts of those targeted with privacy violations.

III. FEDERAL AVIATION LAW AND STATE POLICE POWER

The seminal case purporting to delineate state jurisdiction over private airspace from FAA regulated navigable airspace is *U.S. v. Causby*,[164] holding that landowners "must have exclusive control of the immediate reaches of the enveloping atmosphere" and that a landowner "owns at least as much of the space above the ground as he can occupy or use in connection with the land."[165] In *Causby*, the plaintiff homeowners owned a chicken farm located approximately 2,000 linear feet from an airport runway near Greensboro, North Carolina.[166] The takeoff and landing "glide angle" of military aircraft utilizing the airport passed 67 feet above the Causby house, 63 feet above the barn and 18 feet above the highest tree.[167] The noise and sound from the aircraft stopped the hens from laying eggs and caused as many of six to ten chickens to die from fright each day, forcing the Causbys to close their chicken business.[168]

The Court rejected the Causby's assertion of the doctrine, *cujus est solum eius est usque ad coelum*,[169] that land ownership extends upward to the

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[160] *Drone Registry*, *supra* note 156.

[161] *Id.*

[162] *Id.*

[163] FAA, *How to Label Your UAS*, https://www.faa.gov/uas/getting_started/registration/media/UAS_how_to_label_Infographic.pdf ("You can mark isnide the battery compartment if it doesn't require a tiool to open").

[164] U.S. v. Causby, 328 U.S. 256 (1946).

[165] *Id.* at 264.

[166] *Id.* at 258.

[167] *Id.*

[168] *Id.* at 259.

[169] "[H]e who owns the land is the owner of it, even to the heavens above and to the lowest depths below." City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929).

periphery of the universe, as having no place in the modern world.[170] The Court also rejected the government argument that the United States has "complete and exclusive national sovereignty of the airspace over this country" as inconsistent with private property ownership. [171]

The Court declined to identify a specific height at which private airspace ends, finding only that the public domain air highway begins at 500 feet during the day and 1000 feet at night pursuant to minimum safe flight altitudes prescribed by the Civil Aeronatics Authority.[172] The Court held that invasions of private airspace are to be treated as equivalent to traditional surface trespasses when the intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[173] Accordingly, because the government aircraft constituted such an immediate and direct intrusion into the Causby's use of their property, the court held that the farm owners had a compensable takings claim under the Fifth Amendment.[174]

The Restatement (Second) of Torts[175] endorses the *Causby* test for airspace trespass, substituting the phrase "interferes substantially" in place of *Causby*'s "subtracts" regarding the owner's private use and enjoyment of their airspace:

> (1) Except as stated in Subsection (2), a trespass may be committed on, beneath or above the surface of the earth. (2) Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the airspace next to the and (b) it interferes substantially with the other's use and enjoyment of his land.[176]

Critics of *Causby*'s nebulous "immediate reaches" criteria comment that neither landowners, attorneys, nor drone-flying clients are likely capable of

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[170] United States v. Causby, 328 U.S. 256, 261 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . [b]ut that doctrine has no place in the modern world.").

[171] *See id.* at 260-61.

[172] *Id.* at 263-64 ("The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.'").

[173] *See id.* at 264-65.

[174] *See id.* at 265.

[175] RESTATEMENT (SECOND) OF TORTS § 159 (AM. LAW INST. 1965); *see also* Kristen G. Juras, *The Game of Drones: Federal and State Rules of Play and Their Intersect with Property Law*, 33 PRAC. REAL EST. LAW. 23 (2017).

[176] RESTATEMENT (SECOND) OF TORTS § 159 (AM. LAW INST. 1965) (indicating that subsequent caselaw has limited the federal airspace trespass doctrine to interference with actual, as distinguished from potential, use (RESTATEMENT (SECOND) OF TORTS § 159 cmt. k (AM. LAW INST. 1965)).

accurately predicting the reaches of a landowner's "exclusive control."[177] The Restatement takes the position that "immediate reaches" extend to 50 feet over land or structures.[178] One attorney specializing in drone law recommends that drone pilots either contact all relevant neighbors prior to flight, which may not be practicable, or that pilots contact their state legislature to persuade them to establish the reach of privately-owned airspace.[179]

The Hawai'i Supreme Court cited *Causby* in *In re Honolulu Rapid Transit Co., Ltd.*[180] in support of the proposition that land ownership "extends to so much of the space above the ground as [the owner] can occupy or use in connection with the land" but declined to set minimum or maximum usable occupancy heights.[181] The court held that the lease of an airspace easement beginning 12 feet above the ground level of two parcels and 18 feet above a third parcel—so encumbered the underlying parcels that they interfered "at least in some significant manner, with the performance of [the utility's] duties to the public."[182]

Recent case law suggests that the reach of FAA jurisdiction extends to within a few feet over the ground level of private property, at least for obtaining investigative subpoenas in the context of a drone safety violation.[183] In *Huerta v. Haughwout*, the FAA successfully obtained subpoenas requiring, *inter alia*, the production of the defendant's homemade drone as well as any documents related to online revenues

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[177] *See* Juras, *supra* note 175, at 28.

[178] RESTATEMENT (SECOND) OF TORTS § 159 cmt. I (AM. LAW INST. 2015) ("In the ordinary case, flight at 500 feet or more above the surface is not within the 'immediate reaches,' while flight within 50 feet, which interferes with actual use, clearly is, and flight within 150 feet, which also so interferes, may present a question of fact.").

[179] *See* Juras, *supra* note 175, at 28.

[180] 507 P.2d 755 (Haw. 1973) (finding that where parcels were necessary or useful in performance by a public utility, the public utility was required to obtain approval from the Public Utilities Commission before executing leases).

[181] *Id.* at 759 ("The advent of air navigation has resulted in the curtailment of the extent of surface owner's ownership under the common law, but still the landowner 'owns at least as much of the space above the ground as he can occupy or use in connection with the land.'") (quoting *United States v. Causby*, 328 U.S. 256, 264 (1946)).

[182] *See id.* at 759.

[183] *See* Huerta v. Haughwout, No. 3:16-CV-358 (JAM), 2016 WL 3919799, at *4 ("[A]t the [subpoena] enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party.") (quoting United States v. Construction Prod. Research, Inc., 73 F.3d 464, 470 (2d Cir. 1996)).

associated with posting two youtube videos.[184] The subpoenas also required the names, addresses, telephone numbers, emails addresses, and other contact information of all persons present during the productions of the videos.[185] The defendant posted two short videos: one of a homemade drone shooting a handgun, and a second showing the drone equipped with a flamethrower "cooking" a Thanksgiving turkey.[186] The videos show the drone hovering at no more than six feet above the defendant's backyard.[187]

The district court noted that the scope of the FAA's jurisdiction was immaterial to its decision to enforce the FAA's subpoena petition.[188] The court noted that a determination of the FAA's jurisdictional reach into private backyards was not ripe for analysis until the FAA sought *penalty* enforcement, rather than *subpoena* enforcement, but that the defendants had "raised substantial questions about the scope of the FAA's regulatory enforcement authority."[189] In dicta, the court noted that the FAA's oral arguments indicated that the agency believed it had "regulatory sovereignty over every cubic inch of outdoor air in the United States (or at least over any airborne objects therein)."[190]

Stating that "Congress surely understands that state and local authorities are (usually) well positioned to regulate what people do in their own backyards[,]"[191] the court succinctly encapsulated the debate over the extent of the FAA's constitutional authority while declining to issue a decision on the matter:

> No clause in the Constitution vests the federal government with a general police power over all of the air or all objects that leave the ground. Although the Commerce Clause allows for broad federal authority over interstate and foreign commerce, it is far from clear that Congress intends—or could constitutionally intend—to regulate all that is airborne on one's own property and that poses no plausible threat to or substantial effect on air transport or interstate commerce in general. [192]

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[184] *See id.* at *2.

[185] *Id.*

[186] *See id.* at *1.

[187] *See id.*

[188] *See id.* at *4

[189] Huerta v. Haughwout, No. 3:16-CV-358 (JAM), 2016 WL 3919799, at *4 (D. Conn. July 18, 2016).

[190] *Id.*

[191] *Id.*

[192] Id. at *4 (citing United States v. Lopez, 514 U.S. 549, 558-59 (1995) (outlining limits of federal authority under the Commerce Clause to include the channels of interstate commerce, the instrumentalities of interstate commerce, and other activities that

Until the Court further addresses the vertical reach of private land ownership, and therefore the upper limits of state police power, it remains unclear how far into one's backyard the FAA jurisdiction extends below the 500 foot air highway and the glide plane easement existing near airports.[193] Indeed, the promulgation of drone flight altitude restrictions reduces presumptive private sovereignty of airspace to a maximum of 400 vertical feet over land and structures, assuming the absence of commercial flight activity or dangerous use of drones in that airspace.[194]

A. The Supremacy Clause & Drone Preemption

The Supremacy Clause of the U.S. Constitution establishes that the laws of the United States shall be the supreme law of the land.[195] Accordingly, a state regulation will be preempted when Congress has affirmatively exercised a constitutionally granted power in regulating the same field.[196] Federal preemption of state law may be express or implied.[197]

Express preemption occurs where Congressional legislation explicitly contains a preemption clause.[198] For example, the Ninth Circuit held in *Montalvo v. Spirit Airlines*[199] that a provision in the Airline Deregulation Act stating that no state shall "enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of any air carrier that may

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substantially affect interstate commerce); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-74 (2001) (limiting federal agency's assertion of regulatory authority under the Clean Water Act in light of constitutional limitations under the Commerce Clause)).

[193] *See generally* Henry H. Perritt, Jr. & Albert J. Plawinski, *One Centimeter Over My Back Yard: Where Does Federal Preemption of State Drone Regulation Start?*, 17 N.C. J.L. & TECH. 307 (2015) ("The proliferation of small unmanned aircraft systems (microdrones) invites reconsideration of the limits of exclusive federal authority over aviation, which currently preempts state law.").

[194] *Cf.* 14 C.F.R. §§ 107.39, 107.51 (2016).

[195] U.S. CONST. art. VI, cl. 2.

[196] *See, e.g.*, La. Pub. Serv. Comm'n v. F.C.C. 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting with the scope of its congressionally delegated authority may pre-empt state regulation." (citing Capital Cities Calbe, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Federal Savings & Laon Assn v. De la Cuesta, 458 U.S. 141 (1982))).

[197] *Id.* at 368.

[198] *See* Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007) ("Congress' intent [to preempt state law] may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1997)).

[199] 508 F.3d at 475.

provide air transportation"[200] expressly preempts the validity of any state law that significantly affects airline prices.[201] Helpful to the court's express preemption analysis in that case, § 41713 of the Air Deregulation Act is titled, "*Preemption of authority over prices, routes, and service.*"[202]

Although Congress has asserted "exclusive sovereignty of airspace of the United States[,]"[203] and placed exclusive authority for regulating the airspace above the United States with the FAA,[204] the Supreme Court has held that those assertions do not amount to an expression of general preemption over state law in the field of aviation.[205] Rather, the Supreme Court has construed § 40103's vesting of "exclusive sovereignty" over navigable airspace in the FAA to be an assertion of national sovereignty in relation to *foreign* governments, allowing for states to exercise concurrent jurisdiction pursuant to certain traditional areas of police power.[206]

When preemption of state law is not expressly asserted by Congress, it may be implied in one of two ways: conflict preemption or field preemption.[207] Conflict preemption occurs when a state law actually conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law."[208] Field preemption occurs "when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for [supplementary state law]."[209]

Generally, because even express preemption provisions are to be narrowly and strictly construed to allow for supplementary state law,[210] there is an even stronger presumption against a finding of implied preemption.[211] Courts will presume that federal law does not displace state

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[200] 49 U.S.C. § 41713 (1997).

[201] *See Montalvo*, 508 F.3d at 475-76.

[202] 49 U.S.C. § 41713 (1997).

[203] 49 U.S.C. § 40103 (1994).

[204] *See* Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590, 596 (1954).

[205] *See id.* at 596-96.

[206] *See id.* at 595.

[207] Montalvo v. Spirit Airlines, 508 F.3d 464, 475 (9th Cir. 2007).

[208] *Id.*

[209] *Id.* (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)) (internal quotation marks omitted).

[210] *See Montalvo*, 508 F.3d at 474 ("[P]reemption provisions are narrowly and strictly construed.")

[211] *See, e.g.*, Skysign Int'l., Inc. v. City & Cty. of Honolulu, 276 F.3d 1109, 1113-17 (9th Cir. 2002).

regulatory authority in areas traditionally subject to state police power absent a clear statement of the congressional intent to do so.[212]

The FAA relies on congressional authority for drone regulation primarily under 49 U.S.C. § 40103(b)(1) and (2) of the Federal Aviation Act, which empowers the FAA to: (1) "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace"[;] and (2) to govern the flight of aircraft for purposes of navigating, protecting, and identifying aircraft, and protecting individuals and property on the ground.[213] In addition, 49 U.S.C. 44701(a)(5) allows the FAA to prescribe regulations and minimum standards necessary for safety in air commerce and national security.[214]

Federal courts have interpreted that the FAA's promulgation of rules under those sections of the Federal Aviation Act as "preempt[ing] the entire field of aviation safety through implied field preemption"[215] because the scope of FAA safety regulations is so complete and thorough as not to be subject to supplementation or variation among state laws.[216] In regards to safety, the Ninth Circuit held that "congress' intent to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety."[217]

Even where the FAA retains jurisdiction over safety, courts hold that state laws may operate concurrently on the same aircraft, pursuant to traditional areas of police power, because state common law has traditionally covered aviation tort claims.[218] For example, products liability cases involving airplane malfunctions are subject to state litigation, even though a particular claim may be based on a violation of FAA regulations.[219] The Third Circuit recently found in *Sikkelee v. Precision Airmotive Corp* that "no federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or

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[212] *See, e.g. id.* at 1117. *But see* Brown v. United Airlines, Inc., 720 F.3d 60, 68 (1st Cir. 2013) (stating that pursuant to the ADA's preemption provision, the presumption against preemption should not operate because "[i]n matters of air transportation, the federal presence is both longstanding and pervasive; that field is simply not one traditionally reserved to the states.") (emphasis added).

[213] 49 U.S.C. § 40103 (1994).

[214] 49 U.S.C. § 44701 (2000).

[215] Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007).

[216] *Id.*

[217] *Id.* at 473.

[218] Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 691 (3rd Cir. 2016).

[219] *Id.*

otherwise field preempted"[220] and held that the FAA's pervasive safety regulations were nevertheless subject to background principles of federalism in our "compound republic."[221]

B. Preemption Jurisprudence in Hawai'i

Skysign Intern. Inc, v. City and County of Honolulu[222] stands for the proposition that traditional areas of state police power regulation reach upwards into navigable airspace to operate with concurrent jurisdiction over aircraft, manned or unmanned.[223] Pursuant to presumptions against preemption in the field of aviation, the Ninth Circuit ruled in *Skysign* that "state law cannot by its mere existence stand as such an obstacle when the federal government contemplates coexistence between federal and local regulatory schemes," and held that FAA regulations did not preempt Honolulu ordinances regulating aerial advertising, even within navigable federal airspace.[224] The court reasoned that "[t]he 'mere volume and complexity' of the FAA's regulatory scheme do[es] not, without some affirmative accompanying indication, compel a conclusion that the agency has sought to occupy the field to the full."[225]

In *Skysign*, the plaintiff advertising company displayed illuminated aerial advertising attached to airborne helicopters above Honolulu.[226] The company operated with express FAA waivers to fly in restricted airspace in order "to engage in 'Night Time Aerial Advertising.'"[227] The waivers contained language which stipulated that "[t]he operator . . . understands all local laws and ordinances relating to aerial signs, and accepts responsibility for all actions and consequences associated with such operations."[228]

The City and County of Honolulu sought FAA guidance as to whether local ordinances prohibiting, *inter alia*, aerial signage[229] were subject to

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[220] *Id.* at 707.

[221] *Id.* at 687 (citing THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

[222] Skysign Int'l, Inc., v. City and County of Honolulu, 276 F.3d 1109 (9th Cir. 2002).

[223] *See id.* at 1116.

[224] *Id.* at 1117.

[225] *Id.* at 1116 (quoting Hillsborough Cty. v. Automated Med. Labs. Inc., 471 U.S. 707, 718 (1985)).

[226] *Id.* at 1113.

[227] *Id.*

[228] *Id.*

[229] *Id.* (Revised Ordinances of Honolulu (ROH) section 21–3.90–2, subsections (b), (c), (e) prohibited: "[a]ny sign which advertises or publicizes an activity not conducted on the premises on which the sign is maintained, [a]ny . . . portable sign, and [a]ny flashing sign.

federal preemption. In both 1987 and 1996, the FAA regional counsel responded that "the pervasive federal regulation of navigable airspace would preempt any local attempt to restrict the way in which aircraft operate within that airspace.[230]

Notwithstanding the FAA's conclusions that federal law preempted local regulations, the City and County of Honolulu issued three citations and assessed $2,100 in total fines for violating the local ordinances.[231] The company appealed to Honolulu's Zoning Board of Appeals, which upheld the validity of the citation but deferred the preemption issue for the courts.[232] Skysign then sought a federal declaratory judgment that the local ordinances were preempted and also sought to enjoin the municipality from enforcing the ordinances.[233] The district court found that the references to local law in the FAA waivers indicated that Honolulu's ordinances did not conflict with FAA regulation, although the case was dismissed because Skysign, no longer operating, lacked standing.[234]

Upon Skysign's appeal to the Ninth Circuit, the court found advertising to be an area traditionally subject to regulation under state police power, thus invoking the presumption against federal preemption.[235] Citing to *National Warranty Insurance v. Greenfield*[236] for the proposition that "preemption will not be easily found[,]" the court applied the presumption to Honolulu's *general* signage ordinance, but declined to extend the presumption to its analysis of the ordinance prohibiting the use of *aircraft* signage because the ordinance targeted "an area where there has been a history of significant federal presence, i.e., navigable airspace."[237]

The court first applied express preemption analysis to determine "whether Congress has acted to occupy the entire field and to preempt altogether any state regulation purporting to reach into the navigable airspace."[238] The court found that although Congress had acted so extensively in "regulating certain aspects of air travel, such as aircraft noise and airline pricing," as to preempt state action altogether, the court found

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Honolulu also bars the use of aircraft to display any sign or advertising device" in section 40–6.1).

230 *Id.*

231 *Id.*

232 *Id.* at 1113-14.

233 *Id.* at 1114.

234 *Id.*

235 *Id.* at 1115.

236 214 F.3d 1073, 1077 (9th Cir. 2000).

237 Skysign Int'l, Inc., v. City and Cty. of Honolulu, 276 F.3d 1109, 1116 (9th Cir. 2002) (citing United States v. Locke, 529 U.S. 89, 108 (2000)).

238 *Id.* at 1116.

that § 40103(a)(1)'s assertion of sovereignty over national airspace "d[id] not in and of itself exclude any state regulation of aerial advertising" in that same airspace.[239]

The court then applied two stages of conflict preemption analysis in determining that Honolulu's ordinances were not preempted by existing FAA provisions.[240] First, the court found that although Congress had yet to evince any intent to occupy the entire field of aerial advertising, the FAA retained the discretion to promulgate conflicting aerial advertising rules if it chose to do so, pursuant to its authority to develop regulations for the use of navigable airspace under §§ 40103(b)(1)-(2).[241]

The second issue invoking conflict preemption was the specific issuance of the FAA waivers allowing Skysign to fly above Honolulu.[242] The Court rejected Skysign's argument that the Honolulu ordinances stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives' of federal law[,]"[243] holding that "state law cannot by its mere existence stand as such an obstacle when the federal government contemplates coexistence between federal and local regulatory schemes."[244] The court cited to declamatory language in Skysign's waivers which advised pilots to consult with local law as well as instructions in the FAA's inspector handbook which recommended such language as proof of the FAA's contemplation of concurrently applicable state law.[245] On the basis of the FAA's own express recognition of local airspace regulations, the court found no conflict preemption.[246]

The court then applied implied field preemption analysis and concluded that the "mere volume and complexity of the FAA's regulatory scheme" did not lead to a conclusion that the FAA had sought to occupy the field of aerial advertising.[247] To the contrary, the court again found that the agency's handbook for inspectors – and the FAA's own amicus brief in the case – "contemplate[d] permissible, non-preempted state regulation of banner tow operations and aerial advertising."[248]

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[239] *Id.*

[240] *Id.* at 1116-17.

[241] *Id.* at 1117.

[242] *Id.* at 1117-18.

[243] Skysign Int'l, Inc., v. City and Cty. of Honolulu, 276 F.3d 1109, 1117 (9th Cir. 2002) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[244] *Id.*

[245] *Id.*

[246] *Id.* at 1117.

[247] *Id.*

[248] *Id.* at 1116.

The court found that the FAA had indeed asserted exclusive authority to "prescribe air traffic regulations in the flight of aircraft (including regulations on safe altitudes) for . . . protecting individuals and property on the ground."[249] However, the Honolulu ordinance was found not to encroach into exclusively federal enforcement areas of that provision, including flight paths, hours, or altitudes.[250] Consequently, the court dismissed the preemption claim on the merits.[251]

C. The FAA Addresses State Drone Regulation & Privacy Preemption

In 2015, the FAA Office of the Chief Counsel issued a circular titled *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, setting out "general principles of federal law as they relate to aviation safety, and examples of state and local laws that should be carefully considered prior to any legislative actions to ensure they are consistent with applicable federal safety regulations."[252] In that fact sheet, the FAA cited to the *Skysign* case approving of the proposition that "[l]aws traditionally related to state and local police power – including land use, zoning, privacy, trespass, and law enforcement operations – generally are not subject to federal regulation."[253]

The Chief Counsel specifically cited regulations prohibiting the use of drones for voyeurism as an example of state or local government police power falling outside the preemptive purview of federal statutes.[254] This circular was particularly relevant because the court held in *Skysign* that where an agency does not address preemption explicitly in the Federal Register, the failure will not be determinative in implied preemption analysis, and the court will "accord some weight to the agency's own views."[255]

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[249] *Id.* (citing 49 U.S.C. § 40103(b)(2)(B).

[250] *Id.* The FAA amicus brief also stated that the City & County might have encroached on that subject area had it attempted to regulate in the area of identification markings on aircraft, over which the FAA claimed exclusive jurisdiction. *Id.* at 1117, n. 4.

[251] *Id.* at 1118.

[252] OFFICE OF THE CHIEF COUNSEL, FED. AVIATION ADMIN. OFFICE, STATE AND LOCAL REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) FACT SHEET 1-3 (2015) [hereinafter FAA FACT SHEET].

[253] *Id.* at 3.

[254] STATE AND LOCAL REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) FACT SHEET, (Dec. 17, 2015) https://www.faa.gov/uas/resources/uas_regulations_policy /media/UAS_Fact_Sheet_Final.pdf.

[255] Skysign Int'l, 276 F.3d at 1117.

The FAA also addressed privacy preemption explicitly in the Federal Register.[256] In issuing the final rule for non-hobbyist drones, the FAA acknowledged that it considered whether to include privacy provisions in Part 107 regulations, but in declining to do so, stated the FAA's "mission is to provide the safest, most efficient aerospace system in the world, and does not include regulating privacy."[257] The FAA added:

> The FAA recognizes that unique characteristics and capabilities of UAS may pose risks to individual privacy. However, these concerns are generally related to technology and equipment, which may be installed on an unmanned or manned aircraft, but are unrelated to the safe flight of the aircraft . . . [T]he FAA has never extended its administrative reach to regulate the use of cameras and other sensors extraneous to airworthiness or safe operation of aircraft in order to protect individual privacy.[258]

The Final Rule for Part 107 drone regulations states that "the FAA's rulemaking authority neither mandates nor permits the FAA to issue or enforce regulations specially aimed at protecting privacy interests between third parties."[259] As the court in *Skysign* noted, Congress has the authority to preempt state law should it choose to assert exclusive jurisdiction over the use of aircraft to invade privacy, or to preempt state regulation of drone flight generally. In its preamble to the 2016 Part 107 restrictions, the FAA stated it "will address preemption issues on a case-by-case basis rather than doing so in a rule of general applicability."[260]

In 2016 the Senate passed a version of the FAA Reauthorization Act that included language providing blanket preemptive power of federal law over any state and local action on drones, while reserving that "[state] laws (including common law causes of action) relating to nuisance, voyeurism, harassment, reckless endangerment, wrongful death, personal injury, property damage, or other illegal acts arising from the use of UAS would not be preempted *if they are not specifically related to the use of a UAS*."[261] However, this provision did not make its way into the final version of the bill.

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[256] FAA, Office of the Chief Counsel, OPERATION AND CERTIFICATION OF SMALL UNMANNED AIRCRAFT SYSTEMS, 81 FED. REG. 42,063 (June 28, 2016).

[257] *Id.* at 42,190.

[258] *Id.*

[259] *Id.* at 42,191-92.

[260] *Id.* at 42,119.

[261] SENATE COMMERCE COMM., FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION: SECTION-BY-SECTION ANALYSIS § 2142 (2016).

D. Pending Federal Legislation

Although the current FAA authorization act leaves privacy regulation to the States, Congress may expressly preempt state privacy restrictions on drone use should it choose to do so.[262] Senator Diane Feinstein recently introduced the Drone Federalism Act of 2017,[263] which would require the FAA to define the preemptive scope of its drone regulations and "preserve, to the greatest extent practicable, legitimate interests of State, local, and tribal governments, including – (A) protecting public safety; (B) protecting personal privacy; (C) protecting property rights; (D) managing land use; and (E) restricting nuisances and noise pollution."[264] The bill would allow time, place, and manner restrictions at the state level, for any drone flying below 200 feet, while allowing for preemptive FAA regulation at higher altitudes.[265]

With the 2016 Authorization Act expiring at the end of September 2017,[266] the House and Senate advanced separate bills reauthorizing the FAA and further addressing drone regulation. However, Congress ultimately punted on the drone issue by extending FAA funding through March 2018 without any changes to the prior reauthorization.[267] The proposed House 2017 Reauthorization Act[268] provided that "the Inspector General of the Department of Transportation shall initiate a study on . . . the appropriate roles and responsibilities of Federal, State, local, and tribal governments in regulating and overseeing the operations of [drones] in airspace 400 feet above ground level and below."[269] In addition, the House bill tasked the Department of Transportation with reviewing and identifying any potential reduction of privacy specially caused by drone integration into national airspace and mandated that the taskforce consult with former President Barack Obama's memorandum titled, "*Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil*

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[262] Skysign Int'l, Inc., v. City and Cty. of Honolulu, 276 F.3d 1109, 1117 (9th Cir. 2002).

[263] S. 1272, 115th Cong. (2017).

[264] *Id.* § 2(a)(2).

[265] *Id.* § 2(b).

[266] FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190 §§ 1101-03, 130 Stat. 615, 617-18 (2016).

[267] 2017 Disaster Tax Relief and Airport and Airway Extension Act, Pub. L. No. 115-63, Sept. 29, 2017, 131 Stat. 1168.

[268] 21st Century AIRR Act, H.R. 2997, 115th Cong. (2017) (the most controversial provision in H.R. 2997 calls for the privatization of air traffic control; however, it is unclear as to what effect, if any, privatization might have on drone use).

[269] *Id.* § 438.

Liberties in Domestic Use of Unmanned Aircraft Systems."[270] The restriction that the FAA may not promulgate any rules or regulations regarding "model aircraft" drones left in place.[271]

The Senate reauthorization bill provided that "[i]t is the policy of the United States that the operation of any [drone] shall be carried out in a manner that respects and protects personal privacy consistent with the United States Constitution and Federal, State, and local law."[272] Similar to the House bill, Senate Bill 1405 tasked the Comptroller General with examining and identifying existing criminal and legal remedies for inappropriate drone use, including any deficiencies in privacy protections at the federal, state, and local level, and providing recommendations to address those deficiencies.[273] The bill also incorporated "model aircraft" drones into the FAA rulemaking scheme, while exempting only those drones *incapable* of navigating beyond the visual line of sight of the operator.[274] Additionally, the bill directed the FAA to create special rules for "micro [drones]" weighing under 4.4 pounds,[275] and required testing and licensing for operators of any drone weighing over 0.55 pounds.[276]

In January 2017, President Donald Trump signed Executive Order 13371, arbitrarily requiring administrative agencies like the FAA to remove two existing rules for every new rule established.[277] In compliance with this order, the FAA withheld from issuing over a dozen safety directives related to newly-discovered defects on some commercial airliners.[278] Given the new administration's regulatory stance, it is even more unlikely the FAA will promulgate any privacy-related regulations before the agency's scheduled reauthorization in March 2018.

V. PRIVACY IN HAWAI'I

Article 1, Section 6 of the Hawai'i Constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the

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[270] *Id.* § 435.

[271] *See id.* § 45509(a).

[272] Federal Aviation Administration Reauthorization Act of 2017, S. 1405, 115th Cong. § 2101 (2017).

[273] *Id.* § 2105.

[274] *See id.* § 44803(k).

[275] *Id.* § 44806(b).

[276] *Id.* § 44809(b).

[277] *See* Exec. Order No. 13771, 82 FR 9,339 (Jan. 30, 2017).

[278] Jon Ostrower & Chris Isidore, *Trump Directive Stalls FAA Safety Warnings*, CNN MONEY (Feb. 7, 2017), http://money.cnn.com/2017/02/06/news/companies/trump-faa-air-safety/index.html.

showing of a compelling state interest," and mandates that, "[t]he legislature shall take affirmative steps to implement this right."[279] The Supreme Court has held that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[280] Although the federal constitution provides privacy protection against unreasonable search and seizure in the criminal context, the Hawai'i Supreme Court has interpreted Art. 1 § 6 to control in both criminal and civil matters.[281]

Hawai'i's constitutional privacy protections have been construed to afford state citizens much greater privacy rights than the federal right to privacy.[282] Interpreting Article 1 Section 6, the court has stated, "[i]n short, this right of privacy includes the right of an individual to tell the world to 'mind your own business.'"[283] This section focuses solely on state-level causes of action and criminal statutes pursuant to invasions of privacy effected by private parties against one another. The Fourth Amendment implications of government drone surveillance are both serious and substantial, however, this article does not address those concerns.[284]

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[279] HAW. CONST. art. I § 7.

[280] Arizona v. Evans, 514 U.S. 1, 8 (1995).

[281] *See* Cohan v. Ayabe, 322 P.3d 948, 963 (Haw. 2014) (holding that disclosure of a patient's health information unrelated to the underlying litigation violates the person's "constitutional right to informational privacy") (quoting Brende v. Hara, 153 P.3d 1109, 1116 (Haw. 2007)).

[282] State v. Kam, 748 P.2d 372, 377 (Haw. 1988).

[283] Brende v. Hara, 153 P.3d at 1115 (quoting Stand. Comm. Rep. No. 69, in *Proceedings of the Constitutional Convention of Hawaii of 1978* (Proceedings), Vol. 1, at 674).

[284] *See generally* Matthew R. Koerner, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129 ("[A]dvocat[ing] analyzing drones under an adapted approach to the reasonable-expectation-of-privacy test in Katz v. United States. Courts should focus more on the test's oft-neglected first prong—whether a person exhibited a subjective expectation of privacy—and analyze what information falls within the scope of that expectation, excluding information knowingly exposed to the plain view of the public. This analysis also considers instances when, although a subjective expectation exists, it may be impossible or implausible to reasonably exhibit that expectation, a dilemma especially relevant to an analysis of drones. Courts that adopt the recommended analysis would have a coherent and comprehensible approach to factually dynamic cases challenging the constitutionality of drone surveillance. Until then, the constitutional uncertainties of these cases will likely linger.") (citing Katz v. United States, 389 U.S. 353 (1967)).

A. Criminal Violation of Privacy[285]

Pursuant to the legislature's mandate to affirmatively implement Article 1 Section 6, HRS § 711-1111 provides that a person commits the misdemeanor *violation of privacy in the second degree* by "'peer[ing]" or 'peep[ing]' into a window or other opening of a dwelling" or "structure for the purpose of spying . . . or invading the privacy of another person with a lewd or unlawful purpose, under circumstances in which a reasonable person in that dwelling or structure would not expect to be observed."[286] In addition, the use "outside a private place [of] any device for hearing . . . [or] recording sounds originating in that place which would not ordinarily be audible or comprehensible outside" is a violation without the person's consent.[287] Any trespass "executed for the purpose of eavesdropping or . . . surveillance in a private place" is also a violation.[288] The violation becomes a class C felony—*violation of privacy in the first degree*—if the subject of the recording is "in a stage of undress or sexual activity" at the time of recording.[289]

Congress and the FAA have suggested that state laws which apply to drones but do not specifically target drones are not likely to be preempted by FAA provisions so long as local legislation does not relate to: "flight altitude[;] flight paths; operational bans; any regulation of the navigable airspace; . . . mandatory training; [or] mandatory equipment requirements."[290] Restated, states and municipalities may not weigh in on: (1) where a drone flies; (2) who flies the drone; and (3) equipment the drone carries or incorporates.

By that analysis, Hawai'i's invasion of privacy statute is not preempted because it prohibits the use of onboard camera equipment for illegal purposes, rather than restricting areas where a drone may operate or the type of recording equipment the drone may have.[291] Further, the statute

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[285] *See also* Hillary B. Farber, *Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones*, 33 GA. ST. U. L. REV. 359 (2016-2017); Brandon Gonzalez, *Drones and Privacy in the Golden State*, 33 SANTA CLARA COMP. & HIGH TECH. L. J. 288 (2016); Robert H. Gruber, *Commercial Drones and Privacy: Can We Trust States With "Drone Federalism?*, 21 RICH. J.L. & TECH 1 (2014); Timothy T. Takahashi, *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72 (2012).

[286] HAW. REV. STAT. § 711-1111(1)(b).

[287] *Id.* at (e).

[288] *Id.* at (a).

[289] HAW. REV. STAT. § 711-1110.9(1)(b)-(2).

[290] FAA FACT SHEET, *supra* note 252, at 3.

[291] *See* HAW. REV. STAT. § 711-1110.9 (2014).

does not specifically target drones, or even technology generally.[292] Accordingly, a citizen might be convicted of a felony for operating a drone for the purpose surreptitiously recording private intimate activity through a window in a skyscraper, and the conviction would survive preemption analysis upon appeal. A 2014 House bill in Hawai'i proposed to amend violation of privacy in the second degree to explicitly incorporate the use of model aircraft and drones, but the bill did not leave committee.[293]

B. Intrusion Upon Seclusion and Unreasonable Publicity

Hawai'i recognizes at least four invasion of privacy torts: "(1) unreasonable intrusion upon seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) false light."[294] Intrusion upon seclusion and unreasonable publicity are most suitable for enforcing civil action against drone operators.

Intrusion upon seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another" in a manner that "would be highly offensive to a reasonable person."[295] The Restatement takes the position that the tort may occur "by looking into his upstairs windows with binoculars or tapping telephone lines."[296] Intrusion upon seclusion is the civil analog of Hawai'i's criminal invasion of privacy statute. A drone operator can commit the tort from a public place as long as the operator intentionally directs the camera to capture footage or "peer" into a private place. The tort does not favor landowners over tenants or even guests, thus enabling actions in areas where a reasonable person would expect privacy.

Unreasonable publicity occurs when one gives publicity to a matter concerning the private life of another in a manner highly offensive to a reasonable person and the matter is not of legitimate concern to the public.[297] In regards to unreasonable publicity, the Supreme Court of Hawai'i has held that "the interests of an individual in securing his or her

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[292] *See id.*

[293] *See id.*

[294] *E.g.*, Mehau v. Reed, 869 P.2d 1320, 1330 (Haw. 1994) (citing RESTATEMENT (SECOND) OF TORTS §§ 652A-E (AM. LAW INST. 1977)).

[295] RESTATEMENT (SECOND) OF TORTS at § 652B (AM LAW INST. 1977)).

[296] *Id.* at cmt. b.

[297] Wilson v. Freitas, 214 P.3d 1110, 1120 (Haw. Ct. App. 2009) (citing RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977)).

privacy is a primary state concern"[298] and the tort is "deeply rooted in local feeling and responsibility."[299]

In *Chung v. McCabe Hamilton & Renny Co., Ltd.*, the court held that the privacy protections afforded by Article I, Section 6 of the Hawai'i Constitution incorporated privacy torts and that privacy torts were not subject to federal preemption pursuant to the National Labor Relations Act.[300] Following the analysis of the *Chung* decision—and because the FAA primarily concerns itself with airspace safety and commerce—state privacy violations would likely constitute "merely be a peripheral concern" of the FAA, and would therefore not unduly interfere with debate in the aviation safety and commerce context.[301]

C. *Private Nuisance*

The civil complaint of *private nuisance* in Hawai'i is defined as "any interference with [another's] reasonable use and enjoyment of land," including noise, vibration, and trespass,[302] affecting "a determinate number of persons in the enjoyment of some private right not common to the public."[303] Since "the use of land presupposes the use of some of the airspace above it,"[304] and a landowner owns "at least as much of the space above his ground as he can occupy or use in connection with the land,"[305] a nuisance complaint ordinarily requires a showing of actual, sensible harm to property or the property holder that is not common to all members of the

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[298] *Id.*

[299] Chung v. McCabe Hamilton & Renny Co., Ltd., 128 P.3d 833, 848 (Haw. 2006) (quoting Gouveia v. Napili–Kai, Ltd., 649 P.2d 1119, 1124 (1982); State v. Lester, 649 P.2d 346, 353 (1982) (emphasizing the scope of the right to privacy by stating that "[t]he right-to-privacy provision of [Article I, section 6 of the Hawai'i Constitution] relates to privacy in the informational and personal autonomy sense," which encompasses "the common law right to privacy or tort privacy, and the ability of a person to control the privacy of information about himself such as unauthorized public disclosure of embarrassing or personal facts about himself" and that "*[i]t concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties*" (emphasis added in original))).

[300] 128 P.3d at 534 ("We observe . . . concern of the NLRA.") (citing Gouveia v. Napili-Kai, Ltd., 649 P.2d 1119, 1125 (Haw. 1982)).

[301] *See id.* (citing Gouveia v. Napili-Kai, Ltd., 649 P.2d 1119, 1125 (Haw. 1982)).

[302] Haw. Rev. Stat. § 165-2 (2012).

[303] Territory v. Shuji Fujiwara, 33 Haw. 428, 430 (1935).

[304] Griggs v. Allegheny Cty., 369 U.S. 84, 88 (1962) (citing United States v. Causby, 328 U.S. 256, 264 (1946)).

[305] *In re* Honolulu Rapid Transit Co., 507 P.2d 755, 759 (Haw. 1973) (citing United States v. Causby, 328 U.S. 256, 264 (1946)).

public.[306] The nuisance must render the ordinary use of physical occupation of land uncomfortable by injuring or annoying another in the enjoyments of their legal rights.[307] For example, overhanging, non-noxious plant life which casts shade or drops fruit is not considered a nuisance unless it damages or poses an imminent threat of damage to neighboring property and improvements.[308] On the other hand, short periods of loud noise alone may constitute an enjoinable nuisance.[309] Accordingly, overflight of private property with a drone may be an actionable nuisance if it is sufficiently loud or annoying, but this would require determination on a case-by-case basis.

D. Trespass

Trespass to land is recognized criminally in Hawai'i as a misdemeanor when "a person knowingly enters or remains unlawfully in a dwelling[;] [in or] upon the premises of a hotel or apartment building[.]"[310] The plain language of the statute indicates that defendants may not constructively, i.e. vicariously, trespass with a drone. HB 1657, introduced in 2014, sought to address this deficiency by amending misdemeanor criminal nuisance to make it "unlawful for any person to operate an unmanned aircraft system or model aircraft across or above the State in a manner that constitutes a nuisance to either the public, a person, or the property of a person."[311] The bill provided for maximum penalties of $1,000 and up to one year imprisonment,[312] however, HB 1657 died in committee.

While Hawai'i has yet to amend trespass laws to incorporate unmanned aircraft, other states have addressed the trespass issue directly. Nevada has created an action for trespass which may be brought by any owner or lawful occupant of real property against drone operators who fly lower than 250 feet in altitude over the property, so long as the drone operator has been given constructive or actual notice that the flight was unauthorized.[313]

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[306] *Id. See* Whitesell v. Houlton, 632 P.2d. 1077, 1079 (Haw. Ct. App. 1981).

[307] Littleton v. State, 656 P.2d 1336, 1344-45 (Haw. 1982).

[308] *See Whitesell,* 632 P.2d at 1079.

[309] Cluney v. Lee Wai, 10 Haw. 319 (1896) . . . ("That noise alone may be the subject in equity for an injunction is unquestioned.") (citing HORACE GAY WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS 693 (Albany, J.D. Parsons, Jr. 1875).

[310] Criminal trespass in the first degree. HAW. REV. STAT. §§ 708-813(1)(a)(i)-(ii).

[311] H.B. 1657, 27th Leg., Reg. Sess. (Haw. 2014).

[312] *Id.*

[313] NEV. REV. STAT. §493.103 (2015). The real property occupant may provide sufficient warning to a first-time drone trespasser by erecting fencing, painting fence posts or

As a civil action, trespass is a strict liability tort which does not require a showing of damages.[314] Trespass to land has long been recognized in Hawai'i,[315] and the courts allow for punitive damages in actions where the trespass is willful or recklessly indifferent to the rights of others.[316] As previously discussed, the Restatement (Second) of Torts takes the position that flights occurring fifty feet above one's property amount to sufficient interference with the occupants' use and enjoyment below as to constitute an aerial trespass.[317] However, the Supreme Court of Hawai'i has yet to adopt the Restatement's stance on aerial trespass. As such, it remains an open question as to whether the tort of trespass may be committed vicariously through a drone flight in Hawai'i.

Analogously, Hawai'i courts have recognized the right to exclude encroaching tree branches from the vertical column of airspace over one's property as absolute, whether the branches pose an imminent threat to underlying property or otherwise, provided the landowner does so at his or her own expense.[318] While encroaching tree branches are not considered a nuisance unless they pose an imminent threat to underlying property,[319] the right to cut branches back to the boundaries of one's property as a remedy against trespass is founded in the possessor's interest in *exclusive* possession of his or her land.[320] Accordingly, a landowner might have a viable trespass claim so long as the invasive drone is flying at or below the level of one's or one's neighbors' trees or structures, as *Causby* implicitly

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structures with fluorescent orange paint at intervals not less than 1,000 feet, or notifying the operator orally or in writing. NEV. REV. STAT. §207.200 (2009).

[314] RESTATEMENT (SECOND) OF TORTS § 158(a) (AM. LAW INST. 1965) Liability for Intentional Intrusions on Land ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of another, if he intentionally . . . enters land in the possession of the other, or causes a thing or third person to do so . . . ").

[315] *See e.g.*, Chin Kee v. Kaeleku Sugar Co., 29 Haw. 524, 532 (1926).

[316] *Id.* (citing Bright v. Quinn, 20 Haw. 504 (1911)).

[317] RESTATEMENT (SECOND) OF TORTS § 159 cmt. 2 (AM. LAW INST. 1965).

[318] *See* Whitesell v. Houlton, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981) ("It has long been the rule in Hawaii that if the owner knows or should know that his tree constitutes a danger, he is liable if it causes personal injury or property damage on or off of his property. Such being the case, we think he is duty bound to take action to remove the danger before damage or future damage occurs." (internal citation omitted)).

[319] *Id.* ("[O]verhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit[.]").

[320] *See* RESTATEMENT (SECOND) OF TORTS § 158 cmt. c. (AM. LAW INST. 1965).

established such heights as dispositive factors in determining the upper reaches of airspace ownership.[321]

While Hawai'i courts recognize the right to exclude certain types of foreign objects from one's vertical airspace, the federal government is unlikely to treat self-help drone elimination with the same deference as the cutting of tree branches. 18 U.S.C. § 32 provides for criminal penalties of up to 20 years for any person that willfully damages, destroys, or wrecks "any aircraft in the special aircraft jurisdiction of the United States."[322]

18 U.S.C. § 32 puts into sharp focus the need to establish, by federal statute or Court decision, a bright line boundary for the lower limits of the "special aircraft jurisdiction of the United States," as well as whether non-commercial drones constitute "aircraft."[323] Leaving such matters to be determined on a case-by-case basis has led to less than satisfactory results.

For example, a federal district court recently punted on significant issues of airspace jurisdiction and trespass in the closely-watched case of *Boggs v. Merideth*.[324] In that case, William Merideth, who had taken to calling himself "The Drone Slayer,"[325] brought an allegedly trespassing drone out of the sky with his shotgun.[326] Boggs, the owner of the drone, brought suit in federal court seeking a declaratory judgment on: (1) whether the drone is an "aircraft" under federal law; (2) whether the unregulated Class G airspace above Meredith's property was "navigable airspace" within exclusive federal jurisdiction; (3) whether the drone was operating within "navigable airspace" or within Merideth's private property; (4) whether Meredith had a reasonable expectation of privacy from drones overhead;

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[321] *Id. See* United States v. Causby, 328 U.S. 256, 264 (1946) ("We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.") (citing Baten's Case, 9 Coke R. 53b; Meyer v. Metzler, 51 Cal. 142 (1875); Codman v. Evans, 89 Mass. 431 (1863); Harrington v. McCarthy, 48 N.E. 278 (1897); Stuart S. Ball, *Vertical Extent of Ownership in Land*, 76 U. PA. L. REV. 631, 658-71 (1928)).

[322] 18 U.S.C. § 32(a) (2006).

[323] *See id.*

[324] Boggs v. Merideth, No. 3:16-CV-00006-TBR, 2017 WL 1088093 (W.D. Ky. Mar. 21, 2017).

[325] Andrea Peterson & Matt McFarland, *You May Be Powerless to Stop a Drone From Hovering Over Your Own Backyard*, WASH. POST: THE SWITCH (Jan. 13, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/01/13/you-may-be-powerless-to-stop-a-drone-from-hovering-over-your-own-yard/?utm_term=.7ee590ba7808.

[326] *Boggs*, 2017 WL 1088093, at *1.

and (5) whether shooting the drone violated federal law.[327] Boggs also brought a claim for trespass to chattels, seeking $1,500 in damages for the destruction of his drone.[328]

The district court dismissed the case for lack of subject matter jurisdiction, holding that Boggs had brought "a garden-variety state tort claim,"[329] which failed to raise substantial federal issues.[330] The court held that "FAA regulations, at most, would constitute ancillary issues" because the basis of the claim was for damage to the drone arising under Kentucky state common law.[331] "Accordingly, the Court '[found] it more likely than not that this particular question is not particularly important to the federal government.'"[332] Nevertheless, such issues remain ripe for adjudication or legislation, as the need to provide clarity to drone operators, particularly those wishing to engage in interstate commerce above property, is self-evident.

VI. A PROPOSAL FOR FEDERAL LEGISLATION

Below are four (4) policy prescriptions that balance legitimate commercial and civil drone applications with state zoning regulations and individual privacy interests:

(1) The FAA should establish a drone highway between 350 feet and 450 feet of altitude over sparsely populated areas, and lying between 850 vertical feet and 950 feet over land and structures in dense urban areas. Landowners and other lawful occupants should have exclusive control of a 350 feet column of airspace over their land and structures.

When applied to drone usage, *Causby*'s delineation of the FAA's exclusive jurisdiction over the glide plane easement is nearly as antiquated as the *ad coelom et ad infernos* doctrine itself.[333] This is because *Causby*

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[327] *Id.*

[328] *Id.*

[329] *Id.* at *4 (quoting Hampton v. R.J. Corman R.R. Switching Co., 683 F.3d 708, 713 (6th Cir. 2012)).

[330] Boggs v. Merideth, No. 3:16-CV-00006-TBR, 2017 WL 1088093, at *4 (W.D. Ky. Mar. 21, 2017).

[331] *Id.* at *5.

[332] *Id.* at 5 (quoting Mikulski v. Centerior Energy Corp., 501 F.3d 555, 570 (6th Cir. 2007)).

[333] *See* Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126, 128 (Miss. 1966) (emphasis in original) (citation omitted) ("At common law and until the development of the airplane the right of property which an owner had in the airspace above his land was

provides an easement for takeoff and landing of fixed wing aircraft that is inapplicable to rotorcraft like drones, which are capable of vertical takeoff directly to "cruising altitude" without any linear movement.[334] Because of these vertical takeoff capabilities, no public easement need exist below 350 feet for drones over private property.

Accordingly, takeoff and landing for drones should only occur where the operator already has consent to be present. Interstate and intrastate commerce will certainly be more efficient if delivery drones are able to fly over private property as opposed to following conventional routes of vehicular traffic. While following street traffic might avoid the issue of flying over private property at all, it also eliminates many of economic benefits that make drone delivery appealing.

Causby's holding that a landowner has "exclusive control of the immediate reaches of the enveloping atmosphere"[335] and "owns at least as much of the space above the ground as he can occupy or use in connection with the land,"[336] is consistent with a 350 foot public easement over sparsely populated areas. *Causby* specifically cited to the planting of trees and erection of buildings as examples of legitimate private land use.[337] A 350 foot easement is unlikely to interfere with a landowner's use and maintenance of organic features - the tallest tree in the United States stands at 378.1 feet.[338] As for structures, the FAA already requires that commercial drones fly at a minimum of 400 feet from buildings.[339]

Second, a 350 foot drone easement is likely to assuage nuisance concerns both in regard to noise and impairment of view planes. At an altitude of 350 feet, consumer drones are nearly inaudible and barely visible, thus less likely to "interfere[] substantially" with the use and enjoyment of private property below.[340]

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recognized as absolute. Like his title to that which lay beneath his land the right was based upon the Latin maxim, '*Cuius est solum, eius est usque ad coelum et ad inferos.*'").

[334] It is unlikely the court foresaw the advent of vertical takeoff aircraft in the commercial setting, as the FAA did not issue its first helicopter pilot certificate until 1943.

[335] United States v. Causby, 328 U.S. 256, 264 (1946).

[336] *Id.* (citing Hinman v. Pac. Air Transport, 84 F.2d 755 (9th Cir. 1936)).

[337] *See id.* (discussing how exclusive control of privately owned land is necessary, "[o]therwise buildings could not be erected, trees could not be planted, and even fences could not be run.").

[338] GUINESS WORLD RECORDS, *Tallest Tree Living*, http://www.guinnessworldrecords.com/world-records/tallest-tree-living/ (last visited Oct. 7, 2017).

[339] FAA Operating limitations for small unmanned aircraft, 14 C.F.R. § 107.51(b).

[340] *See* RESTATEMENT (SECOND) OF TORTS § 159(2)(B) (AM. LAW INST. 1965).

Privacy concerns regarding footage captured by drones operating in the 350 ft. easement can be addressed in a number of ways. First, the FAA has the authority to prescribe minimum and maximum airspeeds in navigable airspace.[341] Any drone transiting the easement should be required to maintain a minimum airspeed so that footage captured exposes no more than would passing vehicular or helicopter traffic. State House Bill 314, which passed the House and is pending approval in the Senate, proposes that any image or footage captured by law enforcement agency drones must be destroyed within 90 days absent a reasonable suspicion that the data contains evidence of a crime.[342] Not only should that measure become law, but such data protection mechanisms should also be extended to all commercial drone operators operating in the drone highway in order to protect the privacy interests of civilians.

Third, although footage captured from the 350 feet easement is likely to expose areas not otherwise viewable from ground-based vantages, such as enclosed backyards, drones operating at minimum speeds and travelling 350 to 400 feet from any structure raise few concerns of peering or eavesdropping into private activity not already posed by google maps or helicopter traffic.

In the event of suspected malicious activity occurring within the drone easement, citizens should be allowed to file complaints. Since aircraft flying in the drone easement are subject to FAA monitoring, a drone hovering vertically over property without consent of the underlying landowner would be subject to FAA inquiry concerning whether the drone was acting in compliance with applicable laws. A substantiated complaint might lead to a search warrant of the footage in the criminal context, or render the footage discoverable in a civil matter provided the complaint is non-frivolous.

Other states are passing trespass legislation that would benefit from the clarity of a 350 ft. drone easement. For example, in 2013, Oregon passed a statute that provides an action for damages against a drone operator who flies over private property after being notified on at least one previous occasion that the operator did not have consent to do so.[343] The statute provides treble damages for damages incurred as well as attorney's fees up to $10,000 for prevailing plaintiffs.[344]

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[341] FAA Aircraft speed, 14 C.F.R. §§ 91.117(a)-(d) (1993).

[342] Relating To Unmanned Aerial Vehicles, H.B. 314, 2017 Leg., 29th Sess. (Haw. 2017).

[343] OR. REV. STAT. § 837.380 (2013).

[344] *Id.*

There are a number of issues with this statute. First, the statute precludes complaints where the drone is flying within the takeoff and landing easement for fixed-wing aircraft.[345] As discussed, there is no legitimate state interest served by applying an anachronistic "glide plane" easement to modern drones, whereas a landowner may have a legitimate interest in preventing a drone from flying only a few dozen feet over her backyard. Second, no action may be brought if the drone is in the process of taking off or landing.[346] Again, this is an unnecessary exception given the capabilities of modern consumer drones. Third, extension of private property to 400 feet is excessive.[347] The statute extends strict liability to a drone flying 80 mph at an altitude of 399 feet, with or without its recording equipment powered on.[348] Such use may not be said to "substantially interfere" with the owner's interests below, but may actually interfere with a legitimate use of the drone, such as reaching a landlocked parcel to survey wildfire damage. Fourth, the legislation specifically targets drones and establishes restrictions on flights paths of aircraft. Consequently, the statute is unlikely to withstand preemption analysis on appeal.[349]

(2) Pursuant to states' authority to enact zoning regulations,[350] allow municipalities to designate public areas in which drones may fly at altitudes lower than 350 feet.

These designated areas would allow for recreational use and still be subject to FAA regulations regarding safe flight, and state and local regulations concerning privacy and publicity, while allowing for recreational use. Such sites are already designated in many states. For example, California allows drone operators to fly below 400 feet in state parks while warning that unsafe use may subject operators to FAA or state liability.[351]

Hawai'i Administrative Code § 15-210-13 prohibits drone use in state parks unless the park area is specifically designated for such purposes.[352] However, because the rule does not define the altitude limits of state park boundaries, it remains vague and may conflict with FAA waivers allowing

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345 *Id.* at 2(a).
346 *Id.* at 2(b).
347 *Id.* at 2a)
348 *Id.*
349 Skysign Int'l., Inc. v. City and Cty. of Honolulu, 276 F.3d 1109, 1117 (9th Cir. 2002).
350 *See, e.g.*, Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).
351 CAL. CODE REGS. tit. 14, § 4351 (2017).
352 HAW. CODE R. § 15-210-13(d)(2) (2017).

for such flight. Fatally, the rule specifically targets drones and restricts the flight path of aircraft, meaning it is likely preempted by federal law.

(3) The FAA's longstanding hands-off approach to model aircraft should be amended to reflect twenty-first century consumer aircraft capabilities.

Wifi-enabled consumer drones capable of reaching thousands of feet in altitude are now available at sub-$500 price points accessible to teenagers with part-time summer jobs. Any device capable of exceeding 350 feet in altitude, whether or not its operator intends to fly for compensation, should require FAA registration and operator licensing. Such a mandate is well within the FAA's constitutional authority to provide for the safety of navigable airspace as a channel of interstate commerce.[353] The FAA should continue its existing practice of advising licensed drone operators to be "aware that state and local authorities may enact privacy-related laws specific to [drone] operations" [354] and encourage further education to minimize exposure to civil or criminal liability.

Any commercially available drone with the technical capability of reaching the drone highway should be equipped with mandatory geofencing software that prevents the drone from reaching navigable airspace without FAA permission. Although the technology is capable of being overridden by sophisticated parties, mandatory geofencing would curtail the vast majority of unintentional entries into regulated airspace by lay operators.

(4) Allow states to submit sensible proposals to the FAA constricting the breadth of the drone easement.

Three former FAA Chief Operating Officers have come out in support of privatization of air traffic control, calling for "transformational change" and the creation of a federally chartered, non-profit organization tasked with revitalizing the FAA's famously dated air traffic infrastructure.[355] While the benefits of privatization are hotly contested, the FAA's NextGen automated technology has fallen decades behind.[356]

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[353] *See* Federal Aviation Act of 1958, 49 U.S.C. § 40103 (1994).

[354] FED. AVIATION ADMIN., AC NO. 107-2 ¶ 1.1.3, SMALL UNMANNED AIRCRAFT SYSTEMS (2016), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_107-2.pdf.

[355] Shaun Courtney, *Former Air Traffic Control Chiefs Back Trump's Privatization Plan*, BLOOMBERG: BNA (June 14, 2017), https://www.bna.com/former-air-traffic-n73014453274/.

[356] *Id.*

Independent of the FAA, Parmail Kopardekar, is leading NASA's Ames Research Center in developing a fully-automated cloud-based drone traffic management system called, "Unmanned Aerial Systems Traffic Management (UTM)."[357] The FAA plans to implement UTM by 2019, which would use artificial intelligence to manage an airspace-based communications network, expanding on the existing infrastructure which currently enables wifi availability on commercial aircraft.[358] The FAA would input the rules and define the data exchange algorithms for the smart-system, in which drones and UTM would self-coordinate movements. Such a task would overwhelm any human air traffic controller in the present manual system,[359] which already manages 5,000 passenger aircraft in the U.S. skies at any given time.[360]

Within an automated cloud-based system such as UTM, states could submit proposals for temporary or permanent flight restrictions which would then automatically geofence drones attempting to fly over sensitive events, such as diplomatic functions. Such Temporary Flight Restrictions (TFR) are already in place to protect the President[361] or to provide safe environments for aerial firefighting operations. Since two-thirds of existing drone pilots are unregulated by the FAA, many hobbyists are unaware of TFR postings. For example, an irresponsible drone operator disrupted firefighting operations in Nevada recently, which grounded helicopters until the drone was out of the air.[362] Mandatory geofencing and licensing would therefore bring such drones and their operators into the FAA's purview.

CONCLUSION

Our federal system of government contemplates the coexistence of centralized jurisdiction over national affairs and state jurisdiction over local matters. Although "[t]he Constitution requires a distinction between what is

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[357] Standage, *supra* note 32.

[358] *Cf.* Courtney, *supra* note 355.

[359] *Id.*

[360] Air Traffic by the Numbers, https://www.faa.gov/air_traffic/by_the_numbers/.

[361] *See* Doug Gollan, *Trump Trip to New York Will Impact Private Jet and Commercial Flights This Weekend*, FORBES: LIFESTYLE (May 2, 2017, 1:39 PM), https://www.forbes.com/sites/douggollan/2017/05/02/trump-trip-to-new-york-will-impact-private-jet-and-commercial-flights-this-weekend/#1fb06b03491f.

[362] Marcella Corona, *Drone Disrupts Firefighting Efforts in Prater Fire*, RENO GAZETTE-JOURNAL (Aug. 8, 2017, 6:27 AM), http://www.rgj.com/story/news/2017/08/08/drone-disrupts-firefighting-efforts-prater-fire/547309001/.

truly national and what is truly local[,]"[363] twenty-first century civilian drone use blurs this line in ways the Federal Aviation Act could not have anticipated, bringing traditional state-level privacy concerns into airspace previously untouched by manned aviation.

Case-by-case adjudication determining the extent of private airspace is unworkable in a system of interstate commerce that requires predictability. The FAA's task of integrating drones into the national airspace therefore necessitates the bright-line borders that wifi and cloud-based air traffic control enable. Within that system, accountability to both federal regulations and state laws is facilitated in a manner that respects the many beneficial uses of drone technology while balancing safety with the privacy rights and expectations of citizens below.

[363] U.S. v. Morrison, 529 U.S. 598, 617-18 (2000) (citing U.S. v. Lopez, 514 U.S. 549, 567-68 (1995)).

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘oloili ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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