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SANDRA DAY O'CONNOR COLLEGE OF LAW
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EDITOR INTRODUCTION

The summer of 2020 incentivized important conversations regarding social justice issues, with the death of George Floyd awakening fervent discussion as millions of people in the United States gathered to protest police brutality. During a time where the coronavirus pandemic created an unprecedented mantra of distancing, the nation managed to come together in the hopes of advocating for justness and equality. In the same spirit, Volume fourteen brings attention to topical issues deserving redress.

First, in *Eternal Punishment: The Cruel and Unusual Practice of Deporting Noncitizen Juvenile Offenders*, Maya Reisman challenges the deportation of juveniles that have been criminally prosecuted in adult courts. After offering a thoughtful analysis as to why the practice of juvenile deportation should be considered a punishment subject to the limitations of the Eighth Amendment, Reisman concludes by advocating for a comprehensive agenda eliminating juvenile transfer to adult criminal court.

Livan Davidson continues to shed light on the institutional errors in our criminal justice system by examining how lenient statutes across the nation dictating law enforcement use of lethal force have enabled unjustified killings of civilians. In *Peace Officers' Lack of Peace: A Higher Standard of Care for Police Use of Lethal Force in Florida, Texas, and Other States*, Davidson proposes stricter state laws will help alleviate improper officer training, suggesting that other states mirror their statutes to model the California Act to Save Lives.

Third, in *A Compensation System for Gun Deaths and Injuries*, Frank Vandall exposes the lack of meaningful gun control efforts and legislative solutions to end gun violence. In response, Vandall argues that victims of gun violence should be able to obtain some semblance of justice through the creation of a compensation system funded by the federal government, state governments, and the NLRA coupled with gun manufacturers.

Additionally, Allyce Bailey, Esq., provides a primer on implicit bias and explores the hidden race-based justifications offered to overcome a Batson Challenge. *Bias Within Bias: How Washington General Rule 37 Addresses Disguised Racial Discrimination in Jury Selection and a Blueprint for Rule 37's Nationwide Implementation in All American Courtrooms* addresses why this issue unbalances the scales of justice in both criminal and civil litigation, applauds Washington General Rule 37 for its efficacy in addressing the issue, and urges for its nationwide implementation.

In *Envirodemic: Unconstitutional Restrictions on Environmental Protests from the Attacks of 2001 to the Struggles of 2020*, Benjamin Cramer dissects the anti-environmental protest statutes proposed and enacted by several states, as well as their historical and political influences. After considering how the statutes have avoided judicial review, the article discusses why the state laws should be reevaluated and rejected due to their constitutional violations.

Next, Alexander Medina's *Enforcement of Tribal Witness Subpoenas on Non-Indians: How the UCCJEA Provides for the Impossible*, analyzes how a tribe's sovereign immunity can be a weakness when needing to enforce subpoenas for testimony from Non-Indians. Medina then explores the ability of tribes to utilize the UCCJEA and other means of agreement between tribes and states to issue and enforce any necessary subpoenas for witness testimony in child custody proceedings.

Last, Judith Stinson, Tara Mospan, and Marnie Hodahkwen scrutinize how outsider distrust in the tribal court system creates a number of problems, including decreasing the effectiveness of tribal judicial systems, inhibiting tribal economic development, and ultimately undermining tribal sovereignty. After responding to critics of tribal court systems, *Trusting Tribal Courts: More Lawyers is Not Always the Answer* argues that non-lawyer judges and lay advocates can be as effective as law-trained judges and advocates in other court systems.

I would like to thank my Executive and Editorial Board for their hard work and support. Though our Journal had to continue its mission remotely, we managed to host our annual symposium in a virtual setting to discuss climate migration. Moderated by ASU Professor of Law Angela Banks, our symposium featured three speakers who spoke about climate change's effect on immigration to the U.S. and the movement of peoples within the U.S. and around the globe. Although our world has not yet returned to a sense of complete normalcy, it remains important to amplify the voices of the underserved and underrepresented. The *Law Journal for Social Justice* thanks its authors for continuing to do so.

Julieta Carrillo
2020-2021 Editor-in-Chief

Eternal Punishment: The Cruel and Unusual Practice of Deporting Noncitizen Juvenile Offenders

By: Maya Reisman*

INTRODUCTION

Juan Gamez was a sixteen-year-old, baby-faced boy when he was arrested.[1] He is currently serving fifteen years at Ironwood State Prison for first-degree murder and becomes eligible for parole in 2027.[2] While in prison, Juan is attending college full-time and keeping in contact with his child.[3] After completing his sentence, Juan will be deported back to El Salvador.[4]

The Board of Immigration Appeals has held that juvenile delinquency adjudications do not trigger the same immigration consequences as adult criminal convictions.[5] In theory, juveniles incurring dispositions from juvenile court should not experience deportation as a result. However, the same protections do not apply to noncitizen juveniles tried as adults. An estimated 250,000 youth are tried, sentenced, or incarcerated as adults every year in the United States.[6] For many of these children, their convictions mean not only a harsher criminal sentence, but a subsequent deportation order as well.[7] Many state laws do not specify a minimum age for when a juvenile can be tried as an adult.[8] In some states, a child can technically be

* Maya Reisman, Juris Doctor Candidate, May 2021, American University Washington College of Law.

[1] THEY CALL US MONSTERS (BMP Films & New Artists Alliance June 6, 2016).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* De La Nues, 18 I. & N. Dec. 140 (B.I.A. 1981).

[6] *Keep Youth Out of Adult Courts, Jails, and Prisons*, NAT'L JUV. JUST. NETWORK (Dec. 3, 2019), http://www.njjn.org/about-us/keep-youth-out-of-adult-prisons.

[7] There are no statistics kept on the number of noncitizen juveniles tried as adults who experience deportation as a result of their convictions. However, Latino youth are forty-three percent more likely than non-Latino White youth to be waived judicially into the adult system and are forty percent more likely to be admitted to adult prison. Neelum Arya et al., *America's Invisible Children: Latino Youth and the Failure of Justice*, CAMPAIGN FOR YOUTH JUST. (2009), http://www.campaignforyouthjustice.org/images/policybriefs/race/invisiblechildren/CFYJPB_InvisibleChildren.pdf.

[8] In 2016, twenty-three states and the District of Columbia had at least one provision for transferring juveniles to criminal court for which no minimum age was specified. U.S. Dep't of Just., *Statistical Briefing Book*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (2016), https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=2016.

tried as an adult, convicted, and subjected to mandatory lifetime deportation at any age.

This writing examines the issue of deporting noncitizen juveniles who incur criminal convictions in adult court. Despite the Supreme Court's definitive holding that mandatory lifetime sentences for juveniles violate the Eighth Amendment, judges continue to sentence juveniles to deportation. The first part of this analysis argues that deportation, as applied to juveniles, should be considered a punishment subject to the constraints of the Eighth Amendment. The second part of the argument reasons that the deportation of juvenile offenders violates Supreme Court precedent. Last, the analysis concludes with a policy recommendation to end the practice by minimizing the collateral consequences of criminal convictions for noncitizens and terminating juvenile transfer into the adult criminal system.

BACKGROUND

A doctrinal contradiction between U.S. immigration law and the Supreme Court's Eighth Amendment jurisprudence has emerged. Under current immigration law, noncitizen juveniles tried as adults and convicted of an offense categorized as an "aggravated felony" are sentenced to mandatory deportation regardless of age, family ties, or details surrounding the conviction.[9] Noncitizens deported because of an aggravated felony conviction are inadmissible to the United States "at any time."[10] This practice contradicts the Supreme Court's unequivocal holding that mandatory juvenile lifetime sentences violate the Eighth Amendment prohibition against cruel and unusual punishment.[11]

According to the Supreme Court, deportation is a nonpunitive disposition, i.e., not punishment.[12] Therefore, many constitutional safeguards—including the Eighth Amendment prohibition against cruel and unusual punishment—do not apply to deportation.[13] However, the Supreme Court has not addressed whether deportation qualifies as a punishment when applied to juveniles. If the deportation of juvenile offenders is punishment, it follows that it violates the Eighth Amendment.

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[9] 8 U.S.C. § 1227(a)(2)(A)(iii) (2018).
[10] 8 U.S.C. § 1182(a)(9)(A)(ii) (2018).
[11] Miller v. Alabama, 567 U.S. 460, 489 (2012).
[12] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
[13] *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984) (holding that the exclusionary rule does not apply to deportation proceedings); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (holding that the prohibition of ex post facto laws does not apply to deportation); De La Teja v. United States, 321 F.3d 1357, 1364 (11th Cir. 2003) (holding that the prohibition against double jeopardy does not apply to deportation).

DISCUSSION

I. THE DEPORTATION OF A JUVENILE CONVICTED AS AN ADULT IS A PUNISHMENT THAT VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

Because punishment is a necessary predicate for relief under the Eighth Amendment, it is first necessary to establish that deportation, as applied to juveniles, is punishment. Once deportation is properly categorized as a punishment, the Supreme Court's mandates in *Roper*, *Graham*, and *Miller* require a finding that the deportation of juveniles as a result of a criminal conviction violates the Eighth Amendment.[14]

A. Deportation imposed on a minor qualifies as punishment and is subject to the constraints of the Constitution

A civil, nonpunitive penalty imposed on an adult can be a punishment when imposed on a juvenile.[15] One disposition that is often considered nonpunitive when imposed on adults and punitive when imposed on juveniles is sex offender registration.[16] In assessing whether a registration requirement for juvenile offenders is a penalty or a punishment, courts employ an "intent-effects analysis" asking first whether the legislature meant the statute to establish civil proceedings, and second, whether the statutory scheme is so punitive in purpose or effect that it negates the legislature's purportedly nonpunitive purpose.[17] Courts weigh the *Mendoza- Martinez* factors in answering the second question, asking (1) whether the penalty has historically been regarded as punishment; (2) whether it can rationally be connected to a nonpunitive purpose; (3) whether its application to the nonpunitive purpose is excessive; (4) whether it includes an affirmative disability or restraint; (5) whether the behavior to which it applies is a crime; (6) whether the sanction comes into play only on a finding of scienter; and (7) whether its function will promote the traditional aims of punishment.[18]

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[14] *See Miller*, 567 U.S. at 489; Graham v. Florida, 560 U.S. 48, 74 (2011); Roper v. Simmons, 543 U.S. 551, 575 (2005).

[15] *See* United States v. Juv. Male, 581 F.3d 977, 983 (9th Cir. 2009) (holding that a Supreme Court decision finding adult sex offender registration to be nonpunitive did not control outcome of case deciding whether juvenile sex offender registration was punishment), *vacated on other grounds*, 564 U.S. 932, 938 (2011).

[16] *Juv. Male*, 581 F.3d at 993; *In re* T.H., 913 N.W.2d 578, 596 (Iowa 2018); *In re* C.K., 182 A.3d 917, 935 (N.J. 2018); *In re* J.B., 107 A.3d 1, 20 (Pa. 2014); *see In re* C.P., 967 N.E.2d 729, 738 (Ohio 2012); *see also In re* T.B., 2019 COA 89, ¶¶ 1, 51-54.

[17] *See In re* T.H., 913 N.W.2d at 587-88; *In re* T.B., 2019 COA 89, ¶ 31.

[18] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 163 (1963); *In re* T.H., 913 N.W.2d at 587-88; *In re* T.B., 2019 COA 89, ¶ 31.

The Supreme Court did not address the legislative intent behind deportation because the intent-effects analysis was not in place at the time of the decision that categorized deportation as nonpunitive.[19] A reading of the aggravated felony provision provides no guidance regarding the legislative intent. However, in signing the Immigration Act of 1990, President Bush stated plainly that the legislation met his administration's objective of enforcing "effective punishment for drug-related and other violent crime."[20] Despite this pronouncement, precedent suggests that absent a clear declaration that the penalty was intended to be punitive, the second prong of the analysis must be conducted.[21]

In deciding whether deportation has historically been regarded as punishment, a court would likely consider how closely a penalty resembles banishment.[22] In *Smith*, the Supreme Court held that adult sex offender registration is not historically regarded as punishment because any ostracism or exclusion that occurs is a collateral consequence and not an integral part of the registration requirement.[23] In contrast, exclusion is not a collateral consequence of deportation; it is the main purpose of the practice. The sole reason the aggravated felony provision exists in the Immigration and Nationality Act is to provide for "the expeditious deportation" of noncitizen offenders.[24] Deportation does not merely resemble banishment; it is its modern-day equivalent. This factor weighs heavily in favor of finding that deportation is so punitive that it negates the legislature's purportedly nonpunitive purpose and merits categorization as punishment.

A penalty's application to minors is excessive when it is overinclusive.[25] In *In re T.B* and *In re C.P.*, the courts held that juvenile lifetime registration requirements were excessive in relation to their public safety purpose because they required juveniles who may be rehabilitated to remain registered nonetheless.[26] The deportation of juvenile offenders similarly bars any future determination that the minor no longer poses a threat to public safety and may return to the country. Like lifetime juvenile offender registration, the nonpunitive purpose connected to the deportation

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[19] *See* Fong Yue Ting v. United States, 149 U.S. 698, 747 (1893).
[20] Presidential Statement on Signing the Immigration Act of 1990, 2 PUB. PAPERS 1717 (Nov. 29, 1990).
[21] *See In re* T.H., 913 N.W.2d at 587-88; *In re* T.B., 2019 COA 89, ¶ 4.
[22] *See* Smith v. Doe, 538 U.S. 84, 98 (2003); *In re* T.H., 913 N.W.2d at 589.
[23] *See Smith*, 538 U.S. at 99.
[24] *See* Presidential Statement, *supra* note 20, at 1718.
[25] *See In re* C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 41; *see also In re* T.B., 2019 COA 89, ¶¶ 43-44.
[26] *See In re* T.B., 2019 COA 89, at ¶¶ 43-44; *In re C.P.*, 967 N.E.2d at ¶ 41.

of criminally convicted juveniles is the preservation of public safety.[27] However, the Ninth Circuit has stated that in regards to juvenile sex offender registration, the "high rate of recidivism" affiliated with adult offenders does not apply to juveniles and thus cannot justify the regulatory purpose of preserving public safety.[28] In general, juveniles are less blameworthy than adults because of their immature thought processes, including an inability to anticipate the outcome of certain events and the potential dangers associated with risky behavior.[29] Lastly, there is no federally established minimum age at which a juvenile can be deported because of a criminal conviction. The permanent deportation of a three-year-old is not rationally connected to the purpose of preserving public safety.

A penalty imposed on a juvenile levies an affirmative disability or restraint when it prevents them from meaningfully reintegrating into their community upon release.[30] In *In re T.H.*, the Supreme Court of Iowa held that juvenile sex offender registration placed an affirmative restraint on juveniles because they were not able to be within 300 feet of "any place intended primarily for the use of minors."[31] This restraint isolated juveniles from their peers and prevented them from meaningfully participating in society after completing their sentence.[32] Like the juvenile sex offender registration requirement in *In re T.H.*, deportation prevents juveniles from meaningfully reintegrating into their community upon release because they have no way to reenter the country wherein their community resides. Minors may be further isolated in the countries they are deported to because they may not speak the local language. Girls sent back to their countries of birth may be presumed to have been trafficked and suffer from stigmatization and corresponding isolation.

Modern courts do not give much weight to the last three factors because they are not useful in the analysis. Like sex offender registration, the deportation of juvenile offenders convicted of aggravated felonies hinges upon a criminal conviction and applies to behavior that is exclusively

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[27] *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (noting Congress has the power to deport "aliens whose presence in the country it deems hurtful"); *see also* Exec. Order No. 13768, 829 Fed. Reg. 8799 (Jan. 25, 2017) (stating that the purpose of immigration enforcement generally is to "ensure the public safety of the American people").
[28] United States v. Juv. Male, 581 F.3d 977, 991-92 (9th Cir. 2009).
[29] *See* Marty Beyer, *Adolescent Development*, https://www.martybeyer.com/content/adolescent-development-0 (last visited Oct. 4, 2020).
[30] *In re* T.H., 913 N.W.2d 578, 588 (Iowa 2018).
[31] *Id.*
[32] *Id.*

criminal.[33] Aggravated felonies consist of both offenses that require a finding of scienter and offenses that lack such a requirement, i.e., statutory rape. In considering whether deportation qualifies as retribution, one need only consider how a similarly positioned United States citizen would interpret being permanently separated from his home, family, and friends as a result of a criminal conviction. Relatedly, permanent deportation orders incapacitate juveniles for the remainder of their lives. It is hard to imagine a punishment more isolative than permanent banishment from a country. In regard to the deterrent effect of deportation, it operates as an additional disincentive for noncitizens to commit crimes. Deportation squarely upholds the traditional aims of punishment.

The punitive effects of the deportation of a minor override the declared civil intent of preserving public safety. As a result, the deportation of a juvenile convicted in adult criminal court qualifies as punishment and is subject to the constraints of the Constitution.

B. Under *Roper, Graham,* and *Miller,* the deportation of juvenile offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment

Established case law has interpreted the Eighth Amendment's prohibition against cruel and unusual punishment to limit the imposition of juvenile lifetime sentences.[34] In deciding whether a punishment violates the Eighth Amendment, the Court uses the test first articulated in *Roper*, asking (1) whether there is a national consensus against the sentencing practice, and (2) whether the punishment is disproportionate for juveniles.[35]

In *Graham*, the Court used the *Roper* test to decide whether a juvenile life without parole (JLWOP) sentence for a non-homicide crime violated the Constitution.[36] To determine whether there was a national consensus against the practice, the Court considered state legislation and practices.[37] Since 1989, municipalities and states frustrated with federal immigration policies have refused to cooperate with Immigration and Customs

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[33] 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

[34] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding the Eighth Amendment bars capital punishment for juveniles); Graham v. Florida, 560 U.S. 48, 74 (2011) (holding sentence of juvenile life without parole for an offender who does not commit homicide violates the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding mandatory sentence of juvenile life without parole for any crime violates the Eighth Amendment).

[35] *See Roper*, 543 U.S. at 564.

[36] *Graham*, 560 U.S. at 62.

[37] *Id.* at 62-63 (citing a study finding that there were only 109 juvenile offenders nationwide serving sentences of life without parole for non-homicide offenses).

Enforcement (ICE).[38] These cities, counties, and states are referred to as "sanctuary jurisdictions."[39] As of August 25, 2020, 11 states, and 179 cities and counties across the United States have declared themselves sanctuary jurisdictions.[40] The increasing number of jurisdictions across the nation refusing to facilitate the deportation of their residents indicates an increasing disapproval for the practice of deporting noncitizens. Such disapproval is likely even greater as it relates to children.

Factors contributing to the determination that capital punishment was disproportionate for juveniles included that juveniles are less morally culpable than adults, none of the traditional penological goals provided adequate justification for the lifelong sentence, and the United States was the only country to continue to permit the imposition of the juvenile death penalty.[41] Based on these factors, the same conclusion can be drawn that deportation is disproportionate for juveniles. First, it is well established that juveniles are less morally culpable than adults, and this fact does not change based on the citizenship status of the child.[42] As mentioned in the prior section, none of the traditional penological goals provide adequate justification for a lifelong deportation sentence. Last, the United States is the only country that has not ratified the Convention on the Rights of the Child (CRC).[43] The treaty requires that parties "shall ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child."[44] Because the United States has not ratified the treaty, it can continue to deport noncitizen juvenile offenders without international reprimand.

The Court in *Miller* required a sentencing authority to always take into account the mitigating qualities of youth in determining whether a punishment is proportional under the Eighth Amendment.[45] The mandatory penalty scheme imposing JLWOP for certain crimes prevented judges and juries from considering the differences between adults and children, and

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[38] *See, e.g.*, S.F., CAL., ADMIN. CODE § 12H (1989).
[39] Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, on Implementation of Executive Order 13768 (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download.
[40] Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Countries, and States*, CTR. FOR IMMIGR. STUD. (Aug. 25, 2020), https://cis.org/Map-Sanctuary-Cities-Counties-and-States.
[41] *See* Roper v. Simmons, 543 U.S. 551, 570-75 (2005).
[42] Beyer, *supra* note 29, at 9.
[43] Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015, 1:30 PM), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens.
[44] Convention on the Rights of the Child art. 9, para 1, Nov. 20, 1989, 1577 U.N.T.S. 3.
[45] Miller v. Alabama, 567 U.S. 460, 474 (2012).

thus violated the Eighth Amendment.[46] Although *Miller* addresses JLWOP, the parallels between mandatory deportation and mandatory incarceration are significant. The deportation process is mandatory because it is applied to any juvenile convicted of an aggravated felony, regardless of details surrounding the juvenile or the conviction.[47] Under current United States immigration law, judges have no discretion to consider individual circumstances in ordering a noncitizen's deportation.[48] As a result, a criminal court judge who takes into account the mitigating qualities of youth in sentencing a juvenile offender still violates the mandate in *Miller* because the juvenile will be automatically sentenced to lifelong deportation.

The Supreme Court has unambiguously held that mandatory juvenile lifetime sentences violate the Eighth Amendment prohibition against cruel and unusual punishment.[49] The practice of sentencing juvenile offenders to mandatory lifelong deportation is a direct violation of the Court's Eighth Amendment jurisprudence.

POLICY PROPOSALS

The ideal solution to end the deportation of noncitizen juvenile criminal offenders is for the Supreme Court to hold the practice is a punishment that violates the Eighth Amendment. However, there are two more practical solutions that only require efforts from local lawmakers. First, district attorneys can adopt policies that prevent the collateral immigration consequences of criminal convictions. Second, states can stop transferring juveniles to adult courts.

I. MINIMIZE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS FOR NONCITIZENS

Overview: Prosecutors are not required to take potential immigration consequences into account when charging a criminal defendant, but technically have the discretion to do so. A policy that encourages progressive prosecution and the exercise of discretion can be implemented immediately and can decrease the number of noncitizen juvenile offenders who are deported.

Proposals:

- Prosecutors should be informed of the immigration consequences of criminal convictions.

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[46] *Id.* at 470.
[47] 8 U.S.C. § 1227(a)(2)(A)(iii) (2018).
[48] *See* S-O-G-, 27 I&N Dec. 462 (A.G. 2018) (inhibiting immigration judicial discretion).
[49] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005); *see also* Graham v. Florida, 560 U.S. 48, 74 (2011); Miller v. Alabama, 567 U.S. 460, 489 (2012).

- Prosecutors should have full-time access to an in-house immigration law specialist.

- Prosecutors should obtain a supervisor's approval when charging a noncitizen.

- Prosecutors in direct file states should not waive children into adult criminal court.[50]

Example: In April 2017, Brooklyn District Attorney Eric Gonzalez announced a new policy his office would adopt to minimize the collateral consequences faced by noncitizens who incur criminal convictions.[51] The policy requires assistant district attorneys to (1) note when a defendant is a noncitizen, (2) notify the defendant's attorney of his status, and (3) consider potential immigration consequences in determining an appropriate plea offer or sentencing recommendation.[52] Gonzalez also hired two immigration attorneys.[53]

II. CREATE "NO WAIVER JURISDICTIONS"

Overview: A comprehensive affirmative agenda ending juvenile transfer to adult criminal court will preclude the deportation of noncitizen juveniles involved in the criminal justice system. This proposal is the most powerful tool to end the deportation of noncitizen juvenile offenders because it does not rely on the good will of prosecutors and instead eliminates the possibility of juvenile offender deportation entirely.

Proposals:

- Youth justice advocates should promote national campaigns (like the sanctuary city campaign) encouraging counties and states to self-declare as "no waiver jurisdictions" once they have committed to protecting juveniles from suffering adult criminal consequences.

- Youth justice advocates should support progressive prosecutors who refuse to exercise their direct file authority and refuse to charge minors

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[50] Direct file exists in states wherein prosecutors have discretion to directly file charges against a juvenile in adult criminal court.

[51] Press Release, The Brooklyn District Attorney's Office, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants (April 24, 2017), http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/.

[52] *Id.*

[53] *Id.*

with offenses mandating automatic transfer to adult court (i.e., statutory exclusion).[54]

- In states where judges are elected, youth justice advocates should support candidates that will refuse to exercise their authority to waive jurisdiction to adult court (i.e., judicial waiver).

- Youth justice and immigrant rights advocates should collaborate to gather data on the number of noncitizen juvenile offenders that are deported.

- Youth justice advocates should meet with their governors with the goal of drafting a measure abolishing direct file, judicial waiver, and statutory exclusion.

Example: Although Illinois did not do away with statutory exclusion entirely, the repealing of an automatic transfer law for drug offenses is a valuable blueprint for states seeking to completely do away with statutory exclusion, judicial waiver, and direct file.[55] Youth justice advocates mounted a successful campaign to change the law by (1) gathering data to illustrate the problems with the Illinois transfer laws, (2) persuasively responding to claims that reform efforts would increase crime, (3) reaching out to out-of-state organizations to help develop a national media outreach strategy, (4) identifying a legislative champion in the Illinois legislature, and (5) building bipartisan support in order to avoid having the reform be framed as a partisan issue during reelection campaigns.[56]

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[54] Currently, 12 states and D.C. allow prosecutors to directly file juvenile cases into adult court: Arizona: ARIZ. REV. STAT. ANN. § 8-327(A) (2020); Arkansas: ARK. CODE ANN. § 9-27-318(b) (West 2020); Colorado: COLO. REV. STAT. § 19-2-518(1)(a) (2020); District of Columbia: D.C. CODE § 16-2307(a) (2020); Florida: FLA. STAT. ANN. § 985.556(2) (West 2020); Georgia: GA. CODE ANN. § 15-11-561(a) (2020); Louisiana: LA. CHILD. CODE ANN. art. 305(A) (2020); Michigan: MICH. COMP. LAWS ANN. § 712A.2d (West 2020); Montana: MONT. CODE ANN. § 41-5-206(1) (West 2020); Nebraska: NEB. REV. STAT. ANN. § 43-276(1) (West 2020); Oklahoma: OKLA. STAT. ANN. tit. 10A, § 2-5-205 (West 2020); Virginia: VA. CODE ANN. 16.1-269.1 (2020); Wyoming: WYO. STAT. ANN. § 14-6-203(f) (2020).

[55] Jason Szanyi, *Reforming Automatic Transfer Laws: A Success Story*, CTR. FOR CHILD. L. AND POL'Y (Dec. 2012), https://www.cclp.org/wp-content/uploads/2016/06/6-Innovation_Brief_Reforming_Automatic_Transfer_Laws_A_Success_Story-1-2.pdf.

[56] *Id.*

CONCLUSION

In conclusion, the practice of deporting juvenile offenders is so punitive that it qualifies as a punishment and is subject to constitutional scrutiny. Controlling Supreme Court precedent reveals that the punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment because it imposes a mandatory lifetime sentence on juveniles. As Justice Brewer stated in his dissent in *Fong Yue Ting*: "[T]o be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."[57] Absent a Supreme Court decision holding that the deportation of noncitizen juvenile criminal offenders is a punishment that violates the Eighth Amendment, policies encouraging prosecutorial discretion and the termination of juvenile transfer into the adult criminal system are the best options to end the unconstitutional deportation of noncitizen juvenile offenders.

[57] Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893).

PEACE OFFICERS' LACK OF PEACE: A HIGHER STANDARD OF CARE FOR POLICE USE OF LETHAL FORCE IN FLORIDA, TEXAS, AND OTHER STATES

By: Livan Davidson*

INTRODUCTION

"I can't breathe," said Eric Garner eleven times before his body rested dead on the ground resulting from police officers' use of the chokehold technique.[1] Videos of civilians being fatally shot by those entrusted to protect them have kindled riots, protests, and justice movements.[2] In the United States, police officers kill hundreds of people each year.[3] From the years 2015 to 2019, over 4,000 individuals have died at the hands of law enforcement's use of excessive force.[4] In the year 2019, approximately 783

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[1]Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 54-55 (2016) ("The video captured the moments during which Eric Garner was stopped by police on suspicion of illegally selling loose, untaxed cigarettes near the Staten Island Ferry Terminal in New York, a misdemeanor offense."). *See* Terry Gross, *'I Can't Breathe' Examines Modern Policing and the Life and Death of Eric Garner*, NPR (Oct. 23, 2017, 2:27 PM), https://www.npr.org/2017/10/23/559498678/i-can-t-breathe-explores-life-and-death-at-the-hands-of-police.

[2] *See generally* Camila Domonoske, *After Fatal Police Shooting, Protest Erupts In Charlotte, N.C.*, NPR (Sept. 21, 2016,7:10AM), https://www.npr.org/sections/thetwo-way/2016/09/21/494844130/after-police-shooting-protesters-in-charlotte-n-c-shut-down-interstate; *see also* Katie Mettler, *A Woman Yelled, 'I'm Pregnant!' Seconds Before a Police Officer Fatally Shot Her, Video Shows*, WASH. POST (May 16, 2019, 5:30 PM), https://www.washingtonpost.com/nation/2019/05/14/woman-yelled-im-pregnant-seconds-before-police-officer-fatally-shot-her-video-shows/ ("[A]n 11-year officer with the Baytown Police Department, shot and killed a 44-year-old Texas woman Monday night in the parking lot of the apartment complex where she lived, authorities said — an altercation that a witness captured on video.").

[3] *See Deadly Force: Police Use of Lethal Force in the United States*, AMNESTY INT'L 1 (2015), https://www.amnestyusa.org/files/aiusa_deadlyforcereportjune2015.pdf [hereinafter *Deadly Force*] ("Hundreds of men and women are killed by police each and every year across the United States.") *See also Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ (last visited Oct. 28, 2020) [hereinafter *Fatal Force*] (tracking the number of deaths caused by police use of fatal force in the year 2019).

[4] *See Fatal Force*, *supra* note 3 (recording the number of deaths caused by police use of fatal force from the year 2015 to the year 2019). S*ee also The Counted: People Killed by Police in the US*, GUARDIAN, https://www.theguardian.com/us-news/ng-

people have been killed by police officers.[5] However, there is no unified mechanism in place to count the exact number of lives lost at the hands of police officers.[6]

First, this comment proposes that lenient statutes across the United States regarding when law enforcement can use lethal force have led to unjustified killings of civilians.[7] Second, stricter state laws are a method to reduce the number of homicides caused by police officers' use of lethal force.[8] Third, Florida and Texas' statutes need to be modified to model the California Act to Save Lives.[9] Moreover, a stricter law will compel police departments to train their officers to avoid unjustified killings.[10]

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interactive/2015/jun/01/the-counted-map-us-police-killings (last visited Nov. 27, 2019) (counting the number of deaths caused by police from the years 2015 and 2016 which amounted to approximately 2, 239 dead persons).

[5] *See Fatal Force*, *supra* note 3 (recording the number of deaths caused by police use of fatal force in the year 2019, approximately 893 death as of November 21, 2019); *see also The Counted: People Killed by Police in the US*, *supra* note 4 (counting the number of deaths in the year 2016 which amounted to approximately 1,093 dead persons).

[6] *See Deadly Force*, *supra* note 3, at 1 ("No-one knows exactly how many because the United States does not count how many lives are lost."). *See also* Catherine Barber, et al., *Homicides by Police: Comparing Counts from the National Violent Death Reporting System, Vital Statistics, and Supplementary Homicide Reports*, 106 AM. J. PUB. HEALTH 922, 922 (2016) ("Two longstanding national data systems capture the fatal injuries—Supplementary Homicide Reports (SHRs) from the Federal Bureau of Investigation (FBI) Uniform Crime Reports . . . .").

[7] *See Deadly Force*, *supra* note 3, at 5 ("All state legislatures should introduce or amend statutes that authorize the use of lethal force to ensure that they are in line with international standards by limiting the use of lethal force by law enforcement to those instances in which it is necessary to protect against the threat of death or serious injury."). *See also* ASSEMB. B. 392, 2019-2020 Leg., Reg. Sess. (Cal. 2019) ("This bill would redefine the circumstances under which a homicide by a peace officer is deemed justifiable to include when the officer reasonably believes, based on the totality of the circumstances, that deadly force is necessary to defend against an imminent threat of death or serious bodily injury…").

[8] *See Deadly Force*, *supra* note 3, at 5 ("All state legislatures should introduce or amend statutes . . . by limiting the use of lethal force by law enforcement to those instances in which it is necessary to protect against the threat of death or serious injury."). *See also* Cal. Assemb. B. 392 ("The bill would also affirmatively prescribe the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, to prevent escape, or to overcome resistance.").

[9] *See* Cal. Assemb. B. 392 (establishing a necessity as a requirement before police use excessive force on people). S*ee also* Lizzie Buchen, *New Bill Limits When California Police Can Use Deadly Force*, ACLU (Feb. 8, 2019, 1:15 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/new-bill-limits-when-california-police-can-use (explaining the purpose of California's new law).

[10] *See Deadly Force*, *supra* note 3, at 3 ("What is urgently needed is a nationwide review and reform of existing laws, policies, training and practices on police use of lethal force . . . ."). *See also* Buchen, *supra* note 9 ("Research shows that officers at agencies with stricter

Part I of this comment illustrates the history of police use of excessive force in the United States.[11] In addition, Part I discusses the Fourth Amendment implications on police use of excessive force and the United State Supreme Court's understanding of deadly force.[12] Part II discusses the strengths and weaknesses of Florida and Texas' current state statutes governing police use of excessive force.[13] Part III recommends that Florida and Texas follow the California Act to Save Lives as a model law in order to establish stricter laws governing when police officers can use excessive force.[14] Lastly, Part III concludes with an additional recommendation by suggesting that states should invest in more gender diverse police departments (gender parity) because studies have found that policewomen are less likely than policemen to exercise excessive force under similar circumstances.[15]

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use-of-force policies kill fewer people and are less likely to be killed or seriously injured themselves.").

[11] *See* Leonard Moore, *Police Brutality in the United States*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Police-Brutality-in-the-United-States-2064580 (last visited Oct. 28, 2020) (explaining the history of police brutality in the United States). S*ee generally Deadly Force*, *supra* note 3, at 1 (explaining the realities of police brutality in the United States).

[12] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). *See also* Wayne C. Beyer, *Police Shootings Under the Fourth Amendment*, 8 RICH. J.L. & PUB. INT. 1, 4 (2005) https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1110&context=pilr ("The Supreme Court has defined "seizure" under the Fourth Amendment.").

[13] *Compare* FLA. STAT. § 776.05 (2017) (exemplifying how Florida's statute has a low standard governing police use of excessive force), *and* TEX. PENAL CODE ANN. § 9.51 (West 2018) (exemplifying Texas' low standard governing police use of excessive force), *with* Cal. Assemb. B. 392 ("Existing law does not require an officer to retreat or desist from an attempt to make an arrest because of resistance or threatened resistance of the person being arrested.").

[14] *See* Cal. Assemb. B. 392 (establishing through an Assembly Bill a new law that requires peace officers to resort to lethal force only when necessary under the circumstances); *see also Deadly Force*, *supra* note 3, at 28 ("All state legislatures should introduce or review and amend statutes that authorize the use of lethal force to ensure that they are in line with international law and standards by limiting the use of lethal force by law enforcement to those instances in which it is necessary . . . .").

[15] *See* Amie M. Schuck & Cara Rabe-Hemp, *Women Police: The Use of Force by and Against Female Officers*, 16 WOMEN & CRIM. JUST. 91, 91 (2005) https://www.tandfonline.com/doi/pdf/10.1300/J012v16n04_05?casa_token=fr4I6wwns50AAAAA:49OwSm8uOwSXkb_tbE52UfOGB3KH5PkMr0xHoNp0Or64HD9_fC5aHqaU-43xNTd0mxJzesvQHONf1A ("Results suggested that female officers and same-gender female-female officer pairs used less force, and were less likely to use physical force."). *See also* Ivonne Roman, *How Policewomen Make Communities Safer*, TED TALKS (Apr.,

I. BACKGROUND

A. Overview of Deadly Force in The United States of America

In the United States, people of all races, ethnicities, ages, classes, and genders have experienced law enforcement's use of illegal force.[16]

Illegal use of force can arise to the level of unjustified excessive force, for example: false arrests, assault and battery, and murder.[17] The Bureau of Justice Statistics defines excessive force as "[t]he application of force beyond what is reasonably believed to be necessary to gain compliance from a subject in any given incident."[18] Meanwhile, lethal force is force that is deadly or has the potential to be deadly.[19] The use of firearms has the

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2019), https://www.ted.com/talks/ivonne_roman_how_policewomen_make_communities_safer (explaining the importance of increasing the number of policewomen to reduce death caused by police use of lethal force).

[16] *See* Moore, *supra* note 11 ("Americans of all races, ethnicities, ages, classes, and genders have been subjected to police brutality."). *See also Deadly Force*, *supra* note 3, at 1 ("Hundreds of men and women are killed by police each and every year across the United States. No-one knows exactly how many because the United States does not count how many lives are lost.").

[17] *See* Moore, *supra* note 11 (listing examples of police brutality raging "from assault and battery (e.g., beatings) to mayhem, torture, and murder. Some broader definitions of police brutality also encompass harassment (including false arrest), intimidation, and verbal abuse, among other forms of mistreatment."). *See also Fighting Police Abuse: A Community Action Manual*, ACLU (Aug. 1997), https://www.aclu.org/other/fighting-police-abuse-community-action-manual (listing different types of police brutality, excessive use of deadly force, excessive use of physical force, and discriminatory patterns of arrest).

[18] *Use of Force*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=84# (last visited Oct. 18, 2020) (defining excessive force as force that exceeds the scope of what is reasonably believed to be necessary to effectuate compliance); *see also* Melissa Hamilton, *Excessive Lethal Force*, 111 NW. U. L. REV. 155, 167 (2017) https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1245&context=nulr_online ("A political scientist speaking about killing in wars and times of civil unrest coined the term 'extra-lethal violence,' which she defines as 'physical acts committed face-to-face that transgress shared norms and beliefs about appropriate treatment of the living as well as the dead.'") (quoting Lee Ann Fujii, *The Puzzle of Extra-Lethal Violence*, 11 PERSP. ON POL. 410, 411 (2013)).

[19] *See Deadly Force*, *supra* note 3, at 6 ("Amnesty International has used the terms 'lethal force' to refer to the use of force that is deadly or has the potential to be deadly."). *See also Use of Force*, *supra* note 18 ("Force that a law enforcement officer uses with the purpose of causing, or that the officer knows to create a substantial risk of causing, death, or serious bodily harm.").

potential to be lethal and the term lethal force should be read to include forms of force that cause death (e.g. chokehold technique).[20]

B. Fourth Amendment and The Supreme Court

There is no uniform federal statute that governs police use of force which means that states are typically in charge of criminal prosecutions of state police officers.[21] State statutes and common law govern police use of lethal force in the United States.[22] Although the United States Constitution and the Supreme Court have established general standards regarding police use of force, the application of the law to the particular circumstances is not always clear when police officers are acting under the job.[23]

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[20] *See Deadly Force*, *supra* note 3, at 6 ("As any use of firearms has the potential to be lethal, the term 'lethal force' should be read to include the use of firearms, but does not exclude other forms of force that may also cause death. In the United States the term 'deadly force' is frequently used to refer to lethal force in the statutes on the use of lethal force."). *See also* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (noting it is unlawful for a police officer to seize an unarmed and non-dangerous suspect by shooting him to death); *see generally National Consensus Policy and Discussion Paper on Use of Force*, NAT'L ORG. OF BLACK L. ENFORCEMENT EXECUTIVES 3 (July 2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [hereinafter *National Consensus Use of Force Paper*] (explaining that the chokehold technique is "[a] physical maneuver that restricts an individual's ability to breathe for the purposes of incapacitation." This does not include vascular neck restraints.).

[21] *Deadly Force*, *supra* note 3, at 17 ("There is no federal statute governing the use of lethal force in the United States."). *See also* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 640 (2018) ("Currently, there is no federal statute governing police use of deadly force.").

[22] *See* Lee, *supra* note 21, at 640 ("Police use of force in the United States is governed by U.S. Supreme Court case law, state statutes, and state case law.") *See also* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV., 211, 211 (2017) ("Nor, as recent cases have illustrated, does a criminal prosecution under state law readily lend itself to defining appropriate police uses of force. People might assume that the U.S. Constitution protects citizens against completely unjustified uses of deadly force. They would be wrong to expect clear constitutional rules . . . ."). *See also* RICHARD M. THOMPSON II, CONG. RSCH. SERV., R44256, POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 21 (2015), https://fas.org/sgp/crs/misc/R44256.pdf ("In a line of cases beginning in the mid-1980s, the Supreme Court ruled that all claims of excessive force occurring during an arrest or investigatory stop—deadly or otherwise—are governed by the Fourth Amendment's prohibition against unreasonable seizures.").

[23] *See* Beyer, *supra* note 12, at 2 ("Unless a reasonable police officer would have understood that his/her decision to shoot was clearly constitutionally prohibited, the officer may be entitled to qualified immunity, a decision that the court can make on summary judgment before trial."). *See also* THOMPSON II, *supra* note 22, at 21 ("As aptly noted by Justice Scalia, the very nature of the objective reasonableness/totality of the circumstances

The United States Constitution protects a person from unreasonable searches and seizure of his body and or property.[24] The Supreme Court has ruled that a seizure awakens Fourth Amendment protections when a government actor uses physical force or shows authority in some way that restrains the liberty of a citizen.[25] When a police officer intentionally shoots a free citizen it is a seizure governed by an objective reasonable standard under the Fourth Amendment.[26] The United States Supreme Court decided that lethal force may not be used unless it is used under the following circumstance: when it is necessary to prevent escape of a person that the officer has probable cause to believe the suspect committed a crime involving the infliction of bodily harm or threat of death or serious bodily injury to the officer or others.[27]

The use of deadly force to prevent escape is not reasonable under the Fourth Amendment.[28] The reasonableness of a particular use of force must be evaluated from the perspective of a reasonable officer in the circumstances and not with a vision of hindsight.[29] In *Tennessee v. Garner*,

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approach necessarily requires courts to 'slosh [their] way through the factbound morass of "reasonableness."') (quoting Scott v. Harris, 550 U.S. 372, 383 (2007)).

[24] *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) ("This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.").

[25] *See Terry*, 392 U.S. at 19, n.16 ("[B]y means of physical force or show of authority."). *See also* Beyer, *supra* note 12, at 2 ("An intentional shooting of a free citizen is a 'seizure' governed by the objective reasonableness standard of the Fourth Amendment.").

[26] *See* Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). *See also* Beyer, *supra* note 12, at 56 ("To comply with the Fourth Amendment, the use of force must be objectively reasonable. But the application of that standard to the rough and tumble topography of the streets creates some uncertainty."); *see generally* Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993) (analyzing objective reasonableness for police use of force and citing *Garner*).

[27] *See Garner*, 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). *See also Deadly Force*, *supra* note 3, at 17 ("[I]t is not permissible for the police to use deadly force to prevent the escape of an unarmed suspected felon who does not present a threat to the officer.").

[28] *See Garner*, 471 U.S. at 19 (establishing that police cannot seize by shooting dead an unarmed, non-dangerous suspect); *see also* California v. Hodari D., 499 U.S. 621, 626-27 (1991) (explaining that the application of physical force by an officer constitutes a seizure and is thus subject to Fourth Amendment protection).

[29] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("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."); *see generally* the U.S. CONST. amend. IV.

the U.S. Supreme Court established the Fourth Amendment test for the use of deadly force.[30] In *Garner*, a police officer shot an unarmed young person to prevent his escape during a burglary scene.[31] The Supreme Court found that a police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.[32] In addition, deadly force may be used only where an officer has a probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or others. A threat means that the suspect threatened the police officer with a weapon or there is probable cause to believe that he has committed a crime that involved the infliction or threatened infliction of serious physical harm.[33]

Before the decision in *Garner*, the common law rule in *Tennessee* and other states allowed an officer to use whatever force was necessary to effectuate the arrest of an escaping felon.[34] Then, in *Graham v. Connor* the court found that excessive force during the course of arrests is governed by the Fourth Amendment objective reasonable standard.[35] In *Graham*, the

(establishing that persons are free from unreasonable searches and seizures from the government or its agents).

[30] *See Garner*, 471 U.S. at 19 ("[W]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.") (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[31] *See Garner*, 471 U.S. at 1 ("Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son as, after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing."). *See also* Beyer, *supra* note 12, at 4-5 (explaining Tennessee v. Garner).

[32] *See Garner*, 471 U.S. at 11 (establishing that police cannot seize by shooting dead an unarmed, non-dangerous suspects); *see also Deadly Force*, *supra* note 3, at 17-18 (explaining the standard set out in in Tennessee v. Garner sets a lower standard "than that required by international law and standards, in particular, with regards to the type of harm threatened by the individual fleeing . . . .").

[33] *See Garner*, 471 U.S. at 6 ("[H]ave probable cause. . .to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community."). *See also Deadly Force*, *supra* note 3, at 17 ("[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 injury to the officers or others.").

[34] *See generally Garner*, 471 U.S. at 19 (establishing that police cannot seize by shooting dead an unarmed, non-dangerous suspects); Scott v. Harris, 550 U.S. 372 (2007) (finding that when a police officer chased a suspect's car and hit the car causing it to spin out of the road, which rendered the suspect-driver quadriplegic, it was not a seizure under the Fourth Amendment).

[35] *See Graham*, 490 U.S. at 389 ("One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: 'I've been seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk.'"). *See also* Beyer, *supra* note 12, at 5 (providing *Graham v. Connor* as an example of unreasonable police use of lethal force).

plaintiff was tightly handcuffed during a stop and his head was shoved into the hood of a police car.[36] The objective reasonable standard requires the court to focus on the facts and circumstances on each individual case including: the seriousness of the crime, the threat to the officer or the public, and the suspect's attempt to resist or evade arrest.[37]

Although the Supreme Court has established some standards regarding police use of deadly force, state statutes are not uniform and vary considerably.[38] The state of Florida does not even comply with the lower standard set by the United States Constitution regarding police use of deadly force.[39] Since the year 2015, no state has established a law that mandated police use of lethal force as a method of last resort or a accountability mechanisms for police departments; two states establish by law for the training of police the use of lethal force; subsequently, it was not until the year 2019 that California adopted a new law limiting the use of lethal force to only those situations where there is an imminent threat to life or serious injury to the officer or others.[40]

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[36] *Graham*, 490 U.S. at 389 ("One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: 'I've been seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk.'"); *see also* Beyer, *supra* note 12, at 5 (providing *Graham v. Connor* as an example of a case where police conduct was deemed excessive).

[37] *Graham*, 490 U.S. at 396 (explaining that "proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."). *See also Garner*, 471 U.S. at 8-9 (explaining the test for reasonableness).

[38] *See* Beyer, *supra* note 12, at 4-5 (discussing Supreme Court standard for objectively reasonable force); *see also Overview of Police Use of Force*, NAT'L INST. OF JUST. (March 5, 2020), https://nij.ojp.gov/topics/articles/overview-police-use-force ("Officers receive guidance from their individual agencies, but no universal set of rules governs when officers should use force and how much.").

[39] *See Deadly Force*, *supra* note 3, at 2 (stating that as of 2015 "[t]hirteen states have laws that do not even comply with the lower standards set by U.S. constitutional law on use of lethal force by law enforcement officers."). *See also* Oliver Laughland & Jamiles Lartey, *All 50 US States Fail to Meet Global Police Use of Force Standards, Report Finds*, GUARDIAN (June 18, 2015, 8:10 AM), https://www.theguardian.com/us-news/2015/jun/18/us-states-police-use-of-force-standards-amnesty ("Every state in the US fails to comply with international standards on the lethal use of force by law enforcement officers, according to a report by Amnesty International USA, which also says 13 US states fall beneath even lower legal standards enshrined in US constitutional law. . . .").

[40] *See Deadly Force*, *supra* note 3, at 4 ("None of the state statutes require that the use of lethal force may only be used as a last resort with non-violent and less harmful means to be tried first. No state limits the use of lethal force to only those situations where there is an imminent threat to life or serious injury to the officer or to others."). S*ee also Overview of Police Use of Force*, *supra* note 38 ("Officers receive guidance from their individual

II. DISCUSSION

Recently, the state of California passed one of the strictest laws (The California Act to Save Lives) governing police use of lethal force requiring that peace officers only resort to deadly force in situations where it is only necessary.[41] Necessity is an essential element that should be included in all statutes governing police use of force; necessity is the principle that peace officers must attempt to resort to non-violent methods before using lethal force.[42]

A. Florida, Texas, and California Laws Governing Police Use of Lethal Force

i. *Florida's Statute Governing Police Use of Lethal Force*

Florida's current statute governing lethal force justifies police officers' use of any type of force when an officer: (1) reasonably thinks that it is necessary to use this force to defend himself or herself or others from physical injury while making the arrest; (2) needs to retake a felon who escaped; or (3) needs to arrest a felon fleeing from justice.[43] However under the third provision the statute establishes that police officers are not immune from civil suits for damages for the unlawful use of lethal force, unless the use of lethal force was necessary to prevent an arrest by a felon's flight and, if feasible, a warning was provided, and the officer reasonably thinks that the fleeing felon poses a threat of death or great bodily harm to the officer or others or the officer reasonably thinks the fleeing felon engaged in

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agencies, but no universal set of rules governs when officers should use force and how much."). S*ee generally* ASSEMB. B. 392, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (proving an example of a new bill passed by California that intends to increase the standard applied to evaluate police officers' use of deadly force).

[41] *See* Cal. Assemb. B. 392 ("As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life."). *See also* Buchen, *supra* note 9 ("AB 392 will clarify that police officers can use deadly force only when there are no alternatives that would prevent death or serious bodily injury.").

[42] *See generally Deadly Force*, *supra* note 3, at 14 (explaining the principle of necessity); *see also Overview of Police Use of Force*, *supra* note 38 ("Law enforcement officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm. The levels, or continuum, of force police use include basic verbal and physical restraint, less-lethal force, and lethal force.").

[43] FLA. STAT. § 776.05(1)–(3) (2017) ("The officer is justified in the use of any force: (1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest; (2) When necessarily committed in retaking felons who have escaped; or (3) When necessarily committed in arresting felons fleeing from justice."). *See also Deadly Force*, *supra* note 3, at 46 (providing a copy of Florida's statute on the use of lethal force).

criminal activity that caused or threatened to cause bodily harm to another person.[44]

ii. *Texas' Statute Governing Police Use of Lethal Force*

Texas' current criminal code governing lethal force justifies peace officers' use of deadly force against another person when the officer reasonably thinks that the use of deadly force is immediately necessary to conduct an arrest or prevent escape after arrest.[45] The peace officer must reasonably believe the arrest or search is legal and if made with a warrant he must reasonably believe the warrant is lawful. Moreover, before an officer resorts to force, the peace officer must show his purpose to make an arrest and identify himself as a peace officer to the suspect.[46]

iii. *Weaknesses of Florida and Texas' Statutes Governing Police Use of Lethal Force*

Florida and Texas' statutes governing police officers' use of lethal force fail to clearly define that deadly force may only be used when necessary; additionally, Florida and Texas' statutes do not require that officers resort to other less violent methods before resorting to lethal force.[47] Texas' statute, unlike Florida's statute, provides some language that says deadly force can be used when an officer reasonably believes it is immediately necessary, however it does not sufficiently establish the "only"

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[44] *See* § 776.05(3)(a)–(b) ("However, this subsection shall not constitute a defense in any civil action for damages brought for the wrongful use of deadly force unless the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and: (a) The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or (b) The officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person."). *See also Deadly Force, supra* note 3, at 46 (presenting a copy of Florida's statute on the use of lethal force).

[45] TEX. PENAL CODE ANN. § 9.51(c) ("A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest . . . .").

[46] TEX. PENAL CODE ANN. § 9.51(a)(2) (providing that peace officers, before arresting a person, must identify that he or she is an officer unless the officer reasonably believes the person being arrested would know he or she is an officer).

[47] *See* FLA. STAT. § 776.05 (2017) (failing to establish that deadly force may be used only after officers try to use other less violent methods); *see* TEX. PENAL CODE ANN. § 9.51 (failing to require that deadly force may be used only after officers try to use other less violent methods).

when necessary language that heightens the duty of care for peace officers.[48] The California Act to Save Lives, unlike Florida and Texas's law, incorporates the word "only" to qualify the word "necessary."[49] Thus, California's Act to Save Lives establishes a new trend for other states to follow.[50]

iv. *The California Act to Save Lives*

The California Act to Save Lives establishes that the use of physical force is a serious responsibility and should be exercised in a judicious manner that respects human rights and the right to life.[51] The legislative intent behind the law was to allow peace officers to use deadly force only when necessary in defending human life.[52] In order to make the determination of whether it was necessary for an officer to use deadly force,

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[48] *See, e.g.,* TEX. PENAL CODE ANN. § 9.51(a) (asserting that a peace officer "is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest . . . ."). *But see, e.g.,* § 776.05 (1) (asserting that a police officer may use deadly force which he "reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest . . . .").

[49] *See, e.g.,* § 776.05(1) (providing that any force used by police officers is justified when he or she "reasonably believes to be necessary to defend himself or herself or another from bodily harm."); TEX. PENAL CODE ANN. § 9.51(c) (providing that peace officers can lawfully use deadly force when the "peace officer reasonably believes the deadly force is immediately necessary to make an arrest . . . ."). *But see, e.g.,* ASSEMB. B. 392, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (providing a higher standard for police use of lethal force by making it lawful to use deadly force only when necessary under the totality of the circumstances and requiring peace officers to resort to other techniques if reasonably feasible).

[50] *See* Buchen, *supra* note 9 ("Current laws in California fail to protect against unnecessary killings by police officers. . . . It is unacceptable that today in California police officers can legally kill someone even when they don't have to."). *See also California's New Law Says Police Can Use Lethal Force Only When 'Necessary'*, NPR (Aug. 19, 2019, 5:46 PM), https://www.npr.org/2019/08/19/752529432/californias-new-law-says- ("The law states that police can use lethal force only when necessary. Up until now, the standard was whether a reasonable officer in the same situation would have acted in the same way. So California now has among the strictest standards in the country.").

[51] CAL. PENAL CODE § 835a.(a)(1) ("That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law."). *See also Deadly Force*, *supra* note 3, at 1 ("One of a state's most fundamental duties which police officers, as agents of the state, must comply with in carrying out their law enforcement duties, is to protect life.").

[52] PENAL § 835a.(a)(2) ("[I]t is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life."). Buchen, *supra* note 9 ("The course of action is clear. California lawmakers must start by changing the standard for when police can use deadly force.").

the officer is subject to evaluate the situation based on the specific circumstances of each case; and the peace officer must resort to other available methods if reasonably safer and feasible to the objective reasonable officer.[53] Furthermore, the decision to use deadly force must be evaluated in a manner that weighs the gravity of that authority and grave consequences of the use of lethal force in order to make sure that peace officer's exercise the authority to use force in a manner that is consistent with the current laws and policies.[54] The determination to use deadly force must be evaluated by: using the perspective of the reasonable officer in the same situation; looking at the totality of the circumstances known or apparent to the officers at the time and not based on the benefit of hindsight; and evaluating the totality of the circumstances, taking into account the instances when peace officers may be compelled to make fast judgements about the use of the force.[55]

Additionally, the California Act to Save Lives protects the decision of officers by providing immunity when a peace officer, who makes or tries to arrest a suspect, does not need to stop the use of force if the suspect resists or attempts to resists.[56]

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[53] PENAL § 835a.(a)(2) ("In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer."). *Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of reasonable officer on the scene.").

[54] PENAL § 835a.(a)(2) (establishing that a peace officer's decision to use force "shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies."). *See generally California Set to Pass Landmark Legislation to Save Lives, Reduce the Number of Police shootings*, ANTI POLICE-TERROR PROJECT (July 8, 2019), http://www.antipoliceterrorproject.org/california-act-to-save-lives-ab-392 ("Police officers in California consistently kill more people than officer in any other state. As in other states, Black and Latinx people and people with disabilities are more likely than other residents to be targets of police violence. AB 392 addresses this problem . . . .").

[55] *Graham*, 490 U.S. at 396-97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). PENAL § 835a.(a)(4) (establishing that when a peace officer decides to use force the officer should be evaluated according to the perspective of "a reasonable officer in the same situation" while looking at "the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.").

[56] PENAL § 835a.(d) ("A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b)

III. SOLUTION FOR FLORIDA, TEXAS, AND OTHER STATES

A. Recommendation to Adopt a Proposed Model Statute that Incorporates the California Act to Save Lives

This comment recommends that Florida, Texas, and other states amend, review, or re-write their respective statutes governing police use of excessive force following the Model Statute created in this comment. A stricter standard for the use of police force will help reduce the number of deaths caused by police use of deadly force; Cynthia Lee acknowledged in her article that the time has come for state legislators to take action and "do what they can to try to reduce the loss of life that occurs when police use deadly force in cases where they could have taken steps to avoid the loss of life. Legislators can address this pressing problem by enacting my model statute."[57]

The proposed *Model Statute* adopts the language from the California Act to Save Lives and incorporates additional language establishing peace officers' affirmative duty to protect and the police departments' affirmative duty to self-police within their departments; these affirmative duties for officers to protect people and self-police aim to address the individual and institutional concerns that arise out of police use of lethal force.[58] Both affirmative duties create a balance for the blame (when a person dies as a result of police use of lethal force) so that not only the officer(s) are accountable for their conduct, but also the individual police departments are accountable for training their police officers.[59]

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and (c) to effect the arrest or to prevent escape or to overcome resistance."). *See* Lee, *supra* note 21, at 656 ("And while most use-of-force statutes include language suggesting a necessity requirement, those same statutes permit an officer to use deadly force even if that force was not actually necessary.").

[57] Lee, *supra* note 21, at 683; *see also* Buchen, *supra* note 9 ("After Seattle implemented a new use-of-force policy that contains some of the same key elements that AB 392 does, a study by a federal court monitor showed that the policy significantly reduced mid-level and serious uses of force without any increase in injuries to officers or the crime rate.").

[58] *See generally* ASSEMB. B. 392, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (providing a stricter statute governing police use of excessive force); *see generally California Set to Pass Landmark Legislation to Save Lives, Reduce the Number of Police Shootings*, *supra* note 54 ("[T]he California Senate passed landmark legislation to strengthen the law on police use of force and reduce the number of deadly police shooting in the state.").

[59] *See, e.g.*, INDIANAPOLIS METRO. POLICE DEP'T, GENERAL ORDER 1.30, USE OF FORCE 1 (2012), https://perma.cc/3UU2-4NQZ ("[O]fficers shall use only that amount of force that is reasonable, given the facts and circumstances known by the officer at the time of the event."). *See generally* Garrett & Stoughton, *supra* note 22, at 278 ("There is some evidence that agencies adopt highly varied polices, many of which are quite minimal and must be extensively supplemented by training and supervision on law and practice . . . Many say very little beyond a constitutional floor of 'reasonableness.' The constitutional floor then becomes their ceiling.").

Accordingly, the proposed *Model Statute* below provides a non-exhaustive list of non-violent techniques and policy-based recommendations that police departments will be assessed by under the proposed *Model Statute's* language.[60] Furthermore, the *Model Statute* will afford prosecutors a better probability to prosecute peace officers who abuse their broad discretion to use force.[61] This *Model Statute* will no longer promote such broad discretion and redefines the context under which lethal force may or may not be used; thus the ultimate objective is to create a statute that helps reduce deaths of people and create safer communities for both civilians and peace officers. [62]

B. The Proposed Model Statute

Peace officers have a duty to protect and serve the community while police departments have a duty to ensure its peace officers are lawfully exercising the responsibilities vested upon peace officers.[63]

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[60] *See generally* Marcus, *supra* note 1 (providing recommendations for police departments and communities to create safer police-civilian interactions); *see generally Deadly Force*, *supra* note 3, at 5 (providing key recommendations for states and police departments regarding police officers use of force).

[61] *See* Marcus, *supra* note 1, at 69 ("The indictment of police officers who shoot civilians remains a rare occurrence, however."). Malley v. Briggs, 475 U.S. 335, 354 n.9 (1986) (Powell, J., concurring in part and dissenting in part) ("Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution.").

[62] *See, e.g.*, Cal. Assemb. B. 392 (establishing a new trend for states to adopt stricter legislations that regulate police use of lethal force); *See generally* Lee, *supra* note 21, at 683 ("[S]tate legislators to step up to the plate and do what they can to try to reduce the loss of life that occurs when police use deadly force in cases where they could have taken steps to avoid the loss of life."). *See also* Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197 (2016) (highlighting that passing such legislation to make stricter laws regarding police use of force might be difficult, however, because of resistance from powerful police unions).

[63] *See* Garrett & Stoughton, *supra* note 22, at 218 ("Good police departments care deeply about tactics, particularly the tactics that can be used to minimize the use of force or avoid it altogether . . . ."). *See also* George H. Brereton, *The Importance of Training and Education in the Professionalization of Law Enforcement*, 52 J. CRIM. L. & CRIMINOLOGY 111, 111 (1961) ("The idea that it is necessary to have a well-trained 'career' or professional police officer is by no means a new one. This was recognized and put into practice at a very early date, both on the Continent of Europe and in England.").

Peace Officers' Use of Lethal Force;
Requisite Necessity; and
Affirmative Duties to Protect and Self-Police[64]

If any part of this section conflicts with Federal law, then Federal law applies to that section. If any part of this section is rendered invalid, only that portion of the statute is invalid, the rest of this statute remains valid.

Section 1. This section of the statute governs peace officers use of force during searches, seizures, arrests, and other police-civilian interactions.[65]

A. The Legislature intends that peace officers use *lethal force only when necessary* in defense of human life.

B. To determine whether the use of force is *necessary* the peace officer:
   (1) must evaluate each situation in light of the particular circumstances of each case; and
   (2) must use other available resources and techniques if reasonably safe and feasible to an objectively reasonable peace officer.

C. The determination by a peace officer to use force must be evaluated carefully and thoroughly, in a manner that reflects the:
   (1) gravity of that authority; and
   (2) the serious consequences of the use of force by peace officers, in order to ensure that peace officers use of force is consistent with the laws, agency and police departments policies.

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[64] The author's *Model Statute* adopts language from a variety of sources including the California Act to Save Lives, statutes from Florida and Texas, and other legal academic sources. *See generally* Cal. Assemb. B. 392 (establishing that police officers shall only use deadly force when necessary); FLA. STAT. § 776.05 (2017) (exemplifying a statute that does not include "only" when necessary language but does include language about a warning when "feasible"); TEX. PENAL CODE ANN. § 9.51 (exemplifying a statute that does not impose a duty to retreat on police officers); Garrett & Stoughton, *supra* note 22, at 253 ("Time is a central concept in police tactics, affecting as it does the accuracy of officers' perceptions and the quality of decision making.").

[65] *See* Buchen, *supra* note 9 ("AB 392 is urgently needed because every day that goes by without addressing California's epidemic of police violence is another day that a police officer may violently take another life."). *See generally* Cal. Assemb. B. 392 (establishing a higher standard for California where officers are to use deadly force only when necessary).

D. The determination by a peace officer to use force must be evaluated:
   (1) from the perspective of a reasonable officer in the same situation,
   (2) based on the totality of the circumstances known to or perceived by the peace officer at the time,
   (3) rather than with the benefit of hindsight and the totality of the circumstances shall account for occasion when officers may be forced to make quick judgements about using force.

E. A peace officer is justified in using *lethal force* upon another person:
   (1) *only* when the officer reasonably believes based on the totality of the circumstances that such force is necessary for either of the following reasons:
      (a) to defend against an imminent threat of death or serious bodily harm to the officer or another person;
      (b) to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily harm, if the peace officer reasonably believes that the person will cause death or serious bodily harm to another person unless immediately apprehended.

F. Where *feasible*, a peace officer must, before the use of force:
   (1) make reasonable efforts to identify themselves as a peace officer; and
   (2) warn about the lethal force that may be used, unless the peace officer has objectively reasonable grounds to believe the person is aware of those facts.

G. A peace officer must not use deadly force against a person based on the danger that person poses to themselves, if an objective reasonable officer would believe the person does not present a threat of bodily harm or death to the peace office or another person.

H. A peace officer is not required to retreat or desist efforts by reason of the resistance or threatened resistance by the person who is being arrested.
   (1) However, if a reasonable officer under the circumstances reasonably determines that it is safe to retreat or resort to non-deadly force, then the peace officer should make an attempt to retreat so long as the life of the peace officer or another person is not threatened by bodily injury or death.

Section 2. The following additional factors should be considered when deciding whether peace officers use of lethal force was necessary and reasonable:[66]

(1) The severity of the crime or circumstance
(2) The level and immediacy of threat or resistance posed by the suspect;
(3) The potential for injury to citizens, officers and suspects;
(4) The risk or attempt of the suspect to escape;
(5) The knowledge, training and the experience of the officer;
(6) Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion and the number of officers or subjects.
(7) Other environmental conditions or exigent circumstances.

Section 3. The following additional factors should be considered when deciding whether peace officers use of lethal force was justified:[67]

(1) The time the peace officer had to decide whether or not to use lethal force;
(2) the distance between the peace officer and the danger posed by the person who may be subject to deadly force; and
(3) other circumstances that include whether the peace officer used any tactics to avoid death or harm, whether the peace officer used conflict avoidance, or whether the peace officer resorted for back-up assistance.

Section 4. The Affirmative Duty for Police Departments to Self-Police to Ensure Compliance by Peace Officers. These are standards that police departments must adhere to in order to comply with sections 1-3 of this statute. Police departments are to be evaluated by these standards.[68]

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[66] *See generally* N.Y. STATE UNIVERSITY POLICE DEPARTMENT, *General Order 900* https://www2.cortland.edu/offices/university-police-department/pdfs/GO%20900%20Use%20of%20Force%20Defensive%20Actions.pdf (proving standards to determine reasonableness); *Graham*, 490 U.S. at 396 (referring to factor of the severity of the crime or circumstances); *Scott*, 550 U.S. at 396 (referring to the factors of potential injury to citizens, officers or suspects); Sharrar v. Felsing, 128 F.3d 810, 810 (3rd Cir. 1997) (mentioning the number of officers or subjects).

[67] *See generally* Lee, *supra* note 21, at 666-65 (highlighting the importance of the time frame for officers to make decisions, the importance of de-escalation, and the importance for officers use other tactics to reduce death caused by excessive force); *Deadly Force*, *supra* note 3, at 20 (highlighting the importance of de-escalation tactics including conflict avoidance and resorting to back-up assistance).

[68] *See generally National Consensus Policy and Discussion Paper on Use of Force*, *supra* note 20 (listing a number of standards for police departments to improve their departments'

(1) All officers shall receive training, at least annually, on this agency's use of force policy and related legal updates.
(2) In addition, training shall be provided on a regular and periodic basis and designed to
    (a) provide techniques for the use of and reinforce the importance of de-escalation;
    (b) simulate actual shooting situations and conditions; and
    (c) enhance officers' discretion and judgment in using less-lethal and deadly force in accordance with this policy.
(3) All use-of-force training shall be documented.

C. Analysis of the Model Statute in Light of U.S. Law and International Law

i. *Necessity and Proportionality*

The U.S. Constitution and the U.S. Supreme Court set the floor on the law governing law enforcement use of force; however, the states have the power to set ceilings.[69] The Tenth Amendment delegates immense police power to the states; this includes the power to promulgate criminal laws and to regulate police departments.[70] This means that states have the power to change their laws and create guidelines governing law enforcements' use of force that are in accord with international standards.[71]

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training); Marcus, *supra* note 1 (providing recommendations to improve police departments and prevent the unnecessary use of deadly force).

[69] Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012) ("Despite doctrinal rhetoric to the contrary, constitutional law cannot alone balance individual and societal interests when they conflict. Instead, constitutional rights establish only deferential minimum standards for law enforcement, without addressing the aggregate or distributional costs and benefits of law enforcement or its effects on societal quality of life."). *National Consensus Use of Force Paper*, *supra* note 20, at 6 ("While states cannot take away or diminish rights under the U.S. Constitution, they can, and often do, expand upon those rights.").

[70] *See* U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *See generally* Harmon, *supra* note 69, at 763 (explaining that the constitutional requirements are a minimum standard that does not address all the complex issues related to police use of force).

[71] *See* U.S. CONST. amend. X. (establishing states' power to police within their own states); *see also* Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REPS. 20, 20 (2005) (explaining that police power has "traditionally implied a capacity to (1) promote the public health, morals, or safety, and the general well-being of the community; (2) enact and enforce laws for the promotion of the general welfare; (3) regulate private rights in the public interest; and (4) extend measures to all great public needs.").

Under international legal standards, laws governing police use of force should determine with precision the circumstances under which police officers acting as instruments of the state may deprive a citizen of life.[72] Laws governing police use of force should always address the principles of necessity, proportionality, and precaution.[73] Necessity requires that law enforcement's use of force must be necessary in the circumstance;[74] and proportionality requires that there be a maximum amount of force used to achieve a specific legitimate purpose.[75] The duty of precaution means that law enforcement has a duty to plan operations in a way that minimizes the risk that its officers may kill or injure persons.[76] Both the principles of necessity and proportionality set limits on how law enforcement should exercise force, which means that when necessity and proportionality are neglected this results in a violation of human rights.[77] Meanwhile, the

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[72] *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, GENEVA ACAD., Nov. 2016, at 1, 3 [hereinafter *Use of Force in Law Enforcement and the Right to Life*] https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf ("[T]he law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. As a result, the use of force by law enforcement agencies has been high on the agenda of the Human Rights Council for many years."). *See generally Deadly Force*, *supra* note 3 (highlighting that the state statutes in the US governing police use of force do not comply with the stricter international standards).

[73] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 6 ("In so far as it governs use of force, the law of law enforcement has three main components: necessity, proportionality, and precaution."). *See also Deadly Force*, *supra* note 3, at 14 (highlighting the importance of necessity and proportionality in laws governing law enforcement use of force).

[74] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 6-8 ("[T]he principle of necessity holds that force used for the purpose of law enforcement must be necessary in the circumstances."). *Deadly Force*, *supra* note 3, at 14 ("[T]he principle of necessity requires that the police use only such force as is required to achieve the objective, and amount of force used must not exceed that which is required to achieve that objective.").

[75] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 9 ("[P]roportionality 'sets a maximum on the force that might be used to achieve a specific legitimate objective.'"). *See also Deadly Force*, *supra* note 3, at 14 ("The amount of force officers are allowed to use must be proportionate to the seriousness of the harm it is aiming to prevent.").

[76] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 9 ("The authorities have a duty to plan law enforcement operations in a manner that minimizes the risk that its law enforcement agencies and officials may kill or injure a member of the public. . . ."). *See also Deadly Force*, *supra* note 3, at 14 ("It is the utmost obligation of police to respect and preserve human life. Intentional lethal use of firearms (i.e. using them in a way that will inevitably kill the individual) may only be justified when it is 'strictly unavoidable in order to protect life.'").

[77] *See Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 6 ("Necessity and proportionality set limits on how and when force may be used lawfully

principle of precaution shields police officers insofar as ensuring that police operations are planned in such a manner as to avoid injury to the officer or the others around the officer.[78]

Under international law standards police officers are permitted to use a firearm under four circumstances.[79] The first circumstance is where the officer has to self-defend or defend others from imminent threat of death or grave bodily harm.[80] The second circumstance is where the peace officer has to prevent a serious crime that involves a grave threat to human life.[81] The third circumstance is where the peace officer needs to arrest a person who is resisting arrest if the person is about to commit a serious crime involving grave threat to human life.[82] The fourth circumstance is where the peace officer needs to prevent a person resisting arrest from escaping where the person is about to commit a serious crime that involves a great threat to

during policing actions."). *See also* U.N. Off. on Drugs and Crime U.N. Off. High Comm.,, Resource Book on the Use of Force and Firearms in Law Enforcement, at 20 (2017), https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf ("As with any use of force, the principles of legality, necessity, proportionality, precaution, non-discrimination and accountability apply."). *See generally* Lee, *supra* note 21, at 655 ("Necessity and proportionality, standard features of the defense of self-defense, can easily be forgotten if the focus is simply on the reasonableness of the officer's beliefs.").

[78] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 6 ("[I]t requires states to ensure that law enforcement operations are planned and conducted so as to minimize the risk of injury."). *See also* Resource Book on the Use of Force and Firearms in Law Enforcement, *supra* note 77, at 4 (1990), http://www.un.org/ruleoflaw/files/BASICP~3.PDF ("Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.").

[79] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 12 ("[F]our scenarios permit the lawful use of firearms. Each use remains lawful only if less extreme means are, or will be, unsuccessful."). *See also*
Resource Book on the Use of Force and Firearms in Law Enforcement, *supra* note 77, at 20 ("To avoid such unlawful or arbitrary use of firearms, laws should provide proper guidance for the use of firearms, including by setting strict conditions for their use.").

[80] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 12 ("In self-defence or to defend others from an imminent threat of death or serious injury."). *See also National Consensus Use of Force Paper*, *supra* note 20, at 13 ("[T]o protect the officer or others from what is reasonably believed to be an immediate threat of death or serious bodily injury.").

[81] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 12 ("To prevent a particularly serious crime involving a grave threat to life."); *see also National Consensus Use of Force Paper*, *supra* note 20, at 13 ("[D]eadly force would be justified in instances where an officer attempts to stop the escape of a fleeing violent felon whom the officer has identified as one who has just committed a homicide, and who is armed or is likely to be armed in light of the crime.").

[82] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 12 ("To enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves a grave threat to life.").

life.[83] These circumstances presume that police officers will not discharge a firearm with the intent to kill, but rather, with the intent to stop a suspect.[84]

ii. *The Force Continuum*

Police departments may use a force range that evaluates the force continuum to predict and assess certain patterns that occur during police officer and civilian encounters.[85] The force continuum looks at methods to cope with a set number of circumstances including de-escalation techniques to prevent the use of excessive force.[86] The force continuum is divided into six levels: (1) presence (e.g. the civilian's body language, demeanor, and attitude); (2) verbal resistance (e.g. verbal indications of non-compliance); (3) passive physical resistance (e.g. non-compliance, failing to obey an officer's orders); (4) active physical resistance (e.g. engaging the muscles in a non-aggressive way, as by pulling away or running away); (5) aggressive physical resistance (e.g. physically attacking the officer); and (6) aggravated physical resistance (e.g. physically attacking the officer in a way likely to cause death or great bodily harm).[87]

The police officers' potential responses to the conducts listed above can be broken down into five types: (1) officer presence (e.g. the officer's body language, demeanor, and attitude); (2) verbal commands (e.g. the use of

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[83] *Id.* ("To prevent a person resisting arrest from escaping where he or she is about to commit a particularly serious crime that involves a grave threat to life."). See *also National Consensus Use of Force Paper*, *supra* note 20, at 3-4 ("[T]o prevent the escape of a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit a felony involving serious bodily injury or death . . . .").

[84] *Use of Force in Law Enforcement and the Right to Life*, *supra* note 72, at 12 ("Each of these scenarios assumes that firearms are to be discharged, not with the intention to kill, but only to stop a suspect . . . ."). *See generally Deadly Force*, supra note 3 (highlighting the importance of using other methods before police officers resort to more deadly types of force, for example firing a firearm at a suspect).

[85] *See The Use-of-Force Continuum*, NAT'L INST. OF JUST. (Aug. 3, 2009), https://nij.ojp.gov/topics/articles/use-force-continuum (referring to the force continuum as "describ[ing] a[n] escalating series of actions an officer may take to resolve a situation"); *see also* Garrett & Stoughton, *supra* note 22, at 270 ("[M]ost force and resistance continua broadly conform to the following pattern.").

[86] *See National Consensus Use of Force Paper*, *supra* note 20, at 2 ("De-escalation may include the use of such techniques as command presence, advisements, warnings, verbal persuasion, and tactical repositioning."). *See also* Garrett & Stoughton, *supra* note 22, at 270 ("A stand-alone force continuum, in other words, tells an officer what force he can use (what use-of-force options are available to him), but a force matrix introduces a resistance continuum to tell him *when* he can use it.").

[87] Garrett & Stoughton, *supra* note 22, at 270-271 (providing the force continuum to explain police and civilian encounters); GENERAL ORDERS MANUAL, LAKE CITY POLICE DEP'T 4-5 (2010), https://perma.cc/2C4H-68G6 (explaining a model use of force continuum to depict peace officer and civilian encounters).

authority, non-physical force); (3) empty-hand techniques (grabbing, holding, punching, or striking); (4) intermediate techniques (e.g. less lethal weapons like a baton, chemical spray, or TASER); and (5) lethal force (e.g. weapons or techniques that are substantially likely to cause serious bodily harm).[88]

iii. *Potential Criticism of the Model Statute*

A common criticism of lethal force statutes that heighten the duty for police officers to use deadly force "only" when necessary, is that police officers are subject to making split-second decisions in the line of duty.[89] The split-second decisions police officers make on the job and the current law make it difficult for police departments to clearly instruct officers on how to reasonably exercise force.[90] However, in order to address this common criticism and provide meaningful guidance, police departments "must go to the same source where every other profession finds standards: within the skills of policing itself, as exemplified in the work of its most highly skilled practitioners."[91]

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[88] Garrett & Stoughton, *supra* note 22, at 270-271 (providing the force continuum to explain responses to police and civilian encounters); *see also The Use-of-Force Continuum*, *supra* note 85 (describing the responses to resolve a situation with police and civilian encounters).

[89] Lee, *supra* note 21, at 672 ("[O]fficers need to make split-second judgments about the amount of force that is necessary in rapidly evolving situations and that, therefore, preseizure conduct is irrelevant to the reasonableness of the officer's use of force."). *See also* Garrett & Stoughton, *supra* note 22, at 218 ("[T]he 'split-second' approach presents obvious problems from the perspective of law enforcement supervisors, who cannot provide meaningful guidance about or oversight of how officers react in the moment in an objectively reasonable way.").

[90] *See* Garrett & Stoughton, *supra* note 22, at 218 ("The resulting doctrine is notoriously opaque and fact dependent, providing little meaningful guidance to police officers and rarely resulting in compensation to persons injured by police officers."). *See also* Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119–20 (2008) (calling the Supreme Court's standard "indeterminate and undertheorized" and "confused").

[91] Garrett & Stoughton, *supra* note 22 at 290-91 ("Unfortunately, in developing training and policies to govern the use of force, many police agencies have turned not to their own best practices or tactics, but to the more flexible and forgiving legal standard adopted by the Supreme Court."). *See generally* Carl B. Klockars, *A Theory of Excessive Force and Its Control*, POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 1, 8 (William A. Geller & Hans Toch eds., 1996) (addressing the issue of police use of excessive force and the ways to improve police training).

D. Additional Recommendations for Peace Officers and Police Departments

Florida, Texas, and other states should invest in police departments that are diverse.[92] This includes the creation of a more racially and gender diverse police department.[93] Women account for a small percentage of police officers. [94] However, policewomen, unlike their male counterparts, are less likely to resort to excessive force.[95] This means that gender parity

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[92] *See* Jen Fifield, *Can Diverse Police Departments Ease Community Tension?*, PBS (Aug. 22, 2016, 9:04 AM), https://www.pbs.org/newshour/nation/can-diverse-police-departments-ease-community-tension ("As police-involved shootings have increased tensions between police and black communities across the country, some law enforcement agencies have put out similar calls for help in hopes of recruiting a more diverse force as one way to re-establish community trust."). *See also* Kirsten Weir, *Policing in Black & White*, 47 AM. PSYCH. ASS'N 36, 36 (Dec. 2016), https://www.apa.org/monitor/2016/12/cover-policing ("There's evidence of racial disparities at many levels of law enforcement, from traffic stops to drug-related arrests to use of force.").

[93] *See* Sounman Hong, *How Racial Diversity Makes Police Forces Better*, WASH. POST (Dec. 5, 2017, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/05/how-racial-diversity-makes-police-forces-better/ ("By discussing how the force treats minority citizens, white officers are more likely to reappraise the force's ethical climate and take responsibility for improving individual and collective integrity."). *See also* Katherine Spillar, *How More Female Police Officers Would Help Stop Police Brutality*, WASH. POST (July 2, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/07/02/how-more-female-police-officers-would-help-stop-police-brutality/ ("[W]omen not only perform the job of policing effectively, but are better able to defuse potentially violent situations . . . .").

[94] *Women Police: The Way Forward*, IMPROVING POLICE (May 27, 2015), https://improvingpolice.blog/2015/05/27/women-police-the-way-forward/ ("[T]he numbers of women police has declined during the past decade and only about 10 percent of our nation's police departments are women 20 percent or more in number."). *See also* Curtis Crooke, *Women in Law Enforcement*, COMMUNITY POLICING DISPATCH (July 2013), https://cops.usdoj.gov/html/dispatch/07-2013/women_in_law_enforcement.asp ("Women comprise only a small percentage of the local law enforcement in agencies across the nation.").

[95] Mindy E. Bergman et al., *A Simple Solution to Policing Problems: Women!*, 9 INDUS. & ORGANIZATIONAL PSYCH. 590, 592 (2016), https://www.icos.umich.edu/sites/default/files/lecturereadinglists/bergman_walker_jean%20%282016%29%20IOP%20women%20policing.pdf ("[C]learly demonstrates that, compared with female officers, male officers (a) are significantly more likely to have the excessive force complaints against them sustained, (b) have significantly higher civil liability payouts, and (c) have a significantly higher rate of citizen complaints made against them."). *See also* Roman, *supra* note 15 (highlighting the importance of increasing the number of policewomen to reduce death caused by police use of lethal force).

in police departments can improve police civilian interactions and reduce the number of deaths caused by the unnecessary use of excessive force.[96]

Additionally, police departments can undertake other measures to improve their departments and comply with the proposed model statute.[97] These measures include but are not limited to: focus on stop, search, ticketing, and arrest practices; improve and increase training; improve peace officer supervision; improve recruiting, hiring, and promotion; and increase civilian involvement in police decision making.[98]

CONCLUSION

Albert Einstein once said that "[p]eace cannot be kept by force. It can only be achieved by understanding."[99] Understanding requires that Florida, Texas, and other states adopt the proposed model statute and redefine the laws that govern the conduct of its peace officers and police departments.[100] A law alone will not remedy the problem of police use of excessive force.[101] However, stricter statutes will incentivize police departments to provide better training to their police officers; foster more accountability for police

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[96] *See* Bergman et al., *supra* note 592 ("In addition to evidence that male officers are more likely to use extreme force than are women officers, the use of *routine* force appears to exhibit similar although much weaker sex differences."). *See also* Roman, *supra* note 15 (emphasizing the importance of policewomen in communities to help mitigate the issues of police brutality).

[97] *See* Marcus, *supra* note 1 (highlighting a number of recommendations aimed at improving police departments and reducing deaths caused by law enforcement's use of deadly force); *see also Deadly Force*, *supra* note 3 (presenting a number of recommendations for all 50 states in the US in order to improve police departments and the use of force).

[98] Marcus, *supra* note 1 (listing recommendations to improve police departments and prevent the unnecessary use of deadly force); *see also Deadly Force*, *supra* note 3 (highlighting key recommendations for all 50 U.S. states in order to meet national and international standards).

[99] ALICE CALAPRICE, THE ULTIMATE QUOTABLE EINSTEIN 252 (2011).

[100] *See, e.g.*, *Law Professor On California's New Police Use-Of-Force Law*, NPR (Aug. 24, 2019, 5:13 PM), https://www.npr.org/2019/08/24/754052321/law-professor-on-california-s-new-police-use-of-force-law ("Just as importantly, though, not only have the standards changed but this law provides significantly more definition about what exactly those standards are that way."). *See, e.g.*, *California's New Law Says Police Can Use Lethal Force Only When 'Necessary'*, *supra* note 50 ("Today, California Governor Gavin Newsom signed into law new rules governing police use of deadly force. The law states that police can use lethal force only when necessary.").

[101] *See* Lee, *supra* note 21, at 638 ("Despite the fact that reforming the law on police use of deadly force may not result in more guilty verdicts, it may encourage police officers on the ground to act with more care before using deadly force, which should be the ultimate goal."). *See also Law Professor On California's New Police Use-Of-Force Law*, *supra* note 100 ("And that means that prosecutors, judges, juries and defense attorneys are going to have to analyze an officer's actions under those new standards.").

officers to operate in a manner consistent with the law; and afford prosecutors a better chance at prosecuting police officers who abuse their power.[102]

[102] *See Law Professor on California's New Police Use-Of-Force Law*, *supra* note 100 ("Because the legal standard has changed, there are different rules that now govern when officers are allowed to use deadly force. And that means that prosecutors, judges, juries and defense attorneys are going to have to analyze an officer's actions under those new standards."). *See also* Lee, *supra* note 21, at 638 ("Even though the changes in the law I am proposing may not have an immediate impact on jury verdicts in officer-involved shooting cases, changing the law may influence what juries do in the long run."). *See generally* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.ab701edd60da (explaining that local prosecutions of police officers for fatally shooting individuals are extremely rare events, and convicting police officers is even rarer).

A Compensation System for Gun Deaths and Injuries

Frank J. Vandall[1]

ABSTRACT

My goal is to construct a compensation program for victims of gun violence. If the victim was killed or suffered serious injury through a negligent or intentional shooting, the survivor recovers stepped compensation. The claimant files a request for compensation with the new Second Amendment Commission.

The financial part of the fund will be constructed from three sources: the federal government, the state government and the NRA coupled with the gun manufacturers. The fund will be administered by the Commission. My proposal does not rest on a finding of fault or blame by the contributors. It rests instead on cause in fact.

At last gun victims will be compensated and receive more than mere condolences by political leaders.

[1] Professor of Law, Emory University School of Law; B.A. 1964, Washington and Jefferson College; J.D. 1967, Vanderbilt University School of Law; L.L.M. 1968, S.J.D. 1979, University of Wisconsin Law School. I appreciate the research assistance of Jordan Nittinger. Mistakes are mine, however.

I accept the following as the facts of the gun violence landscape: 38,826 persons die per year,[2] 1,663 are children,[3] and all meaningful attempts at gun control and safety have failed.[4] There is no meaningful gun control legislation on the horizon.[5] The PLCAA immunizes gun manufacturers and sellers from liability and bars practically all damage suits.[6] There are a few small exceptions.[7]

The NRA's bonding of patriotism to the Second Amendment means a large number of Americans support the NRA and resist all attempts at gun

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[2] *The Facts that Made Us Act*, BRADY CAMPAIGN, http://www.bradycampaign.org/key-gun-violence-statistics (last visited Apr. 2, 2021) (showing that each year approximately 14,062 people are murdered, 23,437 die from gun suicide, 483 are killed unintentionally, 521 are killed by legal intervention, 324 die with intent unknown, and 547 women are killed by a male partner).

[3] *Id.* (showing that each year approximately 864 children are murdered, 662 die from gun suicide, 89 are killed unintentionally, 10 are killed by legal intervention, and 38 die with intent unknown).

[4] *See* Maureen Groppe et al., *Poll: Americans Don't Expect Congress to Act on Gun Laws*, USA TODAY (Sept. 9, 2019, 9:04 AM), https://www.usatoday.com/story/news/politics/2019/09/09/gun-control-most-americans-dont-expect-congress-pass-new-laws/2151086001/.

[5] *See* Sheryl Gay Stolberg, *Background Check Bill Marks Gun Control as a Priority for House Democrats*, N. Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/us/politics/house-democrats-gun-control.html (noting that although House Democrats sought to introduce legislation to increase gun control in the first 100 days as majority of the House, the bill would face adversity when introduced to the Senate and was thus unlikely to pass).

On February 13, 2019 the House Judiciary Committee passed a universal gun purchase background check bill. *House Judiciary Chairman Nadler Lauds Historic House Passage of Charleston Loophole Bill & Bipartisan Background Checks Act*, HOUSE COMM. ON THE JUDICIARY (Feb. 28, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=1382. It requires all gun sellers to perform background checks and appears to apply to sales at gun shows as well as sales by individuals. *Id.* At the Thrower Symposium, I suggested that gun violence could be reduced if guns were insured, registered, and stored in a lock box.

[6] *Other Laws & Policies: Gun Industry Immunity*, GIFFORDS L. CTR., https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/ (last visited Nov. 15, 2018) (noting that in 2005, Congress passed a federal statute that gives gun manufactures and gun dealers ample protection if a victim or family of gun violence attempts to sue one of them for gun violence; this leaves many families without any other source of damages. *See* Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113 (2005)).

[7] GIFFORDS L. CTR., *supra* note 6 (noting that PLCAA provides six broad exceptions to protect gun manufactures: first, if one is convicted for knowingly transferring a firearm; second, an action against a seller for negligence; third, when a manufacturer knowingly violates a state or federal law; fourth, an action for breach of contract related to the gun sale; fifth, an action for death at the cause of a defect in a product; sixth, an action from the Attorney General to one of two gun control acts).

control.[8] Owning a gun is viewed as "American as apple pie" in spite of the danger to self, family and others.[9]

The foundational error by those seeking justice for gun violence has been to resist these truths. Therefore, the key to justice for victims of gun violence is to start with fresh ideas and examine a new approach.

My goal is to construct a compensation system for victims of gun violence: the claimant files a request for compensation with the Second Amendment Commission.[10] If the victim was killed or suffered serious injury through an intentional shooting or one resting on negligence, the survivor recovers $250,000 for death and $85,000 for loss of material function. This is roughly the amounts that survivors received in the Virginia Tech murders.[11] It is comparable to payouts from trusts established by Johns-Manville in the 1980's to compensate asbestos victims.[12]

For example, if "A" died in the Las Vegas type massacre[13], his survivors would recover $250,000; if "B" lost the use of her arm or leg when

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[8] *See* Bob Bryan, *Something Historic is Happening with the Way Americans See the NRA*, BUS. INSIDER (Mar. 21, 2018, 12:55 PM), https://www.businessinsider.com/nra-poll-popularity-favorability-more-americans-dislike-2018-3 (citing a poll in which forty percent of people surveyed report a negative view of the NRA and thirty-seven percent reported a positive view, while in 2017 the NRA had a forty-five percent approval view and thirty-three percent negative view).

[9] Alex Horton, *Only 13 NRA Members Used Delta's Discount. Ending it Cost the Airline a $40 Million Tax Break.*, WASH. POST (Mar. 3, 2018, 11:39 AM), https://www.washingtonpost.com/news/business/wp/2018/03/03/only-13-nra-members-used-deltas-discount-killing-it-cost-the-airline-a-40-million-tax-break/ (quoting the NRA as referring to guns, including the AR-15, as being "as American as apple pie").

[10] *See generally* Ian Urbina, *Virginia Tech Shooting Payments are Announced*, N. Y. TIMES (Aug. 15, 2007), https://www.nytimes.com/2007/08/15/us/15cnd-vatech.html. After the Virginia Tech shootings, a seven-million-dollar fund was dispersed to victims, but the victims had to file claims to receive funds. *Id.* The name of the commission is not critical.

[11] *Id.* (noting that thirty-two victim's families were eligible for $180,000. Injured victims were eligible for $90,000 and tuition waivers. Victims who spent three to ten days in the hospital were eligible for $40,000 in addition to a tuition waiver. People who were not injured but present are eligible for a tuition waiver and $10,000. Victim families were eligible for counseling through the Virginia Injuries Compensation Fund). Recoveries from the 9/11 Fund ranged from $500,000 to approximately $9 million. *See infra* note 12.

[12] Matt Mauney, *Johns Manvilles's Asbestos Legacy*, ASBESTOS.COM, https://www.asbestos.com/companies/johns-manville/ (last visited on Nov. 22, 2018).

[13] Mark Berman, *Las Vegas Police Investigation into Massacre without 'Definitively' Determining What Motivated the Gunman*, WASH. POST (Aug. 3, 2018, 1:28 PM), https://www.washingtonpost.com/news/post-nation/wp/2018/08/03/las-vegas-police-end-investigation-into-massacre-without-definitively-determining-motive/ (reporting that a Las Vegas gunman opened fire at a music festival on October 1, 2017, and killed fifty-eight people, while injuring hundreds).

her neighbor's child shot her, she would recover $85,000. This fund would "kick-in" only if a civil suit was not available for compensation.

The financial part of the fund will be constructed from three sources: the federal government, the state governments, and the NRA coupled with the gun manufacturers.

The fund will be administered by the Second Amendment Commission. The Commission will be composed of three persons: a senior trauma surgeon, a plaintiff's gun victim litigator and the CEO of a large gun manufacturer or gun dealer. They will deal with program implementation issues as they arise and will employ a six person staff. A similar approach was used for the 9/11 Commission[14] and the Virginia Tech compensation program.[15]

The policy underlying this compensation system is that keeping a gun in the home has been held in *D.C. v. Heller* to be a constitutionally protected right.[16] Indeed for many American citizens, the Second Amendment is viewed as a right equivalent to life, liberty, and the pursuit of happiness.[17] There are approximately 393 million guns owned by nearly 50 million U.S. families.[18]

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[14] *National Commission on Terrorist Attacks upon the United States*, https://www.9-11commission.gov/ (last visited on Nov. 22, 2018). A commission of ten commission members and three commission staff members was assembled to prepare recommendations for any potential future terrorist attacks on the United States. *Id.* The commission was created after President George W. Bush signed Public Law 107-306 on November 27, 2002. *Id.* The Commission was organized into groups to discuss eight issues relating to terrorism. *Id.*

[15] Michael Sluss, *Judge Clears Tech Shooting Settlement*, ROANOKE TIMES (June 17, 2008), https://roanoke.com/archive/judge-clears-tech-shooting-settlement/article_c87b6b9e-b97c-5655-9e1d-cb2408a709cb.html. An eleven-million-dollar fund was assembled for nearly twenty-four victims who lost a loved one during the Virginia Tech shootings. *Id.*

[16] *See* D.C. v. Heller, 554 U.S. 570 (2008) (holding that an individual has the right to possess a firearm in the home, including in federal territories such as the District of Columbia). I argue that Heller was wrongly decided because the Second Amendment does not say what Justice Scalia said. His theory of "originalism" should exclude AK 47's and modern pistols. Plessey v. Ferguson 163 U.S. 537 (1896) and Korematsu v. U.S., 323 U.S. 214 (1944) were popular when decided. Over 60 years passed before Plessey was reversed.

[17] *See* Robert Barnes & Dan Eggen, *Supreme Court Affirms Fundamental Right to Bear Arms*, WASH. POST (June 29, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062802134.html?hpid=topnews (explaining that the Supreme Court held in McDonald v. Chicago, 561 U.S. 742 (2010) that the right to keep and bear arms is fundamental).

[18] Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/

Many political leaders appear to be remorseful and distraught over the enormous loss of life from gun violence, but no one is willing to accept blame.[19] My proposal responds to that responsibility vacuum and does not rest on a finding of fault or blame. It rests instead on cause in fact. "Cause in fact" means that the shooting would not have occurred "but for" the lack of regulation. The absence of gun control is a "substantial factor" in the shooting. Because there is no meaningful gun regulation in the U.S., both the federal government and almost all the states are causes in fact of gun deaths (many deaths could have been prevented with appropriate gun safety legislation or regulation). The manufacturers produce the guns and the NRA lobbies to prevent gun control legislation. Therefore, both are joint causes of the losses.

If meaningful legislation was passed, such as required gun insurance, registration, storage, and a ban on automatic weapons, fewer shootings would occur.[20] Since this has not happened, and will not in the foreseeable future, the federal Congress and most of the state legislatures are causes in fact of the carnage. California, New York, New Jersey, and Maryland require "good cause" be shown in order to carry a gun[21] and will not be asked to contribute to the compensation fund.

Nothing in regard to gun control or gun violence will change in the foreseeable future. No meaningful gun safety bills will pass, smart guns will not be required, and gun control will not be at the top of the platform of either party for the 2020 elections. The NRA is one of the most powerful lobbying groups in the country[22] and has been wildly successful in blocking

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(stating that there are more civilian guns distributed in the United States than any of the world's wealthy nations).

[19] *See* Alex Leary, *Trump Sends 'Prayers and Condolences' to Victims of Florida School Shooting, Offers Assistance*, TAMPA BAY TIMES (Feb. 14, 2018), http://www.tampabay.com/florida-politics/buzz/2018/02/14/wh-sends-thoughts-and-prayers-to-victims-of-florida-school-shooting-offers-assistance/ (reporting that government officials who are proponents of the Second Amendment, including Donald Trump and Marco Rubio, used Twitter to communicate their condolences for the victims of the school shooting at Marjory Stoneman Douglas High School in Parkland, Florida).

[20] Margot Sanger-Katz & Quoctrung Bui, *How to Reduce Mass Shooting Deaths? Experts Rank Gun Laws*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/interactive/2017/10/05/upshot/how-to-reduce-mass-shooting-deaths-experts-say-these-gun-laws-could-help.html.

[21] Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. 218, 218 (2014) (discussing that jurisdictions including California, New York, New Jersey, and Maryland require that applicants for public carrying licenses must state a cause. Maryland requires a "good and substantial reason," while New York requires a "special need for self-protection").

[22] *US Gun Control: What Is the NRA and Why Is It So Powerful?*, BBC NEWS (Aug. 6, 2020), https://www.bbc.com/news/world-us-canada-35261394 (noting that the NRA is

all avenues for new gun control legislation, lawsuits, and CDC gun policy research.[23] The nation operates in the dark in regard to gun violence facts because of the NRA ban on CDC gun policy research. This is in contrast to the usual epidemic where CDC produces facts and statistics.[24]

Collectively, we were saddened to hear of the shooting deaths at Columbine,[25] the Aurora Movie Theatre,[26] the murder of infants and teachers at Sandy Hook Elementary,[27] Virginia Tech,[28] Las Vegas[29] and Marjory Stoneman Douglas High School[30]. Senator Marco Rubio and President Trump both prayed for the victims of the shootings.[31] We thought

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not only the most powerful organization to protect the Second Amendment, but is also one of the most powerful lobbying groups).

[23] Brennan Weiss & Skye Gould, *5 Charts that Show How Powerful the NRA Is*, BUS. INSIDER (Feb. 20, 2018, 5:00 PM), https://www.businessinsider.com/nra-power-lobbying-statistics-gun-control-2017-10 (noting that the NRA has blocked many federal actions including an assault weapons ban and government funded research on gun violence).

[24] *See Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html (last visited Jan. 15, 2020).

[25] *Columbine High School Shootings Fast Facts*, CNN (Apr. 3, 2020, 10:50 AM), https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html (explaining that on April 19, 1999, twelve students and one teacher were killed by two gunmen at Columbine High School in Colorado).

[26] Julia Jacobo, *A Look Back at the Aurora, Colorado, Movie Theater Shooting 5 Years Later*, ABC NEWS (Jul. 20, 2017, 6:13 AM), https://abcnews.go.com/US/back-aurora-colorado-movie-theater-shooting-years/story?id=48730066 (explaining that on July 20, 2012, a gunman murdered twelve and injured seventy at a movie theatre).

[27] Michael Ray, *Sandy Hook Elementary School Shooting*, BRITANNICA (Dec. 7, 2020), https://www.britannica.com/event/Newtown-shootings-of-2012 (explaining that on December 14, 2012, a gunman killed twenty-eight people in a Connecticut elementary school).

[28] Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html (explaining that a shooter killed thirty-three people in a Virginia Tech academic building in 2007).

[29] Kieran Corcoran, Sinéad Baker & David Choi, *The FBI Has Closed Its Investigation of the Las Vegas Mass Shooting that Killed 58 People and Injured Hundreds More. Here's Exactly How the Nation's Worst Modern Gun Massacre Unfolded*, BUS. INSIDER (Jan. 29, 2019, 4:35 PM), https://www.businessinsider.com/timeline-shows-exactly-how-the-las-vegas-massacre-unfolded-2018-9 (reporting that the deadliest shooting in modern American history occurred on October 1, 2017 at a Las Vegas music festival, killing 58 people and injuring 850).

[30] Tonya Alanez et al., *Two Decades after Columbine and Five Years after Sandy Hook, Educators and Police Still Weren't Ready for Parkland*, SUN SENTINEL (Dec. 28, 2018), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/sfl-florida-school-shooting-timeline-20180424-htmlstory.html (explaining that on February 14, 2018, a gunman entered a Florida high school and killed seventeen people).

[31] Jennifer Sangalang, *Florida School Shooting: Student's Trump Tweet 'I Don't Want Your Condolences' Goes Viral*, FLA. TODAY (Feb. 16, 2018, 2:47 PM),

that certainly the shooting of Representative Gabby Giffords would lead to meaningful legislation to end gun violence.[32] We were wrong to expect a legislative solution, and the proposed compensation program is at present the only viable option.

A key issue is identifying the sources of financing for the proposed compensation plan. Three sources will be tapped. First, the Federal Government—before the dust had settled after 9/11, a fund was in place to compensate those injured at the Trade Center by the acts of terrorists on 9/11.[33] The funds came from Congress with no limits and no debate.[34] The purpose was to provide compensation to victims and to protect the airlines from lawsuits.[35]

Since gun-violence is an American phenomenon, and arguably a cost of the Second Amendment, all Americans will contribute through the federal and state governments' shares. Gun violence is not going away.[36] More people are intentionally shot in the U.S. than the total of those shot in Australia, China, Cuba, England, France, Germany, Japan, and Russia.[37] Congress has passed no meaningful legislation to reduce gun violence. Civil

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https://www.floridatoday.com/story/news/2018/02/15/florida-school-shooting-viral-trump-tweet/340395002/ (reporting that President Trump and Marco Rubio communicated condolences to victims of the Parkland shooting, but this was thought to be ill received by some of the Parkland, Florida community, including high school students).

[32] Gabrielle Giffords, *Getting Shot Seven Years Ago Gave Me Courage to Fight Gun Violence: Gabby Giffords*, USA TODAY (Jan. 8, 2018, 10:48 AM), https://www.usatoday.com/story/opinion/2018/01/08/seven-years-after-being-shot-were-still-standing-up-gun-lobby-gabby-giffords-column/1011400001/ (reporting that Gabby Giffords, Arizona politician, is a gun violence survivor after being shot at community event in 2011).

[33] Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sept. 7, 2011, 9:38 AM), https://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/index.htm (reporting that eleven days after the terrorist attacks, Congress created a $7 billion fund for nearly 6,000 family members of people who were killed).

[34] *See id.* (explaining that the fund was unique because lawmakers from all sides of politics came together to address the magnitude of the 9/11 violence).

[35] *Id. See also* Kimberly Amadeo, *How the 9/11 Attacks Affect the Economy Today: What Is Their Lasting Damage?*, THE BALANCE (Feb. 23, 2021), https://www.thebalance.com/how-the-9-11-attacks-still-affect-the-economy-today-3305536 (reporting that the airline industry lost nearly $5 billion after the 9/11 attacks, the stock market plummeted, and nearly 3,000 people died).

[36] *See* Sean Gregory & Chris Wilson, *6 Real Ways We Can Reduce Gun Violence in America*, TIME (Mar. 22, 2018, 6:29 AM), http://time.com/5209901/gun-violence-america-reduction/ (claiming that an American is 25 times more likely to be a victim of gun violence than in other developed and wealthy countries).

[37] *See id.* (stating that the United States has the highest rate of gun violence, higher than any other developed country).

suits against gun manufacturers and sellers would reduce gun violence. However, Congress passed the Protection of the Lawful Commerce in Arms Act (PLCAA) to immunize gun sellers from litigation, so this source is closed.[38]

Not all states will be requested to pay the same amount. The financial contribution requested from each state will depend on the incidence of gun violence within its borders.[39] Gun violence can occur at any time, in any place.[40] Looking at a map of the U.S., gun violence is concentrated along the southern, southeastern and eastern borders.[41] Alaska has the highest percent of gun deaths and Massachusetts has the lowest percentage of gun deaths, however.[42] The cities with the highest rates of total gun related deaths are New Orleans, Detroit, Las Vegas, Miami, Baltimore, and St. Louis.[43] Their contributions to the fund will be substantial.

Gun violence is not a part of the culture of California, Oregon, Washington, North and South Dakota, Wisconsin and Minnesota.[44] Nor are

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[38] David Kopel, *The Protection of Lawful Commerce in Arms: Fast Facts and Policy*, WASH. POST (May 24, 2016, 6:52 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/?noredirect=on&utm_term=.269ca4f5c747 (reporting that Hillary Clinton was quoted saying that the passage of this law would garner gun owners "absolute control"); s*ee* Vandall, *supra* note 6, at 113.

[39] *See generally* Thomas C. Frohlich & John Harrington, *States with the Most (and Least) Gun Violence*, USA TODAY (Feb. 21, 2018, 2:12 PM), https://www.usatoday.com/story/news/nation/2018/02/21/states-most-and-least-gun-violence-see-where-your-state-stacks-up/359395002/ (reporting that Massachusetts has the fewest deaths by gun violence per capita with 3.4 deaths per 100,000 people, caused by firearms. Alaska has the most gun violence with 23 deaths per 100,000 caused by firearms).

[40] *See* Brian Resnick & Javier Zarracina, *This Cartoon Explains Why Predicting a Mass Shooting is Impossible*, Vox (Aug. 5, 2019, 11:14 AM), https://www.vox.com/science-and-health/2018/2/22/17041080/predict-mass-shooting-warning-sign-research (reporting that the only personal factors that correlate to mass shooters in the United States are the qualities of being young and male. Other indicators of who would be the instigator of a mass shooting are difficult to assess, indicate, and predict).

[41] *See* Richard Florida, *The Geography of U.S. Gun Violence*, CITY LAB (Dec. 14, 2012, 12:23 PM), https://www.bloomberg.com/news/articles/2012-12-14/the-geography-of-u-s-gun-violence (reporting that the cities with the highest rates of gun related deaths per 100,000 people in 2011 were New Orleans, Detroit, Las Vegas, Miami, and Baltimore).

[42] Frohlich & Harrington, *supra* note 39.

[43] Samuel Stebbins, *Cities with the Most Gun Violence*, 24/7 WALL ST. (Aug. 4, 2019, 7:51 AM), https://247wallst.com/special-report/2018/11/13/cities-with-the-most-gun-violence/ (explaining that the cities were measured by population and amount of gun related deaths per 100,000 people).

[44] *See* Florida, *supra* note 41 (reporting that cities with comparatively low gun violence per 100,000 people included San Jose, San Diego, Portland, Seattle, and Minneapolis).

the states in the center of the nation especially violent, with a few exceptions, such as St. Louis.[45]

The NRA and the gun manufacturers will also be asked to contribute to the fund. Economic theory rests on the free market. But for the free market to work, profit motivated companies must be running efficiently.[46] Guns are artificially cheap because their price does not reflect all of their costs nor the damage they cause.[47] Cigarettes were cheap until 1996, because the damages tobacco caused was passed on to the states.[48] The cost of treating people with cancer caused by tobacco was at least 206 billion dollars and was borne by the states who provided care for the victims.[49]

The same is true with guns. They are cheap because the damages are passed onto the state and local governments.[50] Cities treat the wounded after the shootings. The cost of gun violence to taxpayers is about $299 billion per year.[51] Cities clean up the shooting venues and make renovations to the sites of shootings, such as Sandy Hook Elementary School[52] and the

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[45] *See* Florida, *supra* note 41

[46] *See* Greg Depersio, *What are Some Examples of Free Market Economies?*, INVESTOPEDIA (Mar. 6, 2020), https://www.investopedia.com/ask/answers/040915/what-are-some-examples-free-market-economies.asp (suggesting that supply and demand regulate the price of a product in a free market economy. The goal of a free market system is that profit motivated companies to run as efficiently to avoid a loss in market share).

[47] *See* CAROL X. VIZANT, LAWYERS, GUNS, AND MONEY: ONE MAN'S BATTLE WITH THE GUN INDUSTRY 194 (2005) (suggesting that cheap guns increase crime).

[48] *See Tobacco Tax Initiative*, CTRS. FOR DISEASE CONTROL (Mar. 21, 1997), https://www.cdc.gov/mmwr/preview/mmwrhtml/00047031.htm (illustrating that in 1997 Oregon raised the tax on tobacco products from 35% to 65% of the wholesale price due to the public health costs of tobacco use).

[49] *Who Is Really Benefiting from the Tobacco Settlement Money?*, AM. LUNG ASS'N (Feb. 3, 2016), https://www.lung.org/about-us/blog/2016/02/who-benefit-tobacco-settlement.html (explaining that the Tobacco Master Settlement Agreement forced states to provide annual payouts for Americans who had smoking-related diseases; the settlement was nearly $206 billion for the first 25 years and will continue indefinitely); *see* Frank J. Vandall, *The Legal Theory and the Visionaries That Led to the Proposed $368.5 Billion Tobacco Settlement*, 27 SOUTHWESTERN U. L. REV. 473 (1998).

[50] Natasha Bertrand, *A Breakdown of the $299 Billion Gun Violence Tab That American Taxpayers Are Paying Every Year*, BUS. INSIDER (Apr. 24, 2015, 11:00 AM), https://www.businessinsider.com/gun-violence-costs-america-more-than-229-billion-every-year-2015-4 (explaining that taxpayers pay nearly $13 million to cover the costs of incidents involving gun violence).

[51] *Id.* (reporting that a victim of gun violence stated that her medical bills were nearly $5 million. Legal fees can be millions of dollars; for example, the Aurora shooting court fees were near $5.5 million).

[52] Patrick Sisson, *Sandy Hook Elementary School Design Finds Safety, Security in Openness*, CURBED (Feb. 22, 2018, 3:42 PM), https://www.curbed.com/2018/2/22/17042004/sandy-hook-elementary-school-design-

Century 21 movie theatre in Aurora, Colorado.[53] The dangerous neighborhoods pay lower taxes because of gun violence.[54] The impact of this is that the safer communities pay more.

This cost of gun violence is borne by the citizens of the states and cities.[55] These hidden costs should be transparent and reflected in gun prices.[56] My proposal, in shifting some of the cost to the gun manufacturers, would help to price guns more accurately. This would assist to make the market for guns work efficiently. Gun prices would increase (as did the price of cigarettes) to reflect the cost of gun violence.[57] The market for guns would then begin to function efficiently.

There are several important benefits to the proposed compensation plan:

1. The Second Amendment remains unaffected as does *D.C. v. Heller*. Indeed, it could take perhaps 62 years to realize the flaw in *D.C. v. Heller* as it did with the racial discrimination "separate but equal" touted in *Plessy v. Ferguson*, 163 U.S. 541 (1896).

2. The PLCAA is untouched, and Congress is respected. The PLCAA's prohibition of gun suits will be left intact.

3. Most importantly, victims will be compensated. Attorneys aren't required to fill out the forms or craft suits. Litigation is not required. Victims may hire attorneys if they wish, however. Thus, almost all of the fund goes to the victims.

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security-safety (stating that the state gave Sandy Hook Elementary a $50 million grant to build a new elementary school after a gunman killed students and a teacher).

[53] Brandon Johansson, *Century 16 Redesign Plans Unveiled*, SENTINEL COLORADO (Oct. 18, 2012), https://www.sentinelcolorado.com/news/century-16-redesign-plans-unveiled/ (reporting that city documents showed that Aurora paid for nearly $950,000 in renovations, after a gunman entered an Aurora movie theatre and killed 12 people).

[54] *See Strategies for Reducing Gun Violence in American Cities*, EVERYTOWN (June 6, 2016), https://everytownresearch.org/reports/strategies-for-reducing-gun-violence-in-american-cities/#foot_note_anchor_9 (showing that for every one homicide that occurs in an area with low tax revenue, 70 residents leave the area, which makes neighborhoods with low taxes even more sparse).

[55] Aimee Picchi, *Can the U.S. Afford the Massive Cost of Gun Violence?*, CBS NEWS (Oct. 4, 2017, 5:00 AM), https://www.cbsnews.com/news/las-vegas-shooting-gun-violence-economic-costs/ (reporting that one study found that an annual amount of gun violence is $100 billion).

[56] *See* Jay Willis, *Owning a Gun in America Is a Luxury*, GENTLEMAN Q. (Apr. 30, 2018), https://www.gq.com/story/gun-ownership-cost (explaining that a 9-millimeter handgun, which is a standard first-time gun, ranges from $500 to $650, not including a background check or license).

[57] *See* Vandall, *supra* note 49.

4. The NRA and gun manufacturers will remain in a preeminent position of legislative control through lobbying and other acts designed to corral legislators, preventing gun safety.

The proposal rests on substantial legal precedent. First is the sourcing of the fund. At the federal level, the precedent for the funds is the 9/11 Victims Compensation Fund.[58] As noted above, these funds were provided by congress to compensate the 9/11 victims and to prevent suits against the airlines.[59] At the state level, emergencies are funded on the spot. The response to the flooding in Mexico Beach and Panama City Florida in October 2018 was funded in part by Florida and the federal government.[60] No questions were asked whether relief would be provided. Relief during a natural emergency is one of the core purposes of the Department of Homeland Security.[61] Indeed, it is a respected purpose of the U.S. government to assist in reconstruction when parts of the country have been destroyed during a natural disaster.[62] War is funded by Congress as needed.[63] It is no leap to argue that the murder of over 14,000[64] Americans

[58] Aaron Katersky, *Fund Created to Compensate Sick Survivors of 9/11 May Run Out of Money*, ABC NEWS (Oct. 2, 2018, 5:44 PM), https://abcnews.go.com/US/fund-created-compensate-sick-survivors-911-run-money/story?id=58239335 (citing Congress set aside $7 billion to compensate sick victims of the 9/11 terrorist attacks).

[59] *See generally* Gabi Logan, *The Effects of 9/11 on the Airline Industry*, USA TODAY (Apr. 24, 2018), https://traveltips.usatoday.com/effects-911-airline-industry-63890.html (outlining how airlines suffered a loss of passenger demand, and experienced bankruptcy and exponential lay-offs).

[60] *See Federal Disaster Assistance for Hurricane Michael Tops $300 Million in Florida*, INS. NEWS NET (Nov. 13, 2018), https://insurancenewsnet.com/oarticle/fema-federal-disaster-assistance-for-hurricane-michael-in-florida-tops-300-million (describing that the Hurricane Michael disaster relief was ongoing and helped rebuild affected communities).

[61] *Disasters*, DEP'T HOMELAND SEC., https://www.dhs.gov/topic/disasters (last visited Feb. 11, 2021). Homeland Security has assisted in responding to a range of disasters, which started with the terrorist attacks on 9/11. *Id.* Homeland Security provides training to responders and works with the local government affected by the disaster. *Id.*

[62] Rocio Cara Labrador & Amelia Cheatham, *U.S. Disaster Relief at Home and Abroad*, COUNCIL ON FOREIGN RELS. (Sept. 21, 2020, 8:00 AM), https://www.cfr.org/backgrounder/us-disaster-relief-home-and-abroad (describing how, when a large scale disaster occurs, the President has the ability to make an emergency or disaster declaration which cues both monetary and physical assistance to the area of need).

[63] *See* Steven Aftergood & Neta C. Crawford *U.S. Federal and State Budgets*, WATSON INST., https://watson.brown.edu/costsofwar/costs/economic/budget (last updated Sept. 2016) (stating that Congress spent $1.7 trillion to fund combat and international assistance in 2016).

[64] *National Center for Health Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/homicide.htm (last visited Mar. 6, 2021).

each year is a national disaster and constitutes an emergency calling for financial assistance from Congress.

The request for funds from Congress is similar to a Special Bill or Private Law. There, a representative asks Congress to compensate a person for a specific loss.[65] The following are examples:

1. In 1987, then-representative Dick Cheney enacted a special law which ordered the government to pay Lawrence K. Lunt compensation for losses he incurred while imprisoned in Cuba.[66]

2. In 2005, Colorado representatives and senators persuaded Congress to pass the Betty Dick Residence Protection Act, a special bill which allowed an elderly woman to live in a cabin and resist eviction by the Rocky Mountain National Park Service.[67]

3. In 1983, a special bill was passed to assist sixteen employees of the Charleston Naval Shipyard who were paid extra funds due to an administrative mistake. They were permitted to keep the money due to the bill.[68]

There is substantial precedent for large compensation plans. Specifically, there are four important precedents for the Second Amendment Fund:

1. 9/11 – Each person injured during 9/11 was able to recover a speedy and substantial settlement. Congress provided the funds.[69]

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[65] *Public and Private Laws*, U.S. GOV'T. PUBL'G OFF. https://www.gpo.gov/help/about_public_and_private_laws.htm (last updated Mar. 18, 2021) (detailing how a private law is directed at a small and specific group of people who have been injured by government programs).

[66] Devin Dwyer, *Looking for a Bailout? Just Call Your Congressman*, ABC NEWS (Nov. 4, 2009, 10:48 AM), https://abcnews.go.com/Politics/congress-private-laws-bailout-americans-special-cases/story?id=8995047 (discussing how Lunt was imprisoned in Cuba for spying for the United States).

[67] Steve Lipsher & Claire Martin, *Cancer Claims Victor in Park Cabin Battle*, DENVER POST (May 8, 2016, 1:34 AM), https://www.denverpost.com/2006/11/14/cancer-claims-victor-in-park-cabin-battle/ (explaining that Betty Dick lived in a cabin in Rocky National Park and refused to leave when National Park Service attempted to evict her from the house).

[68] Dwyer, *supra* note 66.

[69] *About the Victim Compensation Fund*, SEPTEMBER 11TH VICTIM COMPENSATION FUND, https://www.vcf.gov/about (last visited Feb. 11, 2021) (detailing how this fund

2. BP – Money was allocated to businesses affected by the BP oil spill.[70] States also received compensation from BP for beach damage and the loss of tourists.[71] BP provided the funds.
3. VW Fraud – VW compensated owners for the loss in resale value of VW diesel cars (diminished value).[72] The corporation had actively defrauded the U.S. emission program.[73]

4. Virginia Tech – The University put in place a compensation system for the survivors of those who were shot.[74]

The alternative, if this compensation plan does not pass federal and targeted state governments, is that each state can pass it separately. With gun violence resulting in 15,000 deaths per year, an emergency exists for the victims[75]. The money contributed to the Second Amendment

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was created for anyone who suffered an injury or lost a loved one from the 9/11 terrorist attack). Claims could be filed until December 18, 2020. *Id.*

[70] Kevin McGill et al., *BP Will Pay $18.7 Billion to States Affected by 2010 Deepwater Horizon Oil Spill*, BUS. INSIDER (July 3, 2015, 7:36 AM), https://www.businessinsider.com/bp-will-pay-187-billion-to-states-affected-by-2010-deepwater-horizon-oil-spill-2015-7 (stating that BP paid $18.7 billion to Louisiana, Mississippi, Alabama, Texas, and Florida as a result of the oil spill and the harm on the states' economies).

[71] Kimberly Amadeo, *BP Oil Spill Economic Impact*, THE BALANCE (July 6, 2020), https://www.thebalance.com/bp-gulf-oil-spill-facts-economic-impact-3306212 (describing how ten million pounds of oil residue were collected on the coast of Louisiana, Alabama, Mississippi, and Florida and had immense impact on wildlife).

[72] Jeff S. Bartlett et al., *Guide to the Volkswagen Emissions Recall*, CONSUMER REPS. (Oct. 23, 2017), https://www.consumerreports.org/cro/cars/guide-to-the-volkswagen-dieselgate-emissions-recall- (stating that VW cheated nearly 550,000 cars and compensated affected consumers with a $14.7 billion settlement).

[73] Nick Carey, *VW Executive Gets Seven Years for U.S. Emissions Fraud*, REUTERS (Dec. 6, 2017, 8:13 AM), https://www.reuters.com/article/us-volkswagen-emissions/vw-executive-gets-seven-years-for-u-s-emissions-fraud-idUSKBN1E01W1 (discussing how executives at VW were found guilty of a diesel emissions scandal in which they lied to consumers). These three programs were ably administered by the same person, Ken Feinberg. Danielle Ivory, *VW Names Kenneth Feinberg to Oversee Fund for Claims on Emissions Deception*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/business/ken-feinberg-vw-lawsuit-compensation-fund.html.

[74] *See* Urbina, *supra* note 10.

[75] *Gun Violence Archive 2021*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/ (last visited Feb. 11, 2021) (noting that the total amount of deaths by firearm is 13,253 and the total number of incidents is 51,667); *see*

Compensation Fund is the economic cost of the Second Amendment. No argument has been put forward that owning a gun should be cost free.

The request for aid from the NRA and the gun manufacturers is based on patriotism.[76] The NRA argues that it protects the core value of the country: self-defense, but gun victims have been left uncompensated. For the past two decades, the NRA has spent $203.2 million on political activities[77] and the annual revenue of American gun manufacturers is $13.5 billion, with a $1.5 billion profit.[78] The NRA and the gun manufacturers have no predators.[79] All attempts to rein in or regulate the sale of guns have failed. The NRA has successfully wrapped itself in the flag. Indeed, numerous guns are sold at Walmart and Dick's Sporting Goods. Dick's does not sell rapid fire guns anymore, because the gunman responsible for the shooting at Marjory Stoneman Douglas High School acquired his assault weapon at the nearby Dick's.[80] There are, in fact, more gun stores in the U.S. than the combination of McDonalds and Starbucks.[81] When asked as

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generally Harry Enten, *There's a Gun for Every American. But Less than a Third Own Guns*, CNN POL. (Feb. 15, 2018, 6:02 PM), https://www.cnn.com/2018/02/15/politics/guns-dont-know-how-many-america/index.html (discussing how, although the law does not allow for a database for people to register his or her guns, surveys revealed that 42% of the United States lives in a household that has guns in the home). Handguns are the most common type of gun, but most gun owners own a variety of guns. *Id.*

[76] *See About the NRA Foundation*, NRA FOUND., https://www.nrafoundation.org/about-us/ (last visited Feb. 11, 2021) (stating that the NRA's mission is to teach freedom, remain steadfast in American traditions, and protect the second amendment rights of Americans).

[77] Louis Jacobson, *Counting up How Much the NRA Spends on Campaigns and Lobbying*, POLITIFACT (Oct. 11, 2017), https://www.politifact.com/truth-o-meter/article/2017/oct/11/counting-up-how-much-nra-spends/ (explaining that political events include political party contributions, political candidate contributions, independent expenditures, and lobbying efforts).

[78] Ben Popken, *America's Gun Business, by the Numbers*, CNBC (Oct. 2, 2015, 3:58 PM), https://www.cnbc.com/2015/10/02/americas-gun-business-by-the-numbers.html.

[79] *See* Nick Wing, *U.S. Gun Companies Manufactured a Record 11 Million Firearms in 2016*, HUFFPOST (Feb. 9, 2018), https://www.huffingtonpost.com/entry/gun-manufacturing-2016_us_5a74c4a3e4b06ee97af2799c (detailing how the Annual Firearms Manufacturing and Export Report states that about 550,000 guns were manufactured in the U.S. and exported, while about 11,000,000 were manufactured in the U.S. and put into domestic commerce; these amounts have doubled since 2009).

[80] Grace Donnelly, *Kroger, Walmart, and Dick's Changed How They Sell Guns, but Here's Why it May Not Make a Difference*, FORTUNE (Mar. 1, 2018, 10:32 AM), http://fortune.com/2018/03/01/kroger-gun-sales-walmart-dicks-cabelas/ (stating that Walmart made the minimum age to buy a gun twenty-one and Dick's Sporting Goods eliminated the sale of assault-style weapons).

[81] Leanna Garfield, *There Are 50,000 More Gun Shops than McDonald's in the US*, BUS. INSIDER (Oct. 6, 2017, 10:43 AM), https://www.businessinsider.com/gun-dealers-stores-

loyal Americans, the NRA and gun manufacturers will pay their fair share because they benefit from gun sales and realize that they caused many of the gun related problems. Merely because owning a gun is now interpreted as being protected by the Second Amendment, does not mean there are no costs involved. The costs are there. There is no justice in permitting gun violence costs to be placed on innocent persons—willy nilly. Being insulated from suit by the PLCAA does not mean that the gun sellers are not causally responsible for the deaths.

Contributing to the fund is voluntary. At the federal level, Congress will be asked to contribute. At the state level, each targeted state will be asked to provide their share. In regard to the NRA and gun manufacturers, they will also be asked to contribute to the fund.

I anticipate a response that the proposal will not work based on the thinness of precedent.[82] The point of the paper is to show that the President, Marco Rubio, the U.S. Congress and the state legislature don't really care about the costs due to gun violence. My purpose is to make clear that the gun violence epidemic is not about feelings ("in my heart") or religion ("my prayers"); it is about maximizing gun sales. The NRA controls the President,[83] Congress[84] and the state legislatures,[85] and gun manufacturers

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mcdonalds-las-vegas-shooting-2017-10 (describing how, in the United States, there are 14,146 McDonald's and 64,417 firearm dealers).

[82] Rebecca Shabad, *Why More than 100 Gun Control Proposals in Congress Since 2011 Have Failed*, CBS NEWS (June 20, 2016, 6:00 AM), https://www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/ (stating that 100 gun control proposals were been suggested by politicians from 2011 to 2016, yet failed to be passed into law).

[83] *See* Debbie Lord, *Who are the Top 10 Recipients of NRA Money*?, ATLANTA J. CONST. (Feb. 28, 2018), https://www.ajc.com/news/national/senators-house-members-who-offered-condolences-after-shooting-called-out-for-donations-from-nra/tpitHXUY9jDH3pr4f7f7cM/ (explaining that the NRA donated over $30 million toward Donald Trump's 2016 campaign for president of the United States).

[84] *See* Aaron Kessler, *Why the NRA Is So Powerful on Capitol Hill, by the Numbers*, CNN POL. (Feb. 23, 2018, 2:12 PM), https://www.cnn.com/2018/02/23/politics/nra-political-money-clout/index.html. The NRA gives a substantial amount of congressmen contributions. *Id.* They donated $1,000,000 or more to eight congressmen, $100,000 or more to 39 congressmen, $25,000 or more to 128 congressmen, $10,000 or more to 202 congressmen, while 307 more Congressmen received some type of contribution from the NRA. *Id.*

[85] *See* Terry Gross, *NRA-Backed Gun Laws Have Found Success in State Legislatures Across the U.S.*, N.H. PUB. RADIO (Oct. 10, 2017, 1:30 PM), https://www.nhpr.org/post/nra-backed-gun-laws-have-found-success-state-legislatures-across-us#stream/0 (describing how over the past decade, the NRA has successfully blocked gun restrictions in state legislatures by spending millions of dollars and gaining the support of state legislators who support NRA's mission to normalize gun use in the U.S.).

control the NRA.[86] Gun manufacturers are making huge profits selling guns and they want to keep them.[87] Keep them all. This is the true manifestation of American justice in regard to gun violence. The gun manufacturers are in charge, not our elected officials, and the goal is to maximize profits. The compensation plan provides a means for those who have caused the gun violence tragedy to provide some justice for the victims.

[86] *See Gun Industry Financial Support of NRA*, VIOLENCE POL'Y CTR., http://vpc.org/investigating-the-gun-lobby/blood-money/ (last visited Feb. 11, 2021) (explaining that, although the NRA has long denied that gun manufacturers control decisions, studies show the NRA has received money from its gun industry "corporate partners").

[87] VAL ATKINSON, DISTRACTIONS, DISTORTIONS, DECEPTIONS, AND OUTRIGHT LIES 9-15 (2018). Gun manufacturers make profits—they use these profits to make donations to the NRA. *Id.*

Bias Within Bias: How Washington General Rule 37 Addresses Disguised Racial Discrimination in Jury Selection and a Blueprint for Rule 37's Nationwide Implementation in All American Courtrooms

By: R. Allyce Bailey*

INTRODUCTION

In a trial by jury, the attorneys for each side are the initial gatekeepers to the jury box afforded the limited opportunity to strike, without a particular reason, a certain amount of individuals from jury service. The Supreme Court in *Batson v. Kentucky*[1] and *Edmonson v. Leesville Concrete Co.*[2] attempted to prevent lawyers from racially discriminating against potential jurors with the use of these peremptory challenges as they are called. However, modern case results show that *Batson's* and *Edmonson's* good intentions have failed in reality. While the Court's decisions in *Batson* and *Edmonson* endeavored to eradicate racial discrimination in the exercise of peremptory challenges, routinely, the rationale for the strikes offered by litigators often still has an inadvertent discriminatory effect as many of the justifications are rooted in issues that are more commonly associated with minorities or overwhelmingly affect marginalized populations at disproportionately higher rates. Our court system fails to uphold the notion of justice for all by impinging on the federally protected civil right of citizens to serve as jurors, thwarts criminal defendants' constitutional right to a fair trial and jury of their peers, and inhibits access to justice in civil litigation when otherwise qualified jurors are excluded from jury service for living in a higher crime neighborhood, appearing to have "an attitude," or expressing a distrust of law enforcement.

This article explores the failed intent of the *Batson* Challenge and provides a primer on implicit bias. Additionally, the article explores the hidden race-based justifications offered to overcome a *Batson* Challenge and how these issues are historically associated with minorities and marginalized groups. Finally, the article addresses why this issue unbalances the scales of justice in both criminal and civil litigation and

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

applauds Washington General Rule 37 for its efficacy in addressing the issue and urging for its nationwide implementation.

Section One of this article will explain the peremptory challenge and explore *Batson's* and *Edmonson's* failed attempts to eradicate discriminatory practices in jury selection in criminal and civil trials respectively. Section Two will provide an overview of implicit bias and provide examples relevant to litigation. Section Three will explore the hidden race-based justifications offered to overcome a *Batson* Challenge and the statistics that support how these issues are historically associated with minorities. Section IV will explore the often misunderstood concept of "a jury of one's peers" and will address why the issue of implicit bias in jury selection unbalances the scales of justice in both criminal and civil litigation. Section V examines the efficacy of Washington General Rule 37 and urges for its nationwide implementation.

I. THE PEREMPTORY CHALLENGE

In a trial by jury, the attorneys for each side are the initial gatekeepers to the jury box afforded the limited opportunity to strike a certain number of individuals from service on that particular jury without cause.[3] However, there are some issues that will cause a juror to be stricken from a jury irrespective of the amount of strikes still within a party's play. For instance, a potential juror that has admitted their inability to be fair or impartial during deliberation, or is prejudiced due to a relationship with someone involved in the case must be stricken for cause if the issue is brought to the court's attention.[4]

Contrarily, each side is also afforded the controversial peremptory strike or peremptory challenge which allows a party to strike a juror without cause or without stating the specific reason why the party desires to exclude that party from jury service.[5] Despite the fact that the striking party does not have to disclose their logic behind their peremptory strike, idealistically, such strikes are not supposed to be used to discriminate against potential jurors on the grounds of race, ethnicity, or sex.[6] With no rule absolute of faulty application, jurisprudence birthed the *Batson* Challenge in an effort to curb any discriminatory application of peremptory challenges.[7] A *Batson*

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[3]Jennifer K. Robbennolt & Matthew Taskin, *Jury Selection, Peremptory Challenges and Discrimination*, 40 AM. PSYCH. ASS'N 18 (2009), https://www.apa.org/monitor/2009/01/jn.

[4]*Id.*

[5] *Peremptory Challenge*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/peremptory_challenge (last visited Apr. 13, 2020).

[6] *Id.*

[7] *Batson Challenge*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/batson_challenge (last visited Apr. 13, 2020).

Challenge is "[a]n objection to the validity of a peremptory challenge on grounds that the other party used it to exclude a potential juror based on race, ethnicity, or sex."[8] If the court finds that the party's use of a peremptory challenge was grounded in racial, ethnic, or sexual discrimination, such activity is considered unconstitutional and may result in a new trial in both criminal and civil court.[9]

A. *Batson v. Kentucky*

In the 1980's, James Kirkland Batson was convicted by an all-White Kentucky state court jury on charges of second-degree burglary and receipt of stolen goods.[10] During jury selection, the prosecution struck all four of the only black veniremen leaving Batson with an all-White purported jury of his peers.[11] At the initial criminal trial, Batson's defense attorney moved to have the jury discharged alleging that the prosecution had purposefully rid the jury of black jurors which he argued violated Batson's Sixth Amendment right to a jury of his peers pulled from a cross section of the community and his Fourteenth Amendment right to equal protection under the laws.[12] At the time, no jurisprudence or court rules stood on the books to address any alleged discriminatory practices in jury selection. Accordingly, the trial judge concluded that the prosecutor was entitled to "strike anybody they want to."[13] The jury of twelve White Kentuckians unanimously convicted Batson on both charges, and despite appeals based on the arguably discriminatory jury strikes, these convictions were upheld by every Kentucky court before reaching the Supreme Court of the United States.[14]

Upon uncovering the discriminatory effect of the peremptory challenges exercised during the *Batson* trial, SCOTUS birthed the *Batson* Challenge, holding that the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[15] Post *Batson*, trial lawyers are now subject to reasonable scrutiny in exercising their peremptory strikes in an effort to curb racial discrimination. Those accused of such discriminatory practices could find themselves subject to a Batson Challenge in which the court would apply the following test:

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[8] *Id.*
[9] *Id.*
[10] *Batson*, 476 U.S. at 82.
[11] *Id.* at 83.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 83-84.
[15] *Id.* at 85.

First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.[16]

B. *Edmonson v. Leesville-Concrete*

Reaching the logical conclusion that "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial," the Supreme Court extended the precedent set in *Batson* to civil litigation.[17] Construction worker Thaddeus Donald Edmonson sued his employer, Leesville Concrete, after being injured on the job as the result of a cement truck rolling backward and pinning him under construction equipment.[18] At the trial of the case, the defense exercised two of its peremptory strikes to strike two black potential jurors.[19] Speculating that the strikes may have been racially motivated, plaintiff's counsel cited the *Batson* Court and moved that the court require the defense to provide racially neutral justifications for the strikes.[20] The court denied the request on the grounds that *Batson* did not extend to the civil context.[21] The striking of the two black potential jurors left Edmonson with a jury over 90% White with only one Black juror, a jury that found the plaintiff 80% at fault for his own injuries.[22] The Supreme Court eventually recognized the impropriety of racial bias in the courtroom, and held that the race-based exclusion of otherwise qualified jurors violates the equal protection rights of the challenged jurors even in civil litigation and remanded the case for further consideration.[23] The following year the Supreme Court recognized that, "[a]s a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."[24]

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[16] Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003) (internal citation omitted).
[17] *Edmonson*, 500 U.S. at 619.
[18] *Id.* at 616.
[19] *Id.*
[20] *Id.* at 616-17.
[21] *Id.* at 617.
[22] *Edmonson*, 500 U.S. at 617.
[23] *Id.* at 630–31.
[24] Georgia v. McCollum, 505 U.S. 42, 57 (1992).

II. UNDERSTANDING IMPLICIT BIAS

A. What is Implicit Bias?

Does your core group of friends stem from the same race group? Do you only date a particular race of people? Are there neighborhoods you automatically exclude from places you would be willing to live based on demographics? Do you pass on interviewing people with stereotypically black names? If so, you are exhibiting some implicit bias as these are all examples in which our unconscious ideologies shape how we see and interact within the world around us.[25]

Many people exhibiting implicit bias do not consider themselves to be prejudiced and are often unaware that they have developed the bias.[26] Most people cringe at the implication that they are acting on an implicit bias, intrinsically associating the concept with racism. However, implicit bias differs from overt racism in that the perspective or reaction takes place in our subconscious.[27] Unconscious biases are developed over time through our life experiences and can emerge as early as middle childhood.[28] Officially, implicit bias, or implicit social cognition, is defined as "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner."[29] It's "a biological preference for those we see as 'like' us."[30] It's the collection of our earliest experiences met with our

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[25] Emanuella Grinberg, *4 Ways You Might Display Hidden Bias Every Day*, CNN (Nov. 25, 2015, 10:10 AM), https://www.cnn.com/2015/11/24/living/implicit-bias-tests-feat/index.html; Anne J. Jacobson, *Examples of Implicit Racial Bias at Work*, FEMINIST PHILOSOPHERS (Jan. 4, 2015), https://feministphilosophers.wordpress.com/2015/01/04/examples-of-implicit-racial-bias-at-work/; Kizza Chadiha & Rene Salazar, *State of Science on Unconscious Bias*, UNIV. OF CAL. S.F. OFF. OF DIVERSITY & OUTREACH, https://diversity.ucsf.edu/resources/state-science-unconscious-bias.

[26] Chris Mooney, *Across America, Whites Are Biased and They Don't Even Know It*, WASH. POST (Dec. 8, 2014, 10:40 AM), https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/.

[27] *Understanding Implicit Bias*, KIRWAN INST., https://kirwaninstitute.osu.edu/article/understanding-implicit-bias/ (May 29, 2012); Paula K. Hannaford-Agor & Jennifer K. Elek, *Addressing the Conundrum of Implicit Bias in Jury Decision Making*, 32 CT. MANAGER, 49, 49 (Summer 2017), http://www.ncsc-jurystudies.org/__data/assets/pdf_file/0022/6853/322summer2017jurynewsarticle.pdf; Mooney, *supra* note 26.

[28] Chadiha & Salazar, *supra* note 25.

[29] KIRWAN INST., *supra* note 27.

[30] Kathleen Woodhouse, *Implicit Bias -- Is It Really?*, FORBES: COUNCIL POST (Dec. 19, 2017, 7:00 AM), https://www.forbes.com/sites/forbescoachescouncil/2017/12/19/implicit-bias-is-it-really.

cultural identity.[31] Pointing out that "at any given moment, our brains are receiving 11 million pieces of information [but] can only consciously process about 40 of those pieces," Paradigm IQ cites implicit bias best as "mental shortcuts," used to filter through the other 10,999,960 data pieces relying on our often misguided subconscious.[32] In other words, implicit bias is the conclusion your brain reaches in a situation most naturally once filtered through your personal paradigm.

B. What the Research Shows About Race Perceptions

With efforts to work toward a more dynamic and inclusive society, empirical research regarding implicit bias has increased exponentially in recent years as everyone from psychologists and social scientists to lawyers and law enforcement officials endeavor to increase awareness of and combat implicit bias in countless arenas.[33] Harvard's Project Implicit developed the Implicit Association Test[34] which millions of people have taken worldwide rendering surprising results to even the most self-proclaimed, open-minded, and self-aware test takers and spawning worldwide conversations about implicit bias.[35] Implicit bias research is yielding confounding results that are surprising to some that find themselves becoming enlightened to their own hidden biases and being received as a societal breath of fresh air for minority groups that have spent lifetimes aiming to get the majority to understand their marginalization. A mental image; an observation; a physical sensation interpreted in the light of experience.[36] "*Perception* is reality."[37] Knowing that implicit bias burgeons over time, formed through our experiences and even developed out of

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[31] Caisa Royer et al., *Defining Implicit Bias*, CORNELL L. SCH.: STUDENT PROJECTS, https://courses2.cit.cornell.edu/sociallaw/student_projects/Definingbias.html (last visited Apr. 13, 2020).

[32] Joelle Emerson, *Unconscious Bias FAQs*, PARADIGM: INSIGHTS (July 21, 2016), https://www.paradigmiq.com/2016/07/21/unconscious-bias-faqs/.

[33] *See e.g.*, Patricia G. Devine et al., *Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3603687/pdf/nihms396358.pdf.

[34] *Overview*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html (last visited Apr. 13, 2020).

[35] Mooney, *supra* note 26.

[36] *Perception*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/perception (last visited Apr. 13, 2020).

[37] *Lee Atwater Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/lee_atwater_409179 (last visited Apr. 13, 2020).

stereotypes,[38] a pithy review of the research available on race perception is relevant to this colloquy.

Universally, research shows that most White Americans demonstrate bias against Blacks, even if they're not aware of or able to control it.[39] While it is an ugly truth that many struggle to accept, data shows White people are often illusioned into perceiving a Black face as angrier than a White face exhibiting the same expression, harmless objects metamorphosize into weapons in the hands of a Black child. Implicit bias test takers often more readily identify negative words with black people than White people.[40]

Analysts have also uncovered that Black applicants are disappointingly offered follow-up interviews at a rate fifty percent lower than their White counterparts; college professors respond to emails by students with stereotypically White names twenty-six percent more, and medical providers are less likely to recommend pain killers to Black patients than they are to White patients with the same diagnosis.[41]

With an increase in the publicity of Black and Brown civilians being shot by law enforcement officials, studies have been conducted to address implicit bias in the criminal justice system. A recent "shooter bias" study–summarized in *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*–informed that:

The "shooter bias" refers to participants' propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders. Studies have also shown that participants more quickly identify handguns as weapons after seeing a Black face, and more quickly identify other objects (such as tools) as nonweapons after seeing a White face.[42]

An example of inferred bias that captured mainstream attention and spawned impassioned cross-racial dialogue was the infamous, "Affluenza

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[38] Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, PSYCH. TODAY, (June 9, 2016), https://www.psychologytoday.com/us/articles/199805/where-bias-begins-the-truth-about-stereotypes.

[39] Mooney, *supra* note 26.

[40] Keith Payne, et al., *How to Think About 'Implicit Bias',* SCI. AM.: BEHAV. & SOC'Y (Mar. 27, 2018), https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/; Zola Ray, *This is the Toy Gun that Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK, Nov. 22, 2017, https://www.newsweek.com/tamir-rice-police-brutality-toy-gun-720120.

[41] Payne et al., *supra* note 40.

[42] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 357 (2007).

Teen."[43] Many balked at the term "affluenza," the concept that affluence can affect one's, particularly a youth's, ability to appreciate the consequences of crime, which some imply sounds in implicit bias.[44] The term gained prominence after Ethan Crouch, a Texas youth coined "Affluenza Teen," was released after serving only 720 days in prison for killing four people in a drunk driving accident.[45] A psychologist retained to testify for the defense argued that due to Crouch's uncommon affluence, he simply did not have the psychological capacity to appreciate his actions.[46] Such an argument rooted in privilege would perhaps not incite such debate, if the same logic was extended to Black youth offenders stemming from single-parent, poverty stricken homes. However, Black men are given longer prison sentences for the same crimes committed by White males.[47] In fact, the very judge that supported Crouch's release subsequent to killing four people at the hands of drunk driving later sentenced a Black teen to a ten year sentence for killing one individual via a single punch.[48] The American Psychological Association found that test subjects in a race perception study held young Black boys accountable for their actions but afforded the assumption of innocence to White boys of the same age.[49] The same study found that the age of Black children was often overestimated by

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[43] Daniel Victor, *Ethan Couch, 'Affluenza Teen' Who Killed 4 While Driving Drunk, Is Freed*, N.Y. TIMES, Apr. 2, 2018, https://www.nytimes.com/2018/04/02/us/ethan-couch-affluenza-jail.html.

[44] *Affluenza*, Merriam-Webster, https://www.merriam-webster.com/dictionary/affluenza (last visited Apr. 13, 2020); Victor, *supra* note 43; Patrik Jonnson, *With 'Affluenza' Teen's Capture, Questions About Justice in America*, The CHRISTIAN SCI. MONITOR, Dec. 29 2015, https://www.csmonitor.com/USA/Justice/2015/1229/With-affluenza-teen-s-capture-questions-about-justice-in-America (last visited Apr. 13, 2020).

[45] Victor, *supra* note 43.

[46] *Id.*; Mike McPhate, *Use of 'Affluenza' Didn't Begin With Ethan Couch Case*, N.Y. TIMES, Dec. 29, 2015, https://nyti.ms/1krabvj.

[47] Erica Y. King, *Black Men Get Longer Prison Sentences Than White Men for the Same Crime: Study*, ABC NEWS (Nov. 17, 2017, 8:35 AM), https://abcnews.go.com/Politics/black-men-sentenced-time-white-men-crime-study/story?id=51203491; PATTI B. SARIS, ET AL., U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 8 (2012) https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf; Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 429 (2000).

[48] Christina Sterbenz, *Judge In 'Affluenza' Case Sentenced A Black Teen To 10 Years For Killing A Guy With A Single Punch*, BUS. INSIDER (Dec. 20, 2013, 11:51 AM), https://www.businessinsider.com/judge-jen-boyd-black-teen-prison-2013-12.

[49] *Race, Perception and Implicit Bias*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/education/resources/tools-and-strategies/table-talk/race-perception-and-implicit-bias (last visited Apr. 15, 2020).

as much as four-and-a-half years, even mistaking some Black children who were barely teenagers for adults.[50]

In the workplace, people of color still report feeling discriminated against, with 26% of Blacks and 15% of Hispanics noting that they feel they are treated differently than their majority colleagues.[51] Examples of implicit bias in the workplace include White workers unfoundedly feeling anxious around Black coworkers or the microaggression presented through the surprise that a minority speaks without an accent.[52] Moreover, it has been shown that Caucasian male executives are often applauded for being assertive, while a similarly situated Black female cohort is often deemed disrespectful for the exact same behavior.[53]

While there is no definitive proof that all of these situations are solely derived out of implicit biases, they are arguably instances in which an implicit bias inference can be drawn and/or are examples of life experiences that unknowingly shape our implicit bias.

III. OVERCOMING A *BATSON* CHALLENGE WITH HIDDEN RACE BASED JUSTIFICATIONS

Trial attorneys are prohibited from exercising their peremptory strikes in an effort to control the racial makeup of the jury.[54] Accordingly, if what the *Batson* Court coined an "objective observer" would determine that the attorney's strikes were based in racial discrimination, the striking attorney would be compelled to provide a race neutral basis for the strike in order to overcome a *Batson* Challenge.[55] What the ACLU of Washington discovered, however, is that oftentimes the purported race neutral justifications offered stem from stigmas, stereotypes, or social issues disproportionately associated with minorities.[56] They are the taboo, often uncomfortable to discuss, sometimes politically incorrect issues that when closely examined not-so-ironically stem from implicit bias. Excusing otherwise qualified jurors for the reasons to follow inevitably increases the chances of an all White jury and arguably an unwinnable trial for a minority litigant.

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[50] *Id.*
[51] Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN MONEY (Nov. 25, 2015, 12:04 AM), https://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/.
[52] *Id.*
[53] *Id.*
[54] LEGAL INFO. INST., *supra* note 5.
[55] LEGAL INFO. INST., *supra* note 5.
[56] *Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection.

Trial attorneys have been known to cite prior contact with law enforcement, negative experiences with law enforcement, relation to the incarcerated, and a suspicion of the police or belief that police officers engage in racial profiling as race-neutral reasons to strike a potential juror and routinely, courts have accepted these reasons as sufficient for the very low threshold to overcome a *Batson* Challenge.[57] The quagmire presented by accepting these justifications is that while they appear race-neutral on their surface, data regarding minorities and police encounters demonstrates

[57] *See, e.g.*, State v. Cook, 312 P.3d 653, 656–57 (Wash. Ct. App. 2013) (Washington Court of Appeals overruled the lower court: "This is so because the court proceeded to rule that two reasons the State offered, namely, Juror No. 34's enthusiasm and negative experience with law enforcement, were sufficient to refute any discrimination on the part of the State. But neither of those reasons was sufficient."). State v. Luvene, 903 P.2d 960, 966-67 (Wash. 1995) (prior negative contact with police and refusal to state view on death penalty was sufficient reason where State did not challenge other person of color on jury panel); State v. Jako, No. 50498-3-I, 2003 Wash. App. LEXIS 1376, at *4-5 (Ct. App. July 7, 2003) (per curiam) ("After voir dire, the State sought to exercise a peremptory challenge against Juror No.19, who was the only African–American on the jury panel. Jako objected on the ground that the challenge was impermissibly based on race. The trial court concluded that Jako had not met his initial burden to establish a prima facie case of racial discrimination, but also found that the State's articulated reasons for excluding the juror were race-neutral."). Bui v. State, 627 So. 2d 849, 851 (Ala. Crim. App. 1992), *rev'd sub nom*. Bui v. State, 627 So. 2d 855 (Ala. 1992) ("The second strike excluded a 20-year-old black female on the grounds that she had been arrested for harassment within the year preceding Bui's trial and that she was of a young age. The third strike excluded a 32-year-old black female for the following reasons: (1) she was of a 'youthful age'; (2) she 'had appeared as a witness in grand jury'; and (3) she lived on North Caffey Drive, alleged to be known for its 'problems with drugs.'"). Williams v. State, 548 So. 2d 501, 505–06 (Ala. Crim. App. 1988) ("Finally, the prosecutor had noted that this juror had had some connection, possibly negative, with 'law enforcement' therefore perhaps causing a problem when the key witnesses, police officers, testified."). Scott v. State, 599 So. 2d 1222, 1228 (Ala. Crim. App. 1992) ("[Number 150], my sixth strike. There were — and the seventh strike, [Number 157]. There were two jurors, Your Honor, who responded to a question of had any of their family — had they or any of their relatives been convicted of a crime. And we struck both of those individuals, everyone who had said that a member of their family had been convicted of a crime."). Roach v. State, 79 N.E.3d 925, 929 (Ind. Ct. App. 2017) ("One reason offered by the State as a reason for the strike was that 'when [defense counsel] questioned [Juror Wilson] about whether or not he would stop if a police officer asked him to stop, he said no, I wouldn't stop.'"). State v. Sanchez, 867 P.2d 638, 642 (Wash. Ct. App. 1994) ("[T]he prosecutor relied on Mrs. Allen's admission that she did not trust police officers and would have a hard time believing that one man could assault two officers."). Cox v. State, 629 So. 2d 664, 668 (Ala. Crim. App. 1992), rev'd, 629 So. 2d 670 (Ala. 1993) ("[The striking of a juror because] he was biased against the police constitutes a race-neutral reason."). Turnbull v. State, 959 So. 2d 275, 276 (Fla. Dist. Ct. App. 2006) ("The State's declared reasons for striking venireperson Jeanbaptiste were that he had experiences with racial profiling and he was arrested for driving with a suspended license. The trial judge accepted these reasons and sustained the State's peremptory challenge of Jeanbaptiste.").

that excluding jurors that fit this criteria significantly increases the chances of neglecting diversity from the jury. With minorities making up a disproportionate amount of the millions of annual traffic stops and searches, despite findings that they have no greater propensity for crime or likelihood to be carrying an illegal substance or weapon, and statistics reporting that 32% of Black males can expect to spend some time in prison, it is not surprising that many potential jurors of color fit the aforementioned criteria.[58] Thus, if data shows that Black Americans are going to be stopped at a higher rate, by mathematical probability, there is an increasing chance that Black potential jurors have either had a firsthand negative encounter with law enforcement or know someone that has.[59]

"Race is *the* life experience that has the biggest impact on trust."[60] Also not surprising is that this disproportionate amount of interaction with law enforcement and the way people of color are treated during these encounters inevitably begins to reinforce minorities' suspicions and distrust of law enforcement.[61] Data shows that minorities are significantly less trusting than White Americans in general finding that 81% of African Americans find most people, legal affiliation notwithstanding, untrustworthy.[62] If a Black person and White person are both stopped by the police, statistics show that the Black person is more likely to actually be arrested.[63] Accordingly, due to so many direct and indirect negative experiences with

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[58] Michael A. Fletcher, *For Black Motorists, a Never-Ending Fear of Being Stopped*, NAT'L GEOGRAPHIC, Mar. 12, 2018, https://www.nationalgeographic.com/magazine/2018/04/the-stop-race-police-traffic; Frank R. Baumgartner & Derek A. Epp, *What 20 Million Traffic Stops Reveal About Policing and Race In America*, SCHOLARS STRATEGY NETWORK (June 1, 2018), https://scholars.org/brief/what-20-million-traffic-stops-reveal-about-policing-and-race-america; *The Color of Justice*, CONST. RTS. FOUND., http://www.crf-usa.org/brown-v-board-50th-anniversary/the-color-of-justice.html (last visited Apr. 14, 2020).

[59] Jann Ingmire, *Young people of color mistrust police and legal system, report finds*, U. CHI. NEWS, (Aug. 18, 2014), https://news.uchicago.edu/story/young-people-color-mistrust-police-and-legal-system-report-finds#sthash.kSpQ8gzz.dpuf; *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Apr. 15, 2020).

[60] Sandra S. Smith, *Race and Trust*, 36 ANN. REV. SOCIO. 453, 454 (2010) (quoting ERIC M. USLANER, THE MORAL FOUNDATIONS OF TRUST 91 (2002)).

[61] *Race, Trust and Police Legitimacy*, NAT'L INST. JUST. (Jan. 9, 2013), https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy.

[62] Sara S. Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1277 (2016); *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM (1999).

[63] Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2016, 3:28 PM), https://www.huffpost.com/entry/black-crime-rates-your-st_b_8078586.

law enforcement, minorities exhibit a much higher general distrust of law enforcement and the legal system at large.[64]

Another purportedly race-neutral justification offered by striking attorneys is the individual having children out of wedlock.[65] While certainly no one is asserting that members of the majority do not have children outside the confines of marriage, the systematic marginalization of Black people stemming as far back as slavery has dismantled the Black familial unit making it more likely than not that a juror of color may meet this criteria.[66] While statistics report that on average 40% of babies are born out of wedlock, a closer examination of that data shows grave differentials where race is concerned with Whites accounting for only 29% and Blacks 71% of babies born out of wedlock.[67]

Courts have also allowed demeanor-based justifications when the striking attorney recounts observations of a juror exhibiting behavior, facial expressions, tone of voice, etc. that the attorney deems unfavorable.[68]

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[64] *See* COLE, *supra* note 62.

[65] Bogan v. State, 811 So. 2d 286, 288 (Miss. Ct. App. 2001) ("[J]uror challenged because he lived in a high crime area and was unmarried with a child."). Robinson v. State, 773 So. 2d 943, 948 (Miss. Ct. App. 2000) ("The State indicated that its reason for striking Blanchard was that she indicated on her information card that she was unmarried and had two children. Once again, the prosecutor admitted that he did not 'know if it's out of wedlock children,' . . . .").

[66]James Q. Wilson, *Slavery and the Black Family*, AM. ENTER. INST. (May 1, 2002), https://www.aei.org/articles/slavery-and-the-black-family/.

[67] Joseph Chamie, *Out-of-Wedlock Births Rise Worldwide*, YALEGLOBAL ONLINE (Mar. 16, 2017), https://yaleglobal.yale.edu/content/out-wedlock-births-rise-worldwide.

[68] State v. Tomlin, 384 S.E.2d 707, 710 (S.C. 1989) ("In regard to Mr. Gordon, the prosecutor supplied several explanations for striking this juror: (1) he was unemployed; (2) he 'shucked and jived' to the microphone; (3) he seemed disinterested, he started speaking before he got to the microphone, and he looked down as he spoke."). Davis v. State, 76 So. 3d 659, 660 (Miss. 2011) ("The State argued that Lockett seemed 'hostile' and refused to make eye-contact."). State v. Bardwell, No. 72356-1-I, 2016 Wash. App. LEXIS 152, at *10 (Ct. App. Feb. 8, 2016) ("Also, the State struck juror 25 based on her demeanor when she answered the question about a relative in prison, not because she had a relative in prison."). Yarborough v. State, 947 S.W.2d 892, 893 (Tex. Crim. App. 1997) ("Mr. Martinez, quite frankly, Judge, the notes I put down when I got through talking to him was he has poor facial expressions. He's very inattentive, looks unhappy to be here, body language, posture was such that just made him feel he was uncomfortable."). Nieto v. State, 365 S.W.3d 673, 680 (Tex. Crim. App. 2012) ("The second ground for review asks whether the fact that a venireperson is noted to be 'glaring' during voir dire constitutes a race-neutral reason for a peremptory strike. Dobbs, who was not involved in later proceedings, noted that venireperson Mauldin glared at him during the trial court's voir dire."). Blackman v. State, 414 S.W.3d 757, 763 (Tex. Crim. App. 2013) ("Fortune's 'tone' and referral to the defendant in the prior case as the 'accused'; and her overall bad 'vibe,' eye contact, and demeanor with the prosecutor in contrast to her attentiveness to [the] appellant's counsel (including the alleged incident in which she 'point[ed]' out to the prosecutor that he was wanted at the bench).").

Unfortunately, "[n]onverbal conduct or demeanor, often elusive and always subject to interpretation, may well mask a race-based strike."[69]

For instance, in both *State v. Tomlin* and *Davis v. State*, jurors were struck for failing to make eye contact, when studies show that people of color may engage in eye contact patterns that differ from majority groups finding that it is not uncommon for Blacks to look away from a speaker while listening.[70] Similarly in *Snyder*, a juror was struck for seeming "nervous," which could be supported by the inherent distrust of the American legal system held by many minorities as previously discussed.[71]

Moreover, where *J. E. B. v. Alabama* was supposed to eradicate the use of peremptory strikes for gender discrimination, it appears that not even jury selection is exempt from the potential infusion of the concepts of the "Angry Black Woman"[72] and the "Resting B*tch Face"[73] with jurors being struck for demeanor commonly associated with women and women of color in particular.[74] Women of color are often cited as exhibiting disruptive or

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[69] Davis v. Fisk Elec. Co., 268 S.W.3d 508, 518 (Tex. 2008).

[70] *See* MARGARET F. KARSTEN, GENDER, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (2006).

[71] Snyder v. Louisiana, 552 U.S. 472, 478 (2008); Jennifer K. Robbennolt & Matthew Taskin, *Jury Selection, Peremptory Challenges and Discrimination*, 40 AM. PSYCH. ASS'N MONITOR ON PSYCH. 18 (2009).

[72] Brittney Cooper, *Black Women Are Not 'Sassy' — We're Angry*, TIME, (Mar. 15, 2018, 2:52 PM), https://time.com/5191637/sassy-black-woman-stereotype/; Kimberly S. Allers, *Black Women Have Never Had The Privilege Of Rage*, HUFFINGTON POST, (Oct. 14, 2018, 8:00 AM), https://www.huffingtonpost.com/entry/opinion-angry-black-women_us_5bbf7652e4b040bb4e800249.

[73] Jareen Imam, *'Resting Bitch Face' Is Real, Scientists Say*, CNN, (Feb. 4, 2016, 8:26 AM), https://www.cnn.com/2016/02/03/health/resting-bitch-face-research-irpt/index.html.

[74] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); State v. Bardwell, No. 72356-1-I, 2016 Wash. App. LEXIS 152, at *10 (Ct. App. Feb. 8, 2016) ("Also, the State struck juror 25 based on her demeanor when she answered the question about a relative in prison, not because she had a relative in prison."). Yarborough v. State, 947 S.W.2d 892, 893 (Tex. Crim. App. 1997) ("Mr. Martinez, quite frankly, Judge, the notes I put down when I got through talking to him was he has poor facial expressions. He's very inattentive, looks unhappy to be here, body language, posture was such that just made him feel he was uncomfortable."). Nieto v. State, 365 S.W.3d 673, 680 (Tex. Crim. App. 2012) ("The second ground for review asks whether the fact that a venireperson is noted to be "glaring" during voir dire constitutes a race-neutral reason for a peremptory strike. Dobbs, who was not involved in later proceedings, noted that venireperson Mauldin glared at him during the trial court's voir dire."). Blackman v. State, 414 S.W.3d 757, 763 (Tex. Crim. App. 2013) ("Fortune's 'tone' and referral to the defendant in the prior case as the 'accused;' and her overall bad 'vibe,' eye contact, and demeanor with the prosecutor in contrast to her attentiveness to [the] appellant's counsel (including the alleged incident in which she 'point [ed]' out to the prosecutor that he was wanted at the bench).").

frightening demeanors [75] and acceptable reasons for striking jurors have included the striking attorney being made to feel uncomfortable, the tone in which a juror answered *voir dire* questions, general "bad vibes," and allegedly glaring looks.[76] For instance, when Timothy Tyrone Foster was on trial for the murder of an elderly White woman in 1994, the prosecutor submitted that the Black jurors he moved to strike from the jury were in some form nervous, hostile, or disrespectful, grounds the trial court upheld as being race-neutral justifications.[77]

IV. WHY IS THIS A PROBLEM?

Why does any of this matter? Because as Dr. Martin Luther King so eloquently expressed, "Injustice anywhere is a threat to justice everywhere."[78] According to Thomas Fuller, "A fox should not be on the jury at a goose's trial."[79] In an effort to ensure that isn't the case, and that juries are truly made up of the interested party's peers, an analysis of what a jury of one's peers really is and how race and racial perceptions affect the outcomes of jury trials in both the criminal and civil context is necessary.

A. Systematic Issue

i. *Jury Service Is a Civil Right*

Like many rights and privileges associated with American citizenship, jury service was once limited only to White males that owned property.[80] However, due to the Women's Suffrage Movement and the Civil Rights Acts of 1875 and 1957, the groundwork was laid to break the barriers to access to the jury box for women and people of color.[81] Federal law now

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[75] Cooper, *supra* note 72; Allers, *supra* note 72.
[76] *Yarborough*, 947 S.W.2d at 893; *Nieto*, 365 S.W.3d at 680; *Blackman*, 414 S.W.3d at 763.
[77] Imani Gandy, *When 'Race-Neutral' Reasons for Striking Jurors Aren't Neutral in the Slightest*, REWIRE NEWS GRP., (Nov. 9, 2015, 11:05 AM), https://rewirenewsgroup.com/article/2015/11/09/race-neutral-reasons-striking-jurors-arent-neutral-slightest/.
[78] Martin Luther King, Jr., *Letter from a Birmingham Jail*, AFRICAN STUD. CTR. UNIV. OF PA. (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.
[79] *Thomas Fuller Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/thomas_fuller_151914 (last visited Apr. 19, 2020).
[80] Andrew G. Ferguson, *Why Restrict Jury Duty to Citizens?*, THE ATLANTIC, (May 9, 2013),, https://www.theatlantic.com/national/archive/2013/05/why-restrict-jury-duty-to-citizens/275685/.
[81] Nancy Marder, *Women and Jury Service*, CHICAGO-KENT FAC. BLOG (Aug. 30, 2010), http://blogs.kentlaw.iit.edu/faculty/2010/08/30/women-and-jury-service/; *Civil Rights Act of 1957*, TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/civil-

recognizes the value of a citizen's ability to participate in the justice system by prohibiting discrimination from jury service on the basis of race, color, religion, sex, national origin, or economic status and protecting the right to jury service as a civil right.[82] The nation's Founding Fathers esteemed their right to enter the jury box as highly as their right to enter the ballot box, recognizing one of the marks of full American citizenship as holding status as both a voter and a juror.[83] Jury service has been regarded as a "citizen's absolute right to participate directly in our democracy."[84] Thus, eliminating discriminatory practices in jury selection simultaneously upholds the American constitutional right to a trial by jury and maintains the federal protection of citizens' right to jury service.

ii. *Jury of Your Peers*

Historians widely credit the derivation of the jury trial and the concept of being tried by a jury of one's peers to the Magna Carta.[85] The landmark document provides that: "No Free-man's body shall be taken, nor imprisoned, nor disseised [sic], nor outlawed, nor banished, nor in any way be damaged, nor shall the King send him to prison by force, excepting by the judgment of his Peers and by the Law of the land."[86]

Despite its seemingly straightforward text, the administration of this provision in reality still requires analysis, interpretation, and factual application. Accordingly, composing a jury of one's peers is usually complicated by the need to clarify the meaning of one's "peer" and the definition of an "impartial jury."

In the criminal context, a defendant's right to a jury of one's peers has been defined as "The constitutionally guaranteed right of criminal defendants to be tried by their equals, that is, by an impartial group of citizens from the legal jurisdiction where they live."[87] The concept is further interpreted to mean that a fair and impartial jury should reflect a cross-

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rights-act-of-1957/ (last visited Apr. 22, 2020); Civil Rights Act of 1875, 18 Stat. 335, *invalidated by* the Civil Rights Cases, 109 U.S. 3 (1883).

[82] 28 U.S.C. § 1862.

[83] Andrew G. Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1108-09 (2014).

[84] Chief Judge John M. Harris, *Judge: Jury Duty Is a Right*, FLA. TODAY, (May 4, 2015, 12:01 AM), https://www.floridatoday.com/story/opinion/2015/05/04/judge-jury-duty-right/26661481/.

[85] Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* MAGNA CARTA: MUSE & MENTOR 139, 139 (Randy J. Holland ed., 2014).

[86] *The Articles of the Barons: Article 29*, THE MAGNA CARTA PROJECT, http://magnacarta.cmp.uea.ac.uk/read/articles_of_barons/Article_29 (last visited Apr. 19, 2020).

[87] *Jury of One's Peers*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/jury_of_one's_peers (last updated Jul. 2020).

section of the community with "a broad representation of the population, particularly with regard to race, national origin, and gender."[88]

The Supreme Court held in *Strauder v. West Virginia* that jury pools should be "composed of the peers or equals [of the defendant]; that is, of his neighbors, fellows, associates, persons having the same legal status in society as he holds."[89]

Against a medieval England backdrop, the concept of the jury trial originated by the Magna Carta valued familiarity with the litigants and their first-hand knowledge of the facts of the case.[90] Whereas today, our venire questions seek to discover whether potential jurors have any connection to the litigants, and exclude them from service if they do, contrarily, ancient barristers relied upon jurors' "partiality and knowledge of the reputations of their neighbors," and "not their ability to separate themselves from these instincts."[91]

A jury of one's peers does not necessarily mean for example that a Black male litigant's jury must be solely compiled of other Black males.[92] It is, however, important to recognize the necessity for jurors to be able to relate to the litigant's background, paradigm, cultural customs, social cues, etc.

Yet assessing the credibility of witnesses and of the defendant continues to depend on an understanding of the lifeworld of the defendant, the community and employment possibilities open to them, the slippages between the protection and the threat of law enforcement in their neighborhoods, and, most importantly, what guilt and its opposite might look or sound like. Determining guilt requires an understanding of the context of the alleged crime: it is not merely a factual exercise, and jurors must navigate between judgments based on prejudice and those based on considered reflection. Furthermore, whether or not one trusts a witness is likely to depend not only on errors of fact or outright deception, but on verbal and nonverbal cues, as well as the affective response that a juror has to the witness.[93]

iii. *Importance of Juror Diversity*

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of

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[88] *Id.*
[89] Strauder v. West Virginia, 100 U.S. 303, 304 (1879).
[90] Sonali Chakravarti, *A Jury of One's Peers*, BOSTON REV. (Nov. 25, 2019), http://bostonreview.net/law-justice/sonali-chakravarti-one%E2%80%99s-peers.
[91] *Id.*
[92] *Id.*
[93] *Id.*

human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

—Justice Thurgood Marshall, *Peters v. Kiff* [94]

Although slavery may have been abolished and the United States does not abide by any official caste system, it cannot be ignored that headline after headline shows White law enforcement officers walking free after killing minorities during police encounters and jury verdicts seemingly discount the value of Black lives. Without jury diversity, it can be questioned whether a Black litigant is actually being tried before those that share the "same legal status in society as that which he holds" as cited by the *Batson* Court.[95]

The *Batson* Court opined that, "selection procedures that purposefully exclude Black persons from juries undermine public confidence in the fairness of our system of justice."[96] While arguably unintentional and not purposeful, without addressing implicit bias in jury selection, the same discriminatory effect occurs, resulting in a continuing cycle of generations of people of color lacking faith in our country's judicial system as discussed above.

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.[97]

In either context, whether in criminal or civil litigation, a diverse jury serves the interests of justice.[98] Diverse juries typically show less bias and jury deliberations benefit from a diverse array of opinions and perspectives.[99] While we can never literally trade shoes with someone else,

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[94] Peters v. Kiff, 407 U.S. 493, 503-04 (1972).
[95] *Batson*, 476 U.S. at 86 (quoting *Strauder*, 100 U.S. at 308).
[96] *Id.* at 87.
[97] *Edmonson*, 500 U.S. at 628.
[98] Hannaford-Agor & Elek, *supra* note 27, at 51.
[99] *Id.*

a diverse jury makeup affords White jurors the opportunity to become aware of issues facing minorities.

B. Criminal Context

Ultimately, White people are more likely to find Black people guilty of crimes.[100] Racial disparities run rampant in our criminal justice system, as research shows that while making up only 13% of the total U.S. population, African Americans account for 42% of defendants awaiting the death penalty as opposed to 43% for White inmates.[101] Additionally, it has been found that the race of the victim and race of the accused in a criminal trial play a significant role in the trial's outcome as the life of White murder victims appears to be valued above those of Black murder victims as those convicted of murdering a White person have a much higher potential of receiving capital punishment than those that murder people of color.[102] The results of a simulated trial found that differences in race of the defendant and victim significantly and directly affects the determination of guilt, uncovering that if the victim was Black and the defendant was White, White jurors were likely to deem the White offender less guilty. Black jurors exhibited the same reverse bias.[103] Additionally, Blacks only make up 35% of those arrested for drug violations, however they account for a disproportionate 46% of drug convictions, a discrepancy some believe is related to judicial and juror bias.[104]

One of the leading cases used as a subject to discuss the issue of race perception with respect to jury trials is the infamous O.J. Simpson trial. In 1996, as attorneys headed into the civil trial against O.J. Simpson stemming from the deaths of Nicole Brown and Ronald Goldman, journalists picked up on the relevance the racial makeup of the jury was appearing to make, noticing the plaintiff exercising peremptory challenges to strike Black jurors and the defense ridding the pool of 3 potential White jurors.[105] The plaintiff made no effort to strike a single White juror and likewise the

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[100] CONST. RTS. FOUND., *supra* note 58.

[101] Jennifer Turner & Jamil Dakwar, *Racial Disparities in Sentencing*, ACLU 7 (Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

[102] *Id.*; Eric Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, N.Y. TIMES, (Feb. 24, 1995), https://www.nytimes.com/1995/02/24/nyregion/studies-find-death-penalty-tied-to-race-of-the-victims.html.

[103] CONST. RTS. FOUND., *supra* note 58.

[104] Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, HUFFINGTON POST https://www.huffpost.com/entry/black-crime-rates-your-st_b_8078586 (last modified Sept. 2, 2016).

[105] *Majority White Jury Selected in Simpson Civil Trial*, CNN INTERACTIVE (Oct. 17, 1996, 7:15 PM), http://www.cnn.com/US/9610/17/oj.trial/.

defense aimed to stack the jury with as many people of color as possible, supporting the theory, whether proper or improper, that juries are concerned with the race of the victim and accused.[106]

According to our nation's highest court, the ultimate objective is for the jury to be "composed of the peers or equals [of the defendant] . . . that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[107] Accordingly, with the statistics already stacked against people of color in criminal trials, all the more is it important that the jury reflect a true jury of their peers in an effort to curb any inevitable bias. No one is emptying *all* of their biases at the foot of the jury box; thus, an all-majority jury would allow White bias into the jury box without any Black bias to counterbalance. Education regarding the importance of a diverse jury and the recognition of implicit bias is imperative to ensuring the scales of justice remain balanced.

C. Civil Context

In civil court, compilations of dismal and arguably insulting jury verdicts leave minorities questioning whether a jury lacking in diversity is able to recognize any value in lives of color. While litigants' constitutional rights are not on the line in civil court, obtaining just recompense for tortious conduct suffered at the hands of a tortfeasor is at stake in civil litigation, and statistics show that without minority representation on the jury, Black civil claimants stand to receive lower jury verdicts than their similarly situated White counterparts.[108] Simply put, jurors award Black people less money at trial.[109] An examination of over 1,110 civil trials uncovered that Black plaintiffs receive 41% the amount of non-economic damages awarded to White claimants.[110]

For decades, civil litigants of color have exited courtrooms feeling both wronged by their alleged tortfeasors and failed by the American civil courts. In 1983, the New York Times covered a civil jury trial stemming from three lawsuits filed by 48 Black Georgians who accused several law enforcement officers of leading a mob attack against those demonstrating outside a

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[106] *Id.*
[107] *Strauder*, 100 U.S.at 308.
[108] Ken Broda-Bahm, *Expect Racial Bias in Civil Damage Awards*, PERSUASIVE LITIGATOR (Oct. 16, 2015), https://www.persuasivelitigator.com/2015/10/expect-racial-bias-in-civil-damage-awards.html; Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U.L. REV. 1205, 1219 (1994).
[109] Broda-Bahm, *supra* note 108.
[110] Broda-Bahm, *supra* note 108.

Wrightsville, GA courthouse.[111] After 16 days of trial in front of an all-White jury, the plaintiffs' attorney could not help but wonder if his clients ever stood a chance.[112] The final jury pool of 28 only included 3 Blacks, all of which were struck by the defense.[113] Post trial, the plaintiffs' attorney was quoted as saying, "This is 1983, but it has shadows of the 1960's. Every day since the trial began on Jan. 10 we had to look at 12 White faces. Faces of middle-class Whites who could not understand the lifelong plight of my clients." [114] A statement that many would argue is sadly still relevant even close to 40 years later.

For instance, a recent example in which the relevance of the parties' race was questioned in connection to the resulting jury verdict was the 2018 civil trial of the officers responsible for the killing of civilian Gregory Hill, Jr. in Florida. Hill, a Black father of three, was killed by a Florida police officer responding to a noise complaint.[115] Hill's family, dismayed by the thought that it could be deemed lawful to take Hill's life while in his own home, filed a civil lawsuit seeking damages asserting that Officer Ken Mascara exercised unnecessary excessive force in his interactions with Hill.[116] After over ten hours of deliberation, the jury returned a verdict of $4.00 that sent shockwaves through the courtroom.[117] The $4.00 verdict comprised of $1.00 for Hill's funeral expenses and an additional $1.00 for each child's pain and suffering left some to question whether Black lives matter at all,[118] a sentiment that might be supported by research that suggests that White jurors devalue the losses suffered by plaintiffs.[119] To add insult to injury, Hill, who was in the confines of his own home, was found to be 99% percent responsible for his own death and to have alcohol

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[111] Wendell Rawls Jr., *All-White Jury Rules Against Suit By Blacks in Georgia Rights Trial*, N.Y. TIMES, (Feb. 2, 1983), https://www.nytimes.com/1983/02/02/us/all-white-jury-rules-against-suit-by-blacks-in-georgia-rights-trial.html.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Abigail Abrams, *Jury Awards $4 to Family of Man Killed by Florida Sheriff's Deputy*, TIME, (May 31, 2018), http://time.com/5297891/gregory-hill-jury-awards-4-dollars-police-shooting/.
[116] *Id.*
[117] *Id.*
[118] *Id.*; *see also* Julia Craven, *Michael Slager, The Cop Who Killed Walter Scott, Wasn't Convicted Because Black Lives Don't Matter*, HUFFINGTON POST, (Dec. 5, 2016), https://www.huffpost.com/entry/michael-slager-black-lives-matter_n_58420019e4b017f37fe4c266.
[119] Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. LITIG. 37, 48 (2007).

in his system, which resulted in the reduction of the $4.00 verdict to nothing.[120]

V. HOW WASHINGTON GENERAL RULE 37 ADDRESSES DISGUISED RACIAL DISCRIMINATION IN JURY SELECTION AND A BLUEPRINT FOR RULE 37'S NATIONWIDE IMPLEMENTATION IN ALL AMERICAN COURTROOMS

A. General Rule 37, Washington's Approach to Addressing Implicit Bias in Jury Selection

In an effort to curb the inadvertent discriminatory effect of peremptory challenges supported by arguably unreliable race-neutral justifications, the Washington Supreme Court became the first court to adopt a jury selection rule with an emphasis on addressing implicit bias.[121] Washington General Rule 37 aims to eliminate the unfair exclusion of potential jurors based on race or ethnicity by prohibiting the following as race-neutral justifications for a jury strike:

- having prior contact with law enforcement officers;
- expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- living in a high-crime neighborhood;
- having a child outside of marriage;
- receiving state benefits; and
- not being a native English speaker.[122]

ACLU attorneys championing the expansion of the rule are hopeful that it will reduce the damage done by racial and ethnic bias to the integrity of our judicial system and to communities of color.[123] Despite the well-intentioned expansion of the rule governing *Batson* Challenges, to date, the Washington Supreme Court is the only state with such a rule suggesting that greater attention to the gaps in the law left by *Batson* and *Edmonson*,

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[120] Abrams, *supra* note 115.
[121] *Washington Supreme Court is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection [hereinafter *First in Nation*].
[122] WASH. CT. GEN. R. 37(h)(i)–(vii).
[123] *First in Nation*, *supra* note 121.

implicit bias in general, and the inadvertent discriminatory effects caused by the same, is necessary.[124]

The working group that developed the rule compiled of defense attorneys, members of the judiciary, and court administration among others, prepared a report offering a roadmap for the rule's implementation that can be and should be followed in other states.[125] The group proposes adopting a version of the proposed rule; independently reviewing how the rule can be expanded to include gender and sexual orientation; requiring education sessions for judges related to the implementation of the rule prior to its effective date, if possible; and considering the creation of a list of best practices for jury selection as it relates to the new rule.[126]

B. Practical Steps for the Universal Implementation of an Implicit Bias Rule in All American Courtrooms and Other Potential Solutions to Address the Issue

Washington has provided a great initial blueprint for other states to replicate its efforts to eliminate implicit bias in jury selection. Additionally, it is important to understand the practical steps taken to adopt the rule and exhaust as many potential solutions as possible to address this important issue.

Firstly, the establishment of a relevant local task force composed of attorneys on both sides of the "v,"[127] Judges, community leaders, and general constituents are crucial to a state evaluating its receptiveness to such a rule and to discussing the logistics of local implementation. Additionally, most states' supreme courts possess the authority to implement new court rules at their discretion. Additionally, states' bar associations often feature boards of governors or governing committees tasked with researching and drafting new rules and standards for implementation by their state's bench and bar. Thus, implementation of a mandate similar to Washington General Rule 37 could simply be accomplished by any passionate constituent approaching the state's highest court or bar association, bringing this issue to their attention perhaps by sharing a copy of this article, and

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[124] Debra Cassens Weiss, *Any Prior Police Contact? New State Rule Deems that a Presumptively Invalid Reason for Juror Strike*, ABA J., (Apr. 25, 2018, 8:00 AM), http://www.abajournal.com/news/article/Any_prior_police_contact_new_state_rule_deems_that_a_presumptively_invalid/.

[125] PROPOSED NEW GR 37 –JURY SELECTION WORKGROUP FINAL REP., 1 (Feb. 16, 2018), https://www.courts.wa.gov/content/publicUpload/Supreme Court Orders/OrderNo25700-A-1221Workgroup.pdf.

[126] *Id.* at 7.

[127] Both prosecutors and criminal defense lawyers, plaintiff trial lawyers and civil defense lawyers working on opposing sides of cases – i.e. Party Jack Doe v. Party Jane Doe.

recommending the court or bar to simply mirror the text of Washington General Rule 37 in incorporating it into the state's court rules.

Batson and its progeny already provide us with jurisprudential support to extend the rule to address implicit bias. While the *Batson* Court's ruling contemplated purposeful discrimination, the logic that "the defendant [has] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," should extend to instances of inadvertent discrimination.[128] Likewise, the Court provides support to address the disproportionate impact of some peremptory challenges that would prohibit the exclusion of jurors for the race neutral justifications hidden in bias discussed in this article:

Circumstantial evidence of invidious intent may include proof of disproportionate impact. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." For example, "total or seriously disproportionate exclusion of Negroes from jury venires, is itself such an 'unequal application of the law . . . as to show intentional discrimination."[129]

An actual rule on implicit bias in jury selection is necessary because as it stands *Batson* leaves the analysis of whether a justification given is race neutral to the trial judge holding "that trial judges, experienced in supervising *voir dire,* will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against Black jurors."[130] Unfortunately, our members of the judiciary are only human and are not exempt from their own implicit biases as well.

It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective Black juror is "sullen," or "distant," a characterization that would not have come to his mind if a White juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.[131]

A second initiative to ensure that juries are true cross-sections of local communities would be educating the general public on the importance of jury service and the effects of implicit bias in both criminal and civil jury

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[128] *Batson*, 476 U.S. at 85-86.
[129] *Id.* at 93 (quoting Washington v. Davis, 426 U.S. 229, 241, 242 (2976) (internal citation omitted)).
[130] *Id.* at 97.
[131] *Id.* at 106 (Marshall, J. concurring) (internal citation omitted).

trials. Diverse juries stem from diverse jury pools. It is common for local constituents to view jury service as a chore disrupting their regular schedule. While most minorities are well aware of the hard-fought battles to eradicate Jim Crow Laws that restricted the rights of Blacks prior to the end of the Civil Rights Movement, most potential jurors are uninformed of the fact that jury service, too, is a civil right for which minorities protested. If educated regarding the grave efforts that were extended to afford them the right to serve on a jury, I suspect that many would not so easily dismiss the opportunity to participate in the court process.

Finally, while a court rule can be effective, state-made legislation with more authority could also serve as a potential remedial effort in addressing implicit bias in jury selection. With state legislators seeking to serve the interest of their constituents and their communities, approaching local lawmakers with this article and the idea of further eliminating injustice should fall on receptive ears on both sides of the aisle.

CONCLUSION

Recognizing the injustice that results from discriminatory exercise of peremptory challenges, *Batson* gives us a great framework to address bias in our courts. But even our Constitution did not explicitly prohibit slavery or provide for same-sex marriage. These tenants were carved out through modern interpretation, analysis, and application of centuries old standards premised on logic still relevant today. Likewise, as we evolve as a people and become more knowledgeable regarding issues like implicit bias that potentially impede societal progress, attention must be given to the matter.

There is no "cure" for implicit bias, but we can work together to educate society to recognize it and deliberately implement strategies to prevent the "mental shortcuts" taken in our brains from having unfair, unintentional, and sometimes unconstitutional negative effects. Rather than being color blind, we must learn to see the value in our differences, appreciating the feisty spirit of women of color and the swagger of the Black male that sometimes presents itself in a juror skeptical of the judicial system stemming from generational oppression. If our goal is truly justice for all in both our criminal and civil courts, Washington General Rule 37 is one more place to start.

Envirodemic: Unconstitutional Restrictions on Environmental Protests from the Attacks of 2001 to the Struggles of 2020

By: Benjamin W. Cramer*

INTRODUCTION

Starting in 2017, many American states enacted statutes targeted at environmental protesters, particularly those who delivered anti-pollution messages while demonstrating against large fossil fuel pipeline construction projects. These were followed quickly by additional state laws that added new restrictions for all types of demonstrators, for activities ranging from blocking streets, to making loud noises, to wearing disguises. Those were in turn modified and intensified by lawmakers in 2020, in reaction to an increase in social strife caused by the COVID-19 pandemic and protests against police brutality and racial injustice. These all flowed from the initial statutes targeted at environmental protesters, representing a little-known convergence of anti-terrorism, fossil fuel industry influence, and political reactions to social justice activism.

This article argues that these statutes have followed a pattern, starting with concerns about terrorism after the attacks of September 11, 2001. Soon thereafter, the federal government declared that attacks against "critical infrastructure," which includes fossil fuel pipelines and other energy installations, could be prosecuted as terrorism. In the 2010s, this conception of attacks against critical infrastructure was extended from foreign terrorists to American environmental activists who demonstrated in opposition to high-profile fossil fuel pipeline projects. This resulted in a wave of state laws restricting such protests in the 2017-2019 period, influenced by expanded post-9/11 conceptions of "critical infrastructure." That wave of anti-protest statutes served as precedents for yet another collection of state laws that appeared in 2020, targeted at *all* demonstrators and informed by reactions to that year's widespread popular protests. These statutes include wide restrictions on the freedom of assembly rights enjoyed by citizens under the Constitution of the United States.

As of late 2020, there are a plethora of state anti-protest laws around the country that have not yet been subjected to proper judicial review. This article will argue that these statutes largely contradict the Constitution, particularly the "right of the people peaceably to assemble" provision of the First Amendment.[1] Left unchecked, these statutes restrict the rights of all

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protesters. While protesters at the general level are discussed frequently, this article focuses on environmental activists who have been saddled with laws specifically targeting their own types of protests, and have also been swept up in laws that unconstitutionally restrict *all* peaceful and lawful protests.

The first section of the article serves as a summary of the anti-environmental protest statutes that have been proposed and enacted by various states since 2017, as well as their historical and political influences. The second section covers the constitutional and judicial history of the freedom of assembly clause of the First Amendment, plus the similar but indirect freedom of association. The third section explains that the state anti-environmental protest statutes have almost entirely escaped judicial review as of the time of writing, but argues that most of them are likely to be shot down by the courts if and when judicial review happens. The article concludes with a discussion of why these state laws should be reconsidered and rejected due to their constitutional violations, and as soon as possible.

I. A SURVEY OF ANTI-ENVIRONMENTAL PROTEST LAWS

As of late 2020, 14 states have enacted 25 different statutes that restrict public protests, and 24 similar statutes have been introduced and are currently pending in several other states. Among those are statutes targeted specifically at environmental protests, which have been enacted by 12 states as of late 2020. For purposes of brevity, this article will not describe all of the relevant state statutes,[2] but will instead describe the most noteworthy examples. Besides, many are so similar as to arouse suspicions of copied statutory language that was written by think tanks or similar parties.[3] As described in the *Introduction* section above, one can also detect historical and political patterns in the development of these statutes.

Post-9/11 Influences

The desire of lawmakers to stifle environmental protests, with reasoning based on crises that could resonate with voters, can be traced back to the terrorist attacks of September 11, 2001.[4] During the rush of new laws

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[1] U.S. CONST. amend. I.

[2] For a comprehensive list, *see US Protest Law Tracker* , INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/ (last visited Dec. 26, 2020).

[3] *See infra* notes 28-36 and accompanying text.

[4] Prior to the September 11 attacks, the FBI classified some of the more radical environmentalist groups, particularly animal liberationists, as "ecoterrorists." Use of that and similar terms for a much larger class of environmental activists commenced after the attacks. *See* DeMond Shondell Miller, et al., *Civil Liberties: The Line Dividing Environmental Protest and Ecoterrorists*, 2 J. FOR STUDY RADICALISM 109, 115-16 (2008).

after those attacks, which were in turn universally described as protecting Americans from future attacks,[5] extra protection for "critical infrastructure" and the prosecution of property damage by alleged terrorists became a common statutory tactic.[6] Just hours after the September 11 attacks, some Congressional leaders speculated that they were the works of environmentalists,[7] while Representative Greg Walden (R-OR) compared the general community of environmental activists to the September 11 terrorists as early as September 12.[8] The USA PATRIOT Act of 2001, passed the following month, declared that the nation's policy was now to prevent and prosecute disruptions to *critical infrastructure*,[9] and defined that term as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[10] The act included broad categories of infrastructure to be considered *critical* for such purposes, one of which was "energy";[11] this category was not further defined in the statutory text but there is little doubt that it includes pipelines and similar installations that arouse the ire of environmentalists. This language was then cited in the Homeland Security Act of 2002, which further classifies acts that are "potentially destructive of critical infrastructure or key resources" as terrorism.[12]

While these federal statutes were directed at the prosecution of known terrorists, the language about "critical infrastructure" was later adopted by states hoping to prosecute citizens who conducted protests *about* critical infrastructure, including infrastructure that did not yet exist. While "critical

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[5] This was the interpretation offered as official policy by the Department of Justice when describing several different federal statutes from that period. *See Preserving Life and Liberty*, U.S. DEP'T JUST., https://www.justice.gov/archive/ll/archive.htm (last visited Dec. 27, 2020).

[6] Rebecca K. Smith, *Ecoterrorism: A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists*, 38 ENV'T. L. 537, 570 (2008); Will Potter, *Sentinel Species: The Criminalization of Animal Rights Activists as "Terrorists," and What It Means for Civil Liberties in Trump's America*, 95 DENVER L. REV. 877, 879–82 (2018).

[7] Potter, *supra* note 6, at 882.

[8] *Oversight Hearing on Eco-Terrorism and Lawlesness on the National Forests: Before Subcomm. on Forests and Forest Health*, 107th Cong. (2002) (Statement of Rep. Greg Walden).

[9] U.S.A. Patriot Act, Pub. L. No. 107-56, § 1016(c)(1), 115 Stat. 272, 400 (2001).

[10] *Id.* at § 1016(e).

[11] *Id.* at § 1016(b)(2). This section states the need to protect "critical physical and information infrastructures, including telecommunications, energy, financial services, water, and transportation sectors." The use of the word *including* can be inferred to signify an open-ended list of infrastructure categories.

[12] Homeland Security Act, Pub. L. No. 107-296, § 2 (15)(A)(i), 116 Stat. 2135, 2141 (2002).

infrastructure" had been defined purposefully in federal law, if a bit expansively, that term was widely adopted by state lawmakers who routinely evaded any precise discussion of whether peaceful environmental protesters with a political message should be considered differently than terrorists who are bent on death and destruction.

Statutes Reacting to Keystone Pipeline Protests

Many states began proposing statutes to restrict environmental protests in 2017, and the tipping point was widespread citizen action against the Keystone Pipeline System and associated projects in the American Midwest.[13] This 2000+ mile pipeline network attracted protests from environmentalists soon after its inception in 2008, in the belief that such a long pipeline network would be prone to a correspondingly high number of leaks and breaches, while its construction would itself cause widespread environmental damage.[14] Construction for most of that pipeline network was completed by 2014. A proposal for a parallel overflow pipeline, known popularly as Keystone XL,[15] attracted much more vociferous protests

[13] The Keystone Pipeline System was first proposed in 2008 to transport oil extracted from Alberta, Canada to distribution hubs in Illinois, Oklahoma, and Texas, USA. The system is owned by TC Energy Corporation and the government of Alberta. While Alberta is much closer to seaports on the western coast of Canada, pipelines heading in that direction have to tunnel under the Rocky Mountains or pump the oil up and over them, which both cause significant financial and logistical challenges. The Trans Mountain Pipeline does exactly that, with the attendant capacity shortfalls. *See* Rachel Chen, *Everything You Need to Know About Pipelines – And Why They're So Controversial*, CHATELAINE MAGAZINE (Feb. 4, 2020), https://www.chatelaine.com/news/gas-oil-pipelines-in-canada/.

The much longer southeasterly route, into the midwestern and southern United States, is easier and more cost effective because it follows gently sloping river valleys and is almost entirely downhill. Construction of the Keystone Pipeline System began in 2010. The first phase of the network, extending from Hardisty, Alberta to Nederland, Texas, with a spur to Patoka, Illinois, went into operation in 2014. *See* Melissa Denchak, *What Is the Keystone Pipeline?*, NAT. RES. DEF. COUNS. (Apr. 7, 2017), https://www.nrdc.org/stories/what-keystone-pipeline.

[14] Philip Radford and Daryl Hannah, *Shining Light on Obama's Tar Sands Pipeline Decision*, HUFFINGTON POST (Aug. 29, 2011), https://www.huffpost.com/entry/obama-tar-sands-keystone-pipeline_b_940617. The environmentalists' fears of leaks were justified: in addition to fairly common minor leaks, a major leak of the Keystone Pipeline released 393,000 gallons of unrefined tar sands oil into a sensitive North Dakota wetland in 2019. *See* Emily S. Rueb and Niraj Chokshi, *Keystone Pipeline Leaks 383,000 Gallons of Oil in North Dakota*, N.Y. TIMES (Oct. 31, 2019), https://www.nytimes.com/2019/10/31/us/keystone-pipeline-leak.html.

[15] After the initial Keystone Pipeline System was completed, the supplementary Keystone XL phase was proposed as a roughly parallel line to expand the system's capacity, also beginning at Hardisty, Alberta but following a different route into the American midwest and reconnecting to the original pipeline at Steele City, Nebraska. The Keystone XL

starting in 2015 due to its route through sensitive ecosystems and Native American lands.[16] During that period, yet another pipeline project following a similar long-distance route, called the Dakota Access Pipeline, also attracted significant protests from both environmentalists and Native Americans.[17]

As early as 2010, when popular protests against the Keystone Pipeline System first made the news, the FBI investigated ways to classify peaceful environmental protesters, who opposed the construction of future pipelines, as domestic terrorists who endangered critical infrastructure that had not yet been built; documents obtained by journalists show that some protesters were possibly placed on terrorism watch lists.[18] Protests against Keystone

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phase was temporarily delayed by President Barack Obama in 2015 but reinstated by President Donald Trump in 2017. *See* Steven Mufson and Juliet Eilperin, *Trump Seeks to Revive Dakota Access, Keystone XL Oil Pipelines*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/01/24/trump-gives-green-light-to-dakota-access-keystone-xl-oil-pipelines/.

After several years of revoked permits and rerouting orders from various state and federal agencies, a federal judge in Montana ordered construction of Keystone XL in that state to be halted due to errors in the authorization process. This decision was upheld by the U.S. Supreme Court in July 2020, effectively halting the entire multi-state project until further notice. Northern Plains Resource Council v. U.S. Army Corps of Engineers, 141 S.Ct. 190 (2020). *See also* Adam Liptak, *Supreme Court Won't Block Ruling to Halt Work on Keystone XL Pipeline*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/us/politics/supreme-court-keystone-xl-pipeline.html.

[16] Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NAT'L PUB. RADIO (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight.

[17] The Dakota Access Pipeline follows a route roughly parallel to the proposed route of Keystone XL but about 100 miles to its east. This pipeline originates in an oil-extraction area in North Dakota and heads southeast to Patoka, Illinois, which is also one terminus of the Keystone network. This pipeline was particularly controversial because its route was mapped in a nearly straight line that required it to cross several large rivers and wetlands, while passing through sites deemed sacred by Native Americans. The Dakota Access Pipeline was completed and went into operation in 2017. *See* Tom McCarthy, *How Keystone XL and Dakota Access Went from Opposition to Resurrection*, GUARDIAN (Jan. 24, 2017), https://www.theguardian.com/us-news/2017/jan/24/keystone-xl-dakota-access-pipeline-explainer.

Much like the Keystone network (*see supra* note 14), the Dakota Access Pipeline justified environmentalists' fears by springing at least five leaks in its first few months of operation. *See* Alleen Brown, *Five Spills, Six Months in Operation: Dakota Access Track Record Highlights Unavoidable Reality – Pipelines Leak*, INTERCEPT (Jan. 9, 2018), https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/.

[18] Adam Federman, *Revealed: How the FBI Targeted Environmental Activists in Domestic Terror Investigations*, GUARDIAN (Sept. 24, 2019),

XL and the Dakota Access Pipeline became particularly contentious in 2016-2017,[19] after which the industry lobbied friendly state politicians for new laws to criminalize the protesters.[20]

Starting in 2017, well over a dozen states proposed, and often passed, anti-environmental protest statutes with revealing similarities. All of these laws justify their restrictions by classifying installations that tend to attract environmental controversy, especially fossil fuel pipelines, as "critical infrastructure" that is at risk of sabotage or destruction by terrorists. Oklahoma pioneered this legislative strategy, enacting a statute in early 2017 that authorized misdemeanor charges for trespassing onto property containing critical infrastructure, which in turn was defined as everything from pipelines to telephone poles. Evidence of intent to damage such facilities would result in a more serious felony charge for individuals, while organizations found to have "conspired" with the violators could be charged a fine up to $1 million.[21]

Classifying pipelines and related infrastructure as "critical infrastructure" under this legislative strategy brings the added bonus of prosecuting community-based environmental protesters as if they are terrorists, which comes with political dividends of its own.[22] In addition to expansive definitions of "critical infrastructure", more recent law enforcement efforts have attempted to expand the definition of "terrorism" in order to prosecute protesters. Federal officials explored ways to classify Keystone XL/Dakota Access protesters as "domestic terrorists" in 2017, which would enable tougher felony charges. Officials justified this interpretation by citing the classification of pipelines as critical infrastructure in terrorism-oriented laws dating back to the USA PATRIOT Act of 2001.[23]

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https://www.theguardian.com/us-news/2019/sep/23/revealed-how-the-fbi-targeted-environmental-activists-in-domestic-terror-investigations.

[19] Hersher, *supra* note 16.

[20] Lee Fang, *Oil Lobbyist Touts Success in Effort to Criminalize Pipeline Protests, Leaked Recording Shows*, INTERCEPT (Aug. 19, 2019), https://theintercept.com/2019/08/19/oil-lobby-pipeline-protests/.

[21] H.B. 1123, 56th Leg. Sess. (Okla. 2017) (an Act relating to crimes and punishments; making certain acts unlawful; providing penalties; defining term; providing for codification; and declaring an emergency).

[22] Alexander C. Kaufman, *States Quietly Pass Laws Criminalizing Fossil Fuel Protests Amid Coronavirus Chaos*, HUFFINGTON POST (Mar. 27, 2020), https://www.huffpost.com/entry/pipeline-protest-laws-coronavirus_n_5e7e7570c5b6256a7a2aab41?guccounter=1.

[23] Sam Levin and Will Parrish, *Keystone XL: Police Discussed Stopping Anti-Pipeline Activists "By Any Means"*, GUARDIAN (Nov. 25, 2019), https://www.theguardian.com/environment/2019/nov/25/keystone-xl-protests-pipeline-activism-environment.

Back in the states, Georgia attempted an expanded definition of "domestic terrorism" to include demonstrations, boycotts, and other forms of protest and political expression conducted by groups of more than ten people. That bill, which sported a title promising to protect Georgians from terrorism, was approved by the state senate but was defeated by the state house of representatives in 2017.[24] North Carolina made a similar effort to add such things to its definition of "economic terrorism" in a bill that died in committee.[25] Wyoming also attempted to invent a new crime called "critical infrastructure trespass" for unauthorized entry to such facilities for purposes of vandalism or impeding operations. This bill was passed by both houses of the Wyoming legislature but was vetoed by Governor Matt Mead (R) in 2018.[26]

While those state attempts to expand the definitions of criminal or terrorist offenses failed, attempts to restrict protesters in relation to the established definition of "critical infrastructure" proliferated with little resistance. After Oklahoma's legislative reaction to the Keystone Pipeline protests in 2017, an obvious bandwagon effect commenced in the following years. The year 2019 and the early months of 2020 were a particularly active period for the proposal of new laws targeted at environmental protesters; during this period the Keystone XL/Dakota Access protests had tapered off but lawmakers in more and more states joined the trend as fossil fuel industry lobbyists pushed states legislatures to enact laws like that already passed in Oklahoma.[27] (Note that this particular analysis ends in March 2020, after which a new wave of laws arose in conjunction with the COVID-19 pandemic and social justice protests, to be discussed in the next sub-section below).

The American Legislative Exchange Council (ALEC) is a think tank funded by large corporations and industry groups, which (among other activities) writes model legislation under a theme of free market principles and states' rights. These hypothetical statutes are then presented to state legislators along with lobbying efforts to get them passed.[28] ALEC drafted

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[24] Sen. B. LC 41 1092S (Ga. 2017) *(defeated by state legislature).*

[25] H.B. No. 249, 2017 Gen. Assemb. (N.C. 2017) (an Act to criminalize certain protests as "economic terrorism") *(failed in committee)*.

[26] Sen. B. No. SF 0074, 64th Leg. Sess. (Wyo. 2018) (an Act relating to crimes and offenses; creating the crimes of trespassing on critical infrastructure and impeding critical infrastructure) (passed by state legislature; vetoed by governor).

[27] Susie Cagle, *"Protesters as Terrorists": Growing Number of States Turn Anti-Pipeline Activism into a Crime*, GUARDIAN (July 8, 2019), https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say.

[28] The ALEC website regularly uses the phrase "limited government, free markets, [and] federalism" to describe its philosophy while downplaying its socially conservative views

a generic bill called the *Critical Infrastructure Protection Act* in 2018 that was openly inspired by the Oklahoma statute.[29] By 2019, six states (Indiana, Louisiana, North Dakota, South Dakota, Tennessee, and Texas) had passed statutes featuring language that can be traced back to the ALEC model and/or the Oklahoma statute.[30]

Three of those states added their own unique enhancements. Louisiana got a head start on the trend in 2018 by passing its ALEC-inspired statute, which added increased fines (beyond those charged for traditional trespassing charges) for protests at pipelines and other critical infrastructure, though this statute noted that such fines would not apply to lawful assemblies and peaceful demonstrations for the redress of grievances.[31] Louisiana had considered but rejected authorizing conspiracy charges for the planning of such protests, but North Dakota did not. That state had been particularly traumatized by pipeline protests,[32] and its statute included "organizational liability" for citizens' groups found to have "conspired" with individual protesters, and an organization would pay fines

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on law and order. *See, e.g.,* American Legislative Exchange Council, About Us, https://www.alec.org/about/ (last visited Dec. 26, 2020). For information on the group's ties to conservative lawmakers and industry leaders. *See* Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?ref=politics&_r=0.

ALEC has many notable corporate funders, many of whom overlooked the group's social philosophy until 2013, when a "stand your ground" law in Florida, based largely on a model written by ALEC, became infamous when it supported the acquittal of George Zimmerman who had shot and killed African American teenager Trayvon Martin in a supposed act of self-defense. *See* Lisa Graves, *More Corporations Flee as ALEC Rolls Out Its Legislative Agenda*, PRWATCH (Dec. 3, 2014), http://www.prwatch.org/news/2014/12/12685/more-alec-corporations-flee-alec-rolls-out-2015-legislative-agenda.

[29] American Legislative Exchange Council, *Critical Infrastructure Protection Act* (2018), https://www.alec.org/model-policy/critical-infrastructure-protection-act/.

[30] Cagle, *supra* note 27. For a direct comparison of the language in the ALEC draft legislation with that in anti-protest statutes that had been introduced in various states, *see* Gabrielle Colchete & Basav Sen, *Muzzling Dissent: How Corporate Influence over Politics Has Fueled Anti-Protest Laws*, INST. FOR POL'Y STUD., 14-18 (Oct. 2020), https://ips-dc.org/wp-content/uploads/2020/10/Muzzling-Dissent-Anti-Protest-Laws-Report.pdf (last visited Dec. 28, 2020).

[31] H.B. No. 727, At. No. 692, Reg. Leg. Sess. (La. 2018) (an Act relating to unauthorized entry of a critical infrastructure. An early version of this bill included a conspiracy charge for individuals who merely planned such protests, though this provision was dropped during debate in the state legislature).

[32] Jeff Brady, *2 Years after Standing Rock Protests, Tensions Remain but Oil Business Booms*, NAT'L PUB. RADIO (Nov. 29, 2018), https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming.

ten times higher than that paid by any individual.[33] Texas created four specific new criminal charges for different levels of disruption at a critical infrastructure facility with progressively punitive penalties.[34] The Texas statute was soon utilized to prosecute a group of activists who attempted to make an environmental statement by distracting the pilots of oil tankers passing through a canal in Houston, with a charge of disrupting fossil fuel infrastructure.[35]

Additional states have jumped on the bandwagon, adopting text that originated either with the ALEC draft legislation or earlier state statutes that copied that model themselves.[36] During 2019 and early 2020, similar statutes were passed in Kentucky, Mississippi, Missouri, West Virginia, and Wisconsin. Also during this period, a similar statute was proposed in Illinois, but that is still pending at the time of writing. All of these are noteworthy for creating new criminal charges with revealingly similar names, like "criminal damage to a critical infrastructure facility" in Illinois,[37] and "impeding critical infrastructure" in Mississippi.[38]

It is also worth noting that some of these states, such as Kentucky and Wisconsin, did not have any of the recently constructed mega-pipelines routed through their lands and have not experienced significant pipeline-oriented protests, except perhaps toward smaller local projects. The only possible connection between those states and the Keystone XL/Dakota Access protests that inspired the recent statutes are purely speech-oriented demonstrations in which local activists expressed solidarity with their on-the-ground counterparts along the actual pipeline routes.[39] Laws in those

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[33] Sen. B. No. 2044, 66th Leg. Assemb. (N.D. 2019) (tampering with or damaging a critical infrastructure facility or a public service results in a penalty).

[34] An Act relating to civil and criminal liability for engaging in certain conduct involving a critical infrastructure facility; creating criminal offenses. H.B. 3557, 86th Leg. Sess. (Tex. 2019). The four new criminal offenses are (1) "impairing or interrupting operation of [a] critical infrastructure facility," (2) "intent to impair or interrupt critical infrastructure," (3) "intent to damage" critical infrastructure, and (4) actual damage to critical infrastructure. *Id.*

[35] Nicholas Kusnetz, *Texas Charges Oil Port Protesters Under New Fossil Fuel Protection Law*, INSIDE CLIMATE NEWS (Sept. 19, 2019), https://insideclimatenews.org/news/19092019/oil-port-protesters-charged-texas-fossil-fuel-infrastructure-law-pipelines-greenpeace-houston/.

[36] Kaufman, *supra* note 22.

[37] H.B. 1633, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (tabled by state legislature) (An act concerning criminal law).

[38] H.B. 1243, 2020 Leg. Reg. Sess. (Miss. 2020) (An Act defining impeding critical infrastructure as a misdemeanor or trespass).

[39] Allison Kilkenny, *Hundreds of Actions Are Planned to Protest Keystone XL*, THE NATION (Feb. 3, 2014), https://www.thenation.com/article/archive/hundreds-actions-are-planned-protest-keystone-xl/.

states could be considered copycats targeted at offenses that have not yet happened, which is a sign of industry lobbying pressure.[40]

All of the state statutes passed or proposed during this period use variations of the term "critical infrastructure" and if they do not create new criminal charges, they uniformly add protests at critical infrastructure facilities to existing penalties for trespassing or criminal mischief.[41] All told, 12 states (starting with Oklahoma) enacted such laws during this period, which authorize the prosecution of environmental protesters at critical infrastructure facilities.

Additional states introduced bills that were not passed, including Alabama, Colorado, Idaho, Minnesota, and Pennsylvania. Minnesota lawmakers introduced three different bills, all of which were rejected in the state legislature, and this was also the fate of two proposed bills in Pennsylvania, perhaps demonstrating the ongoing political currency of the issue.[42] Of special note during this period is the first appearance of the issue in the nation's capitol. In 2019, the U.S. Department of Transportation attempted to add expanded criminal penalties for pipeline protests to the annual congressional reauthorization of the department's training and safety budget. Any attempt to "inhibit" the construction or operation of a fossil fuel pipeline would result in up to 20 years in prison plus a fine of up to $250,000 for individuals and $500,000 for organizations. These charges would also apply to those who merely conspired (planned) to engage in such protests. This attempted rider from the Department of Transportation did not survive committee discussions in Congress.[43]

Also during this general period, several states passed, and are currently enforcing, laws that restrict *all* types of protests in various ways, and while these raise much wider issues, they can also be enforced against the environmental protests that are at the heart of this article. Seven states have passed ten different laws of this nature.[44] Most of these intensified previous

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[40] Kathiann M. Kowalski, *Ohio Anti-Protest Bill Could Criminalize Support for Pipeline Demonstrations*, ENERGY NEWS NETWORK (Feb. 12, 2020), https://energynews.us/2020/02/12/midwest/ohio-anti-protest-bill-could-criminalize-support-for-pipeline-demonstrations/.

[41] For brief descriptions of each, see *US Protest Law Tracker – Enacted*, INT'L CTR. FOR NOT-FOR-PROFIT LAW, https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative (last visited Dec. 26, 2020).

[42] *Id.* The relevant states are Alabama, Colorado, Idaho, Minnesota, and Pennsylvania.

[43] *Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2019*, U.S. DEP'T OF TRANSP. legislative proposal (2019), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/71476/2019-pipeline-safety-reauthorization.pdf

[44] *US Protest Law Tracker – Enacted*, *supra* note 42. The relevant states are Arkansas, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, and West Virginia.

penalties for blocking traffic or disorderly conduct while protesting. Some outliers of interest include a law in South Dakota enabling the governor to curtail demonstrations on publicly owned lands, which tend to be the favored locations for environmentalists.[45] North Dakota has prohibited concealing one's identity when protesting;[46] while West Virginia has removed police liability for injuries or deaths that occur when breaking up demonstrations.[47] In an illustration of the need for courts to catch up with this recent rash of anti-protest laws, research for the present article revealed only one such state statute that has been overturned in court. A Missouri statute prohibiting government employees from protesting over matters of personal interest was struck down as an unconstitutionally broad free speech violation by that state's Supreme Court.[48]

The New Wave of 2020

A new rush of anti-environmental protest laws quietly emerged in various states starting in March 2020, just when governors started to order social and economic lockdowns as the COVID-19 pandemic became serious, and the public was understandably distracted by much more pressing government endeavors to bolster health care services and deliver financial stimulus packages. Most such bills had been in development since 2019 or the pre-pandemic months of early 2020, but lawmakers in several states ramped up efforts to get them quickly approved while citizens and journalists were distracted.[49]

Three such state statutes were signed into law by their respective governors almost immediately after lockdowns began. Kentucky Governor Andy Beshear (D) signed legislation that designated fossil fuel pipelines as "key infrastructure assets" and authorized felony charges for tampering with such assets in ways that render their operations "harmful or dangerous".[50] Next was South Dakota Governor Kristi Noem (R), who signed a bill expanding the term "critical infrastructure" to practically all types of fossil fuel equipment and facilities, and adding a felony charge for

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[45] S.B. 176, 2017 Leg., 95th Sess. (S.D. 2017) (An Act to preserve the use of public land, to ensure free travel, to enhance emergency response, and to declare an emergency.). This statute was modified so it would not be enforced against "peaceful" demonstrators after a threatened constitutional challenge by South Dakota citizens.

[46] H.B. 1304, 2017 Leg., 65th Sess. (N.D. 2017) (An Act prohibiting the wearing of masks, hoods, and face coverings during the commission of a criminal offense).

[47] H.B. 4618, 2018 Leg. Reg. Sess. (W. Va. 2018) (A Bill relating to the authority of the Division of Protective Services to compel dispersal of a riot or unlawful assemblage).

[48] H.B. 1413, 2018 Leg. Reg. Sess. (Mo. 2018); overturned in Karney v. Dept. of Labor and Industrial Relations, 599 S.W.3d 157 (Mo. Sup. Ct., 2020).

[49] Kaufman, *supra* note 22.

[50] H.B. 44, 2020 Leg. Reg. Sess. (Ky. 2020) (An Act relating to key infrastructure assets).

causing "substantial interruption or impairment" to such facilities.[51] In the same week, West Virginia Governor Jim Justice (R) signed a bill very similar to that in South Dakota and added fines up to $20,000.[52]

These environmental-specific statutes can be considered harbingers of a larger trend of legislative efforts in additional states that reacted to the social justice protests of Summer 2020. Louisiana, which had already enacted a relatively early statute criminalizing critical infrastructure protests,[53] attempted to add elevated penalties of up to 15 years in prison and $10,000 per person, with even harsher penalties if protesting during an undefined "state of emergency." This bill was passed by the state legislature but vetoed by Governor John Bel Edwards (D) in June 2020.[54] At the time of writing, the most recent state statute to restrict environmental protests was passed by Ohio in December 2020. This statute uses the established federal definition of "critical infrastructure" but expands it to include fossil fuels, electricity, telecommunications, and transportation facilities among others. Protests at any such facility can bring a charge of at least criminal mischief, while organizations can be charged with "complicity" for aiding and abetting protesters.[55]

And while it is outside the immediate scope of this article, during the tumultuous times of 2020, when the citizenry was distracted by the worsening COVID-19 pandemic,[56] there was a veritable avalanche of new state laws targeted at *any* kind of protest. These are political reactions to the racial justice protests after the killing of George Floyd and other African Americans by law enforcement officers, which raised calls in certain quarters for the suppression of protests that were often misleadingly described as violent and anarchistic.[57]

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[51] S.B. 151, Reg. Sess. (S.D. 2020) (An Act to define critical infrastructure and revise certain crimes for the trespass or damage to critical infrastructure).
[52] West Virginia Critical Infrastructure Protection Act, H.B. 4615, Reg. Sess. (W.Va. 2020).
[53] *See supra* note 31 and accompanying text.
[54] H.B. 197, Reg. Sess. (La. 2020) (An Act to amend unauthorized entry of a critical infrastructure) (passed by state legislature, vetoed by governor).
[55] S.B. 33, 133rd Gen. Assemb., Reg. Sess. (Ohio, 2020) (An Act to modify criminal and civil law for critical infrastructure damage).
[56] Kaufman, *supra* note 22.
[57] Assessments of media coverage of the Summer 2020 protests often found over-reporting of minor violent acts by social justice protesters or troublemakers who used the protests as cover, and/or under-reporting of violent acts by police. *See, e.g.*, Sarah L. Jackson, *The Headlines that are Covering Up Police Violence*, THE ATLANTIC (June 3, 2020), https://www.theatlantic.com/culture/archive/2020/06/george-floyd-protests-what-news-reports-dont-say/612571/; Miranda Bryant, *George Floyd Protesters Condemn "Opportunistic" Looting and Violence*, THE GUARDIAN (May 31, 2020),

Just days after passing its critical infrastructure-specific law, South Dakota passed another law defining property damage by three or more people as a "riot" that carries a felony charge.[58] Meanwhile, Tennessee passed a law intensifying criminal charges to up to one year in jail for blocking a street, sidewalk, or government building during a protest; and expanding the definition of a "riot" in which participants can be arrested or ordered to pay restitution.[59] Utah passed a law that adds a "disorderly conduct" charge to anyone who disrupts a government meeting, even by making "unreasonable noises" from outside the building.[60]

Many more bills targeted at any kinds of protests were introduced in 2020 and are in progress at the time of writing. This includes three new federal statutes introduced in the U.S. Congress. One carrying the Orwellian title *Support Peaceful Protest Act*, introduced by Representative Jim Banks (R-IN), would withdraw COVID-19 unemployment benefits and impose fines on anyone convicted of a federal offense while protesting.[61] Two similar bills, introduced by Senators Kelly Loeffler (R-GA) and Ted Cruz (R-TX) respectively, propose to withdraw federal funding for states and cities that fail to prosecute protesters who engage in behavior poorly defined as "rioting."[62]

At the state level, in 2020, eight states introduced fifteen different pieces of legislation targeted at any type of protest.[63] Many of these enhance previous penalties for blocking traffic or disorderly conduct during demonstrations, while often expanding the definition of "riot" as a prosecutable crime. Some outliers that are relevant to the points being made in this article, particularly about bandwagon effects among state legislators, include a proposal in Michigan to revoke public benefits from anyone

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https://www.theguardian.com/us-news/2020/may/31/george-floyd-protesters-condemn-opportunistic-looting-violence.

[58] H.B. 1117, Reg. Sess. (S. D. 2020) (An Act to repeal and revise certain provisions regarding riot).

[59] S.B. 8005/H.B. 8005, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020) (An Act to revise certain criminal laws concerning vandalism, assault, disorderly conduct, rioting, obstructing traffic, camping on state property, and other offenses).

[60] Disorderly Conduct Amendments, S.B. 173, Gen. Sess. (Utah, 2020).

[61] Support Peaceful Protest Act, H.R. 8117, 116th Cong. (2020).

[62] Holding Rioters Accountable Act of 2020, S. 4424, 116th Cong. (2020); RECLAIM Act, S. 4266, 116th Cong. (2020).

[63] For brief descriptions of each, *see US Protest Law Tracker – pending*, INT'L CTR FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/?location=&status=pending&issue=&date=&type=legislative (last visited Dec. 26, 2020). The relevant states are Michigan, Missouri, New Jersey, New York, Ohio, Oklahoma, Rhode Island, and Virginia.

charged with the vaguely-defined offense "civil unrest."[64] Virginia has proposed allowing personal injury lawsuits against local law enforcement officers who refuse to take action against protesters.[65] Rhode Island has proposed heightened penalties for protesters who conceal their identities.[66] And perhaps illustrating the overwrought political reactions arising from shocking events, Missouri and Ohio have proposed statutes that shield counter-protesters or bystanders from civil and criminal liability if they injure or retaliate against protestors, including by driving a vehicle into them, if they can claim that they were trying to escape personal danger.[67]

While these are almost certainly reactions to the civil rights-oriented and social justice-oriented protests of 2020, they are uniformly written in ways that apply to *all* protests and demonstrations. This article does not wish to elevate one type of social grievance above any other, but for present purposes these additional non-specific statutes, if passed, would restrict the rights of environmental protesters as well. These are important First Amendment rights that have been swept aside in the rush to appease industry insiders and citizens who have political disagreements with the protesters. The relatively obscure freedom of assembly right in the First Amendment is at issue.

II. FREEDOM OF ASSEMBLY AND CITIZEN PROTESTS

This article's central argument is that the recent wave of anti-protest laws in various states, including those that are targeted at everybody or at just environmentalists in particular, should be considered violations of various First Amendment rights, particularly freedom of assembly.[68] This section will review the jurisprudence of that particular right of the people, though its history is somewhat limited when compared to its more famous brethren rights regarding speech and the press. This may in turn be a factor

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[64]H.B. 6269, 100th Legis., Reg. Sess. (Mich. 2020) (A Bill to amend the Social Welfare Act).

[65] S.B. 5079, 1st Spec. Sess. (Va. 2020) (Civil action for law-enforcement free zones and standing down during a riot or unlawful assembly).

[66] S.B. 15 Gen. Assemb., Reg. Sess. (R.I. 2020).

[67] S.B. 56, Reg. Sess. (Mo. 2020) (An Act modifying provisions relating to public safety and unlawful assemblies); H.B. 784 (Ohio 2020).

[68] The full text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I. This article focuses on "the right of the people peaceably to assemble," sometimes using the simpler phrase "freedom of assembly" for brevity. *See also* Alan Neuhauser, *Pipeline Protest Laws Spark First Amendment Concerns*, U.S. NEWS AND WORLD REPORT (June 6, 2019), https://www.usnews.com/news/national-news/articles/2019-06-06/pipeline-protest-laws-spark-first-amendment-concerns (last visited Dec. 27, 2020).

in the sparse legal challenges that those anti-protest statutes have faced thus far.

Freedom of Assembly Jurisprudence

In comparison to the more widely studied freedoms of speech and the press in the First Amendment, evidence on why the Founding Fathers included freedom of assembly as a right of the people is rather scant. Thus, the original intent of this constitutional provision is difficult to decipher and the evidence is circumstantial, perhaps leading to some confusion over what the provision truly means, and whether the Founding Fathers intended it to apply to a group as a distinct entity, or just to each individual within it.[69] For instance, this right is almost entirely absent from *The Federalist Papers*.[70] There is some evidence that the Founding Fathers adopted this right from the Magna Carta of 1215, and many of the delegates at the Constitutional Convention in 1787 supported such a right.[71]

Repression of groups of people considered suspicious by government was known to be common in England, and the influential William Penn was arrested in 1670 for assembling supporters in public places for discussions of religion and politics.[72] During the colonial era, British soldiers regularly suppressed gatherings by early Americans, out of suspicion that they were fomenting resistance against the colonial administrators. In 1774, the First Continental Congress published a document titled *Declaration and Resolves* stating that citizens "have a right peaceably to assemble, consider of their grievances, and petition the king."[73] Various rights of assembly, inspired by the Continental Congress document, appeared in several state constitutions starting in 1776.[74] The language from the Continental Congress document was modified only slightly for the First Amendment in 1791, splitting up the right to peaceably assemble and the right to petition the government for redress of grievances, while removing the reference to the king. During the lengthy negotiations over the Bill of Rights, the conception of a freedom of assembly for the "common good" came to the

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[69] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

[70] FEDERALIST NO. 21 by Alexander Hamilton briefly mentions peaceable collective action by citizens, but only for governmental purposes. The terms "assemble" and "assembly" appear in *The Federalist Papers* regularly, but in reference to the proposed national legislative body (later known as Congress). *See id.*

[71] Melvin Rishe, *Freedom of Assembly – Comment*, 15 DEPAUL L. REV. 317, 318 (1966).

[72] Kevin Crosby, *Bushell's Case and the Juror's Soul*, 33 J. LEGAL HIST. 251, 257 (2012).

[73] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), https://avalon.law.yale.edu/18th_century/resolves.asp (last visited Dec. 27, 2020).

[74] Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L. J. 155, 176-77 (2013).

fore, and while that phrase was not ultimately included in the First Amendment, evidence indicates that the Founding Fathers considered peaceable assemblages of citizens to be crucial for the development of democracy and the discussion of political ideas.[75]

Despite its relative obscurity, the Supreme Court has ruled that the freedom of assembly right is "one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[76] Per its plain language, the First Amendment prohibits Congress from enacting laws that restrict the right of the people to peaceably assemble. The meaning of this right was first addressed by the Supreme Court in its *Cruikshank* ruling in 1876, when it held that officials could not prosecute the participants in a public assembly, unless there was reason to believe that the gathering would not be peaceful and lawful.[77]

Meanwhile, the Fourteenth Amendment extends this prohibition to the states.[78] Use of the Fourteenth Amendment to restrict state legislatures is known as the Incorporation Doctrine, and the Supreme Court first applied this doctrine to state laws targeted at group demonstrations and protests in the *DeJonge* ruling of 1937.[79] In the *Hague* ruling of 1939 the Supreme Court first confirmed that the First Amendment protects the right to conduct a peaceful gathering of loosely affiliated citizens on public property.[80] In

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[75] John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TULANE L. REV. 565, 571-74 (2010).

[76] DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (regarding a "criminal syndicalism" statute in Oregon that restricted peaceful gatherings by members of the Communist Party).

[77] United States v. Cruikshank, 92 U.S. 542, 552-53 (1876). This ruling concerned the arrest of two individuals under the Enforcement Act of 1870 (16 Stat. 140 (1870)) which forbade conspiring to deprive someone else of their First Amendment rights. *Id.* at 544. The defendants were found to have been engaged in their own free expression while disrupting a meeting of others who were doing the same. *Id.* at 552-53.

Despite its favorable outcome for freedom of assembly at the high level, the *Cruikshank* precedent was often abused by racially motivated actors who intimidated civil rights demonstrations while claiming to be holding a simple counter-demonstration, until the civil rights reforms of the 1960s. *See* LEONARD W. LEVY ET AL. (EDS.), 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 733 (2000). The Supreme Court vitiated this imbalance in two civil rights-era cases in which it ruled that conspiracy charges could be levied against those who disrupt peaceable assemblies in a hostile fashion. United States v. Guest 383 U.S. 745, 778 (Brennan, J., concurring in part and dissenting in part) (1966); United States v. Price, 383 U.S. 787, 792 (1966).

[78] U.S. CONST. amend. XIV, § 3.

[79] 299 U.S. at 357-58.

[80] Hague v. Cmte. For Indus. Organization, 307 U.S. 496 (1939) (regarding a local ordinance in Jersey City, NJ requiring advance permits for any organizational meeting planned in a public building, in which members are expected to criticize the government).

that ruling, the high court held that the right of citizens to discuss political matters in public places may be regulated in the interests of all, including the assembled citizens themselves as long as they act "with peace and good order".[81]

During the civil rights era, the Supreme Court issued several rulings that extended freedom of assembly rights to increasingly specific types of protests, which correspondingly specific state/local laws had tried to restrict. In 1963, the high court forbade officials from dispersing peaceful demonstrations outside of state and local government offices.[82] The use of "breach of the peace" statutes to prosecute peaceful protesters was outlawed by the high court two years later.[83] An ordinance in Cincinnati, OH outlawing groups of three or more persons who "annoy" passersby was overturned as unconstitutionally vague by the high court in 1971.[84] While this may seem like a laughable conceit, the high court noted that the ordinance enabled police to determine what was "annoying", opening the possibility of abuse toward any public gathering that a police officer personally dislikes, regardless of the ideas being discussed or the social status of the participants.[85] State and local government attempts to restrict assemblies of citizens waned for the next several decades; there were no further significant Supreme Court rulings on this matter until 2010 when it outlawed restrictions against student groups at state universities due to belief system or orientation.[86]

There are some allowable limits to the freedom of assembly right, particularly in the form of Time/Place/Manner (TPM) restrictions, which have been tolerated by the Supreme Court so long as a public demonstration is not restricted altogether.[87] For freedom of assembly disputes, permit requirements are most commonly argued in court. The Supreme Court has

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[81] *Id*. at 515-16.

[82] Edwards v. South Carolina, 372 U.S. 229 (1963) (concerning arrests of participants in a peaceful demonstration outside the South Carolina State House). This holding, as applied to government facilities, was extended to public libraries in Brown v. Louisiana, 383 U.S. 131 (1966); and to jails in Adderley v. Florida, 385 U.S. 39 (1966).

[83] Cox v. Louisiana, 379 U.S. 536, 538-39 (1965) (concerning arrests of non-violent picketers outside a racially segregated restaurant in Louisiana).

[84] Coates v. City of Cincinnati, 402 U.S. 611 (1971).

[85] *Id.* at 612, 615.

[86] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672-73 (2010) (concerning the refusal of the University of California system to recognize a Christian student group that required its members to sign a pledge condemning homosexuality – a practice opposed by other students).

[87] A government's TPM restriction on a public gathering involving expression must survive the Strict Scrutiny test, meaning that the restriction must be narrowly tailored to specifically target the locality's legitimate interest in public safety. Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (regarding a local anti-noise ordinance).

held that local governments can require a permit in advance for a public assembly planned for a certain location,[88] and officials may require changes to the planned location or time but cannot arbitrarily ban the assembly, especially in reaction to the topics to be discussed by the participants.[89] In another precedent from the civil rights era (though in favor of a White Supremacist counter-protest organization) the high court ruled in 1968 that any attempt by officials to preemptively restrict a public meeting must include a hearing in which the affected individuals or organizations are given the opportunity to respond to the specific reasoning behind the government's decision.[90]

There is no precise definition of a "peaceable" assembly in the First Amendment, beyond anything that qualifies for the vaguely defined "common good" as used by the Founding Fathers.[91] Finding the difference between a peaceable assembly and one that is likely to become unlawful has been left to the courts, who issue rulings after an event is restricted by the police. This in turn raises questions about which level of government determines the difference between peaceable and unlawful, and if this can be done before or after the participants' First Amendment rights are violated.[92] This dilemma came up briefly in *Whitney v. California* in 1927, a seminal First Amendment precedent that was mostly about political speech.[93] The better-known outcome of this ruling was to uphold Charlotte Anita Whitney's arrest under California law for a public speech believed to

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[88] Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941) (regarding a state law requiring a permit for parades on public streets). Note that for practical reasons, officials cannot take action against the participants in a public assembly retroactively for failing to obtain a permit in advance, if the assembly was a spontaneous reaction to a current event. *See* Kellie Pantekoek, *Is There a Right to Peaceful Protest?*, FINDLAW (June 3, 2020), https://civilrights.findlaw.com/enforcing-your-civil-rights/is-there-a-right-to-peaceful-protest.html (last visited Dec. 27, 2020).

[89] Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (regarding a city ordinance requiring a permit for any public demonstration); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (regarding a New York City noise regulation enforced against a concert in which organizers discussed political issues between acts; here loudness was considered the "manner" in a TPM restriction).

Also note that in First Amendment jurisprudence, any government restriction on an expressive activity due to its topic is known as viewpoint discrimination, which is rarely tolerated by the courts. *See* Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 S.M.U. L. REV. FORUM 20, 38-40 (2019).

[90] Carroll v. Princess Anne, 393 U.S. 175 (1968) (concerning an attempted restraining order, requested by civil rights organizations, against a planned demonstration by a White Supremacist group in Maryland).

[91] Inazu, *supra* note 75, at 576.

[92] Rishe, *supra* note 71, at 318-19.

[93] 274 U.S. 357 (1927).

threaten public safety and order.[94] Justice Louis Brandeis issued an influential concurrence in which he famously promoted the Marketplace of Ideas doctrine;[95] but a lesser-known aspect of that concurrence was his repeated use of the term "assembly", indicating that a gathering of citizens extolling a message can be considered an act of expression. Per the First Amendment such an assembly should not be considered unlawful if it merely voices opinions that could arouse the ire of others.[96]

This somewhat clarified the meaning of a "peaceful" gathering in First Amendment law, but not entirely. First, the Supreme Court has held that there is no right to participate in an assembly in a fashion that creates a clear and present danger or disruption to public safety and order. The high court precedent on this matter, *Cole v. Arkansas* in 1949, allows retroactive prosecution of any person who committed a violent crime during an otherwise peaceable gathering.[97] While the "clear and present danger" doctrine has since been overturned by the Supreme Court for arrests arising purely from the content of speech,[98] the *Cole* ruling still serves as a precedent for criminal arrests after participating in an assembly.

The *Cole* ruling addressed the actions of individuals who participate in a public demonstration, but the First Amendment rights of groups needed further clarification. The line between group expression and group disorderly conduct was first addressed by the Supreme Court in the *Terminiello* case, also in 1949, in which it ruled that free political discussion by groups could be expected to generate anger in others, but depriving people of the right to assemble simply because onlookers may be stirred to anger is a violation of the First Amendment.[99] Note that directly instructing others to engage in a riot is not covered by this decision, but arousing anger in bystanders while expressing an opinion is protected speech.[100] One practical outcome of this ruling is that there may or may not be a

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[94] *Id.* at 372.
[95] Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).
[96] *Id.* at 374. *See also* Inazu, *supra* note 75, at 597.
[97] 338 U.S. 345 (1949) (regarding two men charged with crimes during a labor strike, challenging their convictions on First Amendment grounds).
[98] The "clear and present danger" test for determining the constitutionality of a speech restriction originated in Schenck v. United States, 249 U.S. 47 (1919). That standard was overturned in Brandenburg v. Ohio, 395 U.S. 444 (1969), which replaced it with "imminent lawless action" as the standard for restricting a person's speech purely for reasons of their topic of discussion in public.
[99] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (concerning a city "breach of peace" ordinance targeted at group demonstrations likely to cause public anger and unrest, issued during a period of frequent racially based demonstrations).
[100] Rishe, *supra* note 71, at 322. A dissenting opinion by Justice Robert H. Jackson found a contradiction between this determination and the "clear and present danger" standard. *Terminiello*, 337 U.S. at 26.

constitutional right to raise a disturbance, but there is certainly a right to hold a demonstration without worrying that uninvolved bystanders could lose control of their actions.[101]

Overall, in freedom of assembly cases that have reached the Supreme Court, in which the definition of a "peaceable" assembly was in contention, the high court resorted to the established "clear and present danger"[102] and (later) "imminent lawless action" doctrines.[103] This is not a particularly clear line, and legal scholars have reached the rather vague conclusion that the First Amendment protects most group activity by citizens but local officials are allowed to break up an unlawful or un-peaceable assembly that transcends protected expression.[104] As will be seen in the next section of this article, the pipeline protests in the several years leading up to 2020 only featured a few isolated acts of violence by protesters, but police often over-interpret passionate protests at secure locations as unlawful or non-peaceable, which in turn justifies tougher penalties for persons arrested in the act of speech-related protest.[105]

Freedom of assembly has also been clarified in judicial review of laws that tried to apply conspiracy charges to citizens' organizations. The Supreme Court ruled in 1958 that states cannot accuse citizens' advocacy groups and non-profit organizations of conspiracy while operating within their territories simply because of the nature of those groups' grievances. In *NAACP v. Alabama*, a state statute of this nature, targeted at civil rights organizations, was found by the high court to be a violation of freedom of assembly.[106]

Freedom of Association Jurisprudence

Among the rights of the people enshrined in the First Amendment, freedom of assembly is unique as the only one that cannot be exercised by an individual. In other words, one cannot "assemble" alone. Also, notwithstanding occasional spontaneous gatherings kicked off by current events, most assemblies are planned in advance. Therefore the constitutional right can be extended to an organization's preparatory activity before it holds an assembly, leading the courts to recognize a related

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[101] DAVID FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 29 (1963).
[102] Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (concerning a state law that banned loitering and picketing).
[103] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also supra* text accompanying note 98.
[104] Rishe, *supra* note 71, at 328.
[105] *See infra* note 132 and accompanying text.
[106] 357 U.S. at 466.

right called "right of association," which is not specifically mentioned in the First Amendment.[107] In the words of the renowned Thomas I. Emerson,

> More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.[108]

That statement was made in 1964,[109] when grassroots organizations had moved beyond hobbies and common interests, and had taken an active role in the political process, particularly in the area of civil rights.

The ability of organizations to enjoy First Amendment rights went back a little further, to the anti-Communist scares of the 1940s and 50s. In an early ruling that bears haunting parallels to the modern trend of classifying passionate protesters and their organizations as terrorists, in 1951 the Supreme Court ruled in *McGrath* that an organization could sue to challenge its inclusion on the federal government's List of Subversive Organizations.[110] This determination was made largely on due process and equal protection grounds under the Fourteenth Amendment.[111] But in a concurring opinion, Justice Hugo Black found that inclusion on the government's unfavorable list could damage an organization's reputation and ability to conduct its activities, effectively punishing a group (in this case, a charitable Anti-Fascist organization) for its political beliefs. Justice Black proclaimed that this "smack[ed] of a most evil type of censorship" that violated the First Amendment.[112] This was an important early recognition of freedom of association as a constitutional right, albeit an indirect one, and by the end of the 1950s courts regularly recognized this right as worthy of protection under the First Amendment.[113]

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[107] John Inazu & Burt Neuborne, *Right to Assemble and Petition*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267 (last visited Apr. 2, 2021).
[108] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1 (1964).
[109] *Id.*
[110] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).
[111] *Id.* at 187 (Jackson, J., concurring).
[112] *Id*. at 143-44 (Black, J., concurring).
[113] L. Darnell Weeden, *Fifty Plus Years After the Start of the Civil Rights Movement: A Contextual Analysis of the Freedom of Association for the National Association for the Advancement of Colored People's Pursuit of Reforming the Law*, 12 FLA. COASTAL L. REV. 337, 344 (2011).

In the 1957 *Sweezy* case, the Supreme Court clarified the relationship between freedom of association and freedom of speech by stating that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association."[114] *NAACP v. Alabama* in 1958, already discussed above as an important precedent for freedom of assembly,[115] was also an important precedent for freedom of association, or in other words, who one assembles *with*. In the opinion of the Court, Justice John M. Harlan II used the term "freedom of association" repeatedly, elevating it to a distinguishable right equal to those that are named explicitly in the First Amendment.[116]

Similarly to the pattern seen for freedom of assembly cases, during the civil rights years the Supreme Court upheld freedom of association while overturning a series of increasingly specific state and local laws, uniformly striking down such laws as First Amendment violations. In the *Shelton* ruling of 1960, the high Court struck down a state law requiring public employees to list all the organizations of which they were members as a condition of employment.[117] In 1963, the same logic was applied to subpoenas, requiring the leaders of organizations that were the subjects of legislative investigations to disclose lists of their membership.[118]

Also like freedom of assembly, active litigation surrounding the meaning of freedom of association tapered off after the civil rights era, but there were a few important developments later. In 1978, the Supreme Court ruled that litigation activities by non-profit citizens' organizations constituted expressive conduct under the First Amendment.[119] In 1995, the high Court ruled that government officials, when awarding permits to organizations wishing to appear at a public event, could not pick and choose such organizations in order to sculpt the event's message.[120] This was an important precedent for the right of organizations to associate with each

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[114] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (concerning an investigation by the state legislature in which the petitioner was ordered to provide information on "subversive" organizations of which he was suspected of being a member).
[115] 357 U.S. 466.
[116] *Id.* at 461-63; *see also* Emerson, *supra* note 108, at 2.
[117] Shelton v. Tucker, 364 U.S. 479, 490 (1960) (concerning an Arkansas state law).
[118] Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 558 (1963) (originating with an investigation into the NAACP by the Florida Legislature).
[119] *In re* Primus, 436 U.S. 412, 437-39 (1978) (concerning a South Carolina statute that classified an organization's search for witnesses in planned litigation to be "solicitation of business" that can be restricted under economic regulations).
[120] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995) (originating with a permitting dispute for the annual St. Patrick's Day parade in Boston, MA, when the LGBT group sought permission to participate and city officials attempted to preemptively douse expected harassment by other groups in the parade as well as spectators).

other for expressive purposes, which in turn becomes an expressive exercise under the First Amendment.[121]

The ties between the First Amendment and expressive activity by groups, be they loose spur-of-the-moment assemblages of individuals or structured protest organizations, and the right of groups to express themselves in public places, should be in little doubt after a comprehensive ruling on the matter by the Supreme Court in 1983. The opinion by Justice Byron White in the *Perry Education* case is worth quoting at length:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[122]

For purposes of the present article, a few passages in Justice White's statement stand out. The next section will analyze whether the statutes in the recent plague of state anti-protest legislation are narrowly tailored to advance a coherent and significant state government interest, and whether they are functional as legitimate time/place/manner restrictions. These matters can be clarified if and when judicial review commences for these various state laws.

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[121] *See* Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. C.R. L.J. 111, 139-40 (1998).

[122] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (citations omitted) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)) (involving a collective bargaining agreement between teachers and the school district of Perry Township, IN, in which a provision regarding access to teachers' mailboxes by representatives of rival unions was disputed. The Supreme Court ruled that a public school district's mail system is a "nonpublic forum"– the use of which can be regulated by government administrators, but they must not discriminate by viewpoint).

III. THE NEED FOR JUDICIAL REVIEW OF ANTI-ENVIRONMENTAL PROTEST LAWS

The constitutional problems posed by the recent plague of state statutes restricting environmental protests have not escaped journalists and legal experts. When those laws started to be proposed in various states in 2017, the earliest examples were declared unconstitutional by the American Civil Liberties Union (ACLU).[123] Legal commentators also predicted that a few of the then-proposed statutes might survive judicial review if they were tailored toward public safety, but also predicted that most of them would be rejected outright as First Amendment violations.[124]

Legal experts and activists also worried that the very existence of these laws, even if they have only been proposed in state houses, could cause a chilling effect on protest movements.[125] A prominent protester at the Dakota Access Pipeline named Chase Iron Eyes bemoaned the chilling effect by saying in 2017 that "[t]he state will try to devise ways to squash opposition and chill the will of people who are willing to face risks to their liberty to further their cause."[126] As similar statutes were passed in more and more states up to 2019, the ACLU again deplored the constitutional violations as the laws targeted a particular category of protest, namely those with an environmental message.[127]

These predictions of chilling effects and defeats in court were logically sound but premature. In the years up to the writing of the present article, the anti-environmental protest laws have proliferated wildly despite their constitutional problems, but in a strange way, the social crises of 2020 have shown that protest movements in general have not been chilled by those laws. In a nutshell, the statutes have proliferated because judicial review has not yet kicked in as of the time of writing. This article argues that judicial review, if it ever happens, will work in favor of protesters. Granted, there is no shortage of parties who could initiate that process if they wished.

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[123] Elise Young & Janan Hanna, *States Are Cracking Down on the Biggest Protests Since '60s*, BLOOMBERG (Feb. 3, 2017, 12:42 PM), https://www.bloomberg.com/news/articles/2017-02-03/worst-u-s-protests-since-1960s-spur-states-to-pursue-crackdown.

[124] Laura Graham, *New Anti-Protest Laws Are Incompatible with American Democracy*, CONVERSATION (Apr. 7, 2017, 8:07 AM), https://theconversation.com/new-anti-protest-laws-are-incompatible-with-american-democracy-74279.

[125] Kristine Ruhl, *"An Alarming Trend": The Dangers of Recently Proposed Anti-Protest Legislation*, 22 PUB. INT. L. REP. 95, 95 (2017).

[126] Mitch Smith & Michael Wines, *Across the Country, a Republican Push to Rein in Protesters*, N.Y. TIMES (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html?_r=0 (referencing bills in North Dakota that were merely proposed at the time of the interview; some have since been passed into law); *see supra* notes 32-33 and accompanying text.

[127] Neuhauser, *supra* note 68.

Since the protests against the Keystone and Dakota Access projects commenced in the early 2010s, many hundreds of demonstrators have been arrested. For example, 141 people were arrested at a North Dakota pipeline construction site in just one day in October 2016, by police sporting riot gear and armored vehicles.[128] Several hundred other people have been arrested over the course of regular demonstrations over multiple years at North Dakota's Standing Rock Reservation.[129] Neither pipeline protests nor arrests have completely dissipated in the years since; at the time of writing the most recent incident involved 22 arrests in December 2020 at a protest against a relatively minor pipeline project in Minnesota.[130]

Many of those arrested persons were charged with felonies under their respective state anti-protest laws that may have been passed just months or weeks before.[131] The overwhelming majority of these charges were related to encroachment or vandalism at critical infrastructure facilities, as there have only been a few reported incidents of violence at anti-pipeline protests, all at Standing Rock Reservation in September through November 2016.[132] In a foreshadowing of official responses to the social justice protests of 2020, lawmakers and police officers routinely used the word "riot" to describe the Standing Rock incidents.[133]

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[128] Sam Levin et al., *North Dakota Pipeline: 141 Arrests as Protesters Pushed Back from Site*, GUARDIAN (Oct. 28, 2016, 9:10 AM), https://www.theguardian.com/us-news/2016/oct/27/north-dakota-access-pipeline-protest-arrests-pepper-spray.

[129] Brady, *supra* note 32; *see also infra* note 152 (regarding the importance of the protests at Standing Rock Reservation).

[130] Brooks Johnson, *22 Protesters Arrested at Enbridge Pipeline Construction Site*, STAR TRIB. (Dec. 15, 2020, 12:19 PM), https://www.startribune.com/22-protesters-arrested-at-enbridge-pipeline-construction-site/573398531/.

[131] Naveena Sadasivam, *After Standing Rock, Protesting Pipelines Can Get You a Decade in Prison and $100K in Fines*, GRIST (May 14, 2019), https://grist.org/article/after-standing-rock-protesting-pipelines-can-get-you-a-decade-in-prison-and-100k-in-fines/.

[132] Journalists have only reported a few incidents during this period in which some protesters set fires, threw rocks and bottles, and tore down one security fence. There is only one report of a serious injury committed by a protester, who threw a rock that inadvertently hit a different protester. Madison Park & Mayra Cuevas, *Dakota Access Pipeline Clashes Turn Violent*, CNN (Nov. 22, 2016, 11:26 AM), https://www.cnn.com/2016/11/21/us/dakota-access-pipeline-protests/index.html; On the other hand, many more injuries were caused by police who fired rubber bullets, sprayed water cannons, and forcibly removed demonstrators from the conflict sites. *See,* Julia Carrie Wong & Sam Levin, *Standing Rock Protesters Hold Out Against Extraordinary Police Violence*, GUARDIAN (Nov. 29, 2016, 3:26 PM), https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation.

[133] Eyder Peralta, *Dakota Access Pipeline Protests in North Dakota Turn Violent*, NPR (Sept. 4, 2016, 4:14 PM), https://www.npr.org/sections/thetwo-way/2016/09/04/492625850/dakota-access-pipeline-protests-in-north-dakota-turn-violent.

Since there was so little violence that was actually caused by demonstrators at the pipeline protests during this period, one can conclude that most of the arrestees were charged with relatively minor offenses for the earlier protests, followed by the locational charges involving "critical infrastructure" installations that were enabled by the new wave of state statutes that commenced in 2017. This raises serious First Amendment issues because most of the arrestees were engaged in nonviolent speech-related protests that typically took place on public lands (or in the case of Standing Rock Reservation, tribal lands on which protesters were local members of the tribe and others who were invited from outside by the tribe).

At the time of writing, it appears that few if any of the arrestees have challenged their charges on First Amendment grounds, at which point freedom of assembly precedents would be beneficial. Meanwhile, except for one specific statute in Missouri,[134] none of the many anti-protest laws (environmental or otherwise) discussed in this article have attracted serious legal challenges from citizens or volunteer organizations who could request judicial review of the facial or applied language in those statutes. Freedom of assembly precedents would also be useful in this type of endeavor.

Given the many contradictions with First Amendment rights displayed by these various state laws, judicial review is sorely needed and most of those laws would surely be found lacking. However, in the American legal system, this will not happen until someone actually brings a case to court.[135] This is especially important for the anti-protest statutes described in this article because they are state laws, and states are known to both create new laws based on specific local trends, and to copy each other at a rapid pace.[136] Thus, there can be a plethora of new laws on a given topic proposed and enacted in a rush in several states, long before the judiciary has the opportunity to pull back their excesses.[137] In the event that any of the state laws described here reach judicial review, the history of freedom of assembly and freedom of association jurisprudence is highly likely to enable outcomes favorable to protesters. The most useful precedents involve

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[134] H.B. 1413, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018); Karney v. Dep't of Lab. & Indus. Rels., 599 S.W.3d 157 (Mo. 2020) (overturning H.B. 1413).

[135] This is embodied in the Case or Controversy Clause of the Constitution, which limits judicial power to cases that a given court is in a position to hear. In other words, a particular judge cannot issue an opinion on a case that does not arrive at that judge's court. U.S. CONST. art. III, § 2, cl. 1.

[136] *See* Bradley A. Blakeman, *States Are the Laboratories of Democracy*, HILL (May 7, 2020, 7:30 AM), https://thehill.com/opinion/judiciary/496524-states-are-the-laboratories-of-democracy.

[137] *See generally* Walter Sinnott-Armstrong, *Weak and Strong Judicial Review*, 22 L. & PHIL., 381, 386 (2003) (responding to an article suggesting that strong judicial review is not democratic by analyzing both weak and strong judicial review).

requirements for time/place/manner restrictions, and the relationship between an individual troublemaker and the group of which he is a part.

Time/Place/Manner Restrictions

State statutes seeking to restrict environmental protesters could possibly survive First Amendment muster if they are structured as time/place/manner restrictions that impose geographic limitations rather than suppressing the protests altogether.[138] Several of the state statutes discussed in this article try to restrict protests against critical infrastructure facilities, but only use vague terms that place the targeted protesters "at" or "near" such facilities, while including a far more specific and widening range of facilities (far beyond pipelines) in that "critical" category. For example, the statutes in Indiana,[139] Kentucky,[140] and Louisiana[141] all repeatedly use the term "entry" or its variations as justification for issuing trespassing or other charges, but without adequate description of the geographic zones "at" or "near" a piece of infrastructure from which entry is excluded.

Those are clearly locational restrictions on the "place" of a protest, and it is important to note that time/place/manner restrictions must satisfy a three-prong test as outlined by the Supreme Court in *Ward v. Rock Against Racism* in 1989.[142] First, the restriction must be content-neutral; second, it must be narrowly tailored to serve a significant governmental interest; and third, it must leave open other channels for communicating the group's message.[143] In reverse order, the third prong of this test is typically a non-issue, because pipeline protesters have plenty of other media options in which to make their point. On the other hand, most of the state anti-protest statutes covered in this article would fail the second prong of that test. The statutes generally do not narrowly define the precise physical locations at or near critical infrastructure from which protesters should be excluded, and they usually avoid discussing the governmental interest that this serves, beyond circular claims that the infrastructure is "critical" in some fashion. For the first prong of the test, one could also argue, though with a little less

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[138] In a time/place/manner (TPM) restriction, law enforcement officials may impose requirements on when a planned protest takes place, its precise geographical location, or the methods to be used by protesters (such as loudspeakers). The officials must not restrict the protest altogether. TPM restrictions are allowable under the First Amendment if they are designed narrowly and convincingly per Supreme Court precedent. *See infra* notes 142-44 and accompanying text.

[139] S.B. 471, 2019 Gen. Assemb., Reg. Sess. (Ind. 2019).

[140] H.B. 44, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020).

[141] H.B. 727, 2018 Gen. Assemb., Reg. Sess. (La. 2018).

[142] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[143] *Id.* at 791.

confidence, that the statutes are not content-neutral because most pipeline protests are focused on two perennial topics–environmental destruction and (occasionally) land rights. Besides, the very location of a demonstration has an important impact on the content of its grievance, so locational restrictions can have surprising effects on the effectiveness of the protest's message.[144] Anti-pipeline protests that were held right at the pipeline sites, such as those in Standing Rock Reservation, easily got the most media coverage and helped spread the environmental message.[145]

On the matter of compelling governmental interests in time/place/manner restrictions, the states have advanced their own justifications for the anti-protest statutes, which may make political sense but their constitutionality is on shakier ground. Texas openly admitted that it wishes to maintain its recent fossil fuels boom by not allowing protesters to block or delay pipeline construction projects.[146] Throughout American history, infrastructural and utility industries have often claimed the need to build their networks as fast as possible for the supposed social and economic benefits, at the expense of other laws and citizens' rights, starting with the railroad industry in the mid-1800s and including several different technological phases of the telecommunications industry since the early 1900s.[147] Fossil fuel industry lobbyists have used the same rationale to push for the passage of anti-protest laws, and have boasted of doing so during the COVID-19 pandemic as a strategy to avoid opposition.[148] Industry insiders also claim that pipelines must be built as quickly as possible because fossil fuel supplies that are extracted at the source but not delivered will be wasted.[149]

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[144] Brod, *supra* note 74, at 189-90.
[145] Hersher, *supra* note 16.
[146] Neuhauser, *supra* note 68.
[147] Benjamin W. Cramer, *Right Way Wrong Way: The Fading Legal Justifications for Telecommunications Infrastructure Rights-of-Way*, 40 TELECOMMS. POL'Y 996, 1002 (2016).
[148] Alleen Brown, *A Powerful Petrochemical Lobbying Group Advanced Anti-Protest Legislation in the Midst of the Pandemic*, INTERCEPT (June 7, 2020, 6:11 AM), https://theintercept.com/2020/06/07/pipeline-petrochemical-lobbying-group-anti-protest-law.
[149] Natural gas presents a particular challenge in this regard. Due to geological processes, natural gas often accompanies oil that is pumped out of the ground. In addition to the desired oil, extraction firms end up with an unexpected quantity of natural gas that they are willing to sell. However, in the United States natural gas finds buyers at a much slower rate than oil, so the oil is sent away in pipelines immediately while the natural gas sits in storage for an extended period. Vast quantities of this unmovable natural gas are burned off at the extraction site, which releases severe pollutants into the atmosphere, wastes a potentially useful natural resource, and causes significant financial losses. The fossil fuel industry has claimed that this problem can be alleviated with more pipelines to ship the natural gas to possible customers who did not have access to natural gas supplies

Per the requirements of First Amendment jurisprudence, this *could* be the compelling governmental interest in the recent restrictions of environmental protests, but state lawmakers have muddled this rationale when proposing and writing bills. Supporters of the statutes in various states have openly admitted that the statutes were reactions to the widespread pipeline protests in 2016-2017 and the resulting popular demand for political action against the protesters.[150] North Dakota state senator Janne Myrdal supported that state's bill, after claiming a protestor tampered with a Keystone XL installation in her district.[151] The newsworthy protests in and around North Dakota's Standing Rock Reservation in 2016, and the commentary of citizens opposed to the protests, caught the attention of lobbyists and lawmakers both in that state and nationwide,[152] and inspired an intense lobbying effort by the industry to convince state lawmakers of the need for statutes restricting pipeline-oriented protests. The network efficiency rationale, along with vague allusions to the need for public safety, were used frequently in this lobbying push,[153] which generated the rush of new laws starting in 2017.

Such patterns are not new in American history, with industry-specific anti-protest laws proliferating after other controversies, such as a plethora of state laws passed in the 1980s prohibiting "agricultural interference" after activists highlighted problems of animal treatment and pesticide usage at big factory farms. Amid the public controversy, industry lobbyists pushed for legal restrictions on protesters with public safety-oriented reasoning.[154] Public safety and network efficiency rationales could serve as the compelling governmental interest required for the anti -environmental

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before but could be enticed to buy if they were near a pipeline hub. Hiroko Tabuchi, *Despite Their Promises, Giant Energy Companies Burn Away Vast Amounts of Natural Gas*, N.Y. TIMES (Oct. 16, 2019), https://www.nytimes.com/2019/10/16/climate/natural-gas-flaring-exxon-bp.html.

[150] Neuhauser, *supra* note 68.

[151] Myrdal's claim of literally seeing the saboteur is unsupported, but two protesters were arrested at the location in question in 2016 under North Dakota's previous conspiracy law. One received probation and the other served a six-month prison sentence. James MacPherson, *Legislature Approves Bumping Pipeline Tampering Penalties*, A.P. NEWS (Mar. 25, 2019), https://apnews.com/article/cd39b04dbbc84246b61171dd9900c1e3.

[152] The Standing Rock Reservation, which is the homeland of several bands of the Sioux people, includes territory in both North Dakota and South Dakota. The Dakota Access Pipeline was routed through a remote corner of the reservation in North Dakota, posing a risk to water supplies for parts of the reservation. The most dramatic environmental protests took place on the tribe's North Dakota territory. *See* Brady, *supra* note 32.

[153] *See generally* Colchete & Sen, *supra* note 30, at 10-12 (outlining the recent push for new laws to prevent environmental protesting and accompanying lobbying efforts from oil and gas interest groups).

[154] *See* Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1319-23 (2015).

protest statutes to pass First Amendment muster, but those have only been claimed by state lawmakers and industry officials off the record. Research for this article uncovered no significant discussion of these rationales in legislative documents, which could have been used in attempts to justify speech-related restrictions that are narrowly tailored and based on a compelling governmental interest. These rationales must be spelled out in convincing detail for any statute that seeks to restrict First Amendment expression.[155]

Peaceably Assembling

This paper argues that the anti-environmental protest laws are at odds with the First Amendment's right of the people peaceably to assemble, but there remains a problem with the meaning of "peaceable" and who gets to define it. It is important to note that the right to peaceably assemble is not absolute,[156] and statutes that prohibit people from assembling with the intention to commit violence and other unlawful actions are permissible under the First Amendment.[157] Therefore the term "peaceable" acts as a restraint on group action.[158] The jurisprudence on freedom of assembly and freedom of association has generally settled on the matter of finding a line between peaceable and not-so-peaceable, allowing officials to restrict public demonstrations if there is a "clear and present danger" and (later) "imminent lawless action."[159] Unfortunately for protesters, there is no settled precedent on where that line is and what logical steps must be followed to find it. Thus, local governments and police officials have been given great discretion in breaking up protests, or refusing to allow them in the first place, because they *could* become unlawful, and this may just be a matter of opinion.

Of particular interest for the topic of environmental or social justice protests, and who gets to decide whether they are "peaceable," is a 2006 ruling by the Second Circuit stating that "government officials may stop or disperse public demonstrations or protests where 'clear and present danger of riot, disorder, interference with traffic upon the public streets, or other

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[155] 491 U.S. 781 (1989) (providing the judicial test for "narrowly tailored" statutes and a "compelling" or "significant" governmental interest).
[156] De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
[157] Cole v. Arkansas, 338 U.S. 345, 353 (1949).
[158] Brod, *supra* note 74, at 167-68.
[159] The "clear and present danger" test for determining the constitutionality of a speech restriction originated in Schenck v. United States, 249 U.S. 47 (1919). That standard was overturned in Brandenburg v. Ohio, 395 U.S. 444 (1969), which replaced it with "imminent lawless action" as the standard for restricting a person's speech purely for reasons of their topic of discussion in public.

immediate threat to public safety, peace, or order, appears.'"[160] Note that this ruling was handed down decades after the "clear and present danger" doctrine had been tossed aside by the Supreme Court,[161] and it specifically uses the loaded term "riot" for an act that may have not yet been committed by initially peaceful protesters. While this is only a Circuit Court ruling, it demonstrates many of the issues discussed in this article, particularly the tendency of officials to assume that peaceful protesters are likely to become violent (or in First Amendment terms, un-peaceable) rioters, and to break up expressive demonstrations preemptively and unfairly before actual violence occurs. One can easily conclude that this process leads to First Amendment violations, as speakers acting as a group are unable to state their grievances before being handled roughly by the police.

The Individual's Role in an Assembly

With a few exceptions that addressed very specific disputes, Supreme Court rulings addressing the meaning of freedom of assembly practically disappeared after the 1980s.[162] America's shortage of decisive and recent jurisprudence on this First Amendment right over the last several decades could be impacting current controversies over protests.[163] Another possible issue is the concurrent increase in private tort lawsuits arising from protests, and the political and legal support for such actions. These tort suits are typically brought by someone claiming to have been harmed during a public protest, with a damages claim against individual participants or the groups that organized the demonstration.[164] These tort suits often use novel claims to sidestep the First Amendment freedoms of the protesters.[165] As noted by Supreme Court Justice William O. Douglas in 1966, "The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit."[166]

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[160] Jones v. Parmley, 465 F.3d 46, 56–57 (2d Cir. 2006) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)) (addressing accusations of police misconduct while dispersing a 1997 demonstration at a Native American reservation in New York State).

[161] *See* 395 U.S. at 449-50.

[162] Inazu & Neuborne, *supra* note 107.

[163] Inazu, *supra* note 75, at 611-12 (arguing that confusion over the difference between freedom of assembly and freedom of association has discouraged the judiciary from tackling the issue in recent decades, while legislators have used that same uncertainty to introduce more and more restrictions on public demonstrations).

[164] Timothy Zick, The Rising Costs of Dissent: Public Protest and Civil Liabilities 1-2 (May 8, 2020) (unpublished paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3511233.

[165] *Id.* at 2-3.

[166] NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting) (arguing against the majority decision to deny certiorari in the case from the Supreme Court of

One recent suit of this nature has attracted the attention of legal commentators, who worry about its possible impact on political protests. In a 2016 protest by Black Lives Matter in Baton Rouge, Louisiana, an unnamed police officer claimed to be injured by a heavy object thrown by someone in the crowd of protesters. In *Doe v. Mckesson*,[167] the officer sued a local leader of the Black Lives Matter movement, DeRay Mckesson, along with the non-profit organization that handles Black Lives Matter's affairs, for personal damages.[168] A federal district court granted Mckesson's motion to dismiss the suit, due to lack of evidence that he was responsible for the thrown object.[169] The police officer appealed this ruling to the Fifth Circuit. In an August 2019 ruling written by Judge E. Grady Jolly on behalf of a three-judge panel, the Fifth Circuit remanded some evidentiary matters to the lower court, but upheld the motion to dismiss based on lack of evidence that Mckesson was vicariously liable for the actions of the unknown assailant who threw the object at the officer.[170] The Fifth Circuit also made liberal use of the 1982 Supreme Court precedent *Claiborne Hardware*,[171] in which the high court ruled that tort claims for damages against individuals or organizations can be restrained if those parties, at the time of the incident, were engaged in expressive activity under the First Amendment.[172]

In an unexpected, and procedurally questionable, turn of events, the Fifth Circuit withdrew its opinion in December 2019, about four months

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Georgia, in which a business owner tried to sue for damages after being boycotted and publicly criticized by the NAACP).

[167] 272 F.Supp.3d 841 (M.D. La. 2017); Mckesson v. Doe, 141 S. Ct. 48 (2020), *cert. granted, vacated*.

[168] Black Lives Matter is a decentralized social movement with no higher leadership structure, with local leaders organizing protests under the movement's name but with mostly local donations and related support. However, an entity called Black Lives Matter Global Network Foundation oversees the movement's philosophy and handles some higher business functions. *See* Laura Barrón-López, *Why the Black Lives Matter Movement Doesn't Want a Singular Leader*, POLITICO (July 22, 2020, 4:30 AM), https://www.politico.com/news/2020/07/22/black-lives-matter-movement-leader-377369.

[169] 272 F.Supp.3d at 854. Whether the object that injured the officer was thrown by a protester, affiliated or unaffiliated with Black Lives Matter, was unproven. The identity of the person who threw the object is also unknown, and it is unclear in the ruling document if there was any investigative attempt to find the assailant's identity. *See id.* at 843-55.

[170] Doe v. Mckesson, 935 F.3d 253, 265-266 (5th Cir., 2019). The Fifth Circuit ruling noted that the First Amendment does not bar the officer's suit for damages, because causing an injury (if proven) is a criminal offense outside of the free speech protections enjoyed by the individual or group. *Id.* at 262.

[171] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (regarding a tort suit from a business owner claiming financial damages caused by a boycott organized by the NAACP).

[172] 935 F.3d at 263.

after it had found in favor of Mckesson. This time, the same three-judge panel that presided in the first ruling overturned Judge Jolly's original opinion.[173] The revised opinion claimed that the first had misread the *Claiborne Hardware* precedent as protection against civil liability for any type of political protest activity. This time the Fifth Circuit dug deeper into the Supreme Court's 1982 ruling and located the statement, "[t]he First Amendment does not protect violence."[174] Thus, the injured officer in the instant case "simply needed to plausibly allege that his injuries were one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson."[175] The panel of judges avoided the matter of whether Mckesson actually did such things himself, and found that the officer's tort claim against him was justiciable and should not have been dismissed by the District Court.[176] The result was to remand the case to the lower court and allow the officer's tort claim to proceed if he could deliver evidence of Mckesson's liability.[177] This has not yet happened as of the time of writing.[178]

Meanwhile, a request by Mckesson for an *en banc* hearing at the Fifth Circuit, to clarify the questionable withdrawal of the first ruling in his favor, was denied in January 2020.[179] This was appealed in turn, and certiorari to the United States Supreme Court was granted in November 2020, though no further progress has been made as of the time of writing.[180] The case at the Supreme Court has drawn amicus briefs from a wide selection of free speech advocates and civil rights groups, who claim that even though the *Claiborne Hardware* precedent does not offer First Amendment protection for violent protesters, the Fifth Circuit erred in its placement of responsibility. The main problem is the assumption that DeRay Mckesson, as an organizational protest leader, is personally liable for the actions of everyone who participated in the protest.[181]

This in turn raises serious issues of freedom of assembly and freedom of association, if one person and/or his organization in a public protest is

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[173] Doe v. Mckesson, 945 F.3d 818 (5th Cir. 2019), withdrawal of 935 F.3d 253. The Fifth Circuit's rationale for revisiting its previous ruling has not been disclosed.
[174] 458 U.S. at 916.
[175] 945 F.3d at 829 (citing 458 U.S. at 927).
[176] 458 U.S. at 822.
[177] 945 F.3d at 834-35.
[178] Garrett Epps, *The Important First Amendment Principle now at Risk*, ATLANTIC (Apr. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/04/important-first-amendment-principle-now-risk/610348/.
[179] Doe v. Mckesson, 947 F.3d 874 (5th Cir. 2020).
[180] Mckesson v. Doe, 141 S. Ct. 48 (2020). This grant of certiorari vacated the three different decisions at the Fifth Circuit and partially remanded some tangential matters of state law to the Supreme Court of Louisiana. *Id.*
[181] Epps, *supra* note 178.

held responsible for the actions of every individual person present.[182] Furthermore, the *Claiborne Hardware* ruling clarified, in a fashion unappreciated by the Fifth Circuit, that private tort lawsuits can muzzle protesters as much as criminal charges, adding another chilling effect for protest movements.[183] These two issues were noted by the Fifth Circuit in its initial ruling in Mckesson's favor, but forgotten in its self-reversal.

While this is just one case, it illustrates the American judiciary's shortage of freedom of assembly jurisprudence and deliberation on the rights of groups since the 1980s.[184] In the interim, the Supreme Court has applied free speech protections to increasingly specific types of expression, from computer code to religious discrimination by businesses, and this indicates a focus on the individual while neglecting the rights of groups under freedom of assembly.[185] Perhaps the *Mckesson* case, accepted by the Supreme Court in late 2020, can be an opportunity to revisit the right to protest in order to air political grievances, especially during the recent resurgence of demonstrations against racial discrimination and social injustice.

State laws attempting to restrict social justice protests have simply been adapted from laws that initially targeted environmental activists. The fractured history of the Mckesson case does not bode well for anyone charged under the state laws restricting environmental protests, unless those statutes are subjected to rigorous judicial review in their own right.

State Constitutions

Before wrapping up the matter of constitutionality, we must also consider the often overlooked matter of state constitutions. Almost all of the fifty states also protect the right of assembly in their state constitutions.[186] This is true for the states that recently passed the most egregious anti-environmental protest laws as described in this article. For example, Oklahoma, which passed the first state statute targeting "critical infrastructure" protests at pipeline facilities by adding criminal charges for gatherings at everything from pipelines to telephone poles,[187] includes "the right to peaceful assembly" in the Bill of Rights section of its state

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[182] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 887 (1982).
[183] *Id.* at 916-17.
[184] Inazu and Neuborne, *supra* note 107.
[185] Kia Rahnama, *How the Supreme Court Dropped the Ball on the Right to Protest*, POLITICO (Aug. 17, 2020, 5:28 PM), https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191.
[186] Andrew M. Winston, *Right to Peaceful Assembly: United States*, LIBR. CONG., (Dec. 30, 2020) https://www.loc.gov/law/help/peaceful-assembly/us.php at n.2.
[187] H. B. 1123, 2017 Reg. Sess. (Okla. 2017). *See supra* text accompanying note 21.

constitution.[188] North Dakota, which passed a statute authorizing "conspiracy" fines against citizens' organizations ten times higher than those paid by any individual who participates in a pipeline protest,[189] has given its citizens the constitutional right "in a peaceable manner, to assemble together for the common good, and to apply to those invested with the powers of government for the redress of grievances."[190]

South Dakota, which has authorized its governor to restrict protests on public lands,[191] and has defined "critical infrastructure" (where protests can also be restricted) as any fossil fuel-associated installation,[192] says in its constitution that the right "of the people peaceably to assemble to consult for the common good and make known their opinions, shall never be abridged."[193] Another interesting example is Wisconsin, which has outlawed big infrastructure protests of a type that it has not yet experienced.[194] This state's constitution includes "[t]he right of the people peaceably to assemble, to consult for the common good, and to petition the government."[195]

One can only speculate on how or why the legislators in these and similar states disregarded their own constitutions when drafting statutes that clearly violate those same freedoms of assembly. It is conceivable that competent judges in those states' court systems could exercise judicial review and find contradictions between the statutes and the state constitutions. However, since the U.S. Constitution is the supreme law of the land, this gives added weight to a legal challenge brought by anyone arrested under those statutes, and if they choose to argue that the arrest was a violation of their freedom of assembly rights, they can make more impact in federal court. Also, the Fourteenth Amendment requires states to observe the First Amendment rights in the U.S. Constitution.[196] Therefore we need judicial review at the federal level in order to reach definitive rulings on the deepest constitutional implications of these state anti-environmental protest

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[188] OKLA. CONST. art. II.
[189] *See* Brady, *supra* note 32 and accompanying text; S. B. 2044, 66th Leg. Assemb. (N.D. 2019).
[190] N.D. CONST. art. I, § 5.
[191] S. B. 176, 2017 Reg. Sess. (S.D. 2017). An Act to preserve the use of public land, to ensure free travel, to enhance emergency response, and to declare an emergency. This statute was modified so it would not be enforced against "peaceful" demonstrators after a threatened constitutional challenge by South Dakota citizens. *See supra* note 45 and accompanying text.
[192] H. B. 4615, 2020 Reg. Sess. (W. Va. 2020). West Virginia Critical Infrastructure Protection Act. *See supra* text accompanying note 52.
[193] S.D. CONST. art. VI, § 4.
[194] *See* Kilkenny, *supra* note 39 and accompanying text.
[195] WIS. CONST. art. I, § 4.
[196] *See* U.S. CONST. amend. XIV, § 3; DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

laws, which in turn would be beneficial for our understanding of the more recent state laws that target protests of all kinds.

CONCLUSION

As opposed to the speech of individuals, the freedom of assembly clause of the First Amendment was meant to protect in-person gatherings by groups that transcend mere collections of individuals.[197] Groups have their own collective concerns that should be considered a unique form of expression. Granted, there has been some dispute over whether to apply Constitutional rights to groups as distinct entities or to each individual participant separately. For instance, in 2008 the Supreme Court stated that "Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right,"[198] because it is unclear if the Constitution's use of the word *people* was in the traditional collective sense or if it was meant to be an allusion to the citizenry as an amorphous entity.[199] However, in a dissenting opinion in the same case, Justice John Paul Stevens proclaimed that the First Amendment's "right peaceably to assemble" indicated rights for distinct groups of citizens.[200]

The Constitution also mentions "the people" in the Ninth and Tenth Amendments as well as the Preamble, so it can be argued that the Founding Fathers considered rights for groups as distinct entities.[201] While most jurisprudence surrounding mentions of "the people" in the Constitution applies amorphously to everybody in the citizenry,[202] this article has demonstrated that the more specific jurisprudence of freedom of assembly and freedom of association allows us to conclude that distinct subsets of the population, in the form of issue-oriented protest groups, have rights as distinct entities.

Due to industry lobbying and political over-reactions to comparatively rare riots, many American states have enacted laws restricting the rights of environmental protesters, and later *all* protesters, that ignore the freedom of assembly right as given in the U.S. Constitution and even in many of those same states' own constitutions. A bandwagon effect among state legislators has applied the rhetoric of violent foreign terrorism, left over from 2001, to

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[197] Brod, *supra* note 74, at 162.
[198] D.C. v. Heller, 554 U.S. 570, 580 (2008). This was not a freedom of assembly case, but instead a Second Amendment case involving a dispute over a local gun control ordinance and whether it violated a right of "the people" as a group, or just individuals. *Id.* at 579-81.
[199] *Id*. at 579.
[200] *Id*. at 645.
[201] Brod, *supra* note 74, at 165. Note that Brod argues that freedom of assembly should be construed as only an individual right while deciding to join a group. *Id.* at 165-67.
[202] *Id*. at 166.

assemblages of American citizens demonstrating their political grievances. This should not stand under the First Amendment, and it will not stand as soon as those laws are subjected to judicial review by judges with a knowledge of First Amendment jurisprudence. Citizens who have been arrested under such laws may not be aware of the possibility of having their arrests overturned on First Amendment grounds, or cannot afford lengthy legal battles, either of which could come with the bonus of such a law being struck down in court. Therefore legal advocacy organizations like the American Civil Liberties Union, which has already condemned many of the laws described in this article,[203] should seek exemplary test cases in which an advocacy effort can draw judicial attention to these unduly politicized statutes.

Legal scholar C. Edwin Baker argued that American protesters should not be restricted from challenging the status quo, and stated that "[t]he constitutional right of assembly ought to protect activities that are unreasonable from the perspective of the existing order."[204] In the recent wave of anti-environmental protest laws, the existing order has thus far prevailed. It is time for a renewed perspective on the neglected "right of the people peaceably to assemble," in which the Constitution serves its function in restraining overzealous state politicians.

[203] *See* Young and Hanna, *supra* note 123 and accompanying text; Neuhauser, *supra note* 68 and accompanying text.
[204] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989).

Enforcement of Tribal Witness Subpoenas on Non-Indians: How the UCCJEA Provides for the Impossible

By: Alexander R. Medina*

ABSTRACT

With the dwindling population of Native American and indigenous populations throughout our country, the care of Indian children is more important than ever before. The courts have recognized that providing for a strong, healthy environment, immersed in a tribe's culture, is tantamount to the preservation of a tribe's identity. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was drafted and adopted to provide an efficient means to care for our most important legacy, our children. American Indian tribes throughout our country recognize the need to protect their children and that custody litigation requires all necessary evidence and testimony for judges to come to the right decisions. A tribe's sovereign immunity is often its greatest strength, but it can also be a weakness when needing to enforce subpoenas for testimony from Non-Indians. While most would consider the issuance and enforcement of such subpoenas to be impossible, the UCCJEA provides the means to complete the task, reinforcing the legitimacy of tribal court authority and allowing tribes to better care for their children.

INTRODUCTION

When the United States Congress passed the Indian Child Welfare Act of 1978[1] (ICWA), they did so knowing that states had failed in their handling of tribal custody proceedings, often failing to account for the cultural and social standards that exist in tribal communities.[2] In passing ICWA, Congress also recognized that it was the exclusive right of the tribes to have jurisdiction over any custody matter "involving an Indian child who resided or is domiciled within the reservation of such tribe" absent vested

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[1] Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (2018).

[2] *Id.* § 1901(4)-(5) (expressing that unwarranted removal of children and breaking up of Indian families occurred under state jurisdiction and chastising the states for their failures and the disruption removals caused).

state jurisdiction by existing federal law, and that the tribes should be provided full faith and credit in recognition of this authority.[3] This passage of authority marked a departure from the, then used, Uniform Child Custody Jurisdiction Act (UCCJA), which did not recognize Indian tribes as "tribunals" eligible to make determinations in interstate child custody proceedings.[4] When the National Conference of Commissioners on Uniform State Laws revised the UCCJA for the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), they explicitly included this new recognition in section 104 of the act in providing tribes the same standing as if it were another state of this nation.[5]

Since the UCCJEA was introduced in 1997, forty-nine states, save for Massachusetts, plus the District of Columbia and the Virgin Islands, have adopted the UCCJEA in some form or another.[6] Bills to enact the UCCJEA in Massachusetts have been introduced in each session since 2003.[7] However, no reports have been issued to explain why it continues to fail in committee. The law provides clarity as to which state has jurisdiction of certain custody proceedings and discusses the enforcement tools available to the courts to gather all necessary facts for determining judgment, including taking testimony of witnesses located in another state.[8]

This article will explore the ability of tribes to utilize the UCCJEA and other means of agreement between tribes and states to issue and enforce any necessary subpoenas for witness testimony in child custody proceedings. Part I will provide a more complete background on the UCCJEA and its application regarding tribal custody proceedings. Part II provides a general background on the use of subpoenas to require non-resident witness testimony and compares provisions of the UCCJEA to other uniform laws that address this issue. Part II will also address how to enforce such

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[3] *Id.* § 1911 (giving exclusive jurisdiction over any proceeding involving an Indian child to the tribes, including rights to decline that jurisdiction, rights to intervene in certain state proceedings, and full faith and credit in Indian child custody proceedings).

[4] Ronald W. Nelson, *UCCJA – UCCJEA Comparison Section-by-Section* 8-9 (2009), KANSAS-DIVORCE, https://www.kansas-divorce.com/uploads/uccja-uccjea_side-by-side.pdf (explaining that the UCCJA was adopted before ICWA was enacted, so there was no basis to offer such recognition).

[5] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT (1997) § 104 (UNIF. L. COMM'N 1997).

[6] *Id.*

[7] S. 959, 2003-04 Gen. Ct., 183rd Sess. (Mass. 2003); S. 872, 2005-06 Gen. Ct., 184th Sess. (Mass. 2005); H. 1657, 2007-08 Gen. Ct., 185th Sess. (Mass. 2007); H. 92, 2009-10 Gen. Ct., 186th Sess. (Mass. 2009); S. 713, 2011-12 Gen. Ct., 187th Sess. (Mass. 2011); S. 711, 2013-14 Gen. Ct., 188th Sess. (Mass. 2013); S. 746, 2015-16 Gen. Ct., 189th Sess. (Mass. 2015); S. 806, 2017-18 Gen. Ct., 190th Sess. (Mass. 2017); S. 886, 2019-20 Gen. Ct., 191st Sess. (Mass. 2019).

[8] *See infra* Part II.

subpoenas through a court's inherent contempt powers. Finally, Part III will address the other means of reciprocity and cooperation between tribes and states through the analysis of applicable state and tribal codes and rules of procedures, allowing for such subpoenas to withstand potential challenges.

I. UCCJEA BACKGROUND

The Uniform Child Custody Jurisdiction and Enforcement Act, or UCCJEA, was introduced by the National Conference of Commissioners on Uniform State Laws in 1997.[9] A successor to the Uniform Child Custody Jurisdiction Act (UCCJA), the UCCJEA was promulgated to provide clarity in the wake of new federal laws and inconsistent interpretations in case law since the UCCJA's promulgation in 1968.[10] Additionally, the UCCJEA provides a process to enforce interstate custody and visitation determinations that the UCCJA lacked.[11]

Regarding jurisdiction, the UCCJEA prioritized the child's home state jurisdiction for initial jurisdiction on any custody proceedings, including exclusive and continuing jurisdiction for modification and other matters.[12] Additionally, the act clarified that emergency jurisdiction over a custody proceeding was only temporary until a court with proper jurisdiction makes a permanent determination.[13] The UCCJEA also specifies that there cannot be simultaneous proceedings in different jurisdictions, save for temporary emergency situations, which prevents any attempt by a parent to circumvent any proceedings or orders from another jurisdiction.[14] Finally, the UCCJEA recognized that international jurisdictions, including intra-national tribal jurisdictions, were to be recognized as states and provided full faith and credit in their custody determinations.[15] However, of the adopting states, some chose not to adopt subsections (b) and (c) of section 104, thus stripping the tribal courts of their opportunity for recognition over these matters.[16] This poses a particular issue with jurisdiction over potential modification proceedings stemming from tribal orders. In addition, this is contrary to the Supreme Court's unanimous decision in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians* that a person must exhaust all

[9] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5.
[10] *Id.*
[11] *Id.*
[12] *Id.* §§ 201-03.
[13] *Id.* § 204.
[14] *Id.* § 206.
[15] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, §§ 104-05.
[16] ALA. CODE § 30-3B-104 (2020); ALASKA STAT. § 25.30.800 (2020); COLO. REV. STAT. § 14-13-101 (2020) (Did not adopt § 104); CONN. GEN. STAT. § 46b-115c (2020); IDAHO CODE § 32-11-104 (2020); VT. STAT. ANN. tit. 15, § 1063 (2021).

available remedies within a tribal court before invoking the jurisdiction of another court; including in civil matters involving non-Indians.[17]

The importance of recognition stems from the ability to access the enforcement tools the UCCJEA provides, which alleviate difficulties that come when parents or children move from the initial jurisdiction.[18] The UCCJEA thus provides means to assist in enforcement, from registration of custody determinations to providing a role for public authorities during the process.[19] These enforcement measures supply the teeth to important tools the UCCJEA provides to parties, particularly the ability to take testimony from non-resident witnesses. The act specifically lays out a party's ability to offer testimony from such witnesses within that witness's state of residence and the court's ability to order such testimony from a witness, as long as these procedures are available to a citizen of the witness' state of residence.[20] This includes depositions or other technological means of testimony.[21] However, this could also include subpoenas for examination in court, if a tribe is located within the state the witness resides in, along with any limits prescribed by a state.[22]

II. SUBPOENAS FOR NON-RESIDENT WITNESS TESTIMONY

The use of subpoenas to require testimony and other evidence from witnesses is one of the most powerful tools available to courts. Per Black's Law Dictionary, subpoenas are a command from a court to compel a person to appear to testify on a certain matter.[23] While the majority of applicable case law involving tribes and subpoenas focuses on quashing them by way of sovereign immunity,[24] it is still often a power granted to tribal courts by

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[17] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). This decision stemmed from a civil case against a state school district from an incident that occurred at a state school on tribal lands. *Id.* The school district sought and gained an injunction from the District of Montana's federal court on pending tribal court proceedings, citing 28 U.S.C. § 1331 for federal question jurisdiction. *Id.* The 9th Circuit reversed but did not discuss the merits of the challenge to the tribal court's jurisdiction. *Id.* The Supreme Court reversed, stating "Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *Id.* ; *cf.* Williams v. Lee, 358 U.S. 271 (1959) (explaining that civil complaints that arise from actions on reservation land, even between non-Indian and Indian parties, are under the exclusive jurisdiction of the tribe).

[18] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 201.

[19] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 5-6.

[20] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 20.

[21] *Id.*

[22] *See infra* Part III, Section B.

[23] *Subpoena*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[24] *See, e.g.*, Bonnet v. Harvest (U.S.) Holdings, Inc., 741 F.3d 1155, 1162 (10th Cir. 2014) (holding a *subpoena duces tecum* against a non-party Indian tribe constituted a suit against the tribe subject to sovereign immunity); Alltel Commc'ns., LLC v. DeJordy, 675

and through the tribe's legal code or statutes.[25] A state jurisdiction's guidance for their subpoenas often stems from their Rules of Civil Procedure, but most states have some form of guidance regarding subpoenas for citizens in foreign proceedings. There may be limits on what these subpoenas can entail, like requiring a deposition in the witness's state of residence instead of testimony in the issuing jurisdiction.[26] Furthermore, the Federal Rules of Civil Procedure recognize instances where a subpoena might need to be transferred to a jurisdiction where compliance would occur.[27] The UCCJEA on its face recognizes the ability of courts to wield this power, imploring determining jurisdictions to utilize it when needed and compliance jurisdictions to accept them when needed.[28]

The UCCJEA is not the only uniform law to provide the means for testimony by non-resident witnesses in a jurisdiction. The Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, familiarly known as the Attendance of Out of State Witness Act (AOSWA), allows for states to compel material witnesses to testify in court for criminal proceedings.[29] AOSWA was revised in 1936 and subsequently adopted by all fifty states.[30] The committee that promulgated the AOSWA did so as a means to facilitate efficient administration of criminal law proceedings, recognizing the importance of having all available material witnesses to provide evidence in such an important matter.[31]

A. *People v. Superior Court (Jans)*

The earliest case to extend the provisions of the AOSWA to tribal courts came out of the Court of Appeals of California, Fifth Appellate District in 1990.[32] *People v. Superior Court (Jans)* stemmed from a superior court ruling that the Navajo Nation could not compel the attendance of a material witness who resided outside of the tribe's reservation, under AOSWA.[33] In *Jans,* the court discussed that the nature of Indian tribes as separate sovereign entities within the United States warranted the question

F.3d 1100, 1105 (8th Cir. 2012) (holding sovereign immunity against subpoenas also applies to third-party tribes).

[25] *See, e.g.*, SPOKANE TRIBE OF THE SPOKANE RSRV. – TRIBAL CODE § 1-6.01 (2001).

[26] *See, e.g.*, Ariz. R. Civ. P. 45.1; Nav. R. Civ. P. 45; 12 OKLA. STAT. § 12-2004.1 (2014); Wash. Sup. Ct. Civ. R. 45.

[27] Fed. R. Civ. P. 45(f).

[28] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 111.

[29] UNIF. ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIM. PROC. § 2 (UNIFORM LAW COMM'N 1936).

[30] *Id.* at note 29, at cover page.

[31] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5.

[32] People v. Superior Court (*Jans*), 224 Cal. App. 3d 1405, 1411 (1990) (holding that the Navajo Nation could invoke AOSWA to compel a non-Indian criminal witness to testify).

[33] *Id.* at 1408.

of whether the Navajo Nation constituted another "State or Territory of the United States" as defined by Penal Code section 1334.1.[34] The United States Supreme Court, however, had already made such a determination in *United States Use of Mackey v. Coxe* (*Mackey*), where the Court determined that the Cherokee Nation constituted a domestic territory of the United States.[35] The *Jans* court, in agreement with the *Mackey* Court, also emphasized the fact that the Navajo Nation had, on their own accord, adopted AOSWA in 1989.[36] The reciprocal nature of the AOSWA, and the fact that both jurisdictions had adopted the act, assisted in creating "a community of jurisdictions which will honor the request of fellow members" and that denying the tribe's request would undermine this intended effect.[37] The effects of *Jans* proceeded to encourage states to adopt similar stances regarding the AOSWA.[38]

The same reciprocity standard of AOSWA applies to states that embrace the UCCJEA. For instance, in *Billie v. Stier,* Florida's Third District Court of Appeals determined that the Miccosukee Tribal Court should be recognized as an eligible "[S]tate" court in the eyes of Florida's UCCJEA.[39] However, the court ruled that, since the Miccosukee Tribal Court had failed to substantially conform to the UCCJEA's requirements, jurisdiction on the matter should be conferred to the state's circuit court.[40] As the *Jans* court dictates, "[t]he act gives only insofar as it takes."[41]

B. Enforcement: Addressing the Contempt Question

Courts must also have the teeth to enforce subpoenas, often in the form of contempt of court charges.[42] The UCCJEA dictates that a court of another jurisdiction has a duty to enforce the determinations and orders of the governing jurisdiction.[43] The committee commented that this includes all remedies available to a party of that state, including a petitioner's right to

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[34] *Id.* at 1407.
[35] U.S. Use of Mackey v. Coxe, 59 U.S. 100, 103 (1856) ("This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory, -- a territory which originated under our constitution and laws.").
[36] *Jans*, 224 Cal. App. 3d at 1407.
[37] *Id.* at 1410 (citing Vannier v. Superior Court, 650 P.2d 302, 309 (1982)).
[38] *See* Tracy v. Superior Court, 810 P.2d 1030, 1049 (1991) (extending Arizona's AOSWA to include the Navajo Nation); State v. Breeden, 634 A.2d 464, 469 (1993) (embracing Maryland's "community of jurisdictions" in analyzing reciprocity).
[39] Billie v. Stier, 141 So. 3d 584, 586 (Fla. Dist. Ct. App. 2014).
[40] *Id.* at 587.
[41] *Jans*, 224 Cal. App. 3d at 1410.
[42] *See, e.g.*, Wash. Sup. Ct. Civ. R. 45(g).
[43] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 303.

cite for contempt of court.[44] The AOSWA also discusses contempt of court charges, echoing similar language to the UCCJEA regarding available remedies in criminal proceedings, stating that they "shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this [jurisdiction]."[45]

However, state jurisdictions tend to differ in regard to subpoena enforcement for non-resident witnesses. For instance, the State of Washington applies the same rule for contempt to local depositions for foreign proceedings as they do for witness testimony in local cases.[46] Arizona explicitly offers non-resident witnesses the same ability as resident witnesses to object to a subpoena.[47] In doing so, Arizona ensures the same due process to any of its residents that they would receive when challenging a subpoena from a state court.[48] By providing this protection in the face of tribal court judgments and subpoenas in its own procedures, Arizona reinforces the requirements imposed by Congress in the Indian Civil Rights Act of 1968 for both Indian and non-Indian persons,[49] just as due process is afforded to any person by the Fifth and Fourteenth Amendments of the United States Constitution. However, while the above-referenced rules discuss options within state courts to enforce their own subpoenas, or proxy subpoenas on behalf of a tribe, very little discussion exists on the ability of tribes to enforce subpoenas.

B(1). Applying *Hicks v. Feiock* to the "Jurisdictional Maze"

Tribes, guided by acts of Congress and the applicable federal courts, recognize that there is an inherent difference between how non-Indians are to be treated in comparison to their own enrolled members within tribal justice systems.[50] Legal scholars recognize that a "jurisdictional maze" often exists in Federal Indian Law, but this can easily be navigated when applying the bright-line rules laid out in Supreme Court precedent.[51] For criminal jurisdiction, tribes are guided by *Oliphant v. Suquamish Indian*

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[44] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 303 cmt.
[45] UNIF. ACT TO SECURE THE ATTENDANCE OF WITNESSES, *supra* note 29, § 2.
[46] Wash. Sup. Ct. Civ. R. 45(g).
[47] Ariz. R. Civ. P. 45.1(e).
[48] *Cf.* Ariz. R. Civ. P. 45(e).
[49] 25 U.S.C. § 1302(a)(8) (2018).
[50] *See* Joseph Chilton, *The Jurisdictional Haze: An Examination of Tribal Court Contempt Powers over Non-Indians*, 90 N.C. L. Rev. 1189, 1204 (2012).
[51] *See, e.g.*, DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 483 (6th ed. 2011) ("The jurisdictional maze can be walked with some confidence if a step-by-step approach is followed.").

Tribe.[52] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians* governs tribal civil jurisdiction.[53] While congressional acts and subsequent Supreme Court cases have expanded the criminal jurisdiction allotted to Indian tribes since *Oliphant*,[54] there has been no rescission of a tribe's original jurisdiction over civil matters involving non-Indians.

Shillitani v. United States states that "[t]here can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt,"[55] and that "it is essential that courts be able to compel the appearance and testimony of witnesses."[56] The concept that contempt of court is a quasi-criminal proceeding within the justice system continues to spread as the line between "civil" and "criminal" contempt blurs.[57] In Federal Indian Law, this distinction becomes even more important in determining a tribal court's ability to cite non-Indians for contempt in terms of jurisdiction.[58]

The most recent guidance from the Supreme Court on this distinction stems from *Hicks v. Feiock*. *Hicks* focused on a challenge to the Court of Appeals of California, Fourth Appellate District's decision to grant the appellee's writ of *habeas corpus* regarding a judgment of contempt of court for failure to pay child support.[59] The Court, in its 5-3 decision, vacated the grant of writ, stating that contempt and its punishments were "civil" in nature and so did not violate the Due Process Clause.[60] Justice O'Connor, writing for the dissent, discussed the traditional analysis of the classification between criminal and civil contempt:

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[52] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 202-04 (1978) (asserting that tribal courts do not have criminal jurisdiction over non-Indians unless explicitly authorized to such jurisdiction by Congress).
[53] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).
[54] *See, e.g.*, 25 U.S.C. §§ 1301(2); 1304, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, 104 Stat. 1856; United States v. Lara, 541 U.S. 193, 210 (2004) (stating that tribal courts have criminal jurisdiction over Indians of another tribe that commit crimes within the jurisdiction).
[55] Shillitani v. United States, 384 U.S. 364, 370 (1966) (Black & Douglas, JJ., concurring in part and dissenting in part) (citing United States v. United Mine Workers, 330 U.S. 258, 330-32 (1947)); *see also* United States v. Barnett, 376 U.S. 681, 753-54 (1964) (Goldberg, J., dissenting).
[56] *Shillitani*, 384 U.S. at 370 (citing United States v. Bryan, 339 U.S. 323, 331 (1950)).
[57] Hicks v. Feiock, 485 U.S. 624, 631 (1988) ("so in the codified laws of contempt, where the 'civil' and 'criminal' labels of the law have become increasingly blurred. . . .").
[58] Matthew L.M. Fletcher, *A Primer on Tribal Court Contempt Power*, MICH. INDIAN JUDGES ASS'N, 4 (May 19, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134936.
[59] *In re Feiock*, 225 Cal. Rptr. at 748.
[60] *Hicks*, 485 U.S. at 626.

> Civil contempt proceedings are primarily coercive; criminal contempt proceedings are punitive. As the Court explained in *Gompers*: "The distinction between refusing to do an act commanded, —remedied by imprisonment until the party performs the required act; and doing an act forbidden,— punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."[61]

Justice White, writing for the majority, followed the precedent of *Shillitani*:

> Any sentence "must be viewed as remedial," and hence civil in nature, "if the court conditions release upon the contemnor's willingness to [comply with the order]." By the same token, in a civil proceeding the court "may also impose a determinate sentence *which includes a purge clause.*" "On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence."[62]

The focus of the classification, then, is based on the ability of the contemnor to purge themselves of the contempt.[63] Numerous tribes within the country have adopted similar language in their tribal codes to include this clarification.[64] For instance, the Sac & Fox explicitly included a purge provision within the contempt statute of their tribal code.[65] The Spokane Tribe of Indians expands these principles further, regarding the treatment of non-Indians, across their statutes. Their Law & Order Code grants, by statute, reprieve from any imprisonment to non-Indians who violate their code, utilizing monetary civil penalties and expulsion proceedings instead.[66]

Applying this to tribal UCCJEA cases, *Hicks* provides the necessary guidance to tribes who aim to utilize subpoenas for non-Indian witness testimony. Therein, the local state jurisdiction would then have a duty to

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[61] *Id.* at 646 (O'Connor, J., dissenting) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911)).
[62] *Id.* at 634-35 (quoting *Shillitani*, 384 U.S. at 370).
[63] *Id.* at 641; *see also Shillitani*, 384 U.S. at 371 (explaining that testifying in a grand jury hearing would have purged the contempt charge); United States v. Lippitt, 180 F.3d 873, 879 (7th Cir. 1999) (affirming a judgment of contempt for failure to pay a fine, when the contempt would have been purged upon payment of the fine).
[64] Fletcher, *supra* note 58, at 19-26.
[65] Fletcher, *supra* note 58, at 25.
[66] SPOKANE TRIBE OF THE SPOKANE RSRV. – TRIBAL CODE § 4-1.02 (2001).

enforce such contempt order and penalty under the UCCJEA's section 303.[67]

B(2). Exhaustion Applies in Tribal Civil Contempt Proceedings

The idea that tribal courts are appropriate forums to adjudicate important matters between Indians and non-Indians is not a new one.[68] As a matter of judicial comity and furtherance of federal policy, federal courts are cautious to intervene in tribal court proceedings.[69] *Nat'l Farmers Union* finalized this policy by requiring that exhaustion of tribal remedies must first occur before pursuing a course of action in federal court.[70] Justice Stevens, writing for the majority, states:

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.[71]

Therefore, in line with Justice Stevens's opinion, any challenge by non-Indians to a tribal court's civil contempt citation must follow in line with other federal court challenges, beginning first with exhausting tribal court remedies.[72] Justice Marshall provided additional clarity in *Iowa Mut. Ins. Co. v. LaPlante*, dictating that "[a]t a minimum, exhaustion of tribal remedies means that tribal *appellate courts* must have the opportunity to review the determination."[73] Additionally, outside of *Nat'l Farmers Union* and its progeny, contempt of court easily lies within the second *Montana* exception, as contempt is clear "conduct [that] threatens or has some direct

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[67] UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 303.
[68] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).
[69] *Id.* at 62-64; *see also* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1325 (9th Cir. 1984) (Wright, Circuit Judge, dissenting in part and concurring in the result), *rev'd*, 471 U.S. 845 (1985); Janis v. Wilson, 521 F.2d 724, 727 (8th Cir. 1975).
[70] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853-57 (1985); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (extending *Nat'l Farmer Union* to federal claims alleging diversity of citizenship under 28 U.S.C. § 1332).
[71] Nat'l Famers Union, 471 U.S. at 856.
[72] Lyda v. Tah-Bone, 962 F.Supp. 1434, 1435-36 (D. Utah 1997) (denying a motion to reconsider contemnor's petition for *habeas corpus* based on a failure to exhaust available tribal remedies, relying on *Nat'l Farmers Union*); *see also* Fletcher, *supra* note 58, at 26.
[73] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. at 17.

effect on the political integrity . . . of the tribe."[74] This cements contempt as an area for which tribal courts hold jurisdiction, not state or federal courts, for failing to abide by the rules of the tribal judiciary risks the political integrity of both the court and the tribe.[75]

The multi-faceted issues that lie in subpoenaing non-Indians in UCCJEA cases all intersect to reach the same conclusion. As a civil matter regarding the welfare of an enrolled member and/or decedent child of a tribe,[76] as subpoenas are a necessary tool to gain important witness testimony, and as flaunting the authority of tribal subpoenas risks the political integrity of the tribal judiciary system,[77] tribal subpoenas issued to non-Indians in UCCJEA cases must be acknowledged and adhered to in line with section 111.

III. ENFORCEMENT OF TRIBAL ORDERS THROUGH OTHER MEANS

In addition to the statutory guidance of the UCCJEA, or another uniform law, states with larger Native American populations have additional rules of procedure regarding the recognition of tribal judgments. The states can vary on how they implement and provide this recognition.[78]

While not nearly as common as it was, some individual courts and judges will choose to ignore tribal court adjudications, choosing to disregard these decisions under a challenge of jurisdiction.[79] However, this challenge to jurisdiction is little more than a refusal to acknowledge the authority granted to tribes and their courts, as a recognized domestic sovereign, and so is counter to national policy and Supreme Court case law.[80] Instead, state courts will either grant comity to a tribal jurisdiction or

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[74] Montana v. United States, 450 U.S. 544, 566 (1981) (emphasis added).
[75] Fry v. Colville Tribal Ct., No. CV-07-0178-EFS, 2007 U.S. Dist. LEXIS 60570, at *9 (E.D. Wash. Aug. 17, 2007) ("[T]he nonmember defendant put the political integrity of the tribe and the tribal court at issue in any failure to abide by the terms of the judgment.").
[76] Boozer v. Wilder, 381 F.3d 931, 935-37 (9th Cir. 2004) (requiring exhaustion of remedies in tribal court in a child-welfare matter where the tribe had original jurisdiction under 25 U.S.C. § 1911(a)).
[77] *Montana*, 450 U.S. at 566.
[78] Tom Tremaine, *Recognition and Enforcement of Tribal Court Orders in States Courts*, AM. JUDGES ASS'N, 3 *et seq.* (2013), http://www.amjudges.org/conferences/2013Annual/EducationMaterials/Tremaine-Recognition-Enforcement-of-Tribal-Court-Orders.pdf; *See also* Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985).
[79] Wright, *supra* note 78, at 1409-10.
[80] Wright, *supra* note 78, at 1410 (citing Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (granting an injunction, requested by the Cherokee Nation, against laws that would have deprived them of their rights as a sovereign nation within their own boundaries)).

extend full faith and credit to tribal adjudications.[81] Comity, when a court respects the judicial decisions of another state,[82] however, is more suited for agreements between international jurisdictions. The concept is not conducive for the domestic sovereignty that is afforded to Indian tribes, which are considered to have equal standing as a territory of the United States.[83] A policy of simple comity between a state and an Indian tribe is discouraged, as comity is granted "primarily as a matter of courtesy rather than strictly as one of right."[84] Therefore, extending full faith and credit to tribal jurisdictions is most in line with national policy and the principle of domestic sovereignty, as comity simply undermines both of these authorities.[85]

States like Washington and Oklahoma provide a simple rule of reciprocity between state and tribal courts, extending full faith and credit to their judgments.[86] Washington additionally provides guidance for cases where tribes have exclusive or concurrent jurisdiction over the subject matter, such as UCCJEA matters, allowing for a smooth transition between the two if needed.[87] Some states offer more comprehensive guidance to recognizing tribal orders, like Arizona, where courts have created a set of Rules of Procedure for the Recognition of Tribal Court Civil Judgments.[88] Arizona, again, provides a person the ability to object along a set of guidelines including lack of jurisdiction and violation of due process.[89] Additionally, several state courts have upheld the federally and/or statutorily granted full faith and credit tribes over a variety of areas, establishing precedent to legitimize this recognition.[90] In *State v. Esquivel*, the state of Washington upheld and enforced a Violence Against Women Act (VAWA) protection order issued by the Tribal Court of the Confederated Tribes of Colville Reservation,[91] per the recognition provided

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[81] *See* Wright, *supra* note 78 and accompanying text
[82] *Judicial Comity*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[83] Wright, *supra* note 78, at 1411.
[84] Wright, *supra* note 78, at 1410.
[85] Wright, *supra* note 78, at 1411.
[86] *See* 12 OKLA. STAT. tit. 12, § 728; Wash. Sup. Ct. Civ. R. 82.5(c).
[87] *See generally In re* Adoption of Buehl, 555 P.2d 1334, 1334 (Wash. 1976); Wash. Sup. Ct. Civ. R. 82.5(a)-(b); *See also* UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT, *supra* note 5, § 110.
[88] Ariz. Tribal Ct. Civ. Judgments R. 1, *et seq.*
[89] Ariz. Tribal Ct. Civ. Judgments R. 5; *cf.* U.S. CONST. amend. XIV, § 1.
[90] Tremaine, *supra* note 78, at 4.
[91] State v. Esquivel, 132 P.3d 751, 754 (2006) (enforcing a VAWA-related protection order, issued by the tribe, as it was given statutory full faith and credit under U.S. CONST. Art. IV, § 1 and 18 U.S.C. § 2265(a)).

to the tribe under VAWA.[92] However, the continued recognition of these orders relies on the continued spirit of reciprocity between tribes and states.[93] Tribes can provide this reciprocity through either their own statutory codes or rules of civil procedure, and by doing so, encourage full faith and credit in various areas of law, such as subpoenas.[94]

CONCLUSION

The idea that a tribe could issue and enforce subpoenas for non-Indian witness testimony is often met with skepticism and caution. Because the case law focuses more on a tribe's ability to quash subpoenas against them via sovereign immunity, tribes ignore the powers available to them by uniform laws which recognize their sovereign authority on certain matters. For instance, if a tribe's sovereign authority to make and be governed by their own law is undisputed,[95] why should anyone question a tribe's sovereign authority to embrace and enforce any promulgated state or federal laws?[96]

The UCCJEA provides one such avenue for tribal courts to exercise their right to gather all necessary evidence to make determinations in child custody disputes. Backed by the precedent established by AOSWA, tribes have lawful recognition and access to tools offered by this uniform act to accomplish the true goal of tribal child custody proceedings: ensuring the best interest of the child, while maintaining the customs and traditions of a tribe. For example, several states have already embraced the use of subpoenas for non-resident witnesses in criminal cases because of their importance. The care for a child is equally as important, albeit in a separate manner, and therefore must be provided the same courtesies. The UCCJEA, in conjunction with applicable state and tribal law, provides that courtesy. The importance of this to tribes and their courts cannot be stressed enough, and the Washington case *In re Adoption of Buehl* highlights this fact:

We agree with the court in *Wakefield v. Little Light* . . . that "there can be no greater threat to 'essential tribal relations,' and no greater

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[92] *Id.*; *See also* Tremaine, *supra* note 78, at 4 (VAWA requires state courts to "grant full faith and credit to the judgments of tribal courts").
[93] *See Jans*, 274 Cal. Rptr. 586, 589 (Cal. Ct. App. 1990).
[94] *See, e.g.*, Rev. Spokane Tribal Law and Order Code § 4-22.02 (providing full faith and credit to states and tribes that reciprocate).
[95] Tremaine, *supra* note 78, at 1.
[96] *In re* Adoption of Buehl, 555 P.2d 1334, 1339 (Wash. 1976) ("If then, Indians are to be accorded with such independence and sovereignty within the limits of their reservation, and if on the other hand, they subject themselves to the benefits and obligations of state law when without, the question becomes at what point the transformation . . . is accomplished."). Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 (W.D. Mich. 1973); *accord* Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228, 237 (1975).

infringement on the right of the . . . [t]ribe to govern themselves than to interfere with tribal control over the custody of their children." Assertion of jurisdiction by Washington courts in this case would violate the proscription of *Williams v. Lee*. "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity." *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973).[97]

Therefore, it is the obligation of tribal courts to utilize these tools for the continued preservation of the tribes' future generations, as well as the preservation of their legacies and identities.

[97] *Buehl*, 555 P.2d at 1342.

Trusting Tribal Courts: More Lawyers is Not Always the Answer

By: Judith M. Stinson,[1] Tara Mospan,[2] & Marnie Hodahkwen[3]

ABSTRACT

Many outsiders distrust tribal courts because they assume they will be treated unfairly. This distrust creates a number of problems, including decreasing the effectiveness of tribal judicial systems, inhibiting tribal economic development, and ultimately undermining tribal sovereignty. Critics of tribal courts assert three main justifications for their structural skepticism: first, that tribal courts are "different" from other court systems in the United States; second, that tribal laws and traditions seem foreign and may be difficult to access; and third, that because the qualifications for judges and practitioners in tribal courts sometimes differ from those in other courts, tribal judges and advocates are inferior. Drawing on other scholarship, this article briefly responds to the first two criticisms. This paper then argues that non-lawyer judges and lay advocates can be as effective as law-trained judges and advocates in other court systems. Although it is impossible to eliminate all outsider bias, refuting the claimed justifications should demonstrate that tribal courts are as fair and as competent as non-tribal courts. Therefore, greater confidence in tribal courts is warranted.

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I. DISTRUSTING TRIBAL COURTS GENERALLY

Tribal courts represent an increasingly significant component of the justice system in the United States.[4] Currently, over 200 tribal justice systems operate in this country,[5] including 250-300 trial courts and over 150 appellate courts.[6] In terms of civil jurisdiction, as tribal economic development increases,[7] more individuals and businesses find themselves subject to tribal court jurisdiction.[8] From a criminal jurisdiction standpoint, federal statutes passed in the last decade expressly grant tribal courts jurisdiction over non-Native offenders under certain circumstances[9] and permit increased sentences over Native offenders.[10] And the recent United

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[4] *See, e.g.*, Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) (noting that even in 1997, tribal courts' "important role in the administration of justice in this country" is "expanding").

[5] ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 45 (2d ed. 2019); Gregory D. Smith, *Native American Tribal Appellate Courts: Underestimated and Overlooked*, 19 J. APP. PRAC. & PROCESS 25, 25 (2018).

[6] Smith, *supra* note 5; *see also* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 71 (2013).

[7] *See, e.g.*, S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 671-73 (2010) (noting that "[r]esearch indicates that the rate of economic growth in Indian Country has exceeded the rate of non-Indian economic growth").

[8] Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 174 n.4 (5th Cir. 2014), *aff'd sub nom. per curiam*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016); Montana v. United States, 450 U.S. 544, 565 (1981) (recognizing that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands" by regulating "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"); Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1193-94 (2010) ("Every day in Indian country, nonmembers work for tribes or tribal enterprises, enter into contracts with tribes or tribal members, and engage in myriad activities, including recreation and tourism, that subject them to tribal laws, mostly without objection or incident."). Furthermore, many scholars advocate for increased tribal civil jurisdiction. *See, e.g.*, Alex Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Jurisdiction over Nonmembers*, 67 UCLA L. REV. DISC. 165, 170 (2019) (recommending a legislative solution that "reconfirm[s] the civil jurisdiction of any tribal court over nonmember defendants in all causes of action arising on the reservation as long as the tribal court has met the requirements for establishing personal jurisdiction over the parties").

[9] Violence Against Women Act, 25 U.S.C. § 1304(b)(1) (granting "special domestic violence criminal jurisdiction *over all persons*" provided the defendant maintains certain ties with the tribe and the tribe provides greater procedural protections than are required for Indian defendants) (emphasis added).

[10] Tribal Law and Order Act, 25 U.S.C. § 1302(a)(7)(D) (allowing incarceration for up to nine years). *See also* EAGLEWOMAN & LEEDS, *supra* note 5, at 43 (noting that "contemporary tribal governments have recognized authority to operate judicial systems with criminal jurisdiction over all Indians within the tribal territory, including Indians with

States Supreme Court opinion in *McGirt v. Oklahoma*[11] drastically extended tribal court criminal jurisdiction over substantial portions of Oklahoma.[12]

Tribal courts and their rulings are often viewed with skepticism, however.[13] As noted by one prominent scholar, state and federal judicial opinions reflect "trepidation" caused by "tribal court power and autonomy" and the United States "Supreme Court has questioned, in not-so-subtle terms, the fairness and objectivity of tribal justice systems."[14] That author adds that this "lack of faith in tribal courts is typically limited to situations

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tribal citizenship/membership in other tribes").

[11] McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[12] *Id.* at 2459-60, 2482 (holding that the Creek Nation retained jurisdiction, at least in terms of the power to prosecute a member of the Seminole Nation, for crimes that were committed on land that Congress reserved for the Creek Nation in 1833 and did not expressly terminate or disestablish). In light of *McGirt*, at least one federal circuit court has enforced tribal jurisdiction in a civil context based on a reservation established in the 1800s. Oneida Nation v. Village of Hobart, 968 F.3d 664, 667-68, 689 (7th Cir. 2020) (holding a non-tribal village, located within the boundaries of the Oneida Nation as set out in the 1838 treaty, had no authority to enforce its permit requirement against the tribe).

[13] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978) (refusing to recognize tribes' inherent jurisdiction over non-Indians for crimes committed on reservations and suggesting that when deciding whether to grant such jurisdiction, Congress should weigh tribal courts' competency); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 544 (1997) (noting that "distrust of tribal courts" negatively impacts their subject-matter jurisdiction); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285 (1998) (pointing out the assumption that "tribal courts are not neutral, justice-administering institutions"); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1047 (2005) (pointing out that cases which limit the jurisdiction of tribal courts are based less on "established Indian law doctrine" than on the assumption that "tribal courts will be unfair to outsiders"); Suzianne D. Painter-Thorne, *Tangled up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. REV. 239, 287 (2011) (noting that "there remains the problem of a general distrust for the competency of tribal courts to adjudicate cases involving nonmembers"); Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 311 (2015) (noting that the provision of the Violence Against Women Reauthorization Act of 2013 expressly granting tribal courts jurisdiction over non-Indians in certain domestic violence cases "leads some to fear that non-Indians subjected to tribal court jurisdiction will face biased juries"); Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICH. L. REV. FIRST IMPRESSIONS 155, 156, 162, 163 (2016) (noting a federal appellate court's "decision to reject the tribal court convictions reveals an alarming distrust of tribal courts and suggests they are undependable and unfair").

[14] Stacy L. Leeds, *[dis]Respecting the Role of Tribal Courts*, 42:3 HUM. RTS. 20, 20 (2017) (pointing out that this "lack of faith in tribal courts is typically limited to situations involving non-Indian litigants").

involving non-Indian litigants."[15] Tribal court litigants allege unfairness and tribal court incompetence,[16] and some commentators seem to agree.[17]

A number of scholars have identified the significant problems this distrust creates: first, it decreases the effectiveness of tribal judicial systems themselves.[18] Second, it inhibits tribal economic development.[19] And third,

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[15] *Id*.

[16] *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (noting that the petitioner claimed federal jurisdiction, as opposed to tribal jurisdiction, was proper to "protect[ ] against local bias and incompetence"); Wilson v. Bull, No. CIV. 12-5078-JLV, 2014 WL 412328, at *1 (D.S.D. Feb. 3, 2014) (stating that the plaintiff objected to tribal court jurisdiction because "she does not believe the tribal courts can be impartial" when the defendant is a tribal entity); Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of* Plains Commerce Bank v. Long Family Land & Cattle Co., 56 S.D. L. REV. 86, 94 (2011) (quoting one brief as follows: "litigation of any legal dispute between a tribal member and a non-member in tribal court is inherently unfair and prejudicial to the non-member"); R. Mitchell McGrew, Note, *Analysis of a Bias-Based Exception to the Doctrine of Exhaustion in* Wilson v. Bull, 39 AM. INDIAN L. REV. 617, 626 (2016) (pointing out that alleging tribal courts are biased "implies . . . tribal courts are incompetent").

[17] *See, e.g.*, Reynolds, *supra* note 13, at 593 ("Commentators confirm a pervasive judicial distrust of tribal court adjudicatory jurisdiction over non-Indians."); Rory Dilweg, *The Importance of Respecting Tribal Courts as Serious Venues and Understanding Their Unique Procedures, in* NAVIGATING TRIBAL LAW: LEADING LAWYERS ON UNDERSTANDING THE UNIQUE PROCEDURES, INTRICACIES, AND CHALLENGES INVOLVED WITH TRIBAL CASES 89, 93 (Thomson Reuters/Aspatore 2012) (stating that "[m]any tribal courts are more willing to listen to a tribal member's issues" but this "may not be the case for non-tribal members or [non-tribal] entities in a tribal forum").

[18] *See, e.g.*, O'Connor, *supra* note 4, at 2. Justice O'Connor was explicit that in order to "fulfill their role as an essential branch of tribal government," tribal courts:

> must provide a forum that commands the respect of both the tribal community and the non-tribal community including courts, governments, and litigants. To do so, tribal courts need to be perceived as both fair and principled. And at the same time the courts seek to satisfy these conditions, they must strive to embody tribal values—values that at times suggest the use of different methods than those used in the Anglo-American, adversarial, common-law tradition.

Id. *See also* Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 442 (2004) (noting that federal courts' refusal to recognize tribal court convictions "undermines the authority of the tribal courts within tribal communities" and implies "that tribal courts lack legitimacy").

[19] *See, e.g.*, Pommersheim, *supra* note 16, at 94 (quoting an amicus brief arguing that tribal courts should have no jurisdiction over non-Indian contractual partners because that "discourages business investment and economic development in Indian country"); Carl H. Johnson, *A Comity of Errors: Why* John v. Baker *is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 55 (2001) (noting that tribal courts "are the keystone to tribal economic development and self-sufficiency"); Ryan Seelau, *In Defense of Tribal Sovereign Immunity: A Pragmatic Look at the Doctrine as a Tool for Strengthening Tribal Courts*, 90 N.D. L. REV. 121, 128 (2014).

it ultimately undermines tribal sovereignty.[20] Mitigating this distrust is therefore necessary considering the future impact of tribal court systems within the United States.

This skepticism has three main causes. First, many believe that tribal court systems are fundamentally "different" from other court systems in the United States.[21] Second, tribal laws cannot always be accessed in the same ways many other laws are accessed.[22] And finally, the perception that non-lawyer advocates and judges used in some tribal courts are less competent than lawyers and law-trained judges causes some to conclude that tribal court outcomes are illegitimate.[23]

Studies suggest most concerns about tribal courts lack merit.[24] Furthermore, underlying, often unconscious racism or bias may fuel many

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[20] *See* O'Connor, *supra* note 4, at 2 (pointing out that "the effective operation of tribal courts are essential to promote the sovereignty and self-governance of the Indian tribes" and noting that the "Supreme Court has recognized, 'Tribal courts play a vital role in tribal self-government'"); Leeds, *supra* note 14, at 25; Seelau, *supra* note 19, at 128. *See also generally* Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110 (1995).

[21] *See, e.g.*, Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 841 (2007) ("Perceptions of justice systems during the ICRA debates and now share a central theme: that the Anglo justice system is superior to indigenous ones."); Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 219 (1986) (arguing that "an 'Americanized' approach to Indian law jurisprudence should replace the Eurocentric one. An Americanized approach acknowledges the need for different American Peoples to respect each other's worldviews, rather than to use legal discourse to subordinate all norms which differ from those of the white man.").

[22] *See, e.g.*, Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 LAW LIBR. J. 199, 199 (2014) (stating that "despite its importance, tribal law, unlike federal and state law, can be very difficult, if not impossible, to locate"); Pommersheim, *supra* note 16, at 94 (quoting one amicus brief as arguing that "'[b]ecause tribal law is *unknowable* to non-members, non-members may not conform their conduct to that law'").

[23] *See, e.g.*, Granite Valley Hotel Ltd. P'ship v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 145, 146 (Minn. Ct. App. 1997) (Randall, J., concurring) (challenging the competence of "lay persons" and their "qualifications, or lack thereof" in the tribal court setting); *see also* Smith, *supra* note 5, at 36-37; Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISCOURSE 88, 100 (2013).

[24] *See generally* Berger, *supra* note 13 (determining after an extensive study of the largest tribal court system in the United States, that of the Navajo Nation, as well as some other tribal courts that the decisions were balanced when deciding cases involving non-members); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 485 (2000) (explaining the author's "comprehensive empirical study of all reported tribal court case law over a 13-year period" and concluding that "tribal courts have taken seriously their interpretive tasks and have provided significant protections to individuals against tribal governments"; they have "deeply assimilated many Anglo political values

of the fears about tribal courts and tribal justice systems.[25] This section will briefly address the first two concerns, and the remainder of the paper will discuss the use of non-lawyer judges and advocates.

First, tribal court systems do not substantially differ from federal, state, county, and city courts. Even though many tribal justice systems were

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even though they give them variant expressions that reflect and support tribal culture"); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 467, 513 (1998) (concluding, after examining "thirty years of litigation under the [Indian Civil Rights Act], with an emphasis on habeas corpus relief in federal courts, tribal sovereign immunity, the status of tribal sovereignty, and implementation of the Indian Bill of Rights by tribal courts," that efforts to "greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem, unfairly based on anecdote and cultural prejudice"); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 583-88 (2009) (noting that a study of tribal courts by the federal Commission on Civil Rights mentioned no bias or unfairness in the courts, but recommended increased federal funding for tribal courts and an *expansion* of tribal court jurisdiction over non-members); Ryan Fortson & Jacob A. Carbaugh, *Survey of Tribal Court Effectiveness Studies*, ALASKA JUST. F., Fall 2014/Winter 2015, at 1, 20 (evaluating more traditional tribal court programs and concluding that studies "tend to support the notion that tribal courts can be more effective than Western-style courts, though more work needs to be done in this area").

[25] *See, e.g.*, Terrill Pollman, *Double Jeopardy and Nonmember Indians in Indian Country*, 82 NEB. L. REV. 889, 932 (2004) (noting that the disparate treatment of tribal courts as compared to "state courts and other sovereign courts suggests to some commentators that the true basis for consent jurisdiction is distrust of tribal courts—and that the distrust is a vestige of the racism that has darkened the relationship of the tribes and the dominant American society"). *See also* Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RSRV. L. REV. 39, 50-51 (2020) (explaining that "race affects decision-making . . . through ingroup versus outgroup bias"; with ingroup bias, "'people make more positive judgments about individuals who belong to the same social category simply because of shared group membership'" as opposed to outgroup bias, which "involves negative judgments against individuals who are not part of the same group"). *See generally* Williams, *supra* note 21, at 219 (arguing "that the white man's European-derived legal discourse relies on historically derived myths to legitimize the colonization and subordination of Indian tribes" and that these myths "assert the primacy of Eurocentric norms, and . . . deny respect to all differing norms and values"); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 764 (2006) ("Racism and bias [against Indians] remain strong, particularly in states where Indians compete with non-Indians for limited resources"); Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 589 (1994) (explaining that the paper "explores how the cultural construction of the Native American operates in the emerging law of concurrent jurisdiction under the Indian Child Welfare Act (ICWA), and perpetuates the subordination of Native American culture, families, and individuals—a subordination that the Act ostensibly counters"). Professor Carriere points out that the practice in child custody proceedings involving Indian children "reflects the Euro-American legal culture's profound distrust of Native American values and Native American legal competence" and the "deep distrust that state courts feel for tribal courts." *Id*. at 628, 648.

historically focused on preserving harmony and tribes often "addressed disputes, social transgressions, and serious offenses according to a complex system of social, cultural, and political relationships,"[26] tribal courts today largely reflect the same structures and procedures used in federal and state courts.[27] In fact, although many tribal courts incorporate some traditional values,[28] most tribal courts today directly reflect federal judicial policy, as they "evolved from courts first established in Indian country by the Bureau of Indian Affairs . . . as part of an effort to assimilate Indians into the Anglo-American legal system."[29]

Furthermore, even predating the formation of the United States, tribes generally provided substantial due process to all participants.[30] Congress has subsequently imposed a modified version of the Bill of Rights on tribes via the Indian Civil Rights Act,[31] ensuring certain procedural protections and providing for federal court review via habeas actions.[32] Some tribal

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[26] Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 92 (2007); *see also* Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 292 (2010) (noting that "traditionally, tribes did not resolve disputes through the adversarial process under the Anglo-American model. Rather, the tribes addressed disputes and criminal activity through consensus."); Judith M. Stinson, *When Tribal Disenrollment Becomes Cruel and Unusual*, 97 NEB. L. REV. 820, 836-37 (2019); MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 355 (2d ed. 2020).

[27] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 263-69, 267 (Nell Jessup Newton ed., 2012) (noting that the "structure of tribal courts is often similar to that of state courts"); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIAL COURT 6 (2008) (noting that "contemporary tribal courts . . . rely heavily on rules and procedures informed by the adversarial practices of Anglo-American jurisprudence"); Dilweg, *supra* note 17, at 96 (arguing that the "most common mistake" made by lawyers in tribal courts "is treating tribal venues differently than non-tribal venues"); FLETCHER, *supra* note 26, at 66-79.

[28] *See, e.g.*, Moppett, *supra* note 26, at 295.

[29] Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253, 257-58 (2017); *see also* THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 340-43 (Bruce Elliott Johnsen ed., 1998).

[30] *See, e.g.*, Hilary C. Tompkins, *Domestic Nations in the Age of "Tribalism*," 52 ARIZ. ST. L.J. 580, 585 (2020) (asserting that Indian tribes were able to gain Congressional approval to prosecute non-Indian defendants for certain domestic violence offenses "only when tribes agreed to adopt constitutional, westernized protections for defendants . . . , ignoring the fact that many traditional Native legal principles provide the same, if not more, due process rights, and that offenders voluntarily enter tribal territory").

[31] 25 U.S.C. §§ 1302, 1304; *see also* Bedell, *supra* note 29, at 259 (noting that because of this federal "intervention, many of the almost 300 tribal courts currently in operation resemble state and federal courts in both their procedural and substantive law").

[32] 25 U.S.C. § 1303; *see also* Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 140 (2015) (concluding, following a study of federal court and tribal habeas petitions alleging

courts may be less formal than federal courts,[33] for example, but the same is true for many American courts and the court systems operated by Native American tribes in the United States are relatively indistinguishable from those other courts.[34]

Second, although many tribal laws[35] may not be accessed in the same way as federal or state law via Westlaw and Lexis, they are still generally

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tribal civil rights violations, that "tribal courts are the appropriate forum to remedy any civil rights violations" because tribal courts "are better able to provide individualized justice, treating each individual petitioner as unique. Through the use of tribal law, the reviewing tribal court can reform the system when needed to better reflect tribal values and protect civil rights.").

In addition, tribes must provide law-trained judges and defense lawyers in certain situations, adding more safeguards when personal liberty is at stake. 25 U.S.C. § 1302(c)(1)-(3). For example, although tribes cannot generally incarcerate convicted Indians for more than a year, the Tribal Law and Order Act allows tribes to sentence Indian offenders to up to three years—but only when the tribe provides defense counsel who is an "attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" and when the judge "has sufficient legal training to preside over criminal proceedings; and is licensed to practice law." *Id.* Similarly, tribal courts can exercise "special domestic violence criminal jurisdiction," 25 U.S.C. § 1304(a)(6), over non-Indian offenders for various domestic violence offenses, but only when the tribe provides a law-trained judge and a lawyer as defense counsel, and the jury pool cannot be not limited to Indians. 25 U.S.C. § 1304(d).

[33] *See, e.g.*, O'Connor, *supra* note 4, at 3 ("Tribal courts often act more quickly, and more informally, than do their counterparts."); Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 227 (1991) (noting that "tribal court proceedings are generally less formal than proceedings in state and federal court"). As one author noted, "[s]ome attorneys make the mistake of confusing a non-formal venue for a non-serious venue" and he suggests that "[t]ribal courts and officials must be accorded the same due respect as non-tribal court officers and judges." Dilweg, *supra* note 17, at 96.

[34] *See, e.g.*, Transcript of Oral Argument at 11, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496) (with Justice Breyer, after asking "What's wrong with the tribal courts?," commenting that "we've seen lots of tribal courts, which I can't distinguish them in the fairness and procedure and so forth from every other court in the country"). Furthermore, as one author noted, "[m]any of the fears about subjecting non-Indians to an unfamiliar judicial system with different norms and potential cultural and language barriers are equally applicable when Indians are tried in federal courts; yet Indians who have argued that they were subject to partial juries in federal courts have not prevailed." Castillo, *supra* note 13, at 312.

[35] Pat Sekaquaptewa, *Tribal Courts and Alternative Dispute Resolution*, BUS. L. TODAY, Nov.-Dec. 2008, at 23, 24-25 (noting that although "it is not possible to accurately characterize tribal statutory and common law across over 550 tribes and their court systems," some generalizations can be made); COHEN, *supra* note 27, at 269-70, 277.

accessible.[36] Tribal law includes tribal constitutions,[37] codes,[38] administrative law,[39] and rules of procedure,[40] which are generally available on tribal websites or from the tribal government.[41] In addition, a number of websites include substantial collections or comprehensive, direct access to tribal constitutions and legislative materials,[42] including those of the Library of Congress[43] and the National Indian Law Library.[44]

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[36] Rob Roy Smith, *Understanding and Respecting the Process of Trying Cases in Tribal Courts: What Attorneys Need to Know*, *in* NAVIGATING TRIBAL LAW: LEADING LAWYERS ON UNDERSTANDING THE UNIQUE PROCEDURES, INTRICACIES, AND CHALLENGES INVOLVED WITH TRIBAL CASES 49, 59 (Thomson Reuters/Aspatore 2012) ("The law applied by tribal courts is written, knowable, and publicly available."). *See generally* STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 569-76 (10th ed. 2015); Nancy Carol Carter, *American Indian Law Research for State Courts*, 45 CT. REV. 32 (2009); Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 AM. INDIAN L.J. 101 (2017); David E. Selden, *Researching American Indian Tribal Law*, COLO. LAW., Feb. 2014, at 51; Shucha, *supra* note 22, at 199.

[37] *See generally* FLETCHER, *supra* note 26, at 111-84; COHEN, *supra* note 27, at 271-72; Selden, *supra* note 36, at 52-53.

[38] COHEN, *supra* note 27, at 275-76. Furthermore, in order to even charge an individual with a criminal offense, the Tribal Law and Order Act requires that tribes "make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government." 25 U.S.C. § 1302(c)(4).

[39] *See, e.g.*, Selden, *supra* note 36, at 53; Carter, *supra* note 36, at 38.

[40] *See, e.g.*, Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243, 1260 (1996) (pointing out that typical civil procedure texts "seldom mention[ ] . . . that Indian tribes have their own court systems and own procedural rules"). Professor Ford further explains that tribal court rules of procedure, like many states, are often "similar to the Federal Rules of Civil Procedure." *Id*. at 1268-69. She adds that "[j]ust as a lawyer must consult the rules for the particular state system in which she is practicing and the local rules for each federal district court, she must consult the particular tribe's statutes and court rules when in a tribal court." *Id*. at 1269.

[41] *See, e.g.*, Smith, *supra* note 36, at 59 ("Written laws and court procedures, always available from the tribal courts themselves, are now available online for an ever-increasing number of tribes"); Kunsch, *supra* note 36, at 129.

[42] *See, e.g.*, Kunsch, *supra* note 36, at 129-30.

[43] *American Indian Constitutions and Legal Materials*, LIBR. OF CONG. (Dec. 30, 2020), https://www.loc.gov/law/help/american-indian-consts/index.php.

[44] *Tribal Law Gateway*, NAT'L INDIAN L. LIBR., https://www.narf.org/nill/triballaw/index.html (last visited Feb. 27, 2021). Many academic library websites contain research guides with links to various tribal materials. *See, e.g.*, *Indian and Tribal Law*, GALLAGHER L. LIBR., UNIV. OF WASH. SCH. OF L., https://guides.lib.uw.edu/law/indian-tribal/tribal (Feb. 26, 2021, 12:16 PM); *Indian Law: Tribal Law*, ROSS-BLAKLEY L. LIBR., SANDRA DAY O'CONNOR COLL. OF L., ARIZ. STATE UNIV., https://libguides.law.asu.edu/indianlaw/tribal (Jan. 14, 2021, 12:32 PM); *Native American Law & Legal Sources: Tribal Law*, LAW LIBR., UNIV. OF WIS.-MADISON, https://researchguides.library.wisc.edu/c.php?g=125278&p=819868 (last visited Feb. 24, 2021); *Native American Constitution and Law Digitization Project*, THE UNIV. OF OKLA.,

Tribal law also includes judicial opinions,[45] and they are also generally available; some tribal judicial opinions are available on Westlaw or Lexis,[46] and some are available through specialized reporters such as the Indian Law Reporter.[47] As with other tribal materials, simple Westlaw or Lexis searches may not be sufficient to access tribal caselaw, however.[48] One online access point for tribal court cases is Versuslaw.[49] This database provides a low-cost option to access tribal court decisions for twenty-two tribes;[50] it is also developing a Tribal Court Database in cooperation with the National American Indian Court Judges Association.[51] Another fee-based site, CaseMaker,[52] includes tribal court opinions from over 60 tribes.[53] And just as state trial court opinions are rarely published,[54] tribal trial court opinions might not be published. As with tribal constitutions and codes, a variety of websites contain links to tribal caselaw, although not as comprehensively.[55]

LAW DIGIT. COLLECTIONS, https://digital.libraries.ou.edu/law/nacl.asp (last visited Feb. 27, 2021). Tribal administrative law is often part of the tribal code. Selden, *supra* note 36, at 53 (noting that "[a]dministrative rules and regulations usually are published as part of tribal codes and ordinances"). Hence, they are available through the same means as tribal constitutions and codes.

[45] COHEN, *supra* note 27, at 272-75.

[46] *Find Tribal Courts and Court Opinions*, NAT'L INDIAN L. LIBR., https://narf.org/nill/triballaw/court.html (last visited Feb. 24, 2021) [hereinafter *Find Tribal Courts*]. Westlaw includes tribal court opinions from "21+ tribes," and Lexis includes tribal court opinions from "32+ tribes." *Id*.

[47] *See, e.g.*, Selden, *supra* note 36, at 53. Thomson Reuters publishes WEST'S AMERICAN TRIBAL LAW REPORTER as part of the National Reporter System, but that reporter includes decisions from only a select number of tribal courts.

[48] *See, e.g.*, Sekaquaptewa, *supra* note 35, at 23 (noting that many tribal laws "are not readily accessible via the usual means"); Kunsch, *supra* note 36, at 131 (pointing out that none of the databases that include tribal court opinions "is comprehensive in the sense of having the decisions of every tribal court"); Newton, *supra* note 13, at 290, 353 (arguing that tribal courts would benefit if their opinions "were more widely available"); Shucha, *supra* note 22, at 199 (stating that "despite its importance, tribal law, unlike federal and state law, can be very difficult, if not impossible, to locate").

[49] *Native American Tribal Courts*, VERSUSLAW, http://www.versuslaw.com/help/library/LibCatProfessional.aspx#tribal (last visited Feb. 27, 2021).

[50] Kunsch, *supra* note 36, at 131-32.

[51] *Tribal Court Program*, VERSUSLAW, https://www.versuslaw.com/company/tribal.aspx (last visited Feb. 27, 2021).

[52] *Tribal Courts*, CASEMAKER, https://public.casemakerlegal.net/libraries/tribal-courts/ (last visited Feb. 24, 2021).

[53] *Find Tribal Courts*, *supra* note 46.

[54] *See, e.g.*, *Case Law Research: Published vs. Unpublished*, WILLIAM S. BOYD SCH. OF L., UNIV. OF NEV. L.V., https://law-unlv.libguides.com/caselaw/published-versus-unpublished (Feb. 1, 2021, 4:34 PM) (noting that "[m]ost states . . . do not publish state trial court cases").

[55] *See, e.g.*, *Tribal Court Decisions*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-

Some tribes provide access to their tribal caselaw through their own websites, and tribal court practitioners can contact the tribe directly.[56] Improvements can clearly be made, but overall, tribal law is generally accessible.

Therefore, concerns about tribal court differences and access to tribal laws should not create insurmountable barriers toward respecting the role of tribal courts in American jurisprudence. The remainder of this paper addresses the use of lay judges and lay advocates in tribal courts.

II. EFFECTIVE TRIBAL LAY JUDGES

A common complaint is that tribal courts suffer from defects which could be addressed by moving toward a more Western style of justice that includes more lawyers as judges.[57] One state court appellate judge expressed this view quite vociferously, electing to draft a fifty-three page concurring opinion.[58] After noting that the tribe in that case "claims the right to set judicial qualifications, or the lack thereof"[59] and therefore had the authority to staff its tribal court with lay judges, he then raised this hypothetical: under the tribe's "version of 'sovereignty' and its judicial code, three lay persons that it decides to appoint, all previously convicted

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institute.org/lists/decision.htm (last visited Feb. 24, 2021); Mary Whisner, *Sources of Tribal Court Decisions*, GALLAGHER L. LIBR., UNIV. OF WASH. SCH. OF L., https://guides.lib.uw.edu/ld.php?content_id=36848686 (Jan. 5, 2021). *See also* Carter, *supra* note 36, at 38.

[56] Smith, *supra* note 36, at 59-60; Kunsch, *supra* note 36, at 132. Furthermore, judicial opinions relying on tribal custom and tradition can create a greater need for accessibility, as the underlying custom or tradition may not be otherwise written. Fletcher, *supra* note 6, at 96 (noting that one prominent Indian Law scholar "recognized that the goal was to develop tribal jurisprudence and common law with an eye toward tribal customs and traditions"); Kunsch, *supra* note 36, at 134 (noting that international law relies on custom and tradition); *see also generally* Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007).

[57] *See, e.g.*, Smith, *supra* note 5, at 36-37; Fortin, *supra* note 23, at 100; *but see* Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, HUM. RTS., Winter 2009, at 16, 17 (asserting that despite the skepticism "of two centuries ago," currently, "[t]ribal judges are law trained"). The same argument is made about needing more lawyers as tribal advocates. *See infra* note 168 and accompanying text.

[58] Granite Valley Hotel Ltd. P'ship v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 138 (Minn. Ct. App. 1997) (Randall, J., concurring). The entire majority opinion was four pages long. *Id.* at 135-38. The judge was apparently concerned with what he perceived as the lack of constitutional protections on reservations. *Id.* at 146.

[59] *Id.* at 144. The judge also included this comment in his opinion: "It has become common knowledge throughout the state for attorneys whose clients have commercial or personal dealings with reservations that tribal courts should be avoided if possible." *Id.* at 146.

of a crime, could decide the liberty and property of all state residents, Indian and non-Indian, who come before them."[60]

This judge's sentiment includes a variety of assumptions, including that all tribal judges are tribal members who are not lawyers and are therefore incapable of reaching a fair result. These assumptions are not universally true, and this also ignores the reality that lay judges continue to preside over a substantial number of cases in non-tribal courts in this country.[61] Furthermore, some of the concerns about lay judges may be fueled by underlying, unconscious racism.[62]

This section refers to "lay judges"—those judges who are not licensed to practice law under a state's bar licensing requirements[63]—and "lawyer judges"[64]—those judges who have extensive legal training and are licensed

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[60] *Id.* at 145. Judge Randall also speculated that Minnesota tribes created tribal courts for the express purpose of *avoiding* justice (stating that the "fairly recent creation of tribal courts in Minnesota may be part of a calculated plan by tribal governments and their advisors to create a totally controlled in-house court system to shield themselves from lawsuits and accountability in state district court where the mandates of state and federal constitutions apply"). *Id.* at 141.

[61] DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM xi (1986) (noting that "[a]pproximately 13,000 lay persons hold judgeships" in American, non-tribal courts).

[62] *See, e.g.*, Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1, 29 (2018) (pointing out that "there is no evidence to suggest that certain legal professionals, such as judges, are cognitively exceptional and therefore not prone to such bias"); Ford, *supra* note 40, at 1260-61 (noting that "many tribal court judges report that the non-reservation attorneys who appear before them seem to have little regard for the tribal courts in general and their judges in particular," adding that this "attitude does a disservice both to the tribal courts and to the clients whose cases are to be decided by them. Bluntly stated, it reflects an abhorrent combination of lawyerly arrogance and racism, whether conscious or not, as well as poor judgment.").

[63] *See, e.g.*, Moppett, *supra* note 26, at 303 ("Some judges in the tribal courts do not have a law school degree, although they will likely receive some training. Frequently, the tribal judges that are not lawyers are respected members of the tribe familiar with the particular customs and traditions of the tribe."). Because almost every state bar association requires its members to possess a juris doctor degree, "lawyer judges" usually hold a three-year law degree. *See, e.g.*, Gaurav Sen, *Beyond the JD: How Eliminating the Legal Profession's Monopoly on Legal Services Can Address the Access-to-Justice Crisis*, 22 U. PA. J. L. & SOC. CHANGE 121, 123 (2019) (noting that "virtually all aspiring lawyers are required to attend three years of law school before being allowed to sit for the bar exam").

[64] Some refer to these judges as "law-trained"; that label could be misleading because it arguably suggests that lay judges have no training in the law. As noted *infra* in Section II(D), lay judges do, or at least should, receive legal training on a variety of topics. In addition, lawyer judges are often referred to as "licensed judges," perhaps because that is one standard identified in the Tribal Law and Order Act necessary for tribal court judges to have jurisdiction in certain circumstances. 25 U.S.C. § 1302(c)(3)(B) (requiring the judge be "licensed to practice law by any jurisdiction in the United States"). At least in theory, however, a lay judge could be licensed to practice law in a tribal jurisdiction and

to practice law under a state's bar licensing requirements. It will first identify the characteristics of a good judge. Next, it will consider the relationship of those characteristics to the training provided in American law schools. Then, it will address the significance of community, specifically tribal communities, and focus on the connection between those characteristics and community. Finally, it outlines a method for ensuring, to the greatest extent possible, that lay tribal judges are effective.

A. Characteristics of a Good Judge

A number of scholars have attempted to identify the characteristics necessary to be a good judge.[65] Although there is no universally accepted list,[66] five traits stand out: fairness; good communication skills, including listening; impartiality; humility; and common sense.

i. *Fairness*

As noted by one judge, "[t]hey don't pay me to be right; they pay me to be fair."[67] Focusing on being "right" has a tendency to drive the proceedings toward a "predetermined" outcome; focusing on being "fair" ensures that the process is balanced and unbiased.[68] It ensures the parties

hence, "licensed judge" is also imprecise. *See, e.g.*, *Bylaws*, § IV(C)(2), NAVAJO NATION BAR ASS'N, https://www.navajolaw.info/bylaws (last visited Feb. 26, 2021) (providing that an applicant for Navajo Bar Association Membership must, in addition to passing the Navajo Bar Exam and meeting several other requirements, be a "graduate of one of the following: a. An American Bar Association accredited law school; b. An accredited four-year institution (Bachelor's Degree); or c. A paralegal training program, advocacy program, apprenticeship program, or equivalent, which is certified by the NNBA Training Committee").

[65] *See, e.g.*, Robert Alsdorf, *Thinking Like a Judge: Five Characteristics of a Judicial Mindset*, 47 CT. REV. 35 (2011); Jeremy Fogel & S.I. Strong, *Judicial Education, Dispute Resolution and the Life of a Judge: A Conversation with Judge Jeremy Fogel, Director of the Federal Judicial Center*, 2016 J. DISP. RESOL. 259 (2016). For appellate judges, qualities of a good judge have been described as writing ability, intelligence, engagement, fortitude, and self-restraint. Brian Charles Lea, *On Judges: A Tribute to Chief Judge Carnes*, 69 ALA. L. REV. 689 (2018).

[66] Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1367 (2005) ("It may well be the case that there is wide agreement that we should select excellent judges but disagreement about what counts as judicial virtue.").

[67] Alsdorf, *supra* note 65, at 35.

[68] *Id.* ("Adherence to process is at the core of the rule of law."); *see also* Richard H. Fallon, Jr., *Greatness in a Lower Federal Court Judge: The Case of J. Skelly Wright*, 61 LOY. L. REV. 29, 47 (2015) (discussing procedural fairness).

are heard and it increases confidence in the system as a whole.[69] Fairness is perhaps the most important of these "human characteristics."[70]

ii. *Good Communication Skills, Including Listening*

When thinking of judges and communication, the mind often conjures up images of lengthy written opinions or judges instructing litigants from the bench.[71] But what is arguably more important in terms of communication skills is having judges listen. One scholar, for example, described sound jurists of old as being "patient listeners to tales borne by excited principals, interested relatives, and officious intermeddlers."[72] Others have commented upon how much more effective judges can be by simply listening: "by asking a lot of open-ended questions and employing active listening," judges can "find out a lot about why the parties are taking the litigation positions they're taking. You can actually prune and shape the case so that time and money aren't spent on tangential disputes, and the key legal and factual issues get teed up and resolved efficiently and fairly."[73] In short, judges need to communicate well—especially by listening.

iii. *Impartiality*

Perhaps the most quintessential "judging" trait is being impartial[74]—avoiding bias and prejudice.[75] Judges should be "neutral arbitrators," "open

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[69] *See, e.g.*, G. David Miller, *Dancing with Itos—What Makes a Good Judge*, COLO. LAW., Jan. 2010, at 77, 79 (arguing that a good judge can "ensure that both sides are allowed a fair opportunity to present their cases, while honoring the spirit, if not the letter of the procedural rules").

[70] Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 ALB. L. REV. 81, 90 (2004).

[71] *See, e.g.*, Joseph A. Condo, *What a Lawyer Expects from a Judge*, VA. LAW., Mar. 1991, at 34, 34 (noting that judges should share what they think is relevant, important, or irrelevant); C.J. Williams, *A View from the Well: One Trial Lawyer's Observations About Attributes of a Good Judge*, FED. LAW., May 2016, at 58, 60 (noting that "failure to communicate causes problems, errors, and delay").

[72] PROVINE, *supra* note 61, at 39; Solum, *supra* note 66, at 1376; Alsdorf, *supra* note 65, at 35 (noting that as judges, "[o]ur first job is *not* to decide; our first job *is* to listen").

[73] Fogel & Strong, *supra* note 65, at 268.

[74] *See, e.g.*, PROVINE, *supra* note 61, at 39 (discussing positive judicial traits as including being "impartial"); *Model Code of Judicial Conduct*, Canon 2, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ (last visited Feb. 26, 2021) (declaring a judge "shall perform the duties of judicial office impartially").

[75] Mark D. Killian, *Look for Decisiveness, Courage in Applicants for Judicial Office*, FLA. BAR NEWS, Feb. 15, 1997, at 17, 17 (stating that judges need to make decision "regardless of the personal or political consequences"); Williams, *supra* note 71, at 62 (noting that judges should be "open-minded" and not prejudge the case).

to the law and evidence" and not "biased in favor of one side or another."[76] Judges should be impartial with regard to the parties and the positions, including special interests.[77] Impartiality is not, however, the same thing as "disinterest":

> A good judge perceives the law and facts from a human perspective. Some facts are hot—charged with emotional salience. Some legal rules are morally charged—engaging our sense of indignation when juxtaposed with violative behavior. So the impartial judge is not cold-blooded; she is not *indifferent* to the parties that come before her. Rather, the judge with the virtue of judicial impartiality has evenhanded sympathy for all the parties to a dispute.[78]

iv. *Humility*

A good judge is also "self-restrained and humble."[79] When a judge—the person with the power in the courtroom—genuinely expresses humility, the court and its rulings gain respect.[80] As one lawyer aptly stated, judges should demonstrate "the humility of acknowledging that we all—including you judges—make mistakes."[81] And perhaps more important, "[r]emembering from whence one came . . . can go a long way" toward avoiding the pitfalls that come with assuming superiority over others.[82]

v. *Common Sense*

Common sense includes "political wisdom and sensitivity, a correct reading of social trends, and the capacity to make the nonlegal value judgments involved."[83] This "'understanding of the human condition'" includes understanding "'what life is all about, . . . why people do the things that they do, and . . . the differences, culturally, between people.'"[84] Basically, common sense means understanding people. It also means not over-thinking situations. One commentator, while discussing a particularly capable judge, explained this quality as follows: while hearing arguments

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[76] Solum, *supra* note 66, at 1373.
[77] *Id.*
[78] *Id.* at 1374.
[79] Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1629 (1988).
[80] Alsdorf, *supra* note 65, at 35.
[81] Condo, *supra* note 71, at 35.
[82] Williams, *supra* note 71, at 62.
[83] Gavison, *supra* note 79, at 1627. Arguably, common sense would also include having a "sharp mind." Lea, *supra* note 65, at 691.
[84] Killian, *supra* note 75, at 17.

about an assertedly "highly complex legal issue," the judge asked the straightforward question: "'Well, what does the statute say?'" [85] As that author points out, "[w]e need judges with the intelligence and thoughtfulness to periodically interrupt the flow of things to ask what the statute says."[86]

B. Significance of a Law Degree

The expectation that lawyers will be better judges than lay persons assumes that law school graduates have the ability to be a good judge. But that is not necessarily true. The relationship of a law degree to the characteristics above is tenuous at best.

First, although in response to criticism over the past fifty years law schools are now required to teach some professional skills,[87] the historical model focusing on using the case method and teaching law students to "think like a lawyer" prevails.[88] As one scholar noted, to be an effective judge in a lower court, the individual does "not need to be a competent lawyer" and "may need skills which have nothing to do with legal competence."[89] For example, when addressing family law matters, it is far more important for the judge to creatively craft a resolution to the problem, in consultation with the parties, if there is to be any hope of a lasting solution.[90] Similarly, much of trial court judging requires significant administrative skill, and these are skills not taught in law school.[91]

Second, despite the "foundational assumption" that lawyer judges "are capable of choosing to be rational and unbiased,"[92] neuroscience

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[85] Miller, *supra* note 69, at 79.
[86] *Id.*
[87] *See, e.g.*, *Standards for the Approval of Law Schools*, Standard 302, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf (last visited Feb. 26, 2021) (requiring, in addition to competence in "[k]nowledge and understanding of substantive and procedural law," that law graduates demonstrate some competence in "professional skills").
[88] *See, e.g.*, Derrick Howard, *Phantom Thread: Restoring Live-Client Interactions to the First-Year Educational Continuum in the Age of Information and Beyond*, 81 U. PITT. L. REV. 597, 612 (2020) (noting that "law schools rely too heavily on the case method, which has some strengths in teaching students to 'think like lawyers,' but not in teaching them the art of doing"). Despite the movement to be more skills-based, law schools are still frequently criticized for how they "teach fundamental lawyering skills." *Id.* at 616-17.
[89] Gavison, *supra* note 79, at 1624.
[90] *Id.* at 1624-25.
[91] *Id.* at 1625.
[92] Spain Bradley, *supra* note 62, at 3. Spain Bradley concludes that her "findings disrupt the widely held view that judges are rational actors capable of putting bias and emotion aside in order to form decisions on the basis of law and fact," using "three aspects of implicit cognition relevant to judicial behavior and commonly studied in neuroscience

demonstrates that all people "are subject to implicit, or hidden, cognition."[93] In short, the "cardinal premise—that judges are impartial because they can choose to be so—is wrong."[94] Law school simply does not alter humans' fundamental neurological processes.

Third, relying on behavioral psychology research, several studies of judges determined that they often react intuitively.[95] Moreover, intuitive decision making is more likely to be incorrect than deliberative decision making.[96] The main study was administered to Florida trial court judges,[97] all of whom were required to be lawyers.[98]

There were "virtually no lawyer judges" in settlement-era America.[99] The historical push for lawyer judges was, at its core, fueled by bar associations seeking to advance their mission.[100] Once lawyers and lawyer judges gained more wealth and prestige, the cycle was self-perpetuating.[101] And this move to "professionalize" the courts conflicted even in the early 1900s with the move to expand access to justice.[102]

Despite the strong push to eliminate lay judges, studies reveal no demonstrable difference in the "attitudes or behavior" of lay judges and lawyer judges.[103] Professor Provine conducted an extensive study of non-lawyer justices of the peace in the United States; her results were consistent with other published studies of lay judges as compared to lawyer judges in the United States, Europe, Chile, and Canada.[104] None of the evidence

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research: bias, emotion, and empathy." *Id.* at 7.

[93] *Id.* at 6. This happens because "the neural activity in our brains associated with decision-making can be integrally interconnected with brain activity engaged in bias, emotion, and empathy." *Id.*

[94] *Id.* There may be exceptions for young people or people suffering from brain injuries or addiction, but "no known exceptions exist for people on the basis of their work as judges." *Id.* at 7.

[95] Chris Guthrie, et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19 (2007) (adding that judges "occasionally demonstrate an ability to override those intuitive responses").

[96] *Id.* at 31.

[97] *Id.* at 13 (noting these trial court judges are referred to as "circuit court judges" in Florida).

[98] *Trial Courts - Circuit*, FLA. CTS., https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit (last visited Feb. 26, 2021) ("To be eligible for the office of circuit judge, a person must be an elector of a county within the circuit and must have been admitted to the practice of law in the state for the preceding five years.").

[99] PROVINE, *supra* note 61, at 1.

[100] *Id.* at 18 (noting that "the bar itself actively fostered the idea that only lawyers should be judges").

[101] *Id.* at 18-19. The move to eliminate lay judges was also fueled by class bias. *Id.* at 31.

[102] *Id.* at 30, 33.

[103] *Id.* at 120.

[104] *Id.* at 116.

"supports the charge that nonlawyers are unable or unwilling to adhere to due-process standards, or less likely to be fair in the exercise of discretion."[105]

This is not to say that all lay judges are perfect, or even competent. Some are not. But some lawyer judges are problematic as well, both within[106] and outside the tribal court context.[107] The point is simply that a law degree does not ensure competence as a judge.

C. Significance of Community

If a law degree is not necessary for a judge to be effective, what *is* necessary? Community. There is a growing understanding in the United States that *local* institutions are best placed to solve local problems.[108] Critiques of the current justice system in America[109] also reflect this

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[105] *Id.* at 120; *see also* LINDA J. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY 103 (Institute of Judicial Administration, 1979) (explaining that "in rural areas where attorney judges are not always available, especially given the cost considerations, non-attorney judges are warranted").

[106] *See, e.g.*, Burrell v. Armijo, 456 F.3d 1159, 1164, 1173 (10th Cir. 2006) (identifying significant problems created by a tribal court judge, Floyd J. Kezele, failing to rule on pending motions for four years). That judge holds a juris doctor degree. *Floyd Kezele*, LINKEDIN, https://www.linkedin.com/public-profile/in/floyd-kezele-94344190?challengeId=AQEIxPCj07xkEQAAAXedV3g6MqeTUJ8wKJqvBdmTvy_gKmV-sSSzOSwJZHiUOQ0KplfAx85SjwdzwEugEEzEfQEnb247JFgB0Q&submissionId=10d01de4-976c-6316-9e3b-86a7407a4f0a (last visited Feb. 26, 2021).

[107] *In re* Russo, 231 A.3d 563, 568, 573, 576 (2020) (removing a New Jersey Superior Court Judge, John F. Russo, Jr., from the bench for, among other violations, asking a sexual assault victim if she "closed her legs" to attempt to thwart the attack and engaging in threatening, ex parte communications with a defendant). Mr. John F. Russo, Jr. remains an attorney in good standing in New Jersey according to state bar records. *Attorney Search Results*, N.J. CT., https://portalattysearch-cloud.njcourts.gov/prweb/PRServletPublicAuth/-amRUHgepTwWWiiBQpI9_yQNuum4oN16*/!STANDARD?AppName=AttorneySearch (search by "Last Name": Russo; "First Name": John) (last visited Feb. 26, 2021). *See also* Disciplinary Counsel v. Bachman, __ N.E.3d ___, 2020 WL 7409655, *8 (Ohio Dec. 18. 2020) (suspending a lawyer judge for six months for walking a woman, who had screamed outside his courtroom while seeking a protection order but was leaving the courthouse, into his court, sitting her in the jury box, and sentencing her to jail for three days).

[108] *See, e.g.*, Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 776-77 (2006) (pointing out that, when trying to decide who should prosecute crime in Indian Country between federal, state, and tribal governments, our "Constitution implicitly and explicitly recognizes that crime is a local problem and should be addressed by local institutions"; furthermore, "the theories underlying local criminal justice and tribal self-determination spring from the same sources of liberal political philosophy and are designed to serve similar interests").

[109] *See, e.g.*, Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1877 (2019)

concern—that the proper role of community has been displaced.[110] Kevin Washburn, a noted Indian Law scholar, pointed out that in the criminal context, for example, "addressing violent acts in criminal trials is an expressive community act."[111] Rather than recognizing this reality, opponents of lay judges generally describe a community's influence as a source of "prejudice and bias,"[112] ignoring the benefits of having judges who understand the community, its people, and their values.[113]

Furthermore, the rise of courts such as drug courts,[114] veterans' treatment courts,[115] and mental health courts[116] recognize the need to address the whole problem,[117] not simply one manifestation of a problem.

("Many lawyers today practice within a legal system that they oppose in the hope of frustrating or dismantling that system"). Of course, criticisms focused on disparate treatment based on race and gender, among other classifications, are plentiful. *See, generally* Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020); Gerald P. López, *Growing up in Authoritarian 1950s East LA*, 66 UCLA L. REV. 1532 (2019); Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, 28 KAN. J.L. & PUB. POL'Y 505 (2019).

[110] *See, e.g.*, PROVINE, *supra* note 61, at 59. *See also* Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 797 (2008) (explaining that drug courts improve the victim's community, return the defendant to the community, and rely on community resources). The authors also point out that, in responding to concerns that drug courts alter "the traditional components of the criminal justice system," that "rather than adhere blindly to tradition, especially when tradition is shown to be ineffective, court systems should strive to improve results, even though that may require some flexibility." *Id.* at 808.

[111] Washburn, *supra* note 108, at 777.

[112] PROVINE, *supra* note 61, at 58.

[113] *Id.* (noting that to those critics, having judges who represent "the classes and groups served by these courts is of no particular concern" because their articulation of "the professional conception of adjudication is divorced from the particularity of individual communities").

[114] *See, e.g.*, Kevin S. Burke, *Just What Made Drug Courts Successful?*, 94 JUDICATURE 119, 119 (2010) (pointing out that the drastic increase drug courts since first established in 1989 is because of their "focus on procedural fairness").

[115] *See, e.g.*, Mark A. McCormick-Goodhart, Comment, *Leaving No Veteran Behind: Polices and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN ST. L. REV. 895, 906 (2013) (emphasizing the "rehabilitative approach" used in veterans treatment courts).

[116] *See, e.g.*, Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 125 (2007) ("Mental health court judges take the unique opportunity afforded by these courts to employ a multi-systemic approach toward problem-solving.").

[117] *See, e.g.*, Hora & Stalcup, *supra* note 110, at 725-27 (identifying the "primary goal" of a drug court as "finding solutions that will be 'mutually beneficial to the defendant, the larger community, and . . . [the] victims'"); McCormick-Goodhart, *supra* note 115, at 926 (noting that veterans courts "address each offender's emotional injuries as well as their

Tribes have historically addressed problems this way,[118] and tribal courts continue to do so.[119] The rise of therapeutic justice,[120] restorative justice,[121] and alternative dispute mechanisms[122] in mainstream United States justice systems is a move toward tribal justice principles, including community consensus.[123] This suggests that some of the concerns present with lawyer judges are less problematic with tribal lay judges. For example, because tribal judges focus more on solving problems[124] than on making "judgments,"[125] their intuition serves them well rather than leading to errors.[126] Furthermore, because "interaction grounds community,"[127] lay tribal court judges are the best positioned to understand and apply tribal law and custom.

In addition, there are practical reason for tribes to use lay judges: there are very few lawyers on most reservations. The latest published study shows

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other individual needs" and they are therefore "quickly becoming a vital component in the criminal justice system and an overarching symbol for the rehabilitative movement").

[118] Stinson, *supra* note 26, at 822 (pointing out that tribes historically "responded to criminal (or other anti-social) conduct with peacekeeping and restorative justice mechanisms aimed at solving the underlying problem and restoring harmony").

[119] *See, e.g.*, Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 136 (1995) (commenting on tribes reinstating "traditional practices of problem solving"); Moppett, *supra* note 26, at 295 (pointing out that "many tribal courts adopt a restorative approach, focusing on 'keeping harmonious relations among the members of the community'").

[120] *See, e.g.*, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1064-65 (2003) ("Unlike traditional judges functioning in traditional courts, judges in problem solving courts consciously view themselves as therapeutic agents, and, therefore, one can see them as playing a therapeutic jurisprudence function in their dealings with the individuals who appear before them.").

[121] *See, e.g.*, Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020) (pointing out that "[r]estorative justice has been part of the American criminal justice system for more than three decades" and that early theorists emphasized the "relational harms caused by crime or deviance from social norms").

[122] *See, e.g.*, Kirk W. Schuler, Note, *ADR's Biggest Compromise*, 54 DRAKE L. REV. 751, 751 (2006) ("Alternative Dispute Resolution (ADR) has become an increasingly popular alternative to litigation in America.").

[123] *See, e.g.*, William P. Zuger, *A Baedeker to the Tribal Court*, 83 N.D. L. REV. 55, 62 (2007) ("The tribal judge must be a consensus builder.").

[124] *See, e.g.*, Fortin, *supra* note 23, at 105 (quoting one tribal judge as follows: "'I think tribal judges are more problem-solvers than, say, state judges. I don't think we have to be law-trained to be problem-solvers.'").

[125] Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMM. & RHETORIC: JAWLD 1, 7, 20-21 (2013) (positing that although "judges are just as prone to making mistakes as other individuals when they are making judgments," their intuition is likely to help them be better problem solvers).

[126] *See supra* notes 95-96 and accompanying text.

[127] RICHLAND, *supra* note 27, at 2.

fewer than 3,000 Native American lawyers in the entire United States.[128] Even though approximately twenty percent of those lawyers practice in the tribal sector,[129] that equals an average of approximately one Native American lawyer per tribe.[130] Hiring non-Indian lawyer judges is an option, of course, but many tribal courts are in distant, economically disadvantaged locations;[131] finding lawyers willing to relocate to those areas can be difficult. And that also undermines the benefits of community noted above; awareness of tribal culture helps ensure decisions are culturally sound.[132] Furthermore, having "tribal court judges who are not members of the community may push the common law of the community in an erratic and even illegitimate direction."[133] Therefore, many tribes have "deliberately created justice systems that involve the active participation of elders or other lay judges."[134] As noted by scholars studying non-lawyer judges, "[l]ay

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[128] Mary Smith, *Native American Attorneys Systematically Excluded in the Legal Profession*, HUM. RTS., Spring 2015, at 14, 14 ("There are only 2,640 Native Americans [sic] attorneys in the United States, comprising 0.2 percent of the more than 1.2 million attorneys in the United States.").

[129] *Id.* at 16 (noting that "more than 20% of [survey] respondents practiced in the tribal sector"). Not all Native lawyers want to or are able to work on a reservation, of course. The current figure amounts to less than 600 Native American lawyers practicing law with tribes.

[130] There are currently 566 federally recognized Native American tribes in the United States. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS & THE UNITED STATES: AN INTRODUCTION 6 (2020), https://www.ncai.org/attachments/PolicyPaper_VmQazPEqbvZDMeaDvbupWTSZLmzyzBKOknQRXnUyoVMoyFkEWGH_Tribal%20Nations%20and%20the%20United%20States_An%20Introduction.pdf (last visited Feb. 26, 2021).

[131] *See, e.g.*, Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1005 (2008) (noting that despite initially owning the entire country, the federal government removed Indians "to out of the way and distant places"); Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683, 717 (1997) (noting that "Indian reservations are among the most economically depressed sectors of the nation").

[132] Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 457 (1999) (identifying the significance of culture to tribal court jurisprudence and arguing that frequently "legal decision making and the legal system as a whole are seen as a purely formal system of rules and procedures that bear little relationship to the day to day life of people living on the reservation (or elsewhere for that matter);" he adds that "[s]ensitivity and awareness of (tribal) culture helps to insure that tribal court decision making will not only be analytically sound, but also culturally informed"). *See also* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE xvii (2009) (noting that tribal court jurisprudence "involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues and tribal problems").

[133] Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 82 (2007).

[134] Fortin, *supra* note 23, at 104. *See also* William C. Watt, *Practicing Indian Law in Tribal Courts*, FED. LAW., Mar./Apr. 2005, at 12, 14, noting:

judges in many communities make possible the settling of disputes within the community."[135]

D. Maximizing Lay Judge Effectiveness

Lay judges can be effective; the goal is to maximize that effectiveness. Accountability is important, of course.[136] Periodic performance reviews with an eye toward improvement can help any employee perform better.[137] And with proper selection, training, and resources, lay tribal judges should be able to perform as well as (or, perhaps for the reasons noted above,[138] better than) lawyer judges.

First, in terms of selection, looking for individuals who possess the traits identified above—fairness; good communication skills, including listening; impartiality; humility; and common sense[139]—is a good start. Second, individuals who are part of the community[140] should be, all other things equal, stronger candidates. And individuals who approach judging as problem-solving[141] should also be stronger candidates. Some tribes have developed their own bar exam;[142] for those tribes, that exam should be a prerequisite for any candidate for the bench.[143] Other tribes may wish to

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> Many tribal communities also tend to regard the character, life experience, and cultural identity of their judges as qualifications that are at least of equal importance to formal training in Anglo-American legal tradition. . . . Thus, in any given proceeding, the presiding tribal court judge might be a distinguished member of the tribal community who has little formal education, or the judge could be an experienced attorney with a formalistic view of the law.

[135] SILBERMAN, *supra* note 105, at 103.

[136] *See, e.g.*, Gavison, *supra* note 79, at 1655 ("In principle, unaccountable power is bad and dangerous."); Berger, *supra* note 125, at 20 (noting that intuition can be strengthened by receiving "prompt, accurate, and consistent feedback"). Some tribes have adopted ethical rules or codes of judicial conduct and can impose consequences for judicial misbehavior. *See, e.g.*, *Judicial Conduct Commission*, NAVAJO NATION, http://www.courts.navajo-nsn.gov/JCC-Policies.html (last visited Feb. 26, 2021); Leah K. Jurss, *Telling Stories in Council and Court: Developing a Reflective Tribal Governance*, 10 ALB. GOV'T L. REV. 157, 183 n.110 (2017). And the National American Indian Court Judges Association has adopted its own "Judicial Conduct and Code of Ethics." *Judicial Ethics*, NAT'L AM. INDIAN CT. JUDGES ASS'N, http://www.naicja.org/about-us/judicial-ethics/ (last visited Feb. 26, 2021).

[137] *See, e.g.*, Guthrie, *supra* note 95, at 39 (suggesting a "peer-review processes to provide judges with feedback" and noting that research shows "accountability of this sort can improve decision-making performance").

[138] *See supra* notes 108-35 and accompanying text.

[139] *See supra* notes 66-86 and accompanying text.

[140] *See supra* notes 108-35 and accompanying text.

[141] *See supra* notes 124-26 and accompanying text.

[142] *See, e.g.*, Moppett, *supra* note 26, at 304-05; Smith, *supra* note 36, at 50.

[143] *See, e.g.*, *Salt River Pima-Maricopa Indian Community Code of Ordinances, Ordinance*

develop their own bar exam. In addition to the selection criteria, tribes should be thoughtful about *who* makes the decision to hire judges.[144] That decision will necessarily involve a careful review of each particular tribe's constitution, code, customs, and practices, but it is a decision that should be made deliberately.

Second, in terms of training, lay judges can be effective without a three-year law degree, but legal training is helpful. Prior to beginning on the bench, all judges should receive some training in reading laws and applying them. They should also receive training on their role within the particular tribal structure; some tribal constitutions create an independent judiciary,[145] and in other tribes, the judicial branch is subordinate to tribal council.[146] New judges ought to fully understand their position, and meeting with the tribal council prior to taking the bench would be wise.

In addition, ongoing judicial training can be beneficial and is readily available from a number of sources,[147] including Native American tribes themselves.[148] Perhaps the most comprehensive external training for tribal court judges is offered by the National Tribal Judicial Center,[149] a division of The National Judicial College, which trains judges across the country in a variety of courts.[150] The goal of the National Tribal Judicial Center, which began in 2002, is to "improve justice through national programs of education and training directed toward judicial proficiency, competency, skills and understanding."[151] They offer live, online, and self-study courses,

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Number SRO-516-2020, § 4-32(b)(7), SALT RIVER PIMA-MARICOPA INDIAN CMT'Y, https://www.srpmic-nsn.gov/wp-content/uploads/2020/03/SRO-516-2020.pdf (last visited Feb. 26, 2021) (noting that associate judges must, among other qualifications, "pass a test administered to persons applying to practice before the Community court and/or other applicable tests").

[144] *See, e.g.*, Gavison, *supra* note 79, at 1650 (pointing out that the selection of qualified judges "has two interrelated features: *the criteria of selection*, and *the identity of the choosers*").

[145] *See, e.g.*, COHEN, *supra* note 27, at 265.

[146] *Id.*

[147] Guthrie, *supra* note 95, at 38 ("Just as there is continuing legal education for lawyers, there also is continuing legal education for judges.").

[148] *See, e.g.*, *Salt River Pima-Maricopa Indian Community Code of Ordinances, Ordinance Number SRO-516-2020*, § 4-31a(a)(v), SALT RIVER PIMA-MARICOPA INDIAN CMT'Y, https://www.srpmic-nsn.gov/wp-content/uploads/2020/03/SRO-516-2020.pdf (last visited Feb. 26, 2021) (noting that the presiding judge has the authority to "develop a training plan" for all judges).

[149] *About the NTJC*, *National Tribal Judicial Center*, THE NAT'L JUD. COLL., https://www.judges.org/ntjc/about-the-ntjc/ (last visited Feb. 26, 2021) [hereinafter *About the NTJC*].

[150] THE NAT'L JUD. COLL., https://www.judges.org/ (last visited Feb. 26, 2021).

[151] *About the NTJC*, *supra* note 149.

as well as a Tribal Judicial Skills Certificate.[152] Judicial training is also available through the Bureau of Indian Affairs; the Tribal Court Trial Advocacy Training launched in 2011 and provides training for tribal law judges, among other tribal court personnel.[153] The National American Indian Court Judges Association also provides judicial training.[154] Furthermore, a number of other organizations, institutions, and groups also provide training opportunities. Many of these trainings are hosted by academic institutions, such as the annual Tribal Court Trial Skills College[155] hosted by the Indian Legal Clinic at Arizona State University's Sandra Day O'Connor College of Law and the annual Alaska Tribal Court Conference[156] at the University of Alaska Fairbanks.

Finally, in terms of resources, tribal governments themselves are "in the first instance responsible for funding tribal justice systems along with other governmental functions."[157] In part because of the difficulties created by federal Indian policy over centuries, moving from nation-to-nation treaty making,[158] to treaty breaking and removal,[159] to allotment, termination, and assimilation,[160] as part of the current federal Indian policy of self-determination[161] the Bureau of Indian Affairs and the U.S. Department of Justice provide some federal funding for tribal justice systems.[162] This

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[152] *Tribal Courses & Certificates*, *National Tribal Judicial Center*, THE NAT'L JUD. COLL., https://www.judges.org/ntjc/tribal-courses/ (last visited Feb. 26, 2021).

[153] *BIA Director Black Announces Training Program for Tribal Court Judges, Prosecutors, Clerks and Administrators*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS. (March 25, 2011), https://www.indianaffairs.gov/as-ia/opa/online-press-release/bia-director-black-announces-training-program-tribal-court-judges. During 2019, tribes conducted eleven three-day trial advocacy training session with TJS funding; "[o]ver 500 tribal court participants were trained." *Training*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., https://www.bia.gov/CFRCourts/training (last visited Feb. 26, 2021) [hereinafter *Training*].

[154] *Bureau of Justice Assistance*, NAT'L AM. INDIAN CT. JUDGES ASS'N, http://www.naicja.org/bureau-of-justice-assistance/ (last visited Feb. 26, 2021) (including trainings such as the "Role of the Tribal Court Judge").

[155] *Tribal Court Trial Skills College*, SANDRA DAY O'CONNOR COLL. OF L. AT ARIZ. STATE UNIV., https://events.asucollegeoflaw.com/trialskills/ (last visited Feb. 26, 2021) [hereinafter *Tribal Court Trial Skills College*].

[156] *Alaska Tribal Court Conference*, UNIV. OF ALASKA FAIRBANKS, https://www.uaf.edu/tribal/atcc/ (last visited Feb. 26, 2021).

[157] EAGLEWOMAN & LEEDS, *supra* note 5, at 45.

[158] *See, e.g.*, Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 6-8 (2014-2015).

[159] *Id.* at 8-13.

[160] *Id.* at 13-16.

[161] *Id.* at 16-18.

[162] EAGLEWOMAN & LEEDS, *supra* note 5, at 45. In 1993, "Congress passed the Indian Tribal Justice Act," designed to "reinforce the functioning of tribal courts," although the

funding is used by many of the organizations listed above, including the National Tribal Judicial Center,[163] to develop their training programs. Funding should also be made available to attend off-site trainings,[164] whether from the tribes themselves or through federal grants. Through the Tribal Justice Support Directorate, the Bureau of Indian Affairs works with tribes to conduct some tribal court assessments,[165] but additional funding is needed for both internal and external court assessments. Finally, another key resource that can help maximize the effectiveness of tribal lay judges is people. Law clerks, paralegals, interns, and court solicitors can help advise tribal court judges,[166] leaving the ultimate control in the judge's hands but providing input when needed.[167]

The characteristics necessary to be an effective judge have little relationship to a law degree. In the tribal court context, lay judges may be preferred to lawyer judges because of the connection they have with the community. With the proper attention paid to selection, training, and resources available for tribal courts, lay judges can therefore be at least as effective as lawyer judges.

III. EFFECTIVE TRIBAL LAY ADVOCATES

In addition to complaining about lay judges, critics argue that tribal courts should be distrusted because they often permit lay advocates to represent litigants.[168] Many tribal courts do not require advocates to be

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Act was unfunded for several years. Vicenti, *supra* note 119, at 137.

[163] *About the NTJC*, *supra* note 149.

[164] For example, through The National Judicial College, one training can cost several thousand dollars, including fees, travel expenses, and miscellaneous expenses. *Advanced Tribal Bench Skills: Competence, Confidence and Control*, THE NAT'L JUD. COLL., https://www.judges.org/courses/advanced-tribal-bench-skills-competence-confidence-and-control-2/ (last visited Feb. 26, 2021) (Reno, NV, October 11, 2021 to October 14, 2021 Course $1239.00; Conference Fee $299.00). Some scholarships are available but finding is not guaranteed.

[165] *Tribal Justice Support Directorate*, BUREAU OF INDIAN AFFS., OFF. OF JUST. SERVS., https://www.bia.gov/sites/bia.gov/files/assets/bia/ojs/ojs/pdf/idc2-045807.pdf (last visited Feb. 26, 2021). This service is offered pursuant to 25 U.S.C. § 3612.

[166] *See, e.g.*, Brown & Desmond, *supra* note 33, at 226 (noting that many tribes employ lay judges and that as tribal "dockets become more complex, tribal courts are served by lawyers in the capacity of law clerks" more often). The Tribal Law and Policy Institute, for example, coordinated a program between the Hopi Appellate Court and the UCLA Native Nations Law & Policy Center to "provide a clinical program which trains and supervises law students to serve as law clerks for the Appellate Court of the Hopi Tribe of Arizona." *Hopi Appellate Program, Past Projects*, TRIBAL L. & POL'Y INST., https://www.home.tlpi.org/past-projects (last visited Feb. 26, 2021).

[167] In addition to personnel resources, scripts and checklists can be helpful. *See, e.g.*, Guthrie, *supra* note 95, at 40.

[168] *See, e.g.*, Granite Valley Hotel Ltd. P'ship v. Jackpot Junction Bingo & Casino, 559

attorneys,[169] admitting into tribal court practice individuals who meet certain qualifications and demonstrate proficiency in the tribe's laws.[170] Critics fail to acknowledge that in many contexts outside of tribal courts, advocates are not required to be lawyers, even when the proceeding is largely legal. For example, union representatives are often effective advocates in employment matters.[171] Similarly, sports and entertainment agents can be effective advocates, including negotiating contracts and pursuing arbitration for pay increases, despite those functions generally being undertaken by lawyers.[172] External demands for "lawyers" in tribal courts "ignore[s], or discount[s], the wisdom and input of lay advocates who participate in many tribal courts."[173] And as with concerns about tribal lay

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N.W.2d 135, 145-46 (Minn. Ct. App. 1997) (Randall, J., concurring) (questioning the justice provided by tribal courts because "court-appointed advocate[s]" might not be attorneys and their "*qualifications, or lack thereof*, are set by tribal government") (emphasis added); Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 61 (1988) (noting that critics abound but increased "legitimacy of tribal courts is (and has been) inextricably bound to their amenability to change and reform that increases the net perception of the development of a more orderly and just system and society," with one example being "the increase of law trained Indian people within many systems"). *See generally* Thais-Lyn Trayer, Comment, *Elementary Unfairness: Federal Recidivism Statutes and the Gap in Indigent American Indian Defendants' Sixth Amendment Right to Counsel*, 63 AM. U. L. REV. 219 (2013).

[169] *See generally* FLETCHER, *supra* note 26, at 829-82; James D. Diamond, *An Overview of Practicing American Indian Criminal Law in Federal, State, and Tribal Courts, and an Update About Recent Expansion of Criminal Jurisdiction over Non-Indians*, FED. LAW., Apr. 2018, at 19, 66.

[170] *See, e.g.*, AUSTIN, *supra* note 132, at 32 (noting that the Navajo Nation Bar Association licenses both lay advocates and lawyers to "practice law on the Navajo Nation"); Neil Fulton, *All Things Considered: The Effect on Tribal Sovereignty of Using Tribal Court Convictions in United States Sentencing Guideline Calculations*, 46 AM. J. CRIM. L. 241, 259 (2019) (noting that "many tribes allow law advocates"); Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 359-60 (2011) ("Tribal-court advocates generally are not law school graduates but have obtained experience in tribal court practice and law through an apprenticeship or study at a tribal college and/or a certified paralegal program.").

[171] *See, e.g.*, 48A AM. JUR. 2D *Labor and Labor Relations* § 1404, Westlaw (database updated Feb. 2021) (specifying that employees are entitled to consult with their union representative prior to an investigatory interview in order for the union representative to "give effective aid and protection to the employee").

[172] *See, e.g.*, Adam Epstein & Bridget E. Niland, *Sports Agent Litigation and the Regulatory Environment*, 11 ATL. L.J. 36, 36 (2009) ("Sports agents play an important and beneficial role in representing the interests of their clients.").

[173] Fulton, *supra* note 170, at 258-59 (commenting on the U.S. Sentencing Commission's proposal to require lawyers in order to consider a tribal conviction for federal sentencing purposes).

judges, underlying, unconscious racism may be at the root of many of the fears about tribal lay advocates.[174]

This section identifies the characteristics of a good advocate. It then considers whether those characteristics are taught in law school. Next, it addresses the impact of community on the potential effectiveness of advocates. Finally, it explores the circumstances necessary to maximize the effectiveness of tribal lay advocates.

A. Characteristics of a Good Advocate

A variety of characteristics are considered essential for being a good advocate. The four that stand out are: interpersonal skills; diligence; understanding court procedure; and storytelling ability.

i. *Interpersonal Skills*

The most significant characteristic necessary to be an effective advocate is having good interpersonal skills. Relying on empirical literature, interpersonal abilities, as part of the "[h]eightened abilities associated with the core of professionalism," positively influenced advocates' effectiveness in law practice.[175] Although some might argue that "legal skill" is more important than interpersonal skills, a study considering the impact of advocates' interpersonal skills "found that relational skills were preferred over legal skills by individuals asked to select or recommend an attorney."[176]

Trust is an essential component in a relationship with a client.[177] When the client trusts her advocate, she is willing to share more "case-relevant information."[178] Advocates can build trust by using "basic interpersonal skills such as active listening, patience, empathy, and respect" to let their "clients know that their opinions are important and that their feelings are

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[174] *See, e.g.*, Spain Bradley, *supra* note 62, at 29 (explaining that no evidence demonstrates "legal professionals" are "cognitively exceptional and therefore not prone" to bias).

[175] Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 137 (2011).

[176] Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust Among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scale*, 20 BEHAV. SCIS. & L. 69, 69 (2002). Boccaccini and Brodsky described this finding as "surprising" because they assumed "that attorney preferences would be based mainly on perceptions about an attorney's knowledge and lawyering skills." *Id.* Hence, "perceptions about attorneys' interpersonal skills may be as important as perceptions about legal skills in forming opinions about overall lawyering ability." *Id.* at 84.

[177] *Id.* at 70.

[178] *Id.* at 71 (noting that "the extent to which a client trusts his or her attorney directly influences the nature of their interactions and the quality of the attorney-client relationship").

affirmed."[179] And for an advocate to effectively represent his clients, he needs to have "an understanding of the human condition"—an understanding about how "'real' people think" and how to motivate them.[180]

ii. *Diligence*

Diligence[181] includes preparation,[182] hard work,[183] and a willingness to learn.[184] Diligence is more important than substantive knowledge because it is impossible to know all of the law, and the law is ever-changing.[185] In addition, diligence is difficult to teach but it is part of "good thinking": "Good thinking depends on certain mental dispositions and much less on intelligence. Intelligence, it turns out, correlates only very weakly with open-mindedness, diligence, and curiosity, the dispositions that really do affect one's ability to be a good thinker."[186] In short, being an effective advocate requires constant "vigilance" and "intensive study."[187]

iii. *Understanding of Court Procedure*

Good advocacy requires both an understanding of—and an appreciation for—procedure.[188] The rules of procedure govern practice, and strong advocates need to know those rules. As one author framed it, "[j]ust as one cannot succeed at a game without knowing its rules, one cannot be

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[179] *Id.* at 84. Hence, relationships between advocates and their clients "characterized by high levels of trust should be associated with high levels of participation within the relationship, which should, in turn, be associated with high levels of client satisfaction." *Id.* at 71-72.

[180] John A. Day, *What It Takes to Be a Great Trial Lawyer*, TENN. BAR J., Nov. 2008, at 14, 36.

[181] *See, e.g.*, Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1059 (2000).

[182] *See, e.g.*, Randy Wilson, *What Do Jurors Say About Trial Lawyers*, 68 TEX. BAR J. 152, 154 (2005); David C. Sarnacki, *Effective Advocacy in Divorce Trials*, 78 MICH. BAR J. 20, 20-27 (1999) (noting throughout the importance of preparation).

[183] *See, e.g.*, Jacob, *supra* note 181, at 1059 (noting that advocates "must be capable of hard work"). *See generally* Andrew Strong, *Hard Work Does Pay Off!*, 65 TEX. BAR J. 620 (2002).

[184] *See, e.g.*, Steven R. Smith, *The Meaning of Quality*, 43 S. TEX. L. REV. 735, 739 (2002) (commenting that the law "is a 'learning' profession").

[185] *See, e.g.*, *id.*

[186] DOUGLAS O. LINDER & NANCY LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW 145 (2014).

[187] Michael D. Schag, *Developing Basic Trial Skills*, COLO. LAW., Feb. 2004, at 33, 40.

[188] *See, e.g.*, Day, *supra* note 180, at 16-17 ("Great trial lawyers understand that every judge has 'local rules,' not all of which are written down. The lawyer learns the written rules and makes a reasonable effort to learn the unwritten rules.").

an effective advocate without knowing procedure—the rules of litigation."[189]

iv. *Storytelling*

At its core, persuasion is about telling a compelling story.[190] Simply relaying your client's perspective by telling his story helps persuade,[191] and one key attribute of effective storytelling is having a strong theme and theory of the case.[192] As noted by one lawyer, "at the most fundamental level, our clients rely on us to tell their stories."[193] Good advocates therefore need to be competent storytellers, in addition to having strong interpersonal skills, being diligent, and having an understanding of procedure.

B. Significance of a Law Degree

The general assumption is that "learning to think like a lawyer" means law school graduates have the ability to be good advocates. Law school education is extensive and graduates undoubtedly possess substantial knowledge and some lawyering skills. Unfortunately, neither law school nor the bar exam ensure lawyers have the characteristics needed to be an effective advocate.

In terms of interpersonal skills, the "substantial body of research . . . on the personality characteristics of attorneys and law students"[194] demonstrates that "compared to the general population, attorneys and law students tend to be 'uniformly less interested in people, in emotions, and in

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[189] Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 STETSON L. REV. 55, 80-81 (2004) (discussing the positive effects when procedure is used well and the problems that can result "when procedure is not used as well as it could have been").

[190] *See generally* J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53 (2008). Storytelling is persuasive even in the transactional context. *See, e.g.*, Susan M. Chesler & Karen J. Sneddon, *Telling Tales: The Transactional Lawyer as Storyteller*, 15 LEGAL COMMN'C & RHETORIC: JALWD 119 (2018).

[191] Rideout, *supra* note 190, at 59 (noting that narratives provide a "compelling structure, most probably because narratives are a natural mode for understanding human experience"); *see also* Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 LEGAL COMMN'C & RHETORIC: JALWD 37, 61 (2010) (noting that because law "is made through the telling and the believing of stories," all legal advocacy "involves some kind of persuasion, and all persuasion involves some kind of storytelling"); Schag, *supra* note 187, at 35 (explaining that a key component of persuasive advocacy is to tell "a compelling story").

[192] *See, e.g.*, Sarnacki, *supra* note 182, at 21.

[193] Sarah E. Warner, *The Power of Storytelling*, J. KAN. BAR ASS'N, Oct. 2018, at 6, 7.

[194] Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCH. REV. 81, 92 (2001).

interpersonal concerns.'"[195] Furthermore, "legal education does not assist or encourage students to acquire interpersonal skills."[196] Hence, lawyers are actually *less likely* to possess this critical advocacy characteristic than lay persons.

With regard to diligence, as noted by one former law school dean, "[b]efore one enters law study for the purpose of becoming a practitioner, he or she should possess certain inherent traits and characteristics"[197] including being diligent and willing to work hard.[198] Law schools are simply not able to teach diligence.[199] And although law schools teach procedure, that almost always means a course in federal civil procedure[200]—not the procedural rules of a variety of different jurisdictions, much less tribal courts. A particular tribe's procedural rules may not resemble the federal rules,[201] yet law school graduates may assume that they already know "procedure," resulting in them being less likely to learn[202] the applicable rules and actually compounding the problem.[203] Furthermore, despite

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[195] *Id*. at 93.

[196] Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1381 (1997). As noted by two scholars, these factors "may help to explain the problematic relationship between attorneys and their clients." Boccaccini & Brodsky, *supra* note 194, at 93.

[197] Jacob, *supra* note 181, at 1058.

[198] *Id.* at 1059. Dean Jacob also pointed out that law school applicants should already have good communication skills, including listening. *Id.* at 1060.

[199] *Id.* at 1058-60. Another law school dean acknowledged that ensuring law students are "proficient at any one of" the skills needed for successful law practice, including an ability to learn, "would be an enormous undertaking for programs that last usually only three or four years." Smith, *supra* note 184, at 739. Dean Smith summarized this point well: "As the critics of legal education have pointed out, law schools do not do an excellent job in completing all of the tasks of instruction that are set out for it in educating fine lawyers." *Id.*

[200] *See, e.g.*, Larry L. Teply & Ralph U. Whitten, *Teaching Civil Procedure Using an Integrated Case-Text-and-Problem Method*, 47 ST. LOUIS UNIV. L.J. 91, 98 (2003).

[201] *See, e.g.*, Heidi McNeil Staudenmaier & Metchi Palaniappan, *The Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 591 (2005) (noting that "[m]ost tribal law and order codes contain procedural rules specific to the tribal court").

[202] *See supra* notes 184-85 and accompanying text.

[203] The same problem exists with regard to substantive law; law school teaches "generic" substantive law, not the law of the jurisdiction where its graduates are likely to practice. *See, e.g.*, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf (requiring law school graduates demonstrate competency in "[k]nowledge and understanding of substantive and procedural law," with no requirement that students learn the law of any particular jurisdiction). "No matter how effective a law school is, it can only

increased awareness of the importance of storytelling to effective advocacy,[204] storytelling remains under-taught in American law schools.[205]

It is not surprising, therefore, that a legal education scholar recently noted that "[l]aw schools have acknowledged that they cannot continue to promote the traditional law school model as the sole structure for law schools."[206] This dissatisfaction with legal education is one reason for the rise in "Limited Practice Legal Professionals"[207]—individuals who, without a law degree, are authorized by various states to perform certain legal services for clients.[208] And an increasing number of states do not require applicants for the bar exam to have graduated from law school.[209] Furthermore, returning to the roots of law practice in the United States,[210] some state bars are now licensing lawyers with no law degree if they have apprenticed in the field,[211] and "the apprenticeship model [is being considered] as a solution"[212] to the inadequacies of the current model of legal education. And for particular fields, such as patent law, applicants need not have attended law school.[213]

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begin the process of legal education because no attorney has learned the law at the time of graduation." Smith, *supra* note 184, at 739.

[204] *See supra* notes 190-193.

[205] *See, e.g.*, K. Jane Childs, Note, *(Re)Counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum*, 29 B.U. PUB. INT. L.J. 315, 317 (2020).

[206] Howard, *supra* note 88, at 623. Howard also explains that for over "twenty years, it has been 'alarmingly clear that legal education [has] become a house of cards.'" *Id.* at 622. Another scholar concluded that more than fifty percent of the factors necessary to be an effective advocate are not generally "covered by most legal educators." Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 822-24 (2012).

[207] *Limited Practice Legal Professionals: A Look at Three Models*, BAR EXAM'R, Winter 2018-2019, at 16, https://thebarexaminer.org/article/winter-2018-2019/limited-practice-legal-professionals-a-look-at-three-models/.

[208] Access to justice is another key factor fueling this movement. *See id.* at 16; *see also* infra notes 229-39 and accompanying text.

[209] *See, e.g.*, *Can You Take the Bar Exam Without Going to Law School?*, INDEED, CAREER GUIDE (Dec. 17, 2020), https://www.indeed.com/career-advice/career-development/can-you-take-the-bar-exam-without-going-to-law-school#:~:text=Currently%2C%20Washington%2C%20Vermont%2C%20California,least%20some%20law%20school%20experience.

[210] *See, e.g.*, PROVINE, *supra* note 61, at 6.

[211] *E.g.*, Sen, *supra* note 63, at 123 n.13 ("Four states permit legal apprenticeships in lieu of law school.").

[212] Howard, *supra* note 88, at 623.

[213] *See, e.g.*, Maria Z. Vathis, *Design Patents Can be Women's Work*, FED. LAW., May/June 2019, at 3, 3 ("In order to sit for the patent bar exam, a law degree is not required.").

Of course, not all lay advocates are competent.[214] But not all lawyers are competent, either.[215] A law degree does not guarantee competence or effective advocacy.

C. Significance of Community

Just as judges can be more effective when they are part of the community,[216] the same holds true for advocates within tribal justice systems. Many lay advocates are members of the tribe where they practice.[217] Because trust between an advocate and her client is essential,[218] having an advocate who understands the client's culture should help build confidence in the process and the justice system itself.[219] Furthermore, good advocates "stay in touch with how real people think."[220] Lay advocates therefore may be preferred in tribal courts because of their ability to relate to clients.[221]

Second, storytelling—one of the essential characteristics of a good advocate—is prevalent in Indigenous communities.[222] Storytelling is "a

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[214] *See, e.g.*, In re Sekayumptewa, 3 Am. Tribal Law 434, 435 (Hopi App. Ct. 2001) (noting that a lay advocate was suspended for six months for failing "to appear in court as lay advocate for numerous clients").

[215] *See, e.g.*, Stephanie Francis Ward, *Before the Fall*, A.B.A. J., Mar. 2015, at 44, 46, 49 (discussing a Dallas attorney who pled guilty to "misapplication of fiduciary property" and was sentenced to twenty-five years in prison, and had previously been censured by the State Bar of Arizona because a Navajo Nation judge concluded he had "violated a court order directing him to transfer his tribal court cases to another lawyer by a certain date").

[216] *See supra* notes 108-35 and accompanying text.

[217] *See, e.g.*, Annamarie Johnson, *Nevada Legal Services Tribal Court Advocate Training Project*, NEV. LAW., Aug. 2011, at 32, 32 ("Most tribal courts license tribal members to serve as lay advocates for other tribal members as a means to providing them with access to justice."); M. June Harris, *Nuts and Bolts of Practicing in Arizona Tribal Courts*, ARIZ. ATT'Y, Aug. 2020, at 66, 66 (noting that "a lay advocate is usually a member of that tribe but can be a member of another tribe or even a non-Indian" and cataloging the various requirements for admission in tribal courts in Arizona).

[218] *See supra* notes 177-80 and accompanying text.

[219] Boccaccini & Brodsky, *supra* note 176, at 84 (noting that "perceptions about attorneys' interpersonal skills may be as important as perceptions about legal skills in forming opinions about overall lawyering ability"). Furthermore, "outgroup bias" can make it more difficult for an advocate and client to build trust when they are not part of the same community. *See, e.g.*, Bowman, *supra* note 25, at 12.

[220] Day, *supra* note 180, at 36.

[221] *See, e.g., id.* (noting that "advanced education tends to divorce one from most people in our society" and that "a law school education separates you from the way ordinary people process information").

[222] *See, e.g.*, Kirsten Manley-Casimir, *Creating Space for Indigenous Storytelling in Courts*, 27 CANADIAN J.L. & SOC'Y 231, 234 (2012) (noting that "a storytelling approach is central to the struggle for decolonization"). The author discusses the need to create "space for Indigenous storytelling . . . to ensure that Indigenous Elders are respected and

way to be seen and heard within their own context and in their own words."[223] An advocate who is part of the community and can genuinely and convincingly share his client's story is more likely to be effective.

Third, although lay advocates are not lawyers, they are regulated. Tribes have admissions standards for lay advocates, which may include passing a tribal bar exam.[224] They also have appropriate systems for monitoring lay advocate effectiveness; for example, the Hopi Court of Appeals sanctioned a lay advocate for failing to appear in tribal court for a number of clients.[225] Despite suspending that particular advocate for failing to fulfill his professional obligations, the court commented on the "importance of the role of lay advocates in the future growth of the Tribal Courts and overall legal community in Hopi."[226] The court added that because of the "heightened role that lay advocates play in Hopi society, . . . the lay advocates' commitment to the people they represent must also be heightened."[227] The court concluded:

> As lay advocates, Petitioner and others like him must recognize that though they are not lawyers, their role is similar and uniquely more important. Specifically, the lay advocate is the bridge that connects the ordinary person to the sometimes confusing legal system that they must now confront. Further, the role of the lay advocate is even more important than lawyers when it is considered that lay advocates usually share the client's culture and tradition and thus are better able to provide the client with a more well-rounded understanding of the process they are facing. Consequently, to require lay advocates to act by a standard

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to recognize the holistic worldviews of Indigenous peoples, which may be best reflected in a narrative style of testimony." *Id.* at 243.

[223] Danielle Delaney, *Under Coyote's Mask: Environmental Law, Indigenous Identity, and #NODAPL*, 24 MICH. J. RACE & L. 299, 317 (2019). Many argue that storytelling is more common in minority communities. *See, e.g.*, Ana Garza, Note, *The Voice of Color and Its Value in Legal Storytelling*, 1 HISP. L.J. 105, 111-12 (1994) ("Critical Race Theorists contend that minorities have a way of speaking that is different from the majority and that this enables them to tell stories that benefit society.").

[224] *E.g.*, Moppett, *supra* note 26, at 305 (noting that "many tribes require that lay advocates pass the tribe's bar exam or show that they know the tribe's law in order to appear before the court"); Watt, *supra* note 134, at 12 (pointing out that "tribal courts also generally allow nonattorneys to practice before them if they have passed a bar exam or otherwise can demonstrate knowledge of the tribe's laws").

[225] In re Sekayumptewa, 3 Am. Tribal Law 434, 435 (Hopi App. Ct. 2001).

[226] *Id.* at 439.

[227] *Id.*

> below that of lawyers would be contrary to the goals of the Tribal Courts.[228]

Finally, even if lawyers could provide consistently better advocacy, access to justice considerations strongly support the use of lay advocates in tribal courts. Rural areas tend to have an insufficient number of lawyers,[229] and many tribal courts are located in remote areas.[230] Furthermore, attracting lawyers to tribal courts is difficult for a variety of reasons, including "the lack of access to professional schools for Indians; the reluctance of the few Indian lawyers to practice in tribal courts; and the dismally underfunded tribal courts themselves, in a profession where prestige is often tied to salary."[231]

Financial considerations also compound access to justice in tribal courts.[232] Critics challenge the monopoly status that high-priced lawyers hold in American society, leaving the most vulnerable and oppressed unable to right the wrongs that occur so frequently in this country.[233] And Native Americans have the highest poverty rate in the United States. Despite an overall U.S. poverty rate of 11.8% in 2018,[234] U.S. Census Data reflects a 25.4% poverty rate for Native Americans.[235] The poverty rate for Blacks

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[228] *Id.*

[229] *E.g.*, Hannah Alsgaard, *Rural Incentive Programs for Legal and Medical Professionals: A Comparative*, 59 S.D. L. REV. 585, 585-86 (2014) (noting that despite having "more lawyers than legal jobs in the United States, many rural areas of the country do not have sufficient lawyers" and "there are definite harms to communities and individuals when lawyers are not available").

[230] *See supra* note 131 and accompanying text.

[231] Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 124 (2000-2001); *see also* Fortin, *supra* note 23, at 100 (noting that lay advocates have "filled a practical need in Indian country where 'law-trained' defense attorneys may be in short supply").

[232] *See, e.g.*, Moppett, *supra* note 26, at 305-06 ("In light of the inability of most Indians on reservations to pay a lawyer to act on their behalf, lay advocates play a critical role in ensuring that tribal members have access to the tribal justice system.").

[233] *See, e.g.*, Sen, *supra* note 63, at 126 ("The legal profession's stranglehold on the market for legal services creates higher prices and effectively shuts out millions of Americans from the marketplace for legal services. The lawyers' monopoly is pervasive: it prohibits anyone but bar-certified, juris doctor attorneys from providing most kinds of legal services."). Access to justice is especially important for protecting civil rights. *See, e.g.*, Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 514-15 (1998) (arguing that to extend civil rights protections to tribal members, "low income Native Americans [must] have equal access to justice").

[234] *Poverty Facts: The Population of Poverty USA*, POVERTY USA, https://www.povertyusa.org/facts (last visited February 28, 2021) [hereinafter *Poverty Facts*].

[235] *Id.* More recent official federal government census bureau publications do not identify poverty rates among Native Americans and instead, provide this footnote:

was 20.8%; for Hispanics was 17.6%; and for Whites and Asians, 10.1%.[236] Because they do not need to recoup the cost of a legal degree, lay advocates can charge substantially less than lawyers.[237] Without lay advocates, many tribal court litigants would be without representation[238] and, arguably, without justice.[239]

Lay advocates with in-depth knowledge of tribal laws and customs can effectively assist litigants at a fraction of the cost charged by licensed attorneys. And "in a court setting informed by tribal customary law, some lay advocates may be more effective litigators than a law school graduate who is well grounded in Anglo-American criminal justice theory."[240]

D. Maximizing Lay Advocate Effectiveness

In order to maximize the effectiveness of tribal court lay advocates, tribes should carefully consider their admission standards, training

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> Federal surveys give respondents the option of reporting more than one race. Therefore, two basic ways of defining a race group are possible. A group, such as Asian, may be defined as those who reported Asian and no other race (the race-alone or single-race concept) or as those who reported Asian regardless of whether they also reported another race (the race-alone-or-in-combination concept). This table shows data using the first approach (race alone). The use of the single-race population does not imply that it is the preferred method of presenting or analyzing data. The Census Bureau uses a variety of approaches. *Data for American Indians and Alaska Natives, Native Hawaiians* and Other Pacific Islanders, and those reporting two or more races *are not shown separately*.

Jessica Semega, et al., *Income and Poverty in the United States: 2019*, U.S. DEP'T OF COM., U.S. CENSUS BUREAU 26 n.2 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf (emphasis added). This approach, of course, underreports poverty data for minorities. And even if the approach was appropriate, the authors provide no explanation for the federal government failing to report the poverty statistics of Native Americans who are *not* of two or more races.

[236] *Poverty Facts*, *supra* note 234.

[237] *Trends in Graduate Student Loan Debt*, NAT'L CTR. FOR EDUC. STAT., NCES BLOG (Aug. 2, 2018) https://nces.ed.gov/blogs/nces/post/trends-in-graduate-student-loan-debt (explaining that for law students graduating in 2016, the average debt was $145,500, a 77% increase over those graduating in 2000).

[238] *See, e.g.*, Watt, *supra* note 134, at 12 ("The availability of these lay advocates is crucial if litigants are to have access to the tribal courts, because few residents of reservations can afford to hire licensed attorneys.").

[239] Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures*, 88 FORDHAM L. REV. 2407, 2407 (2020) (relaying "a saying in the United States: the justice one receives is the justice one can afford").

[240] Fortin, *supra* note 23, at 100.

opportunities and requirements, and the resources available to lay advocates.

First, lay advocates should be admitted (or denied admission) to practice in tribal court after considering all components of their application, which may include their performance on a tribal bar exam[241] or other assessment of their knowledge of tribal law,[242] as well as other admissions criteria designed by the tribe. Those making admissions decisions should also consider whether applicants possess the characteristics identified as central to advocate effectiveness—interpersonal skills; diligence; understanding of court procedure; and storytelling ability.[243] Finally, for the reasons noted above in terms of developing client trust and increasing advocate effectiveness generally,[244] tribes may find it useful to encourage applicants who are members of the tribal community.

Second, lay advocates should be provided with initial training, whether through formal courses[245] or some other means; that training should include finding, reading, and applying tribal law, including applicable procedural rules. In addition, apprenticeship with a seasoned tribal court advocate may be a helpful way to train potential new advocates.[246] Certificates and other specified trainings may be helpful for individuals applying to be a lay advocate.[247] For example, the National Tribal Trial College offers a free Certificate in Tribal Court Legal Advocacy.[248] In addition, a number of

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[241] *See, e.g.*, Harris, *supra* note 217, at 66-67.

[242] *See, e.g.*, Moppett, *supra* note 26, at 305; *see also* FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 119-20 (David E. Wilkins ed., 2006) ("Of course, it is not necessary that persons should have a professional law training in order to practice before tribal courts. Knowledge of the applicable laws, ordinances, and regulations should be a sufficient qualification, if the applicant is of good character.").

[243] *See supra* notes 175-93 and accompanying text.

[244] *See supra* notes 216-23 and accompanying text.

[245] Training for lay advocates does not need to be as extensive as that for law school graduates, of course, but some training would be helpful. For example, applicants for the Navajo Nation Bar Association Bar Examination must complete "an NNBA-approved course in Navajo law, culture, traditions, and history" within five years before admission. *See, e.g.*, *Bylaws*, § VI(E), NAVAJO NATION BAR ASS'N, https://www.navajolaw.info/bylaws (last visited Feb. 28, 2021).

[246] *See, e.g.*, Austin, *supra* note 170, at 359 (noting that lay advocates have often gained "experience in tribal court practice and law through an apprenticeship"); *see also* notes 211-12 and accompanying text.

[247] Some of those programs, however, have been discontinued because of lack of funding. *See, e.g.*, Johnson, *supra* note 217, at 32-33 (describing the former "Tribal Court Advocate Training program," where Nevada Legal Services trained tribal members to be lay advocates).

[248] *Certificate in Tribal Court Legal Advocacy*, NAT'L TRIBAL TRIAL COLL., https://www.nttconline.org/ (last visited Feb. 28, 2021) (requiring twenty weeks of "online study and coursework" plus an additional week of "interactive in-person, skill building

educational institutions provide certificate programs for aspiring tribal lay advocates, although costs vary widely.[249] Individuals seeking to become lay advocates could also pursue training to become Limited Practice Legal Professionals;[250] those programs are unlikely, though, to be specific to tribal courts.

Third, some tribal courts mandate ongoing training—continuing legal education[251]—for their lay advocates, and that practice should become more prevalent. Training could be provided by the tribe itself or the tribe in collaboration with other partners[252] and focus on the most pressing needs of the lay advocates in a particular tribal court. In addition, external entities provide training that may be helpful; for example, the federal Bureau of Indian Affairs offers training for tribal advocates.[253] Some educational institutions also offer training designed for current tribal lay advocates.[254]

Finally, the proper resources can help ensure lay advocate effectiveness. As noted with regard to tribal judges, tribes themselves "are in the first instance responsible for funding tribal justice systems."[255] For lay advocates who are tribal employees, tribes should ensure those advocates are properly trained, either internally or by attending external sessions, in order to be in the best position to perform competently.[256] For private lay advocates who are paid by their clients, tribes have no obligation

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sessions that take place at the University of Wisconsin Law School in Madison, WI").

[249] For example, Lac Courte Oreilles Ojibwe Community College offers a thirty-five credit, one-year "Tribal Court Lay Advocate Certificate" for less than $7,000 (plus living expenses). *Tribal Court Lay Advocate Certificate*, LAC COURTE OREILLES OJIBWE COLL., https://www.lco.edu/layadvocate (last visited Feb. 28, 2021); *Tribal Court Lay Advocate Curriculum*, LAC COURTE OREILLES OJIBWE COLL., https://43e25334-378a-4f98-bcac-23aae7f80efb.filesusr.com/ugd/a5e475_de05db344fae4500bc3e36da808a0ec2.pdf (last visited Feb. 28, 2021); *Tuition and Fees*, LAC COURTE OREILLES OJIBWE COLL., https://www.lco.edu/tuition (last visited Feb. 28, 2021).

[250] *See supra* notes 207-08 and accompanying text.

[251] *See, e.g.*, Smith, *supra* note 184, at 739.

[252] *See, e.g.*, Danna R. Jackson, *Cooperative (and Uncooperative) Federalism at Tribal, State, and Local Levels: A Case for Cooperative Charging Decisions in Indian Country*, 76 MONT. L. REV. 127, 127 n.* (2015) (explaining that the author, an Assistant United States Attorney, "is designated as the District's tribal liaison" and she "responds to training requests from . . . tribal advocate programs").

[253] *Training*, *supra* note 153 (noting that "funding is available for tribal justice training on various subjects including . . . trial advocacy skills").

[254] *See, e.g.*, *Tribal Court Trial Skills College*, *supra* note 155 (describing an "intensive workshop providing practical, hands-on training for tribal court advocates" and others; preference is given to advocates "who currently practice in tribal court").

[255] EAGLEWOMAN & LEEDS, *supra* note 5, at 45. As noted above, some government agencies also provide funding for this training. *See supra* note 253 and accompanying text.

[256] As employees, those advocates should also be subject to performance reviews, providing additional opportunities to assist with professional development and to ensure effectiveness. *See supra* note 137 and accompanying text.

to provide training or other resources; however, it is arguably in the tribes' best interest to provide training sessions available for free or at a low cost to all practicing advocates in order to ensure competent representation in tribal courts. And tribes may find it useful to provide some funding to experienced lay advocates in order to supervise, through an apprenticeship model, aspiring new lay advocates.[257]

Hence, considering the characteristics of a good advocate and the impact of a law degree and of community, properly admitted lay advocates, with sufficient training and resources, can provide effective representation. Lay advocates can also be especially helpful because of their community connections and the access to justice they provide.

IV. CONCLUSION

Tribal courts are entitled to greater respect. They do not differ substantially from other courts in the United States,[258] and tribal laws and rules of procedure are generally available.[259] Tribal courts employ some lay judges and lay advocates, but law degrees do not guarantee justice. Tribal courts are quite capable of administering justice; tribal court lay judges and tribal court lay advocates can achieve fair and culturally appropriate outcomes.

This paper does not purport to suggest that lawyer judges or lawyers themselves are necessarily bad for tribal courts. But increasing trust in tribal courts does not require "more lawyers." [260] Instead, focusing on how to make tribal lay judges and lay advocates the best they can be should go a long way toward generating greater trust in tribal courts.

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[257] *See supra* note 246 and accompanying text.
[258] *See supra* notes 26-34 and accompanying text.
[259] *See supra* notes 35-56 and accompanying text.
[260] *But see The Godfather: Part III (1990), Al Pacino: Don Michael Corleone*, IMDB, https://www.imdb.com/title/tt0099674/characters/nm0000199 (last visited Feb. 25, 2021) (quoting Michael Corleone rejecting an offer from his nephew, Vincent Mancini, to work for him, stating: "I don't need tough guys. I need more lawyers.").