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EDITOR INTRODUCTION

Now in its fourteenth year, the Law Journal for Social Justice continues to pursue its mission to promote diverse voices and advance important conversations around timely social justice issues. The articles within this volume were thoughtfully curated to provide academic analysis on a variety of social justice topics as well as calls to action for students and practitioners in the legal community. With a broad focus on environmental, educational, and criminal justice, the articles in this volume bring attention to the pervasiveness of injustice in our society, offer new perspectives, and present thoughtful solutions to difficult issues.

Volume Eighteen begins with A Tale of Two Committees: Comparing Police Officer Standard and Training (POST) Bodies by Nino Monea. In the article, Monea pulls back the curtain on how Police Officer Standard and Training Post Bodies operate in the context of decertifying officers for wrongdoing. In analyzing the POSTs of Oregon and Kansas, Monea highlights a troubling lack of accountability and transparency in the current police oversight system. Monea concludes by offering policy suggestions to improve public safety and policing outcomes. While POSTs have a valuable role to play in keeping misbehaving police officers accountable, there is still work to be done.

Next, Cayley Balser, Erin Weaver, Stacy Rupprecht Jane, Gabriela Elizondo-Craig, Tate Richardson, and Antonio Coronado at Innovation for Justice present their research and propose regulatory reform suggestions to improve access to justice for marginalized communities in Leveraging Unauthorized Practice of Law Reform to Advance Access to Justice. The authors emphasize the need for diverse voices to be included in the design and implementation of regulatory reform efforts and advocate for improving access to legal training within community-based organizations.

In Prison Siting from an Environmental Justice Perspective: The Toxic Cycle of Mass Incarceration, Jacqueline Cochrane shifts the conversation to environmentally hazardous prisons—an emerging issue where environmental justice and criminal justice intersect. Cochrane argues for increased accountability for state and federal actors in toxic prison siting. Additionally, Cochrane proposes an Eighth Amendment claim for the environmental harms that people who are incarcerated are forced to endure.

In Answering the Question of Intent in Structural Racism: A Tortious Framework for Establishing Intentional Discrimination in Environmental Justice, Mai Rubin proposes a new legal framework for environmental justice claims involving discriminatory siting. Rubin suggests tort law holds the answer for improved legal outcomes for marginalized communities.
where the Equal Protection Clause of the Fourteenth Amendment has fallen short.

Lastly, Esteban Ortiz argues for meaningful educational opportunities for all in K-12 schools in *Educational Equality, Educational Adequacy: A Conjunction for the Future*. He urges that proper education must include both an adequate and equal education experience for all students. In doing so, it will be possible to achieve equity in K-12 education.

*LJSJ* would like to thank the authors of this volume for their dedication to social justice and willingness to share their knowledge. I would also like to extend my deepest gratitude to the members of the *LJSJ* Board and Associate Editors whose efforts this past semester made this publication possible.

*Megan Ealick*
EDITOR-IN-CHIEF
A TALE OF TWO COMMITTEES: COMPARING POLICE OFFICER STANDARD AND TRAINING (POST) BODIES

By: Nino C. Monea*

ABSTRACT

Every state has a Police Officer Standards and Training (POST) body responsible for credentialling law enforcement, and if necessary, decertifying them for misconduct. Oregon and Kansas are outliers in that they post disciplinary decisions online. This Article examines 400 decisions from the two states—every decision available as far back as records go through the end of 2022—to analyze how these agencies operate in practice. It finds that, much like other police oversight bodies, these POSTs often fail to hold officers to account or act transparently. Even so, state POSTs have an important role to play in protecting the public and maintaining high standards, and policy recommendations are made based on the review of these cases.

INTRODUCTION

Being a cop is a tough job. Done well, police keep communities safe and display profound heroism. Done poorly, they can shatter public trust in authority and work great harm. A term like “New York’s Finest” is not merely a compliment; it is an expectation. With jobs so important, it has to be.

Police Officer Standards and Training (POST) bodies are statewide regulatory agencies that oversee law enforcement,¹ and they help make that expectation a reality. Existing in all 50 states and the District of Columbia, they determine eligibility for police, coordinate training, manage police academies, create policy standards for local departments to meet, and—most relevant for our purposes—certify officers to work in law enforcement and decertify them when they violate moral fitness standards.² POSTs thus hold great power over small departments that lack resources, civilian

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² Id. at 1352.
oversight, or attention from the federal government. Yet they have received relatively little attention from scholars. Journalists, too, may overlook the role of POSTs.

Although POSTs routinely decertify, suspend, or admonish police officers, most state POSTs do not have publicly accessible databases of disciplinary cases. Kansas and Oregon stand out. Both offer publicly accessible websites that list disciplinary cases against named officers. The author reviewed every available case as far as records exist up through 2022. This resulted in 233 cases for Oregon and 167 for Kansas, and a grand total of 400. The goal of this Article is to improve the collective understanding of how POSTs operate on a practical level and critique them, rather than strictly analyzing their statutory structure and powers.

The Article proceeds in six Parts. Part I surveys the police discipline ecosystem. In short, though many institutions exist to oversee policing, none are terribly effective, at least in isolation. Recurring problems include bias in favor of police, extra-ordinary due process protections, and a lack of transparency. POSTs throughout the country exhibit these same issues.

Part II explains the data this Article draws upon 400 disciplinary cases available online from the Oregon and Kansas POSTs.

Part III goes over general findings that apply to both states. I find that officers commit a wide variety of misconduct, typically six to eight years into their employment, and many officers get fired from one jurisdiction only to seek work in another. Although POSTs are statewide bodies, they are heavily reliant on local departments and may undervalue the harm caused by excessive force and sexual harassment. Other times, punishment appears unjustified.

Part IV looks at Oregon specifically. Oregon provides more information than Kansas about cases where no punishment is issued. We can see that Oregon has adopted questionable justiciability doctrines for employment discipline, frequently fails to punish malfeasant officers, has unexplained disparities in punishment for similar facts, and has effectively allowed officers to commit DUIs without penalty.

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3 Id.
4 Id. at 1353-55. A noteworthy exception is Roger L. Goldman, who is responsible for much of the existing academic writing on POSTs.
5 USA Today has a database of 30,000 police officers across 44 states, including Kansas and Oregon, who lost their licenses. John Kelly & Mark Nichols, Search the list of more than 30,000 police officers banned by 44 states, USA TODAY (June 27, 2022, 2:22 PM), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002/. However, the author could not locate Kansas and Oregon POST decisions within the USA Today database.
6 Rau et al., supra note 1, at 1370-71.
Part V focuses on Kansas. The state frequently fails to make cases publicly available; the exact number of hidden cases is uncertain. Though it does not provide disciplinary cases where there is no punishment, it has a troubling habit of using reprimands to handle conduct that looks worthy of a suspension or revocation. That said, Kansas’ POST is willing to take cases Oregon’s likely would not.

Some notable points that the Article will explore further include:
- Officers who committed revocable misconduct served for an average of 6.52 years in Kansas and 8.05 years in Oregon in this dataset.
- Oregon punished officers in about 40 percent of published cases. Kansas does not publish enough data to know its punishment rate, but I estimate it could be as low as 17 percent.
- Less than one percent of officers in either state face revocation proceedings in a given year.
- There is an average of 1.87 years between an officer committing an offense and the Kansas POST issuing a decision; it is 2.21 years for Oregon.
- Decertification decisions have an enormous impact on public safety and officers’ careers, yet a typical decision in either state is only about five pages.

I. **HOW POSTs FIT INTO POLICE DISCIPLINE**

A. **The Role of POSTs**

For most of the nation’s history, local chiefs and sheriffs handled all hiring and firing. In the 1950s, states started professionalizing police by setting minimum training and qualifications, which led to the creation of POSTs. California pioneered regulating police as a profession in 1959 when it created the California POST—a model other states followed. A year later, New Mexico became the first state to allow revocation of a police officer’s certification for misconduct. Today, some state POSTs not only regulate police but an array of public safety professionals like corrections officers, parole officers, private security guards, and so forth.

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10 *Id.* at 150.
Although POSTs have a variety of functions, this Article is primarily concerned about their role in decertifying misbehaving officers, also known as revoking their credentials or more colloquially as taking their badge. Decertification goes beyond labeling an officer as morally culpable, it makes them unemployable.\textsuperscript{11}

Decertification also counters the perverse incentives of the labor market for police. Local police departments who hire brand new officers often need to pay for that recruit’s training and salary while they attend the academy to obtain their certification.\textsuperscript{12} So hiring an officer who was previously fired locally but never revoked by the state POST may be cheaper: that kind of disgraced officer will still have their certification and thus require less training.\textsuperscript{13} Additionally, bad officers who are fired by their original department may be able to find work in a different jurisdiction.\textsuperscript{14} Maybe the new jurisdiction does not conduct a background check, maybe the original jurisdiction agreed to give a positive reference in exchange for a speedy departure, or maybe the new jurisdiction is so poor it can only afford to hire disgraced officers who will work for less.\textsuperscript{15} Decertification removes this backward incentive to hire bad officers for lower wages or less training costs.

No two states are exactly alike on how POSTs wield decertification power. Some states, for example, only decertify officers if they receive a criminal conviction; others require an administrative hearing before revocation can occur.\textsuperscript{16} One fairly consistent feature, however, is that decertification is a rarely used tool. Of the 1,847 decertifications nationwide in 2015, a majority were from Florida and Georgia.\textsuperscript{17} That means the other 48 states and District of Columbia issued fewer than 900 decertifications. Considering there are 18,000 local police departments nationwide,\textsuperscript{18} this implies that an extremely small slice of officers are getting decertified.

Colorado is probably closer to the norm. It lists its first decertification as occurring in 1978 and had only invoked the power four times by 1994.\textsuperscript{19}

\begin{thebibliography}{99}
\bibitem{footnote12} Goldman, supra note 9, at 149.
\bibitem{footnote13} Id.
\bibitem{footnote14} Ben Grunwald & John Rappaport, \textit{The Wandering Officer}, 129 YALE L.J. 1676, 1716 (2020).
\bibitem{footnote15} Id. at 1685, 1695. \textit{See also} J. Hoult Verkeke, \textit{Legal Regulation of Employment Reference Practices}, 65 U. CHI. L. REV. 115, 135 (1998) ("[T]he available empirical evidence suggests that former employers are less likely to reveal employee misconduct than any other information about the employee.").
\bibitem{footnote16} Goldman, supra note 9, at 150-52.
\bibitem{footnote17} Rau et al., supra note 1, at 1382.
\bibitem{footnote19} \textit{Dashboard}, COLO. PEACE OFFICER STANDARDS & TRAINING (last visited Jan. 5,}
During the 1990s, its annual decertification remained in the single digits.\(^{20}\) It was not until 2003 that the agency settled into a modern average of about 25 decertifications a year.\(^{21}\) While Oregon and Kansas do not necessarily lead the pack in terms of aggressiveness, they earn high marks in another category: transparency. Both states make disciplinary decisions freely and easily accessible online.\(^{22}\) Shortcomings with the data notwithstanding, they are leaps and bounds ahead of most states on this front.

**B. The POST Structure for Kansas and Oregon**

The framework for the Kansas POST, formally known as the Commission on Peace Officers’ Standards and Training, was established by the Kansas Law Enforcement Training Act.\(^ {23}\) The body has twelve members who are largely drawn from the law enforcement community.\(^ {24}\) Rachel Moran has noted that independent police review agencies are often staffed by former police officers, prosecutors, or other law enforcement officials.\(^ {25}\) Kansas’ POST is no exception. Most seats are reserved for law enforcement positions, such as the superintendent of the Kansas Highway Patrol, or individuals nominated by law enforcement, like a law enforcement officer selected by the governor from a shortlist created by the Fraternal Order of Police.\(^ {26}\) The only member without law enforcement affiliation is a civilian chair, selected by the governor.\(^ {27}\)

The Kansas Commission has the power to conduct investigations and proceedings to carry out its mission, including administering oaths and taking testimony, issuing subpoenas, and compelling the attendance of witnesses and the production of evidence.\(^ {28}\) There are six authorized punishments that the Commission may dole out: suspension, condition,
revocation of an officer’s certification, reprimand or censure of an officer, or denial of certification.\textsuperscript{29}

Officers may be punished if they fail to maintain the qualifications of being in law enforcement (most relevantly having “good moral character”\textsuperscript{30}), engage in criminal conduct whether or not it is charged, engage in “unprofessional conduct,” engage in racially biased policing, fail to complete annual training, or fail to cooperate with Commission investigations.\textsuperscript{31} In other words, almost any misdeed could fall under the Commission’s ambit.

We can use Officer Christopher White’s case as an example.\textsuperscript{32} White abused his wife, hitting her, inundating her with text messages, and planting a GPS tracker on her car.\textsuperscript{33} The victim reported it, leading to an internal departmental investigation where White admitted to his misconduct.\textsuperscript{34} Although the Commission is capable of doing limited investigations, it appears to have relied solely on the police department’s internal investigation to conclude misconduct occurred and accordingly revoked his credentials.\textsuperscript{35} Although the Commission lists which rules were violated, there is no record of internal deliberations, mitigation evidence published, or the vote count of Commission members. Occasionally, the Commission will have a contested case with a more thorough record,\textsuperscript{36} but the record in White’s case is far more typical: it contains some facts and some law, but very little explaining why the particular punishment was selected.

Oregon’s POST is officially known as the Board on Public Safety Standards and Training, and has a similar structure to Kansas. It has 26 members, and like Kansas, most of them represent a public safety constituency such as police, firefighters, or prosecutors.\textsuperscript{37} Beneath the Board, there is a Police Policy Committee that consists of all members of the Board who represent law enforcement disciplines, and nine additional members from outside of the Board, mostly representing law enforcement organizations.\textsuperscript{38}

\textsuperscript{29} \textsc{kan. stat. ann.} § 74-5616 (2018).
\textsuperscript{30} \textsc{kan. stat. ann.} § 74-5606(b)(5) (2018).
\textsuperscript{31} § 74-5616.
\textsuperscript{33} \textit{Id.} at 1-2.
\textsuperscript{34} \textit{Id.} at 2-3.
\textsuperscript{35} \textit{Id.} at 6.
\textsuperscript{37} \textsc{or. rev. stat. ann.} § 181A.360 (Westlaw through 2023 Legis. Sess.).
\textsuperscript{38} \textsc{or. rev. stat. ann.} § 181A.375(5) (Westlaw through 2023 Legis. Sess.).
Both the Board and the policy committee may suspend, revoke, or deny certifications for an officer.\textsuperscript{39} Grounds for punishment include conviction of a crime, failure to meet the minimum standards of being a police officer (again, including “moral fitness”\textsuperscript{40}), abuse of authority, or bias.\textsuperscript{41} Regulations have further explained that certifications may be revoked for dishonesty, misuse of authority, or “misconduct,” which includes criminal acts, conduct that “threatens or harms persons, property or the efficient operations of any agency, or discriminatory conduct.”\textsuperscript{42} Like Kansas, this means the Board can sanction officers for almost any wrongdoing if it so chooses. By rule, if the Board needs more information about a case to decide, it may request information from the officer’s employer or conduct its own investigation.\textsuperscript{43} Though state law declares that local police departments “shall” provide information to the Board upon request,\textsuperscript{44} we shall see this does not always work in practice.

The case of Officer Zachary Gibson gives a good example of the lifecycle of a case in Oregon. We can see more of the internal deliberation process than in Kansas. Gibson was fired from the Clatskanie Police Department and his office submitted a notice to the Commission that he had been terminated.\textsuperscript{45} The process was delayed because Gibson filed a Writ of Review with the courts, but lost it.\textsuperscript{46} A Commission staff investigation found that Gibson made inappropriate comments and lied about making such comments.\textsuperscript{47} As part of the staff report, all of the possible grounds to revoke a person’s credentials were listed, along with aggravating, mitigating, and neutral factors as well as the range of punishments available for each ground for revocation.\textsuperscript{48}

After the staff report summarizes the facts and applicable law, the matter goes to the Police Policy Committee for action. Here, the Committee voted to recommend a permanent revocation of Gibson’s law enforcement certification.\textsuperscript{49} Finally, the Board on Public Safety Standards and Training issues the order of permanent revocation.\textsuperscript{50} An exhibit list indicates that

\begin{itemize}
  \item \textsuperscript{39} OR. REV. STAT. ANN. § 181A.630 (Westlaw through 2023 Legis. Sess.).
  \item \textsuperscript{40} OR. REV. STAT. ANN. § 181A.410(1)(a) (Westlaw through 2023 Legis. Sess.).
  \item \textsuperscript{41} OR. REV. STAT. ANN. § 181A.640 (Westlaw through 2023 Legis. Sess.).
  \item \textsuperscript{42} OR. ADMIN. R. 259-008-0300(3)(C) (2023).
  \item \textsuperscript{43} OR. ADMIN. R. 259-008-0310(7) (2023).
  \item \textsuperscript{44} OR. REV. STAT. ANN. § 181A.670 (Westlaw through 2023 Legis. Sess.).
  \item \textsuperscript{46} Id. at 10.
  \item \textsuperscript{47} Id. at 10-11.
  \item \textsuperscript{48} Id. at 10-12.
  \item \textsuperscript{49} Id. at 8.
  \item \textsuperscript{50} Id. at 4.
\end{itemize}
many more documents are part of the case file but not available to the public.\footnote{Id. at 9.} Every once in a while, the officer has an attorney,\footnote{In re Andrew Jackson, No. 54783 (Or. Dep’t of Pub. Safety Standards and Training, Apr. 29, 2020), https://www.oregon.gov/dpsst/CJ/CertActions/Jackson54783-FOSR.pdf.} but there is normally no record of one. Another rare occurrence is a fully contested hearing, with an Administrative Law Judge presiding and issuing a proposed order that the Board can ultimately ratify.\footnote{E.g., In re Larissa White, No. 52624 (Or. Dep’t of Pub. Safety Standards and Training, Mar. 18, 2021), https://www.oregon.gov/dpsst/CJ/CertActions/White52624.pdf.} But generally, the Board ultimately ratifies whatever decision the Policy Committee makes, and that is the end of it.

For ease of reference, throughout this Article, the Kansas POST will be called “the Commission” and the Oregon POST will be called “the Board.”

\section{Secrecy Is Common for POST Decertifications}

Like many other aspects of police discipline, transparency is lacking for POSTs. At the federal level, there is a National Decertification Index, but it is restricted to access by law enforcement.\footnote{See About NDI, INT’L ASS’N DIRECTORS LAW ENFORCEMENT STANDARDS & TRAINING (last visited Jan. 5, 2023), https://www.iadlest.org/our-services/ndi/about-ndi.} Most states are little better, either failing to list malfeasant officers\footnote{E.g., Certifications and Training Division, GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, https://www.gapost.org/div_cert.html (last visited Jan. 5, 2023) (no information on malfeasant officers, or how to even file a records request).} or demanding an individualized record request be made.\footnote{E.g., Office of the General Counsel Public Records/ Records Custodian, FLA. DEP’T LAW ENFORCEMENT, http://www.fdle.state.fl.us/OGC/Public-Records.aspx (last visited Jan. 5, 2023), Montana charges $20 a pop. Criminal History Online Public Record Search, MONT. DIV. CRIM. INVESTIGATION, https://dojegovmt.com/choprs/ (last visited Jan. 5, 2023).} The National Decertification Index’s website has links for twelve states that have “Revocation/Suspension Data,”\footnote{See About NDI, supra note 54 (Oregon is not listed).} and twelve more (partially overlapping) states that have “Integrity Bulletins,” for a total of 17 unique states that provide information to the public. But despite sharing a common header, the level of detail varies wildly.

Massachusetts maintains a list of officers with suspended certifications and lists the statutory basis for the suspension but says nothing about the circumstances of the sanction or the deliberative process.\footnote{Data and Reports, MASS. PEACE OFFICER STANDARDS & TRAINING COMM’N, https://www.mass.gov/lists/data-and-reports (last visited Jan. 5, 2023).} This is
essentially the same system used by California, Colorado, Connecticut, Florida, Idaho, New York, Vermont, Washington, and Wyoming. Indiana announces revocations but does not state a reason. North Carolina allows users to search for officers by name but does not have a comprehensive list of them, and does not give any information on why they were revoked. The link for “Hawaii” on the National Index website is only for the Honolulu Police Department, which provides brief narratives for office discipline, but no more than a sentence or two.

Other states do not give the names of the revoked officers but publish anonymous overviews of misconduct. These may give slightly more information about what happened, but by failing to name the officers, it is impossible to know who did what. Take Arizona. The AZ POST gives a

62 E.g., Quarterly Update, at 13-31, FLA. CRIM. JUST. STANDARDS & TRAINING COMM’N (Fall 2022), http://www.fdle.state.fl.us/CJSTC/Publications/Quarterly-Update/ (select link for “Fall 2022” for document).
64 Police and Peace Officer Decertification, N.Y. DIV. CRIM. JUST. SERVS., https://www.criminaljustice.ny.gov/Officer_Decertification.htm (last visited Jan. 5, 2023) (select link for “Police/Peace Officer Decertification List (11/15/2023)”).
67 Certification Actions, WYO. PEACE OFFICER STANDARDS & TRAINING COMM’N, https://drive.google.com/drive/folders/1eiq1v0xWmwYM6YEc3eOBqP5c4r7pE4ZM (last visited Jan. 5, 2023).
69 Officer Search: Revocation/Suspension Data, N.C. ATT’Y GEN., https://ncdoj.gov/officer-search/ (last visited Jan. 5, 2023) (for an example of how little information is provided, search the name “Andre Caldwell”).
summary of each month’s disciplinary cases. Officers are only identified by case numbers and a single anonymous paragraph. Or perhaps a single sentence. Tennessee’s POST gives the names of the officers it is decertifying but is even cagier about what they did. Utah and Montana also give anonymous records of discipline, with Montana being more generous with facts.

Unfortunately, secrecy is the rule, not the exception, when it comes to police discipline beyond POSTs. Records of police misconduct are notoriously hard to come by. According to Project WNYC, police misconduct records are confidential in 23 states, limited in 15, and public in only 12. But this merely tells us the legal availability of records. Alabama, for instance, is coded as “public” access, due to a statute that provides, “Every citizen has a right to inspect and take a copy of any public writing of this state.” As the language implies, a person may obtain a document, but it says nothing about making them easily available. Agencies can require requesters to give a reason for wanting records. This is exactly


72 Id. (For example, “An officer was dishonest in the hiring process. The officer was dishonest about his prior arrest history, prior suspension of driving privileges, and other misconduct.”).


74 Agenda, TENN. PEACE OFFICER STANDARD & TRAINING COMM’N (Nov. 17, 2022), https://www.tn.gov/content/dam/tn/commerce/documents/post/meetings/2022/Nov.-2022-POST-Commission-Informal-Meeting-Decisions.pdf (For example, “Mr. Proffitt was submitted for decertification based on his termination for violation of department policy and procedure.”).


78 ALA. CODE § 36-12-40 (2013).

79 Cox and Freivogel, supra note 77.
what the Alabama POST demands. When the state recently passed a law to create a police misconduct database, it was not opened to the public. So while an individual has a (cumbersome) path to getting information about a particular officer who wronged them, there is no way to view misconduct holistically.

The arc of the disciplinary universe does not necessarily bend towards transparency, either. Cleveland’s police department used to post disciplinary notices where it listed officer names and badge numbers. But recently, it anonymized these notices. The department stated this decision was justified to remove shame from an officer’s punishment and “dispel any notion regarding lack of fairness in outcomes.”

The result of so much secrecy is that bad officers can fly under the radar, sometimes with deadly consequences. Multiple officers involved in fatally shooting teenagers had records of misconduct that were not available to the

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82 Cynthia Conti-Cook, Digging Out from Under Section 50-A: The Initial Impact of Public Access to Police Misconduct Records in New York State, 18 U. ST. THOMAS L.J. 43, 48 (2022) (Police misconduct information “is almost never delivered in a format that easily translates to ‘public access’ in any meaningful way. This data is often delivered in hard copy or Portable Document Format (PDF) with thousands of pages of unsorted information.”). Courts may also limit the practical value of open record laws. In 2018, the NYPD insisted on a broad interpretation of state civil rights law to block access of misconduct records, the state’s highest court agreed with them. Cynthia Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public, 22 CUNY L. REV. 148, 150 (2019). This led to decades of disciplinary records being removed over the next two years. Id. Courts will sometimes protect police internal investigations from public eyes. Owen Doherty, A Reform to Police Department Hiring: Preventing the Tragedy of Police Misconduct, 68 CASE W. RES. 1259, 1279 (2018).
84 Id.
85 Id.
public. Might lives have been saved had these misconduct records been public, and the officers been taken off the streets?

Compared to these systems, Kansas and Oregon POSTs excel. While this Article is critical of many aspects of the POSTs for these states, they should still be commended for providing far more information than their compatriots. Kansas and Oregon stand out for providing not only names of officers who were punished, but the underlying facts of the case. Case documents also provide insight into the deliberative process. Kansas only provides information for police officers, but Oregon provides decertification decisions for all public safety professionals. And the records are online for all to see, no hoop-jumping required.

D. Statewide Action through POSTs Is Necessary for Police Oversight

Although a decertification by a POST may be an uncommon occurrence, it still helps augment the inadequate police discipline system. There is no uniform approach to handling police discipline. To the extent there is a standard system, the investigation and determination of punishment are still primarily handled by the local department. During a recession in the 1980s, many cities bartered away disciplinary authority in exchange for wage freezes. With this newfound power, police wrote “bills of rights” that gave themselves more protections than other public employees. Many police employment contracts insist that disciplinary


87 For another horrendous example, a San Antonio officer had sex with teenagers participating in the department’s youth program, in addition to other sexual misconduct complaints, yet was never taken off patrol. Later, the officer handcuffed a woman in his squad car and raped her. Reade Levinson, Across the U.S., police contracts shield officers from scrutiny and discipline, Reuters (Jan. 13, 2017), https://www.reuters.com/investigates/special-report/usa-police-unions/.


90 Girion & Levinson, supra note 86.

91 See id. Police under suspicion also get more rights than the criminal defendants they prosecute. See id. For example, in Rochester, New York, police under investigation have a contractual right to be interviewed “at a reasonable hour” during daylight, view all past reports on the incident, details of the investigation, and names of all involved—information not provided to criminal defendants. See id.
case files are shredded or burned after a set time.92 Sometimes, this happens as quickly as six months.93 Other contracts defang independent oversight bodies by limiting their ability to access records or question officers.94 Contracts can even be enforced in court to countermand the will of the voters and block reforms.95

The system that emerged from these contracts was shot through with “bias, inadequate investigative procedures, and lack of meaningful oversight.”96 Good faith efforts may also be stymied by the infamous blue curtain, the code of silence by which police do not report each other.97 And data from New York City, Boston, and Chicago indicate that there are racial disparities in terms of officer discipline.98 If an officer is investigated for wrongdoing, they may be given months of suspension with pay.99

Terminations almost never happen. Among 1,156 complaints filed against San Francisco officers between 1995 and 2001, only two officers involved in those complaints were fired.100 Even if the local police department terminates an officer, the officer can usually invoke an appeals process that results in a “stunningly high percentage” of officers being rehired.101 Beyond internal procedures, officers may have the right to bring matters to arbitration. This system too can be highly favorable to officers. A San Antonio officer had a habit of challenging suspects to a fistfight for a chance at freedom, yet avoided termination because friendly arbitrators kept retaining him.102 Arbitrators in Oakland refused to fire an officer who

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93 Id.
94 Id.
96 Hanner, supra note 89, at 67.
98 Maggie Hadley, Behind the Blue Wall of Silence: Racial Disparities In NYPD Discipline, 53 COLUM. HUMAN RIGHTS L. REV. 663, 672-74 (2022).
99 E.g., Letter from James E. White, Detroit Police Chief, to David M. LeValley, Assistant Chief (June 1, 2022), https://onedrive.live.com/?authkey=%21ADGpF6Y42lvp4rQ&cid=5FF627DD129ED335&id=5FF627DD129ED335%21222306&parId=5FF627DD129ED335%21222023&o=OneUp.
101 Paranyuk, supra note 88, at 1681.
102 Stephen Rushin, Police Disciplinary Appeals, 167 U. PA. L. REV. 545, 547-49
repeatedly shot unarmed men. In the District of Columbia, for every nine officers fired, six are reinstated. Cash-strapped offices frequently rehire previously fired officers to save money, too.

Some police departments have dedicated internal affairs bureaus, but these too are often ineffective at rooting out and punishing malfeasance. They have created nearly insurmountable burdens of proof to exonerate the accused officer in virtually all cases, and frequently do not bother to investigate allegations. They may have a reluctance to rock the boat. Two decades ago, Los Angeles’ police department was found to have engaged in systematic evidence fabrication, leading to at least 100 false convictions. In spite of this, the department’s internal report did not identify any leadership failures or call for structural changes. Worst of all, some bureaus have attempted to intimidate complainants to not file or refused to record complaints.

Some jurisdictions set up citizen review boards, but these have not been panaceas either. Most of the time, they can only recommend punishments, not impose them. And recommendations may not be warmly received by local departments that retain the ultimate say. New York City’s board, for instance, has a $6 billion budget and is the largest board of such kind in the country. It is highly skeptical of allegations of misconduct. The board failed to substantiate a single one of the 2,500 complaints of bias policing, according to a 2019 report, and only substantiated 73 complaints of inappropriate force out of 3,000 filed. Yet it had such a hard time getting the department to follow its disciplinary recommendations that it started

(2019).

103 Id. at 550.
105 Hanner, supra note 89, at 80.
106 Moran, supra note 25, at 859-60.
107 Id. at 862-65.
108 Id. at 857 (noting the Denver’s Sheriff’s Department internal affairs bureau received 54 complaints alleging serious misconduct, but only investigated nine).
110 Id. at 550.
112 Patton, supra note 97, at 795.
113 Hanner, supra note 89, at 65-66.
114 Id. at 72.
intentionally lowering its suggested penalties in an (unsuccessful) bid to make the department take it seriously.\textsuperscript{115}

Prosecutions for police misconduct are rare, and when they do occur, officers are rarely convicted or imprisoned.\textsuperscript{116} The Department of Justice has the authority to sue local police departments for systemic abuses, but can only handle a few of these a year.\textsuperscript{117} Individual civil suits are often too expensive to pursue,\textsuperscript{118} and the qualified immunity doctrine ensures all but the most egregious private lawsuits will be dismissed anyway.\textsuperscript{119} In the unlikely event that civil damages are assessed against an officer, the city usually indemnifies them and covers the tab.\textsuperscript{120} When law enforcement violates rights, Professor Joanna C. Schwartz has estimated that 99.98 percent of dollars paid out in settlements come from the government, not from the officers themselves.\textsuperscript{121} Sometimes, the city retains the officer whose misconduct caused the civil suit.\textsuperscript{122} POSTs, at least, can help plug some of the gaping holes in a system that fails to hold bad actors accountable.

\section*{II. The Data}

The States of Kansas and Oregon were selected for this study because they provide records for every POST disciplinary sanction taken. These records are publicly available on each POST’s website—no need to file a special request or be in law enforcement. The author reviewed every police decertification decision available on the Kansas and Oregon POSTs’ websites at the end of 2022.

Kansas posts its disciplinary actions going back to 2018.\textsuperscript{123} The website lists the names and sanctions for officers going back to 1998 but does not provide any documents associated with these cases. The author reviewed

\begin{itemize}
  \item Hadley, supra note 98, at 678.
  \item Paranyuk, supra note 88, at 1686-87.
  \item Goldman & Puro, supra note 11, at 571 (noting that the DOJ was given the power to investigate local departments in 1994, but had only done 14 such investigations by 2000).
  \item Patton, supra note 97, at 753-54.
  \item Paranyuk, supra note 88, at 1686-87. Qualified immunity protects officers unless they violate clearly established rights, meaning another court in the same jurisdiction found similar misconduct to be wrongful. See Mullenix v. Luna, 577 U.S. 7, 11-12 (2015). The Supreme Court has also made the standard more difficult to meet over time. Joanna C. Schwartz, \textit{Qualified Immunity’s Boldest Lie}, 88 U. CHI. L. REV. 605, 613-15 (2021).
  \item Hanner, supra note 89, at 75.
  \item Id. at 946.
  \item Certification Dispositions by Date, \textsc{Kansas Comm’n On Peace Officers’ Standards And Training}, https://www.kscpost.org/disdate.html (last visited Feb. 21, 2023).
\end{itemize}
167 cases between 2018 and 2022. Kansas does not publicly post names or records for actions taken based on medical conditions but states that there were 33 such actions in the studied time period.

Oregon posts its disciplinary actions going back to 2020. The website includes not only law enforcement disciplinary cases, but also disciplinary cases for other public safety officials, like parole officers. This Article analyzes not only cases involving a police certification review, but also disciplinary actions against people who work for a law enforcement office, like jail officials in the sheriff’s office, and law enforcement trainees. The author also reviewed decertification for non-police who were employed at law enforcement agencies (this mostly means corrections officers employed by sheriffs’ offices), and economic sanction decisions posted by the Oregon POST on behalf of local departments. This gives a total of 233 cases between 2020 and 2022.

All told, there are 233 decisions for Oregon, and 167 for Kansas, for a total dataset of 400 decisions, or about 2,000 pages of records. To contextualize these numbers, Kansas has nearly 14,000 law enforcement employees, and Oregon has over 12,000. So most cases of police discipline are being handled by some other body.

III. GENERAL FINDINGS

A few statistical tidbits. Decertified police officers are not rookies. There were 145 Kansas cases that listed both the date the officer began employment with their local unit and the date they left employment. Averaging these out, the average officer in a decertification case had worked 2,380.5 days at their local unit, or 6.52 years. And because of the way data is reported, their total law enforcement career likely stretches back even further. Officer Lauro Garcia holds the distinction for shortest tenure at 43 days. On the long end, Officer Steven Rios stayed with the Kansas City Police Department for over 32 years. Oregon did not report

124 Id.
125 Id.
126 Id.
128 Typically, the employment start and end dates are just for the local unit they were with when they got decertified. E.g., In re Jacob Mullen, No. 2018-0209 (Kan. Comm’n on Peace Officers’ Standards and Training, Mar. 19, 2019) at 1, https://www.kscpost.org/orders/2020/jmullen.pdf. It is therefore possible, perhaps even likely, some of these officers had worked in other jurisdictions before the one they got decertified in, meaning they had served even longer in law enforcement.
130 In re Steven Rios, No. 2019-0105 (Kan. Comm’n on Peace Officers’ Standards and
these dates as consistently, meaning we have a smaller, possibly skewed sample (31 cases), but the average was 8.05 years and a range of 36 days to over 21 years. Experience is no guarantee against incompetence.

A. Officers Commit a Wide Range of Misconduct

Reviewing the records of discipline reveals imaginative misconduct. Officer Gary Allen organized a charity poker run and auction to honor a fallen comrade. All of the money raised went to his personal account, and none of the charities associated with the event received anything. Allen then claimed he was the victim of burglary and all of the event money was stolen. But an investigation found he had used all of the money for personal expenses, resulting in him being convicted of fraud and decertified.

Madison Callender supervised an inmate for her job and began dating him when he got out on work release. She communicated with the former inmate using her work phone, exchanging 1,244 messages in three weeks. When she had her communications with the former inmate restricted, she tried to have her mother reach out, but was ultimately found out and punished.

Franklin Kendall was a decade-long veteran of the force. But he behaved like a child, throwing a series of temper tantrums where he seemed to throw whatever he could get his hands off at colleagues, including a whiteout container, paperwork, peanuts or trail mix, an orange, cookies, and an unidentified object. He also yelled at inmates and was dishonest about the orange incident.

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134 Id.
135 Id.
136 Id. at 3-4.
138 Id. at 3.
139 Id.
141 Id.
142 Id.
Police Chief Terry Timeus\(^{143}\) and Officer Tony Reeves\(^{144}\) conspired with a bigoted employer and friend of Chief Timeus to frame and arrest an employee. The employer owned a towing company and claimed his employee was embezzling money but local police would not help.\(^{145}\) Even though the employer was outside of their jurisdiction, Officer Reeves—at the direction of Chief Timeus—coordinated with the employer about arresting the employee.\(^{146}\) During text communications, the employer used racial slurs and derogatory language.\(^{147}\) After Reeves arrested the employee and searched his car, he discovered the employee was drafting a racial discrimination complaint against his employer.\(^{148}\) When filing his crime report, Officer Reeves omitted exculpatory and impeachment evidence that would help the employee and destroyed evidence,\(^{149}\) much of this at the direction of Chief Timeus.\(^{150}\) It goes to show no matter is too crazy to end up before a POST.

Certain cases raise questions about how much misconduct can lurk in the shadows. Officer Joshua Price was hired by the Wichita, Kansas Police Department in 1996.\(^{151}\) In 2017, he arranged for his girlfriend to move into a house that belonged to a friend of his.\(^{152}\) But when they broke up, he engaged in a far-reaching harassment campaign against her and her new boyfriend. This included telling her she needed to move out of the friend’s house, surveilling her house, distributing booking photos of her, giving a description of her car and home to other police, getting other police to ticket her, and running records checks on her, her new boyfriend, and her family on official police databases.\(^{153}\) He was eventually convicted of multiple crimes and decertified.\(^{154}\) While he was punished for his actions, one wonders if a man capable of such spiteful actions might have abused his power in the previous 20 years.


\(^{145}\) Id. at 9.

\(^{146}\) Id.

\(^{147}\) Id.

\(^{148}\) Id. at 10.

\(^{149}\) Id.


\(^{152}\) Id.

\(^{153}\) Id. at 2.

\(^{154}\) Id. at 3.
Or consider Officer Joel Sutherland. He had his certification revoked for performing 30 “bad” traffic stops, meaning he stopped cars for violations that did not exist and performed searches that were not authorized.\textsuperscript{155} He pulled someone over for not displaying a license tag when the tag was clearly visible, lied to dispatch about knowing a vehicle was stolen to justify a chase, and wrote a false report claiming he had run a report showing a license plate as expired.\textsuperscript{156} The Commission had evidence of 30 such misdeeds, but considering he was hired in 2011 and fired in 2015,\textsuperscript{157} who knows how many more they missed?\textsuperscript{158}

Relatedly, Officer Allen Kirk was investigated for improper subpoena service in a case.\textsuperscript{159} During the investigation, the Commission noted there was documentation showing the officer had been found lying multiple times in DUI cases.\textsuperscript{160} No estimates were given of how many times it happened, but it was bad enough the district attorney refused to put him on the witness stand.\textsuperscript{161}

## B. Wandering Officers Persist in Both States

The dataset reveals many instances of the “wandering officer,” meaning police who commit misconduct in one jurisdiction only to seek out employment in another.\textsuperscript{162} They persist because under-resourced departments do not always perform background checks or purposely hire

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{155} In re Joel Sutherland, No. 2015-0182 (Kan. Comm’n on Peace Officers’ Standards and Training, June 1, 2019) at 2, https://www.kscpost.org/orders/2019/jsutherland.pdf.
\item\textsuperscript{156} Id. at 2-3.
\item\textsuperscript{157} Id. at 1.
\item\textsuperscript{158} See also in re Hedrick Cintron, No. 2018-0217 (Kan. Comm’n on Peace Officers’ Standards and Training, Aug. 28, 2019) at 2, https://www.kscpost.org/orders/2019/hcintron.pdf (officer issued seatbelt violation tickets to citizens even when he knew they were wearing seatbelts to help meet a seatbelt enforcement grant, and turned office audio recording equipment when he was explaining the citation).
\item\textsuperscript{160} Id. at 2.
\item\textsuperscript{161} Id. See also in re Jesse Cross, No. 2022-0025, (Kan. Comm’n on Peace Officers’ Standards and Training, June 24, 2022) at 2, https://www.kscpost.org/orders/2022/jcross.pdf (officer falsified maintenance records for intoxilyzer, resulting in her DUI cases being thrown out).
\item\textsuperscript{162} For an egregious example, see Ross Jones, A Detroit cop faced firing for Greektown punch—until Eastpointe gave him a badge, WXYZ DETROIT (May 16, 2023), https://www.wxyz.com/news/conduct-unbecoming/a-detroit-cop-faced-firing-for-greektown-punch-until-eastpointe-gave-him-a-badge (discussing the resignation of Detroit Officer Kairy Roberts who punched a man in the face who posed no threat, knocked him to the pavement, failed to render aid, and was hired as an officer by neighboring Eastpointe within ten days).
\end{itemize}
\end{footnotesize}
incompetent officers because they require lower salaries. Their continued prevalence underscores the importance of not only decertifying misbehaving officers to prevent re-hiring within the state but of making the information accessible so that other jurisdictions can identify them more easily.

There are many examples of bad officers bouncing around. Starting with Kansas, Jeffrey Montre was driving around at nighttime in November 2014. He was previously employed as a deputy sheriff with Saline County, but not at that time. He saw two teens driving around a cemetery, so he called the police dispatch and approached the teens, telling them he was a deputy sheriff while on police radio. The teens apologized and left and Montre texted the police dispatcher “Idiot kids. U gonna turn me in for lying to em?” Montre was convicted of impersonating an officer in 2015 but then got a job with the Marquette Police Department in 2017. The revocation order does not clarify if Montre concealed his conviction, or Marquette was willing to hire him anyway, but it underscores how a strong POST Commission is essential to preventing bad officers from shuffling between departments.

Chase Tinsley was a Missouri officer who put out a false BOLO (be on the lookout) for a truck, claiming it was a joke that got out of hand, and was punished for it. He later got a job as a Kansas law enforcement officer, and only after hiring was his misconduct uncovered. When the Kansas Commission was adjudicating the case, it came to light he had been fired by yet another jurisdiction.

Michael Graves was fired from the Garnett, Kansas, Police Department for using his position to flirt with female suspects. When interviewing for a new position, a lie detector suggested he was being deceptive when asked about past misconduct, but Coffey County Sheriff’s Office gave him the

163 Grunwald & Rappaport, supra note 14, at 1695.
165 Id.
166 Id.
167 Id.
168 Id. at 2-3.
170 Id. at 1.
171 Id. at 4.
benefit of the doubt and hired him.\footnote{Id. at 3.} He was later fired and his certification was revoked.\footnote{Id.}

Patrick Johnson pursued a vehicle that failed to pull over for a license tag infraction, calling other officers to assist.\footnote{In re Patrick Johnson, No. 2021-0163 (Kan. Comm’n on Peace Officers’ Standards and Training, Dec. 7, 2021) at 1, https://www.kscpost.org/orders/2021/pjohnson.pdf.} Police used stop sticks to blow out the tires of the suspect.\footnote{Id. at 2.} Other officers approached the disabled car on foot and found the suspect to be slow and lethargic, with one officer describing the suspect as “comatose.”\footnote{Id.} Johnson arrived on the scene slightly later, and almost immediately tased the suspect before gathering any facts, even though he posed no threat, other officers were already on-scene, and the situation was dying down when Johnson arrived.\footnote{Id.} During the investigation, Johnson admitted he had resigned from a different police department to avoid termination for doing essentially the same thing.\footnote{Id. at 3.}

Oregon has them too. Some wanderers may even seek out the Beaver State as a means to game the system. Officer Jake Jensen, who secretly used at least six different types of illegal drugs, failed a lie detector test when applying for a job with the Bureau of Alcohol, Tobacco, and Firearms.\footnote{In re Jake Jensen, No. 56154 (Or. Dep’t of Pub. Safety Standards and Training, Apr. 28, 2022) at 1, https://www.oregon.gov/dpsst/CJ/CertActions/Jensen56154.pdf.} He then applied for a law enforcement job in Oregon because he knew it did not require a polygraph.\footnote{Id. at 9.} Plainly, he sought out jobs that would not screen for misconduct.

Notwithstanding this unfortunate reputation, the Oregon POST has enabled future wanderers by failing to punish officers. Officer Nigel DeLuna resigned from the Portland Police Bureau in 2016 after saying “If you are an Indian and a woman you can get this job easily.”\footnote{In re Nigel DeLuna, No. 54679 (Or. Dep’t of Pub. Safety Standards and Training, July 23, 2020) at 2, https://www.oregon.gov/dpsst/CJ/CertActions/DeLuna54679.pdf.} He was not yet certified at the time, so the Board stayed its review.\footnote{Id. at 1.} DeLuna was then able to get hired by the Mt. Angel Police Department, and when his earlier comments resurfaced, the Board voted not to punish him.\footnote{Id. at 1.} Officer Ashley Dalton resigned from a police job in Lake Oswego, Oregon while under investigation for spreading false rumors about another officer, only to get...
hired later by the Milwaukie, Oregon Police Department.\textsuperscript{185} Oregon’s POST decided to take no action against her.\textsuperscript{186} So, if Dalton were to resign again under bad circumstances, she would be free to switch over to yet another department.

Sadly, even a revocation is not a panacea. Officer Terrance Brown had his Kansas certification revoked in 2012, but by 2015, he was working as a law enforcement officer in Missouri, and his new employer was unaware his Kansas revocation was revoked.\textsuperscript{187} This shows decertification is not enough. Disciplinary decisions must be accessible, and hiring agencies must be vigilant about whom they hire.

C. State POSTs Are Too Reliant on Local Departments

Neither state POST studied here has a large team of investigators who search for or uncover misconduct by police. Rather, they tend to act only after a local department clues them in.\textsuperscript{188} Even when the Board does an investigation, it typically consists of simply calling up the local unit.\textsuperscript{189} Making matters worse, state POSTs may lack the power to compel records. Oregon’s POST tried to obtain information about Officer Jeffrey Davis, who resigned as a result of a settlement for misconduct.\textsuperscript{190} The local department refused to provide information about the resignation, and the Board unsuccessfully tried to compel records with the help of the state Department of Justice.\textsuperscript{191} After that failed, the POST decided to not risk taking the matter to court for fear of creating adverse precedent limiting its ability to obtain records in the future.\textsuperscript{192} It had to rely on newspaper articles


\textsuperscript{186} Id. at 1.


\textsuperscript{191} Id.

\textsuperscript{192} Id.
and court documents, none of which demonstrated actionable misconduct by the officer.  

The number of delays illustrates the problem. Starting with Kansas, 104 cases provided both the date of the offense and the date of Commission sanction. The average delay between the offense date and the commission sanction date was 683.21 days, or 1.87 years. This is roughly four times longer than what it takes to remove an officer from employment for misconduct. The shortest case was 150 days, where an off-duty officer committed disorderly conduct in November of 2018 and lost his certification in January; the longest case was nearly 8,000 days (over 20 years).

This does not necessarily mean the Commission is ignoring problems for years. A wrongful act may occur in secret and remain concealed for years. Take the longest case, Officer Keith Meyers. It involves an officer who committed a domestic violence offense in 1999, got hired by the Clay County Sheriff’s Office in 2016, and was investigated for another domestic violence incident in 2021—at which point the Commission was notified and promptly decertified the officer. The problem is not that the Commission dragged its feet; the problem is that the Commission is reliant on local units to report misconduct. As the Keith Meyer case illustrates, even when an officer is convicted of a crime within the same state, the Commission or local unit might not even be aware.

Moving onto Oregon, there were 70 cases reporting both a date of offense and date of final order of decision. They give us an average of 810 days, or 2.21 years, between when the offense occurs and the date the Board issues a sanction. Like Kansas, the delay is not purely the Oregon POST’s fault. The longest delay was about ten years, and again, involved an officer who had an old, undiscovered conviction. So, the ten-year delay, in a case like that, is not a condemnation of the POST staff members, but shows how reliant the system is on individual officers and their local units to report misconduct.

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193 Id.
194 There were eighty-nine Kansas cases where both an employment end date was listed and where a date of offense could be determined—excluding cases where the offense occurred before the officer was hired. This gives us an average of 169.26 days (0.46 years) between the offense and the end of employment, whether by termination or resignation.
197 Id. at 1-4.
misconduct. This set all but guarantees misconduct will slip through the cracks.

D. The System Undervalues Certain Misconduct
   i. Excessive Force / Mistreatment of Suspects

   The lack of concern for certain offenses gives the impression that POSTs do not take such offenses seriously. Police brutality is one such example. Officer Robert Johnson responded to a call where he used force three times: he used a takedown maneuver, placed his hand on a citizen’s neck, and pressed his knee into the head of the citizen on the pavement.\(^{199}\) These techniques can be fatal, yet Johnson told his supervisor he did not use force.\(^{200}\) His account differed from his original report, the citizens’ accounts, and the medical evidence.\(^{201}\) He exaggerated the aggressive behavior of the citizen and later admitted he should have reported the use of force.\(^{202}\) Even though he lied about using potentially deadly force, the Board voted overwhelmingly against punishment.\(^{203}\)

   Officer David Dominy’s case defies a single categorization, but he resigned after being untruthful about pointing a firearm at a man while off-duty, pointing his gun and threatening to kill people who were lawfully on property he was renting, lying about a background check, being untruthful about being a witness in a domestic dispute, and speeding at 100 mph past school buses.\(^{204}\) All this was not enough to spur the Board to action, as it voted 10-to-1 to do nothing.\(^{205}\)

   Officer Amyr Motlagh enjoyed mocking prisoners. When an inmate asked for size 2XL clothes, Motlagh taunted the inmate, asking “do you want me to write 2X on some mediums.”\(^{206}\) True to his word, Motlagh wrote “2XL” on medium clothes and gave those to the inmate, and when the

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\(^{200}\) Id.

\(^{201}\) Id. at 4.

\(^{202}\) Id. at 1, 4.

\(^{203}\) Id. at 1.


\(^{205}\) Id. at 1-2.

inmate grew angry, Motlagh used that as a pretext to revoke his dayroom privileges.\textsuperscript{207} Motlagh used this as another opportunity to mock the inmate, asking “can you read? I didn’t think you could. It says you lost your dayroom.”\textsuperscript{208} Motlagh also had unrelated misconduct in his file and did not fully accept responsibility for his actions, yet the Board only suspended his credentials for three years.\textsuperscript{209}

On July 31, 2019, Officer Eric Weaver responded to a call about an assault at a house.\textsuperscript{210} After speaking with the victim, he searched the house and unlocked the door to the bathroom.\textsuperscript{211} He came upon a woman on a toilet and a man on the floor with his legs crossed who said “ouch.”\textsuperscript{212} Despite the fact that the man on the floor was not threatening, Weaver immediately tased the man without warning and later falsely claimed that he announced he was a police officer before unlocking the door and that the man had moved before Weaver tased him.\textsuperscript{213} Weaver refused to cooperate in an internal investigation of the matter but the Board nonetheless declined punishment.\textsuperscript{214}

Tyrone Jenkins, who had 28 years of law enforcement experience, got into a heated argument with his adult son.\textsuperscript{215} The argument turned physical when Jenkins pushed his son in the chest, and claimed his hand slid up to his son’s clavicle and neck.\textsuperscript{216} According to the son, Jenkins grabbed him by the neck and tossed him, shoved him in the neck, and rated the pain six or seven out of ten.\textsuperscript{217} The Board voted unanimously against doing anything, thereby granting domestic violence a free pass.\textsuperscript{218}

Trends like this are easiest to observe in Oregon because of the publication of cases with no punishment, but they exist all over. There were over 26,000 excessive force complaints in 2002 across large states and local

\textsuperscript{207} Id. at 9.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 1, 9-10.
\textsuperscript{211} Id. at 3.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 1, 3-4.
\textsuperscript{214} Id. at 4.
\textsuperscript{216} Id. at 3-4.
\textsuperscript{217} Id. at 2.
\textsuperscript{218} Id. at 1.
law enforcement agencies, which appears to be the last time to Department of Justice did a national survey. Yet punishment is rare. Reviewing every integrity bulletin in 2022 for Arizona’s POST, for instance, reveals only a single instance of an officer being punished for excessive force—and it only resulted in a 40-hour suspension. Either Arizona’s peace officers are extraordinarily peaceful, or its POST does not do much to address excessive force.

**ii. Sexual Harassment / Domestic Violence**

POST Commissions do not always take harassment seriously. Douglas Thoman was a licensed law enforcement officer serving as a school resource officer. He made a female high school student uncomfortable by sending her memes, trying to connect on social media, texting her, and leaving her a birthday gift. He also sent sexual messages to a variety of female students and graduates of high school and middle school. He admitted to some of these transgressions. Based on all this, the Kansas Commission scheduled an interview with him, which he did not attend. While his certification was revoked, the sole basis was failure to cooperate, giving the impression that flirting with students was not a disqualifying offense.

To the extent POSTs underappreciate the harm of sexual harassment, local police departments do the same thing. Joseph Plankinton was fired from the Pottawatomie County, Kansas, Sheriff’s Office for sexual harassment in 2017. Either sexual harassment was not a dealbreaker, or no one bothered to check his background, because Plankinton was hired by

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222 Id. at 1-2.

223 Id. at 2.

224 Id.

225 Id.

226 See id. at 3.

the Wabaunsee County Sheriff’s Office within a few months. Unsurprisingly, he quickly racked up multiple complaints of sexual harassment. Plankinton was ordered to stay six feet away from “all women” and “use his body camera to record any interactions between himself and any females.” While he eventually had his certification revoked, if the allegations were so serious and credible that the department felt it necessary to order him to stay away from all women and record all interactions with them, why not simply suspend or fire him?

Officer Andrew Moyer spent 23 years in law enforcement before having his license revoked in 2020. He had sexual harassment allegations going back to at least 2012. He repeatedly sent sexually explicit images to coworkers over text, Instagram, and Facebook and would follow up by saying he sent it to the wrong person. In 2017, he was investigated for watching porn and masturbating while in the room with a coworker, “dry hump[ing]” a coworker from behind, making sexual comments and jokes to coworkers, sending nude photos of himself to coworkers, including one with a “little sombrero sticker” on his penis. Why did his coworkers have to endure eight-plus years of this before he lost his license?

Although officers who are convicted of domestic violence will typically lose their badges, other decisions call into question how important POSTs believe domestic violence is. Officer Mitchell Coussens was called for a Domestic Menacing complaint, but he did not complete the call, left work without notifying anyone, and was dishonest about it later. His departure was so abrupt that his unit thought he was AWOL and expended time and resources to try and find him. In the words of the Board, his abandonment was “shocking conduct for a seasoned officer” and “citizens were endangered” by his hijinks. The same Board decided on no punishment.

Officer Alex Noli received a unanimous Board vote against punishment for failing to disclose a domestic violence allegation on his background

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228 Id.
229 Id. at 2.
230 Id.
232 Id.
233 Id. at 8.
234 Id. at 9.
236 Id.
237 Id. at 1.
check. Officer Ryan Dews already had demonstrated past assaultive behavior when he got into an argument with his girlfriend in 2016. When she attempted to leave, he blocked her, and when she ran to the bathroom, he pushed the door open, knocking her to the ground. She then retreated to a closet, but he again knocked her down by pushing the door open. He only relented when she pretended to call 911. According to Dews, his girlfriend fell by slipping on a rug, but a text exchange contradicts this account. Dews resigned in 2018 when his department investigated the domestic violence, and the Board did not revoke his license until 2021. That means an abuser remained eligible to serve for three years between his resignation and revocation.

E. Punishment May Not Have Been Justified in Some Cases

Although this Article argues bad officers should not be allowed to escape punishment, the reverse is also true: No officer should be punished unless they actually committed misconduct. Yet sometimes, officers are unjustly punished. For example, some police were disciplined for kneeling in protest of police brutality and racism, and charges like that could appear in their disciplinary records without context. Unfortunately, both Kansas and Oregon routinely publish records of punishment with zero context of what the officer did. This means officers who were unfairly or disproportionately punished may get lumped in with ne’er do wells.

Under Supreme Court precedent *North Carolina v. Alford*, a criminal defendant can strategically plead guilty without actually admitting to committing a crime. Oregon’s Board seems to adhere to a similar rule. It allowed Officer Boyd Rasmussen to append a statement denying any wrongdoing, but surrendering his license to save him and his family the stress of fighting it. If Rasmussen was truly innocent, it was inappropriate for the Board to strip him of his certification. If Rasmussen was in fact

240 Id. at 8.
241 Id. at 8-9.
242 Id. at 9.
243 Id.
244 Id. at 8.
culpable, the Board should not obscure this fact by printing his apologia. Either way, using Alford-like surrender agreements is a bad idea.

Likewise, Officer James Candiff filed a complaint against his local leadership for fostering a racist and misogynistic environment. It appears his complaint had merit, as it led to an investigation where one supervisor was fired and one was disciplined immediately. After, his supervisor raised concerns that Candiff had a “single exchange of inappropriate texts” with his ex-girlfriend, which were sent in response to explicit photos from her. The Board got involved, and Candiff eventually surrendered his certifications, but maintained his innocence and claimed he was only targeted due to filing the complaint. It appeared to be bona fide retaliation, given that multiple supervisors were punished based on Candiff’s complaint, he was only investigated after the complaint, and the misconduct he committed appears to be relatively minor. Rather than getting to the bottom of things, the Board took the easy way out and had him surrender his license, potentially engaging in retaliation against a whistleblower in the process.

And as noted in the previous section, decisions tend to be short. Sometimes, they are so short, we have no idea what the officer did. In cases such as these, we have no way to assess whether a lifetime bar to working in law enforcement is commensurate with the misdeed.

IV. OREGON

Oregon, to its credit, does explain decisions with no punishment. But the frequency with which it retains bad officers shows why greater transparency is so necessary in the first place.

By the author’s count, Oregon’s Board revoked 87 times out of 213 decisions, or 40.8 percent of the time. In other words, most of the time, the Board decides misconduct is not serious. Why might this be?

A. Refusal to Hear Cases

One reason for this is that the Board’s regulations and practices have essentially created a justiciability doctrine to avoid hearing cases. Courts have developed internal rules of justiciability—or prudential reasons not to hear cases. This makes good sense when courts wield vast power over a law of general applicability. What is more, courts often have overcrowded

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249 Id.
250 Id.
251 Id. at 1-2.
dockets and need to focus their resources on disputes where a judge can have the biggest impact.

Yet the Board, which only applies to public safety officials, lacks the power to overturn state laws and regulations, takes a few dozen cases a year, and at worst, will only impose employment sanctions. At times, it can feel like the Board seems to look for any reason it can find to not decide cases.

i. The Board Will Not Decide “Moot” Cases

When an officer is dismissed from the police force without receiving credentials, the Oregon Commission will state it does not have jurisdiction and defer the case without a determination of wrongdoing.252 Officers who resign or are fired without obtaining certification will typically have their cases dismissed by the Board253 with the promise to investigate if the officer applies in the future. The Board has done this for officers who have committed sexual assault,254 domestic violence,255 disorderly conduct and


253 OR. ADMIN. R. 259-008-0310 (2023).


255 Memorandum from Melissa Lang, Pro. Standards Case Manager, Or. Dep’t of Pub. Safety Standards and Training, to Marsha Morin, Crim. Just. Certification Program
criminal mischief, dishonesty during a background check, dishonesty about welfare checks and inventory logs, dishonesty about bereavement leave, unspecified dishonesty, unprofessionalism, injuring people, making discriminatory statements, sending unsolicited nude
photos,\textsuperscript{264} and drunk driving.\textsuperscript{265} The Board has said being demoted for misconduct is not enough to warrant a professional standards review.\textsuperscript{266} It must defer review of a case where the officer is no longer employed and not in possession of a certification.

These kinds of dismissals are often accompanied by a statement from the Board saying it will do nothing until and unless the officer applies for a new public safety position.\textsuperscript{267} But the Board is capable of barring non-licensed officers from even applying for credentials due to misconduct in the academy, so dismissing cases rather than making a finding of liability looks to be a conscious choice.\textsuperscript{268}

Worse, sometimes officers resign and keep their credentials and the Board decides not to investigate. Officer Scott Boyll resigned after apparently lying about his son getting sick to allow him to stay on vacation but retained his basic, intermediate, and advanced police certifications.\textsuperscript{269} The Board claimed it could not prove or disprove the allegations, but it made no independent effort to investigate. It did not so much as attempt to interview Boyll. It simply dismissed the case after he resigned, as if that mooted the issue for all time.

Refusal to decide these kinds of cases may conserve resources, but it does not hold officers accountable for potential misconduct. Investigating

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and sanctioning officers who lack credentials is not a matter of scoring pointless moral victories.\textsuperscript{270} It has concrete public safety benefits. Failure to punish increases the risk malfeasant officers will find their way back into the system. Steven Loos was terminated from the Lane County Sheriff’s Office in 2014, and the Board did nothing because he had no certification.\textsuperscript{271} In 2021, he got hired as a corrections officer (which is a position also regulated by the Board), but got fired when the office discovered the prior termination.\textsuperscript{272} Once again, the Board did nothing, citing his lack of employment and certification.\textsuperscript{273} The Board’s failure to take action against terminated officers only increases the odds some of them will slip through undetected, as a public sanction would likely be easier for new employers to search for than a private termination.

The claim that the Board will investigate in the future if the officer reapplies rings hollow. Ask any prosecutor: the time to investigate a crime is when it happens, not years later when memories degrade, witnesses fall out of touch, and documents get destroyed. So if the Board is truly concerned with getting to the bottom of what happened, time is of the essence.

\textsuperscript{270} There are times when not investigating every allegation is reasonable. Officer Matthew Higgins was had unproven allegations of speeding, inappropriate sexual relationships, and sexual harassment, but he was given a lifetime revocation for proven sexual harassment, so piling on more charges would add little. See \textit{In re Matthew Higgins}, No. 50256 (Or. Dep’t of Pub. Safety Standards and Training, Oct. 22, 2020) at 11, https://www.oregon.gov/dpsst/CJ/CertActions/Higgins50256.pdf. Similarly, Officer Mark Cudmore left the law enforcement profession in 1973, and got a DUI in 2016 and the Board declined to pursue the matter. See Memorandum from Melissa Lang, Prof. Standards Case Manager, Or. Dep’t of Pub. Safety Standards and Training, to Marsha Morin, Crim. Just. Certification Program Manager, Or. Dep’t of Pub. Safety Standards and Training (Apr. 20, 2021), https://www.oregon.gov/dpsst/CJ/CertActions/Cudmore00499.pdf. The odds of Cudmore returning to the police force after 40-plus years was extraordinarily remote. See Memorandum from Linsay Hale, Prof. Standards Dir., Or. Dep’t of Pub. Safety Standards and Training, to Bd. on Pub. Safety Standards and Training, Or. Dep’t of Pub. Safety Standards and Training (Apr. 22, 2021), https://www.oregon.gov/dpsst/CJ/CertActions/Yeager13084.pdf (officer left law enforcement 29 years ago).


\textsuperscript{272} \textit{Id.}

\textsuperscript{273} \textit{Id.}
ii. Non-Convictions Prevent Board Punishment

If an officer commits a crime and gets a diversion agreement, the Board may cite that as reason enough not to take action.\(^{274}\) Sometimes, however, this looks like a fig leaf. Officer Matthew Paton committed drunk driving and entered into a diversion agreement on April 4, 2019 in which he said he would abstain from alcohol.\(^{275}\) On February 20, 2020, he called in sick and requested staff come over.\(^{276}\) When they arrived, they found Paton drunk, and he admitted to consuming alcohol multiple times during his diversion period.\(^{277}\) He was fired and it took him nearly two years total to complete his diversion agreement, after which time the Board voted to take no action.\(^{278}\) The Board cited no evidence of rehabilitation beyond completing his diversion agreement (that he violated in secret multiple times), and expressed no curiosity about whether he had truly overcome his alcohol problems.\(^{279}\) As explanation, the Board cited an administrative rule that directs dismissal if the only charge against an officer is drunk driving and they complete a diversion agreement.\(^{280}\) But here, there were also multiple violations of diversion agreement. The Board called this “insubordination” and outside of its purview, but it could have just as easily called it dishonesty or violation of a court order, which would have made it quite different from a pure drunk driving offense.

By a similar token, the Board may dismiss a disciplinary case if an arbiter finds the officer did not commit a fireable offense.\(^{281}\) This means if the arbitration process is broken, it could indirectly weaken the efficacy of


\(^{276}\) \textit{Id.}

\(^{277}\) \textit{Id.}

\(^{278}\) \textit{Id.} at 2.

\(^{279}\) \textit{Id.}

\(^{280}\) \textit{Id. See also OR. ADMIN. R. 259-008-0310 (4) (2023).}

the Board, since it rubberstamps the arbitrator without independent review of the evidence.

At least diversion agreements or favorable arbiter opinions mean the officer’s misconduct was adjudicated. Other times, cases simply fizzle out, and this too is cited by the Board as reason enough to drop them. Officer Daniel Carpenter had minor convictions in 2004, but much worse, a charge of aggravated Homicide in the Second Degree for threatening to kill a woman over the phone.\textsuperscript{282} It was credible enough she got a protective order, but no conviction could be found, so the Board dropped the case.\textsuperscript{283} No effort was made to investigate, and the officer remained employed with law enforcement.\textsuperscript{284}

Officer Matthew Krump was arrested for coercion and harassment, and charged with two felonies that were later dismissed.\textsuperscript{285} In response, the Commission said because there was no conviction “staff cannot make a determination on whether or not Krump’s conduct violates the Board’s moral fitness standard.”\textsuperscript{286} There is no documented attempt to review the charge sheet, interview anyone, or figure out what caused the arrest—it appears the only materials considered were the docket entry and the judgment of dismissal.\textsuperscript{287}

While a non-conviction would be a legitimate mitigating factor for the Board to consider, dismissing disciplinary proceedings outright when the criminal process fails to produce a conviction makes little sense. Firstly, there are conflicting standards. Criminal trials convict based on truth beyond a reasonable doubt. Oregon administrative proceedings, on the other hand, use preponderance of the evidence,\textsuperscript{288} and no analogous evidence code exists for disciplinary proceedings. Even if there is a conviction, it might be for something like open container possession,\textsuperscript{289} which hardly

\textsuperscript{283} Id.
\textsuperscript{284} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id.
\textsuperscript{288} Dixon v. Or. State Bd. of Nursing, 419 P.3d 774, 778 (Or. Ct. App. 2018).
makes someone a menace to society. The criminal justice system should not be used as a facsimile for moral culpability. This is particularly true because we expect officers to hold themselves to a higher standard before they are trusted with a monopoly on state-sanctioned violence.

Secondly, we do not know why the criminal justice system failed to produce a conviction. Charges may get dropped or pled down due to an expired statute of limitations, the victim declining to participate, speculation that a jury would not convict, an overcrowded docket, or some other reason that does not absolve the officer. The absence of any inquiries is all the stranger because the Board is capable of gathering basic documents about an investigation to determine if there is no moral fitness violation. Every once in a while, the Board will revoke when an officer commits misconduct notwithstanding a lack of criminal charges. Officer Chris Keyser had his license revoked for negligently firing his gun at home while he was drinking and children were playing in the area, and then lying

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290 For example, one officer went up to a suspect lying on a bunk in jail, placed him in a chokehold for no apparent reason, yelled at him, used pressure points, and was not criminally charged for it. See, e.g., In re Brad Messersmith, No. 2020-0119 (Kan. Comm’n on Peace Officers’ Standards and Training, June 8, 2021) at 4, https://www.kscpost.org/orders/2021/bmessersmith.pdf. Another officer beat a handcuffed suspect multiple times, slammed him into a wall, bent him over a metal table, and tased him multiple times—all for no apparent reason—and pled it down to a class B misdemeanor. See In re Raymond Hall, No. 2017-0157 (Kan. Comm’n on Peace Officers’ Standards and Training, June 8, 2021) at 1, https://www.kscpost.org/orders/2019/rhall.pdf.


about such information. The District Attorney did not file charges, but the Board revoked anyway. This shows it can act, if it wants to.

And thirdly, failure of the Board to take action can also feed into a larger cycle of state actors passing the buck. Officer Patrick Smith resigned in 2016 as part of a settlement agreement for undisclosed reasons. The District Attorney refused to pursue any charges because Smith had already resigned, and the Board in turn failed to investigate because there were no criminal charges. Adding insult to injury, a change in local department leadership and poor recordkeeping by the Board led to a four-year delay in processing the case. Smith thus has no mark on his record and the public has no idea what happened.

Failure to hold officers accountable can have consequences down the road. Officer Robert Conklin got into a fight with his ex-wife’s boyfriend outside of a bar in 2016 and attempted to have a fellow officer use their position to take action against the boyfriend. He got an unpaid weeklong suspension, but there is no record of Board action or criminal charges. A few years later, Conklin had a new wife, and arrested the ex-husband of that new wife. While booking the ex-husband, Conklin pushed him into a gate, yelled obscenities at him, and shoved him into a concrete wall. Plainly, he did not learn his lesson from the first time.

Officer Seth Collins resigned after lying multiple times between 2014 and 2018. In 2014, he misled supervisors about using a patrol vehicle to


297 Id. at 1.

298 Id.


300 Id. at 9.

301 Id. at 8, 9.

302 Id. at 8.

303 Memorandum from Linsay Hale, Prof. Standards Dir., Or. Dep’t of Pub. Safety Standards and Training, to Bd. on Pub. Safety Standards and Training, Or. Dep’t of Pub.
That same year, he gave misleading information about a training incident; and in 2018, Collins misled supervisors about checking a park for a homicide suspect. At some point, he also lied about qualifying for a marksmanship award, received an unpaid suspension for his dishonesty, and was determined to not be a useful resource by the local prosecutor. It was not until 2021 that the Board revoked his credentials, years after he had been punished for dishonesty.

### iii. Self-Imposed Jurisdiction Limitations

Unlike some states, Oregon has the power to decertify officers for virtually any reason. Beyond committing crimes or acts of dishonesty, credentials may be revoked or suspended for conduct that “threatens or harms persons, property or the efficient operations of any agency, or discriminatory conduct.” Despite the fact that its own rules explicitly permit revocation for harming “efficient operations,” the Board is insistent that “poor performance” is categorically excluded from this purview—in effect, outside the Board’s jurisdiction.

The line between “poor performance” and “moral fitness violation” can appear downright arbitrary. An “egregious,” repeated failure to perform basic job functions for serious cases is not a moral fitness violation. Making disparaging comments about colleagues—bad enough to result in demotion and resignation—is not a moral fitness violation. Using foul language in front of the public does not fit the definition, nor does being psychologically unfit for the job. This is not to say every one of these

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305 Id.

306 Id. at 1, 10.

307 OR. ADMIN. R. 259-008-0300(3)(C) (2023).


cases should have resulted in a lifetime revocation, but the fact that they are not even seen as moral failings is hard to understand.

Officer Andrew Casper failed to respond to a priority call for 14 minutes and instructed a probationary officer not to respond either.\textsuperscript{312} After eventually arriving, Casper made no effort to apprehend a suspect who damaged a person’s house and then walked away.\textsuperscript{313} When asked about it later, he said he could not chase suspects because of the Obama Administration.\textsuperscript{314} Allowing politics to infect basic job functions should be antithetical to anyone’s idea of a model police officer, yet the Board did not even see a moral fitness violation.\textsuperscript{315}

David Poole was an officer who engaged in a 13-mile, 12-minute, dangerous high-speed chase.\textsuperscript{316} Even before he did the chase, he was the subject of multiple sustained complaints about rude communications with community members.\textsuperscript{317} Somehow, the Board found there was no “intentional disregard for the moral fitness standards” and imposed no punishment.\textsuperscript{318}

An investigation into Officer Mark Scott stemming from a federal civil rights lawsuit against him because the charges were “civil in nature,” and therefore not moral fitness violations by definition.\textsuperscript{319} Concluding that something cannot be a moral fitness violation because it is “civil in nature” is nonsensical. A civil rights lawsuit could mean anything from torturing inmates\textsuperscript{320} to replacing chunky peanut butter with smooth.\textsuperscript{321} The fact that

\textsuperscript{313} Id. at 2.
\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{317} Id.
\textsuperscript{318} Id.
\textsuperscript{320} E.g., Hope v. Pelzer, 536 U.S. 730 (2002) (vindicating a federal civil rights lawsuit for prison guards who shackled inmates to a hitching post under the hot Alabama sun).
\textsuperscript{321} Jeff Kahane, Wacky Lawsuit Wednesday: Convict vs. Prison aka Chunky vs. Smooth, KAHANE LAW OFFICE (Mar. 25, 2015), https://kahanelaw.com/wacky-lawsuit-wednesday-
a lawsuit is civil tells us next to nothing about whether the conduct was morally wrong.

For the converse situation, consider Officer Brian Lister. He violated a criminal law by not having ownership tags for a few bobcats that he trapped. For this sacrilege, the Board gave him a three-year suspension from working as a police officer, a far greater punishment than people who committed far worse offenses. When failing to tag wild game is a moral fitness violation, but violating someone’s civil rights categorically is not, commonsense has left the building.

Even breaking the law does not always appear to be a “moral fitness violation.” Officer Ryan Fauver failed to obtain consent to search, failed to take a report of a missing person, and did an illegal search and seizure of property. Specifically, he illegally searched a vehicle and took a license plate from it without a property receipt. He even admitted to knowingly violating the law by performing the illegal search and seizure, but the Board stated he did not intentionally commit misconduct and listed no aggravating factors, letting him off without punishment. How can violating the most pedestrian criminal law be a moral fitness violation, but knowingly violating the Constitution through illegal search and seizure be merely poor performance? On this quandary, the Board has nothing to say.

Classifying misconduct as “poor work performance” and not indicative of a moral fitness violation can also hurt citizens. Officer Sara Tolley failed to process a probable cause affidavit, resulting in a suspect being arrested for the same offense twice. She also was disciplined for failing to properly investigate and document a case, submitting 15 consecutive reports.

convict-vs-prison-aka-chunky-vs-smooth/.


323 *Id.* at 2.


325 *Id.* at 3.

326 *Id.* at 1.

327 This kind of oversight is endemic to POSTs. Decades ago, in a study of Florida, researchers concluded that “[u]nlawful searches and seizures were not a significant part of the public, official misconduct cases.” Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L. Q. 45, 69 (1987).

that were not up to snuff, and failing to notify her supervisor about absences multiple times.  

Because all of this was coded as “poor work performance,” the Board did nothing, and Tolley is free to seek employment throughout the Beaver State. Call it incompetence, or call it morally unfit, but no one should be calling Tolley “Officer.” Limiting the kinds of cases that state POSTs can take—or think they can take—puts citizens at risk. Just ask the person who got arrested twice.

B. Little to No Punishment for Serious Abuse

Many officers were found to have violated moral fitness standards, but not given any punishment regardless. Because Oregon’s Board does not issue censures or reprimands, there is not even an official condemnation of their actions. For the Board’s practical purposes, a finding of a moral fitness violation without punishment is no different than a finding of no moral fitness violation.

Just as the cases that found no moral fitness violation could be odd, so too are the cases where no punishment was imposed. Officer Lian Mechanic hit a parked car while drunk, causing extensive damage. She told responding police that she only had a couple of beers, but police found empty beer cans and empty six-pack holders in her car, and she had a .29 breath alcohol content—putting the lie to her answer. She pled guilty to drunk driving and reckless driving, did not report her arrest to the Board, and was arrested again the day before she was supposed to enter a residential treatment facility—suggesting she had an ongoing problem with alcohol. All told, there were twice as many aggravating factors as mitigating factors, yet the Board decided on no punishment. This makes it hard to understand how the factors are weighed.

Officer Orrin Wallace attempted to negatively influence the budget process for the police department through a 50-minute phone call to a budget committee member and then was dishonest about what he said on the call. Separately, he was investigated for misuse of sick leave, false

\[329\] Id.
\[330\] Id. at 2.
\[332\] Id. at 1, 3.
\[333\] Id. at 1, 4.
\[334\] Id. at 1.
\[335\] Id. 3-5.
injury, insubordination, and worker’s comp fraud.\textsuperscript{336} He got no punishment.\textsuperscript{337}

Officer Joseph Patnode was a supervisor who failed to report misconduct by a subordinate for months.\textsuperscript{338} The Board raked him over the verbal coals, calling his conduct an “epic failure of leadership in which he failed the officer and his department,” a “series of events that continued over months and amounted to a dereliction of his duties,” he was “protecting his friend instead of doing his job,” and he was not willing to demonstrate a commitment to comply with policies.\textsuperscript{339} Yet the Board voted against punishment, reasoning that the “incident, although spanning over months, was an isolated event.”\textsuperscript{340}

Antonio Ortiz had a criminal record that included elements of dishonesty, but the Board listed a mitigating factor that his dishonesty occurred while he was drunk.\textsuperscript{341} David Martinez’s threats to ticket citizens for parking the same way he himself had done were condemned as “hypocritical, unprofessional, and indicative of a pattern of poor decision making” but not worthy of sanction.\textsuperscript{342}

Officer Eric Kozowski openly flouted rules about wearing his uniform while campaigning to gain a political advantage.\textsuperscript{343} He lied about not authorizing a social media post about himself in uniform and was investigated for improperly handling almost a dozen sex crime cases.\textsuperscript{344} The Board said he lied and misused authority, but voted unanimously not to punish him.\textsuperscript{345}

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\item\textsuperscript{336} Id. at 3-4.
\item\textsuperscript{337} Id. at 1.
\item\textsuperscript{339} Id. at 1, 4.
\item\textsuperscript{340} Id. at 2.
\item\textsuperscript{344} Id. at 1.
\item\textsuperscript{345} Id.
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Officer Terry Lohf failed to respond to a call about a domestic disturbance involving an individual who had an active felony warrant and then attempted to mislead the Town Manager about what he did. He was fired for dishonesty, and an arbitrator concluded that the firing was reasonable given that Lohf withheld information about his actions. Yet the Board voted to take no action.

What is the point of having a POST if it cannot hold officers like this accountable?

C. Huge, Unexplained Disparities in Outcome

The previous two sections dealt with officers who suffered no practical consequences from the Board, notwithstanding their misconduct. We may also compare officers who commit similar misconduct yet get starkly different outcomes.

Officer Devon Lindsey got a lifetime revocation for falsely indicating he completed hourly cell checks three times. Though such a failure may be a safety hazard, nothing actually went wrong because of it. Officer Richard Sneath, on the other hand, failed to complete a cell check that led to a failure to prevent an inmate from committing suicide and did not even lose his job, much less face Board punishment. Similarly, Officer Kevin Litten left a K9 handler and his dog alone without cover while searching a suspect, putting them in danger, and then gave an inaccurate account of what he did and resigned because of it; the Board said there was no moral fitness violation.

Other people got slammed for tiny offenses. Officer Angela Schraeder went on COVID leave after her family got sick. She was supposed to

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347 Id. at 4.
348 Id. at 1.
remain in isolation until her test results came in, but was spotted kayaking.\textsuperscript{353} At first, she denied breaking isolation but later fessed up to it.\textsuperscript{354} There was no other misconduct listed, and the Board said her dishonesty was not malicious and she quickly confessed.\textsuperscript{355} Yet she got a unanimous, lifetime revocation. And Officer Jason Wileman served for 13 years with one documented case of misconduct by the Board: dishonesty about following up on a theft case where the only thing stolen was a bag of tin cans.\textsuperscript{356} He, too, got a lifetime revocation for this.

Contrariwise, Michael Huber was a senior, off-duty, police officer who was at home when a neighbor started setting off illegal fireworks.\textsuperscript{357} Huber started simultaneously shoving the neighbor and calling for subordinate police, and then texted police saying “some a**hat” was setting off fireworks, told them to “kick their a**!” told them to hurry up, asked for a license check of the neighbor’s vehicle, used his foot to stop the neighbor from closing their garage door, and told the incoming police “you’ve got at least three arrests out of this.”\textsuperscript{358} When police arrived, Huber falsely claimed he did not push the neighbor, and also falsely denied mentioning arrests or raising his voice with the neighbor.\textsuperscript{359} The neighbor tried to complain to the police about Huber’s conduct, but the police said they were subordinates and could not do anything about Huber.\textsuperscript{360} For all this—multiple instances of dishonesty, coercing subordinates to address a largely personal grievance, and potentially committing trespass and an illegal search and seizure of the neighbor’s garage—Huber got a three-year suspension.

Officer Joseph DeLance was at a policing course where he was reckless in practicing new combat moves without an instructor or safety equipment.\textsuperscript{361} When slamming another student to the ground, DeLance caused life-threatening injuries to the student, causing a brain bleed, a neck fracture, a broken wrist, broken bones near the eye, and loss of

\textsuperscript{353} \textit{Id.}
\textsuperscript{354} \textit{Id.}
\textsuperscript{355} \textit{Id.} at 6-7.
\textsuperscript{358} \textit{Id.}
\textsuperscript{359} \textit{Id.} at 9.
\textsuperscript{360} \textit{Id.} at 8.
When the student awoke, he complained about head and wrist injuries. Rather than get help, DeLance tried to convince the student to sleep off the injury, and when a quad-mate heard the student moaning in the shower, DeLance told the quad-mate to talk to him before taking the student to the hospital. Doctors said that had the students simply gone to bed and not the hospital, he might have died. And DeLance’s account of events was less than truthful. He got a three-year suspension, rather than permanent revocation. At least he got a suspension—other officers who significantly injured other students at training and did not report it sometimes get no punishment.

Officer Angela Branford used law enforcement databases for personal reasons. To wit, she looked up the name and phone number of a person who was dating one of her friends, and another time, did a check on a friend’s boyfriend to see if he was cheating. It happened at least six times, and she was dishonest about it. Was this wrong? Absolutely.

But was it worse than Officer Christen Powell? Powell also used law enforcement databases for personal reasons. Analysis found he was more likely to run checks on women, particularly women of a certain age and appearance. He too was dishonest about this, claiming it was “totally random” that he ran checks on women more often. On top of this, he sent flirtatious texts to a female victim of a crime, told her that “incredibly hot women” could get away with violating the law, ran a check on her boyfriend’s license plates, and perhaps unsurprisingly, received past complaints from women about inappropriate behavior.

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362 Id. at 1, 4, 10.
363 Id. at 10.
364 Id.
365 Id.
366 Id. at 9.
367 Id. at 1.
370 Id. at 7-8.
371 Id. at 7.
373 Id.
374 Id. at 9.
375 Id. 8-9.
It could be argued Powell’s conduct was worse than Branford’s. It would be hard to argue Powell’s conduct was significantly better. And yet, the Board took Powell’s credentials for five years, and Branford’s for life.

Officer Scott Boyll lied about his son being sick so that he could extend his vacation, and his case was dismissed. Officer Michael Boyd had his license permanently revoked for lying about being approved for more than four vacation days. Other officers have been revoked for similar levels of dishonesty. Officer Gregory Buddrius failed to notify supervisors about his vacation after multiple directives to do so, and this was said to not even be a moral fitness violation. What explains the yawning gulf for what was essentially the same misdeed?

Finally, we have Officers Andrew Pastore and Peter Arnautov. Pastore lied about a justification for working four hours of overtime and shopping around for supervisors until he found one to approve his overtime request. Pastore had 16 years of experience and no other listed misconduct.

Arnautov said “I hate f**s” while at an office training discussing the Inclusion Patrol Car that had rainbow lettering—he claimed that English was his second language and what he actually said was “I hate gays.”

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381 Id.
382 Memorandum from Melissa Lang-Bacho, Pro. Standards Case Manager, Or. Dep’t of Pub. Safety Standards and Training, to Bd. on Pub. Safety and Training, Or. Dep’t of
Whatever he said, he never disavowed the sentiment and admitted the statement made him ineffective as a police officer.\textsuperscript{383}

Both were suspended for ten years. How can lying about a justification for overtime be on par with admitting to ongoing bias that renders the officer ineffective (in addition to the slur)? Outcomes like this make punishments look arbitrary.

D. Drunk Driving Almost Never Results in Revocation

Oregon does not view drunk driving as a dealbreaker to be a cop. By state administrative rule, police discipline cases will essentially be closed if the only charge is drunk driving, and it is dismissed.\textsuperscript{384} This rule effectively blesses cops who break the law. Innumerable officers were let off without punishment for drunk driving.\textsuperscript{385}

\textsuperscript{383} Id. at 1.
\textsuperscript{384} OR. ADMIN. R. 259-008-0310(4) (2023).
While a single instance of victimless drunk driving might not render a person categorically unable to serve in law enforcement honorably, the utter lack of concern by the state is worrisome. There are a whole host of potential mitigating and aggravating factors in any drunk driving arrest. The least harmful scenario would be a one-time offender who was over the legal limit, yet whose driving skills were unimpaired, no bad driving was observed, and the offender overcame their drinking problem. On the other end of the spectrum, the crime of drunk driving would be much worse if others were injured, there was a hit and run, the offender was driving recklessly, passengers were present in the car, the offender was substantially over the legal limit, and the offender failed to take responsibility for their actions.

Likely due to the state administrative rule, the Board makes little effort to uncover these critical facts, at least most of the time.386 And cases on the bad side of the spectrum get the same outcome as those on the mild side. Officer David Sytsma drove to work drunk, had been previously disciplined, including for misuse of alcohol, and was likely dishonest about how much he drank, yet received no Board punishment.387 He is not alone in that respect.

The following officers were allowed to continue serving without so much as a reprimand: one who was three times the legal limit and crashed into a mail truck;388 one who was weaving in and out of traffic, could not

386 The Board is capable of explaining itself, if it chooses to do so. Officer Jason Maury pled no contest to drunk driving and reckless driving. See Memorandum from Linsay Hale, Pro. Standards Dir., Or. Dep’t of Pub. Safety Standards and Training, to Bd. on Pub. Safety and Training, Or. Dep’t of Pub. Safety Standards and Training (Oct. 22, 2020), https://www.oregon.gov/dpsst/CJ/CertActions/Maurry43487.pdf. He had a .28 breath alcohol content, four times the legal limit, and crashed into two parked vehicles. Id. Yet he was also extremely cooperative, took responsibility, self-reported, followed his court obligations, and was disciplined by his employer. Id. at 1. Whether or not one agrees with the Board’s decision, it weighed the facts and came to a transparent conclusion. See Memorandum from Linsay Hale, Pro. Standards Dir., Or. Dep’t of Pub. Safety Standards and Training, to Bd. on Pub. Safety and Training, Or. Dep’t of Pub. Safety Standards and Training (Jan. 28, 2021), https://www.oregon.gov/dpsst/CJ/CertActions/Ingram50213.pdf. The Board also suspended an officer’s credentials for ten years when they drunk while operating their police car. In re Raymond Dube, No. 41238 (Or. Dep’t of Pub. Safety Standards and Training, Apr. 29, 2020), https://www.oregon.gov/dpsst/CJ/CertActions/Dube41238.pdf.


maintain a constant speed, had an open container of alcohol, and was more than double the legal limit;\textsuperscript{389} and another who committed a hit and run while nearly double the legal limit.\textsuperscript{390} According to the POST, these were not even moral fitness violations. There was no grappling with the facts, victim statements, or rehabilitation.

Furthermore, drug offenses can get much harsher punishment. The Board has permanently revoked an officer for drug possession without elaborating on aggravating factors.\textsuperscript{391} Drunk driving and drug possession both involve substance abuse, and the former has higher risks of harming others. Yet drunk driving is simply not punished in the vast majority of cases—regardless of aggravating facts.

\textbf{E. Failure to Share Case Information}

Oregon’s POST sometimes references exhibits without sharing them.\textsuperscript{392} And its case files are brief. Board opinions are short and to the point; their decisions averaged 4.95 pages. And sometimes, the opinion is an empty surrender agreement that gives absolutely no information about what happened.\textsuperscript{393} The author counted 31 such voluntary surrender cases, which tend to be a single page stating the officer agreed to give up their certification. Given the huge variance in what gets officers revoked, the officer could have done anything from not clocking out for lunch\textsuperscript{394} to sexual assault.\textsuperscript{395} Mute surrender agreements fail to apprise the public and


\textsuperscript{393} \textit{E.g.}, \textit{In re} Travis Luttmer, No. 46752 (Or. Dep’t of Pub. Safety Standards and Training, Oct. 28, 2020), https://www.oregon.gov/dpsst/CJ/CertActions/Luttmer46752.pdf. Looking only at revocation cases where a record was made (rather than voluntary surrender agreements), the average is 12.12 pages.


future employers about the gravity of the wrong. These kinds of
tightlipped surrender agreements are a disservice to the public, particularly
as the Board is capable of giving factual summaries in surrender agreements
if it wants to.

Oregon’s POST also shares economic sanction reports from local
departments—which usually involve losing pay or vacation time. Because
these are done by local departments, details are usually sparse. Sometimes,
the conduct appears fairly tame, like using vulgar language when telling a
story. Other times, the reader is left wanting more. Officer Wesley
Murphy had 11.25 hours of accrued paid leave docked because he failed to
report untruthfulness by a subordinate. That description is so vague it
could be anything from lying about a sick day to perjury. Posting these
economic sanctions notices helps track misconduct by officers, but tells us
very little about what they did. Adopting standards for what information
local departments would have to provide would help address this.

Perhaps the worst example of withholding information comes from
Douglas Treat’s case in Oregon. Treat retired amid a sexual harassment
investigation. The investigation uncovered that he asked a female
coworker whether she had worn tight clothing at her prior job as a waitress,
told two subordinates he was dreaming of having sex with them, made jokes
about his willingness to exchange sex for ammo, used insensitive racial
language when explaining a traffic stop, commented about his sex life to
subordinates, and commented on pornography he watched during a shift

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396 Sometimes, the Board also gives descriptions that are both too specific and too
vague. Officer Austin Daugherty was investigated for committing an “incident” where
“another student was significantly injured and Daugherty failed to seek medical assistance or
notify [the Board] of the injury.” Memorandum from Melissa Lang, Prof. Standards
Case Manager, Or. Dep’t of Pub. Safety Standards and Training, to Marsha Morin, Crim.
Just. Certification Program Manager, Or. Dep’t of Pub. Safety Standards and Training
do not know if this was training accident or an assault.

397 E.g., In re James Candiff, No. 51133 (Or. Dep’t of Pub. Safety Standards and

398 E-mail from John Koch, Undersheriff, Wash. Cnty. Sheriff’s Off., to Or. Dep’t of

399 E-mail from Michael Krantz, Bend Police Dep’t., to Or. Dep’t of Pub. Safety

400 Memorandum from Linsay Hale, Pro. Standards Dir., Or. Dep’t of Pub. Safety
Standards and Training, to Bd. on Pub. Safety and Training, Or. Dep’t of Pub. Safety
change, along with many, many other sexual comments.\textsuperscript{401} And the sexual
comments were not even the worst of it: he also said it was okay for a
husband to hit his wife because she was his property.\textsuperscript{402}

In the face of this appalling record of misconduct, the Board
unanimously voted against punishment. Its justification? That the Board
received “extraordinary” mitigation materials (which it did not share), along
with the facts that Treat was subsequently promoted at his new employer,
and the “culture of [the police department] allowed Treat’s behavior to
persist without recourse.”\textsuperscript{403} Without any way of knowing what made the
mitigation materials so “extraordinary,” the only clear message is that
unconscionable behavior will be tolerated so long as an officer is good at
their job. And by taking no action, the Board fed into the same permissive
culture of sexual harassment it used to justify its decision.

If these states wanted to make further progress on transparency, they
could post more cases, provide more supporting documents, and give more
details on the cases that are posted.

V. Kansas
A. Withholding Information
   i. Many Cases are Not Posted

Kansas usually only posts cases that resulted in a finding of misconduct
and resulted in sanction. As such, we cannot see close calls where the
commission found no misconduct or found a violation but decided no
sanction was warranted. This deprives us of the full spectrum of the
commission’s decision-making.

How many cases is the Commission looking at but not posting? We can
make an educated guess. Kansas gives every disciplinary action a case
number. For example, the disciplinary record against Officer Raymond
Paredes is case number 2018-0271, one of the highest the author could find.
Presumably, this means there were 270 cases before him in the year 2018.
If we assume there were 271 cases per year, that would mean 1,355
published cases in five years of data. Alas, there are only 167 published
cases in this period. If the denominator is an accurate guess, only 17 percent
of cases result in discipline. Recall that in Oregon, which does publish cases
where no sanction was issued, the punishment rate was about 40 percent.
The lack of candor from Kansas makes a more accurate estimate impossible.

We do not know if these hypothetically missing Kansas cases were
investigated and failed to substantiate the evidence, the officer had
mitigating evidence that convinced the Commission not to issue a

\textsuperscript{401} Id. at 2-3.
\textsuperscript{402} Id. at 3.
\textsuperscript{403} Id. at 1.
punishment, the revocation was solely due to mental or physical disability, or the Commission dropped the case for prudential reasons.

ii. Information Is Often Sparse

While Kansas and Oregon provide more than any other state POST, that does not mean they reveal everything. The vast majority of Kansas cases were decided based on summary proceedings: 144 summary and 23 non-summary. Whatever the style, the cases are short. On average, a summary opinion is only 5.36 pages long, versus 8.95 pages for non-summary. There is nothing wrong with brevity, but there are more documents we are not privy to, referenced by the Commission but not made known to us.\textsuperscript{404}

The lack of published reasoning makes it harder to understand why and how the Commission decides borderline cases. One area where Kansas offers stronger transparency is in consent agreements. Even though consent agreements, as the name implies, are not contested, they provide a greater level of detail than a typical Summary Order of Revocation.\textsuperscript{405} If Summary Orders were expanded to look more like Consent Agreements, that would provide a better window into the Commission’s reasoning.

The Commission should also consider expanding transparency of actions that do not result in sanction. Brian Treaster is a prime example. He was an officer with the Ellinwood, Kansas Police Department whose marriage broke down.\textsuperscript{406} Starting in 2019, he engaged in an escalating stalking campaign against his wife and family, violated a restraining order to confront her work to “ask about mail she received and sexually transmitted diseases.”\textsuperscript{407} Another time, he confronted her, her new boyfriend, and their children at the grocery store, pointing at the children and making a slashing gesture across his neck.\textsuperscript{408} Later, his wife called saying she was worried Treaster was threatening to kill her and children, to which Treaster confirmed the threat, saying “That’s all I said, I’m going to

\textsuperscript{404} \textit{E.g.} \textit{In re} Terrence Brown, No. 2010-0108 (Kan. POST, June 12, 2021) at 1–2, https://www.kscpost.org/orders/2021/tbrown.pdf (noting that the state submitted exhibits without posting them, and noting a past order in the case was “incorporated by reference” but not included in the public case file).


\textsuperscript{407} \textit{Id.} at 2.

\textsuperscript{408} \textit{Id.} at 3.
f*** ‘um all,” among numerous other death threats, general and specific. He even tried to confront his wife at a domestic violence shelter.

During the investigation, it came to light that Treaster had resigned from a previous law enforcement job amid a criminal investigation in 2016. Back in 2016, the Commission took no action, but they did permanently revoke his certification for the 2019 misconduct following a jury conviction. The author could not locate any record of the Commission’s decision to take no action in 2016. If we had it, we could better assess whether the Commission missed obvious red flags with Treaster.

Matthew Tatro is a second example. In 2021, he arrested someone during a traffic stop and the suspect passively resisted. Tatro called the suspect a “dick weed” while arresting him, and when booking him, shoved the suspect, causing him to fall to the ground. While the suspect was on the ground, Tatro yanked the suspect up and placed him on a bench, hurting his back. Tatro had previously been investigated by the Commission for physical contact with law enforcement officers he was instructing at the firing range, but no action was taken. Again, the author could not locate any publicly accessible information about this past case.

And Tate Rosenbaum gives a third example. His 12-year-old son had a fight with another family member and left the house. Rosenbaum went looking for his son, and when he found him, he was “very mad,” grabbed him, and threw him into his vehicle, causing visible injury. He was charged with child abuse and battery, eventually pleading to battery. Previously, the Kansas Commission investigated Rosenbaum for excessive force and domestic violence, but closed the case without action. There is no record of that case on the public website.

Expanding access to cases could be good for police. Officers in Cleveland, Ohio, have complained that the department discipline policy had “no rhyme or reason why someone gets a certain number of days” of

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409 Id.
410 Id. at 4.
411 Id. at 5.
412 Id. at 4.
414 Id. at 2.
415 Id.
416 Id.
418 Id. at 1-2.
419 Id. at 2.
suspension. Clearly explaining why punishment is imposed helps officers understand what they need to do to avoid sanction.

B. Using Reprimands to Deal with Serious Misconduct

If the Kansas POST Commission is going to impose a punishment, it is usually a revocation of an officer’s certification. But occasionally it will impose a temporary suspension or a reprimand, which is simply professional criticism. An appropriate use of a reprimand is for minor bureaucratic transgressions, like failure to complete annual training requirements or making errors when filling out paperwork onboarding a new officer. This is appropriate: police should not lose their certification for missing a few hours of annual training.

While most reprimands or temporary suspensions look reasonable, some are used to give heavy misconduct a light punishment. Officer Victor Ivory responded to a report of a motorcyclist breaking traffic laws. When he arrived, he drove in the wrong lane and accelerated toward a motorcyclist who was standing in the turn lane. Ivory struck the motorcyclist, sending him flying into a ditch. The motorcyclist fled and Ivory chased after him with a taser, causing a second motorcyclist to yell “What the f*** is wrong with you?” The officer responded by tasing the second motorcyclist as he was driving away and then tried to grab a third motorcyclist out of his bike as he was driving by. A witness called the police about Ivory, saying he was “out of control.” The Commission suspended him for a year, but did


425 Id. at 2.

426 Id.

427 Id. at 2.

428 Id.

429 Id.
not revoke his certification or explain why it was foregoing its ordinary course of permanent revocation.\textsuperscript{430}

A yearlong suspension does have bite, but it is strange that Ivory’s conduct—which could have killed or injured multiple people who had not committed any crime—resulted in an extremely rare suspension, not a permanent revocation. Why is this less serious than stealing a tank of gas,\textsuperscript{431} or Pokémon cards,\textsuperscript{432} hiring a prostitute,\textsuperscript{433} smoking marijuana,\textsuperscript{434} playing hooky for a single day,\textsuperscript{435} lying about a journal entry,\textsuperscript{436} or lying about completing a two-hour training,\textsuperscript{437} all of which received permanent revocations? If there was substantial mitigating evidence for Ivory, the Commission did not mention it. This is a perfect example of why it would be helpful for the Commission to explain its reasoning.

Even worse, the case of Robert Dierks. Dierks was not merely a sworn officer, he was the elected County Sheriff.\textsuperscript{438} A subordinate deputy pulled over a friend of Dierks’ for drunk driving.\textsuperscript{439} The friend promptly called Dierks, who in turn tried to convince the deputy to let the friend go.\textsuperscript{440} The deputy refused, so Dierks went to the deputy’s direct supervisor to try and


\textsuperscript{439} Id. at 2.

\textsuperscript{440} Id.
get the deputy to drop the charges. 441 When these efforts also proved unsuccessful, Dierks spent months trying to stop the deputy from testifying at court proceedings. 442 Dierks was eventually criminally charged with interfering with an official proceeding—leading to him being ousted from office. 443 The Commission only reprimanded him—a punishment that is usually reserved for failing to submit complete annual training requirements. 444 This was sustained, out-and-out corruption by the head of the organization, and it got a finger-wagging. Since the Commission does not explain its reasoning, the most natural inference is that bosses get sweetheart deals, and line officers get the hammer.

Another unexplained reprimand was used for Jesse Niemeth. Niemeth responded to a domestic incident and arrested a suspect, handcuffed him, and placed him in his squad car. 445 During questioning, the suspect was uncooperative and said he would “whoop” Niemeth. 446 Niemeth verbally spared with the suspect and eventually “lost control,” approaching the suspect and strangling him for two seconds. 447 The officer self-reported his conduct, was criminally charged, acquitted at a jury trial, and reprimanded by the Commission. 448 The self-reporting and acquittal might have explained the reprimand, but the Commission does not say. It has revoked for misconduct where the prosecutor has declined the case altogether, 449 so it is unclear what the rationale is. And even considering the mitigating evidence, strangling a handcuffed suspect who was seated in a squad car is more serious than some of the misconduct that resulted in a lifetime revocation.

Perhaps the most inexplicable reprimand was for Matthew Honas. He was dispatched to deal with a 12-year-old autistic foster child who was attempting to run away. 450 A struggle ensued, and the officer shoved, elbowed, applied pressure points, carried, pulled, hog-tied, and tased the

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441 Id.
442 Id.
443 Id. at 2-3.
444 Id. at 4.
446 Id. at 2.
447 Id.
448 Id.
child, even though there were other officers present. Honas tased the child while he was seated in the back of the squad car, with his hands cuffed behind his back, ankle shackles on, and a chain connecting the ankle cuffs to the handcuffs. In other words, the child was totally helpless when tased. The unreasonableness was compounded by the fact that Honas refused assistance from other officers, did not use any de-escalation techniques, lied about the incident, threatened the child’s ability to breathe, did not wear his body camera, and threatened to hurt the child more when backup arrived. This is outrageous conduct far worse than many cases that resulted in permanent revocation, and there was not a shred of mitigating evidence in the case file, yet all Honas received was a reprimand.

The lack of explanation is particularly strange given that reasoning is explained for reinstatement cases. Officer Terrance Brown was revoked in 2012 for dishonesty. He applied for reinstatement in 2014, but did not attend the hearing and was denied. In 2020, he applied again, attended the hearing, and submitted evidence. This time, the Commission gave an extremely thorough analysis, listing out the seven factors of consideration under state law and going through them in detail. Why not provide the same level of analysis for normal revocations? Surely, depriving someone of their livelihood is a harsh enough punishment to justify a few extra pages of explanation.

C. Kansas Takes Cases that Oregon Likely Would Not

Though we do not know how many cases Kansas declines to punish or fully investigate, it is clear that it does not use the same “justiciability” standards as Oregon. That is often a good thing.

Officer James McCann conspired with his friend Brent Peitz to kidnap women for Peitz. McCann would enter a convenience store on duty and in uniform to tell a woman she was under arrest, handcuff her, place her in the back of her patrol vehicle, and leave her at Peitz’s house. Another time, Peitz called a woman and cryptically told her “go with it” while she was driving. This left her confused until she saw police lights behind her and

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451 Id.
452 Id.
453 Id. at 2-3.
455 Id.
456 Id.
457 Id. at 4-10.
459 Id.
McCann, in uniform and on duty, pulled her over and told her she was speeding.\footnote{460 Id.} McCann asked her questions about her boyfriend, handcuffed her, placed her in the backseat of his car, and took her to Peitz.\footnote{461 Id.} The case file does not explain why Peitz wanted these women abducted, but the sexual undertones are plain to see. When later investigated, he admitted these women had not committed any crimes, was charged with misdemeanor criminal restraint, got a diversion agreement, and was revoked.\footnote{462 Id.} Had he been in Oregon, might the Board have determined the diversion agreement removed all need for action?  

Kansas is willing to proceed with revocation even if an officer manages to resolve the criminal case. Eric Smith was a former Kansas officer who did not turn in his badge when he left employment in law enforcement.\footnote{463 In re Eric Smith, No. 2019-0163 (Kan. Comm’n on Peace Officers’ Standards and Training, Apr. 21, 2020) at 1, https://www.kscpost.org/orders/2020/ esmith.pdf.} This did not stop him from saying he was still in law enforcement and flashing his badge when he got pulled over for a traffic offense.\footnote{464 Id. at 2.} He was initially charged with impersonating an officer but pled it down to the underlying traffic offense.\footnote{465 Id.} Kansas went ahead with the revocation; Oregon might have let him off.

Brian Dillow rose through the ranks to become chief of police for the Humboldt Police Department.\footnote{466 In re Brian Dillow, No. 2017-0155 (Kan. Comm’n on Peace Officers’ Standards and Training, Feb. 19, 2019) at 1, https://www.kscpost.org/orders/2020/bdillow.pdf.} Once there, he falsified documents for his subordinate officers verifying they had completed mental and physical evaluations, swearing under penalty of perjury they were correct.\footnote{467 Id. at 2.} Separately, he got drunk and pushed his wife, broke chairs, punched a hole in the wall, and injured his son when the son tried to intervene.\footnote{468 Id. at 2.} Dillow was charged with domestic battery and got a diversion, but this did not stop the Commission from revoking his certification.\footnote{469 Id. at 2-3.} Indeed, Kansas regularly revoked certification for officers who committed criminal misconduct and got a diversion agreement for it,\footnote{470 See, e.g., In re Clinton Pierce, No. 2018-0268 (Kan. Comm’n on Peace Officers’ Standards and Training, Feb. 19, 2019), https://www.kscpost.org/orders/2019/cpierce.pdf; See also, e.g., In re Jason Davis, No. 2018-0205 (Kan. Comm’n on Peace Officers’ Standards and Training, June 19, 2019), https://www.kscpost.org/orders/2020/jdavis.pdf.} 23 times by the author’s count. While a diversion may be an appropriate
alternative to criminal punishment, that does not mean it is necessarily appropriate for a divertee to continue serving as a police officer.

Similarly, Kansas ensures a record of misconduct is made even in cases where they could have swept a matter under the rug. Aaron Newberry was a provisional law enforcement officer who sexually abused a prisoner in his custody. He was promptly fired before he completed his basic entry course of instruction, which meant his law enforcement certification was automatically revoked. The Commission could have left it at that, but it issued a summary order additionally revoking his certification for the specified misconduct. This has the benefit of making a public, easily searchable record of the misconduct, ensuring the reason for revocation is listed as misconduct not merely failing to complete a course of instruction, demonstrating the Commission will not tolerate abusive behavior or take the path of least resistance.

Another example is Michael Murski. He was an officer with the Kansas Racing and Gaming Commission. He submitted a false timesheet inflating the hours he worked, and stole about $300 in property from the casino he worked at. The Commission asked him to come into an interview about the investigation, and he responded by saying he relinquished his law enforcement certification, moved out of Kansas, and found other employment. At that point, the Commission probably could have gotten away with simply revoking his certification without explanation, but to its credit, it still made a public record of the misconduct, reducing the risk that Murski could apply for law enforcement credentialing in another state under the radar. Occasionally, the Commission will issue

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472 Id. at 1-2.
473 Id.
476 Id. at 2.
477 Id. at 3.
extremely vague descriptions of the crime, but the problem is not endemic and appears to be happening less since 2019.

D. Officers Get Due Process Protections Ordinary Litigants Do Not

Merely failing to cooperate with the Commission can be enough to justify revocation. Officer Michelle Koos committed simple assault while off-duty—no charges were filed but she was fired and was reportedly suicidal at the time. Koos never responded to the Commission’s inquiries, and she was terminated on the sole basis of failure to cooperate.

While failure to cooperate can be enough to revoke someone, the Commission will typically make strenuous efforts to contact a person first. For example, Officer Andrew Reid was under investigation for providing alcohol to minors. The Commission set up an interview with Reid, and when he did not show up, set up a second interview that he also did not attend. In attempting to set up the third interview, the Commission called him twelve times and sent certified mail and first-class mail with tracking, before finally proceeding without him and revoking his certification. All told, the Commission began trying to contact Reid on September 20, 2018, and kept trying until January 9, 2019.

Another example is Ronnie Butler, who was being investigated for repeatedly violating department policy by having unauthorized passengers

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483 Id. at 2.

484 Id. at 3.

485 Id. at 2-3.
in his squad car and being dishonest about it. The Commission scheduled an interview with Butler for December 4, sending both certified mail and first-class mail with tracking. Butler signed for certified mail on November 23, and the letter with tracking arrived on November 21. Yet Butler did not appear on December 4. As a courtesy, a second interview date was scheduled for December 19, again using certified mail and first class mail with tracking, and again the tracked letter was confirmed to arrive (though the certified letter was unclaimed). Butler did not appear on December 19 either. So the Commission attempted to call Butler, confirmed with his chief that the mailing address was correct, and only then went ahead with the revocation.

While it is admirable that such efforts are made to contact officers facing punishment, it should be noted this is much more generous than what many other types of Kansas litigants get. Tenants facing eviction get only three days’ warning and may be notified through a single instance of personal service, ordinary mail, posting at their home, or by the landlord giving the court notice to anyone above 12 years old at the residence. Failure to show up for jury service can result in a $100 fine per day. Failure to show up to court can mean being held in contempt. One can only hope that all judicial actors make similar efforts to contact people before administering punishment.

CONCLUSION

Police officers are entrusted with enormous power and responsibility in our society. They are expected to protect and serve the public, uphold the law, and respect the rights and dignity of all people. But who oversees the police and ensures that they meet these expectations? And who holds them accountable when they do not?

State POSTs have an important role in answering these questions. Unfortunately, they often fall short. Most states do not make any meaningful

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487 Id. at 2.
488 Id.
489 Id.
490 Id.
491 Id.
492 Id.
494 KAN. STAT. ANN. § 43-165 (1973).
effort to make disciplinary cases public. Oregon and Kansas do, and for that, they should be commended. Yet even POSTs in these states only have archives that go back a few years and often produce inconsistent decisions with opaque reasoning. Moreover, there are many cases of officers committing serious misconduct without so much as a day off the force.

But perhaps the deeper problem this Article underscores is the lack of cases. Each POST has only a few dozen published cases per year in states that have over 10,000 uniformed officers. If every case that went before each POST resulted in revocation, fewer than one percent of officers would be affected. Even if we assume most police officers are serving honorably, this system is not catching every bad actor. Local departments are still the front line for setting high standards and holding officers to them.

Still, POSTs play an important role, as they affect the entire state and have the unique power to decertify officers. It is therefore worthwhile to make sure they work effectively. To that end, a few suggestions.

First, all efforts to improve transparency should be adopted. Without it, it is impossible to assess the effectiveness of a POST. Kansas and Oregon lead the pack in this regard but still have shortcomings given that they may fail to post some cases or give bareboned opinions.

Second, more spots on POSTs should be open to non-law enforcement personnel. While having a law enforcement perspective is invaluable, so too is having an outsider’s opinion. Ideally, these boards would include not only off-the-street citizens, but also those with relevant experience, such as defense attorneys, judges, victims of crimes, and the formerly incarcerated. Hopefully, this would reduce the prevalence of head-scratching cases where serious misconduct went unpunished.

Third, states should invest in better databases to track and share misconduct. This Article documented many officers who were hired in one office or state after being fired from another, who had criminal convictions that came to light only through self-reporting, or who came to the attention of the POST only because the local department alerted them. Punishment is pointless if it remains hidden.

Fourth, POSTs should create more sentencing guidelines or do more to explain why a particular punishment was justified. This would have twin benefits. It would reduce huge disparities where similar facts result in divergent outcomes and it would give officers a clearer insight as to why they received the punishment they did.

Fifth, state governments should do more to push local departments to cooperate with POSTs and investigate and report misconduct consistently and thoroughly. It is unacceptable for local departments to refuse to turn over records to POSTs that are trying to investigate malfeasant officers.
Sixth, POSTs should be given their own investigative staff. Even if a POST was not mandated to investigate all allegations of misconduct, they should have the ability to investigate concerning cases, or cases that the local department failed to look into.

And seventh, POSTs should have a publicly available annual review of their work. This would not only provide basic statistical insights into a highly important public body, but it would force them to take a hard look at their own decisions. As this Article has documented, a hard look back is necessary.
LEVERAGING UNAUTHORIZED PRACTICE OF LAW REFORM TO ADVANCE ACCESS TO JUSTICE

By: Cayley Balser, Erin Weaver, Stacy Rupprecht Jane, Gabriela Elizondo-Craig, Tate Richardson, and Antonio Coronado

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5 Tate Lindsey Richardson, Esq., graduate of University of Arizona 2018, and University of Arizona James E. Rogers College of Law 2022. Dedicated to the friends and family we made along the way.

6 Antonio M. Coronado, Project Lead at Innovation for Justice, University of Arizona James E. Rogers College of Law and University of Utah David Eccles School of Business. They/them/elle pronouns. Antonio is an interdisciplinary educator, legal storyteller, and cross-jurisdictional advocate committed to the liberatory work of realizing community-led justice. As a classroom facilitator and abolitionist, they are dedicated to practices of dreaming, disrupting, and radical reflection.

* The authors have contributed to Innovation for Justice (“i4J”) research and design work in regulatory reform. i4J is a social justice innovation lab housed at both the University of Arizona James E. Rogers College of Law and the University of Utah David Eccles School of Business. The work of i4J would not be possible without the support of the community, including our research teams, community collaborators, and contributors.
ABSTRACT

Access to justice is a stated goal of regulatory reform efforts in Utah, Arizona, and over a dozen other jurisdictions considering change to the legal profession’s practice of law. Absent from these legal service innovations, however, are models that prioritize, and not just acknowledge, the delivery of legal services for low-income community members. As decision-makers across the country begin to reconsider and reform the practice of law, there is both risk and opportunity. The risk: regulatory reform efforts may fall short of their potential, creating new service models that entrench old legal service problems into new regulation. The opportunity: to view regulatory reform from the outset as a chance to radically re-imagine the pathways for connecting all community members who are navigating civil justice needs with critical civil justice problem-solving.

Drawing on over four years of community-driven and trauma-informed research by Innovation for Justice, this Article explores several key factors that policymakers must consider to ensure that new regulatory structures maximize their liberatory potential for communities without re-embedding existing patterns of harm, inaccessibility, and injustice. Recorded data from lived experiences highlights the importance of including four categories of stakeholders in the design of novel regulation to the practice of law: community-based organizations, consumer communities, regulatory reform decision-makers, and design hubs. This Article concludes by looking to the collective future of legal innovation. If the legal profession is to meaningfully and structurally commit to increasing access to civil legal help, as many concede it must, these efforts must include 1) free, preventative civil legal problem-solving for those who face the largest social and financial barriers to accessing the civil legal system and 2) the intentional inclusion of diverse voices, including community-based organizations and consumers, at the outset of designing and implementing regulatory reform efforts.

INTRODUCTION

Historically, only lawyers—those individuals who earn a Juris Doctor (“J.D.”) degree, pass a bar exam, and pass a character and fitness exam—have been permitted to give legal advice.\(^1\) Anyone else providing

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legal advice is at risk of violating the Unauthorized Practice of Law ("UPL") restrictions of one or more jurisdictions. In our current legal service ecosystem, the lawyers-only service model contributes to a status quo in which low-income community members receive inadequate or no legal help for 93% of their legal problems.

While definitions differ, UPL generally refers to several distinct practices: 1) lay individuals engaging in the work of a lawyer, either in or outside of the courtroom; 2) a lawyer practicing law outside of the jurisdiction in which they are licensed; and/or 3) disbarred lawyers continuing to practice law. However, multiple states are engaging in regulatory reform and thereby changing the way in which they approach the practice of law and the demarcations of who is and is not authorized to provide legal advice. Arizona and Utah, for instance, have led this charge in the regulatory reform movement. In August 2020, the Supreme Court of Utah enacted significant changes to the regulations that govern the practice of law within the state. Arizona followed suit shortly afterward. These changes create pathways for new forms of legal services by modifying UPL restrictions and non–lawyer ownership of legal services. Other states are currently considering similar regulatory reforms and now look to Arizona and Utah as case studies, models, and early adopters.

In these early days of regulatory reform to the practice of law, there is both risk and opportunity. The risk: regulatory reform efforts may fall short of their potential, creating new service models that entrench old legal service problems into new regulation. The opportunity: to view regulatory


4 Laurel A. Rigertas, The Birth of the Movement to Prohibit the Unauthorized Practice of Law, 37 Quinnipiac L. Rev. 97, 103 (2018).


reform from the outset as a chance to radically re-imagine the pathways for connecting all community members who are navigating civil justice needs with critical civil justice problem-solving.

In this Article, Innovation for Justice ("i4J") shares findings and recommendations from four years of community-led research to provide a shared language and roadmap for fellow legal innovators who share our goal of leveraging unauthorized practice of law reform efforts to advance access to justice for low-income community members. This roadmap, in turn, will ensure that new regulatory structures maximize their liberatory potential for communities without re-embedding existing patterns of harm, inaccessibility, and injustice.

I. **REGULATORY DEVELOPMENTS IN UTAH AND ARIZONA**

Regulatory reform-based innovations in Utah are currently authorized and supervised by the Office of Legal Services Innovation, which houses a “regulatory sandbox” for legal innovation.\(^8\) The regulatory sandbox permits nonlawyers and novel legal technologies to engage in the provision of legal services through authorized entities.\(^9\) A range of entities in the state have been authorized to practice law in several service models across many service categories.\(^10\) These entities are classified depending on the amount of lawyer involvement in the entity: Low, Moderate, or High lawyer involvement.

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\(^8\) *Who We Are, Off. of Legal Servs. Innovation*, https://utahinnovationoffice.org/about/staff-list/ (last visited Jan. 13, 2020) (“The Legal Services Innovation Committee is an independent advisory Committee of the Utah Supreme Court made up of volunteer lawyers and nonlawyer experts. It is tasked with recommending entities for participation in the Legal Sandbox and proposing regulatory policies. It also directs the regulatory duties of the Office of Legal Services Innovation. The Innovation Office is tasked with regulating non-traditional legal entities and services. The Innovation Office, housed at the Utah State Bar, runs the day-to-day operations of the Office including initial assessments of entity applications, data submissions, and enforcement actions.”).


\(^10\) *See Off. of Legal Servs. Innovation, Innovation Office Manual 31* (2021), https://utahinnovationoffice.org/wp-content/uploads/2021/08/IO-Manual-Published-Aug.-25-2021.pdf (explaining that “[t]here are currently 21 valid legal service category codes. 19 of the 21 service categories are permissible within the Sandbox” and that these service categories include: “Accident/Injury; Adult Care; Business; Criminal - Expungement Only; Discrimination; Domestic Violence; Education; Employment; End of Life Planning; Financial Issues; Healthcare; Housing [Rental]; Immigration; Marriage and Family; Military; Native American and Tribal Issues; Public Benefits; Real Estate; Traffic Citation.”); *Authorized Entities, Off. of Legal Servs. Innovation*, https://utahinnovationoffice.org/authorized-entities/ (last visited Aug. 8, 2023) (noting that several Sandbox entities are authorized to provide legal services in more than one service category).
involvement.\textsuperscript{11} All but one entity has been classified as a Low or Moderate Innovation, as most of the authorized entities provide services with a share of lawyer involvement.\textsuperscript{12} As of June 2023, business concerns, veteran/military benefits, and immigration related issues together account for approximately 76% of the services provided by authorized entities.\textsuperscript{13} Overall, very few of the authorized nonprofit entities provide no-cost legal assistance to low-income populations.\textsuperscript{14}

Utah has also created an exception to the authorization to practice law for Licensed Paralegal Practitioners ("LPPs"), which permits these trained individuals to assist clients in specific practice areas in which they are licensed.\textsuperscript{15} LPPs can be licensed to assist clients in certain family law matters, forcible entry and detainer, and debt collection matters as long as the debt amount at issue is not greater than that allowed to be processed in small claims court.\textsuperscript{16} While LPPs may engage in several actions on behalf of their clients, they may not appear in court for their clients.\textsuperscript{17} The state’s LPP curriculum provides for credentialing in the areas of family law, debt, and housing.\textsuperscript{18} While eleven of the state’s 26 LPPs provide assistance in family law, most do so through the law firms where they worked as paralegals.\textsuperscript{19}

Arizona has similarly established licensure options for paraprofessionals without a J.D. degree, these being Licensed Paraprofessionals ("LPs").\textsuperscript{20} There are six possible pathways to LP licensure in Arizona, two of which are most relevant here: 1) an education-based pathway and 2) an experience-based pathway.\textsuperscript{21} LPs may become

\textsuperscript{11} See Off. of Legal Servs. Innovation, supra note 10, at 5.
\textsuperscript{12} Id.
\textsuperscript{14} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, Judges and the Deregulation of the Lawyer’s Monopoly, 89 Fordham L. Rev. 1315, 1325 (2021).
\textsuperscript{19} Houlberg & Drobinske, supra note 1, at 9; see generally Steinberg et al., supra note 18 (data from University of Utah Professor Anna Carpenter and Wesleyan University Professor Alyx Mark on file with author); see also Licensed Paralegal Practitioner, supra note 15.
\textsuperscript{20} See Off. of Legal Servs. Innovation, supra note 10, at 9.
\textsuperscript{21} Id. at 57-59.
licensed to practice in four key areas of law: 1) family law, 2) limited-jurisdiction civil, 3) limited jurisdiction criminal, and 4) narrow aspects of administrative law. As of August 2023, fifty-three LP applicants have passed both the core and subject-matter state examinations and forty-six have been admitted to the state bar. Relatedly, Arizona has also authorized the creation of an Alternative Business Structures (“ABS”): “a business entity that includes nonlawyers who have an economic interest or decision-making authority in a firm . . . .” To date, the Arizona Supreme Court has authorized thirty-nine ABS entities via Administrative Order.

While the Sandbox, LPP, LP, and ABS reforms have focused on market-driven innovations, Arizona and Utah have also authorized community-based advocacy initiatives that allow trained advocates to provide limited-scope legal services in certain areas of law. Community-based advocacy initiatives permit modification of/exemption from UPL restrictions in order to allow trained individuals other than lawyers to provide legal services and legal advice. Since 2019, i4J has been involved in the design, implementation, and evaluation of four such community-based advocacy Initiatives in Utah and Arizona.

i4J’s community-based advocacy Initiatives function by “upskilling” individuals who are already in community-helping roles. For i4J, this

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22 ARIZ. CODE OF JUDICIAL ADMIN. § 7-210(F)(2)(a-d).
23 See ARIZ. ADMIN OFF. OF THE CTS. (discussing as of August 2023, forty-two LPs in Arizona have been approved in family law, seven have been approved in civil law, for have been approved in criminal law, and Data provided by Arizona Supreme Court Administrative Office of the Courts, on file with author. As of the time of publication, 42 LPs in Arizona have been approved in family law, 7 have been approved in civil law, 4 have been approved in criminal law, and none have been approved in administrative law (on file with author). As of April 2023, the Juvenile Law certification is still under development (email on file with author). Data provided by Arizona Supreme Court Administrative Office of the Courts, on file with author. As of April 2023, the Juvenile Law certification is still under development, email on file with author.
26 HOULBERG & DROBINSKE, supra note 1, at 5.
27 Id.
28 At the time of publication, i4J actively facilitates three community-based service Initiatives. These include: Licensed Legal Advocate Initiative (LLA), Medical Debt Legal Advocate Initiative (MDLA), and Housing Stability Legal Advocate Initiative (HSLA).
means that advocates who are already interfacing with community members who experience the legal problem are trained to provide limited-scope legal advice within the course of that existing interaction. Legal training and state-level certification of advocates, as facilitated by i4J, serve as added tools that advocates might use within the course of their current position at a community-based organization (“CBO”).

The following subsections overview each of i4J’s Initiatives, spanning systems, states, and subject matters.

A. Domestic Violence Legal Advocate Initiative

In June 2020, the Arizona Supreme Court authorized the Domestic Violence Legal Advocate (“DVLA,” formerly the Licensed Legal Advocate or “LLA”) Initiative, which upskills trauma-informed lay legal advocates at a domestic violence (“DV”) service provider to provide “limited-scope legal advice to domestic violence survivors.”

DVLAs are able to assist survivors by: 1) providing limited-scope legal advice on urgent legal issues present during the initial intake; 2) providing limited-scope legal advice while a DV survivor is completing legal forms; 3) providing limited-scope legal advice while a survivor is preparing for a mediation or hearing; and 4) attending court with a survivor, with a seat at the survivor’s table to quietly advise and answer questions if asked by the court.

i4J continues to evaluate the outcomes of the DVLA Initiative through evaluation and direct engagement with the host site and through periodic reports.
feedback from volunteer lawyer mentors affiliated with the Initiative. This Initiative is the first of its kind to adapt a state’s UPL rules to train advocates already embedded in the social service field to give legal advice concurrently with their delivery of social services.33

B. Medical Debt Legal Advocate Initiative

In May 2021 and August 2022, two Medical Debt Legal Advocate (“MDLA”) Initiatives were authorized to train advocates to provide legal services to individuals experiencing medical debt in Utah.34 The MDLA Initiative encompasses two separate Initiative programs: the Medical Debt Court Diversion Initiative and the Community Health Worker Medical Debt Advocate Initiative.35 These two Initiatives will empower financial coaches and community health workers, respectively, at Utah community-based organizations to give limited-scope legal advice to community members experiencing medical debt before their debt becomes a lawsuit.36 By assisting individuals in negotiating their medical debt before trial, MDLAs help increase the likelihood that individuals owe less and that extra costs associated with the debt collection court processes are avoided.

Since the MDLA Initiative’s launch, the first cohort of MDLAs have completed their training and are providing services through their respective organizations. As of Fall 2023, a second cohort of MDLAs are completing the required training and are projected to start providing services by the close of the year.37

35 INNOVATION FOR JUST., ADVANCING LEGAL EMPOWERMENT FOR UTAHNS EXPERIENCING MEDICAL DEBT (2020), https://static1.squarespace.com/static/60dcbec3e7ab3e5de9acbe/t/62d1b87458ac192336a449fl1657911412325/MDLA+Project+Brief.pdf (providing that the Medical Debt Court Diversion Initiative provides defendants with a medical debt legal advocate before a complaint is filed and the Community Health Worker Medical Debt Advocate Initiative empowers bilingual community health workers to provide upstream legal advice regarding medical debt on a variety of issues including insurance options and financial-aid applications. Community health workers will also be trained to negotiate settlements on their clients’ behalf).
36 See OFF. OF LEGAL SERVS. INNOVATION, supra note 9 at 3.
37 A third MDLA Initiative was designed to train bachelor of social work students; that Initiative is on hold; results of prototype testing flagged challenges to embedding regulatory reform initiatives in higher education that need to be resolved through further research before the Initiative can be tested in the field.
C. Housing Stability Legal Advocate Initiative
In 2023, the Housing Stability Legal Advocate (“HSLA”) Initiative was authorized state-wide in Arizona and Utah through Administrative Order\(^\text{38}\) and Standing Order,\(^\text{39}\) respectively. Parallel to the previously discussed initiatives, the HSLA Initiative will train staff and volunteers at community-based organizations who already interact with individuals experiencing housing instability to provide limited-scope legal advice on landlord-tenant issues.

The HSLA Initiative is designed to upskill advocates in the nonprofit social services sector who already interact with people experiencing housing instability to problem-solve and spot a housing instability legal issue before it goes to court.\(^\text{40}\) HSLAs will be trained to give legal advice to clients regarding their eviction cases, in addition to possible legal defenses to their case and post-judgment procedures.\(^\text{41}\)

D. Community Justice Workers in Healthcare Initiative
The Community Justice Workers (“CJWs”) in Healthcare Initiative, in collaboration with University of Utah Health, explored innovative approaches to embedding civil justice problem-solving within a healthcare setting.\(^\text{42}\) The CJW model is designed to train people who already live and work in the West Valley City community of Utah to provide limited-scope civil legal advice to West Valley patients, with the goal of improving health outcomes.\(^\text{43}\) Community justice workers could be community health workers, staff from area community-based organizations, or other


\(^{39}\) See Utah Standing Ord. No. 16 (2023).

\(^{40}\) See generally CAYLEY BALSER, RACHEL CRISLER & STACY BUTLER, INNOVATION FOR JUST., HOUSING STABILITY LEGAL ADVOCATE INITIATIVE: 2023 UPDATE (2023), https://docs.google.com/document/d/1G3QqXB8Y5nz4la_kRChxtBLJz3A_J3AodjiZ457PMvs/edit#heading=h.ch45y9gsdvvj (establishing that the HSLA Initiative enables community-based organizations who already interface with tenants at multiple different intervention points to provide free, holistic, trauma-informed, limited-scope legal advice to tenants experiencing housing instability, to supplement the various social services they already provide).

\(^{41}\) See id.

\(^{42}\) This Initiative is slightly different from other i4J regulatory reform Initiatives because it did not seek to address a predefined civil justice need but, instead, focused on collaborative opportunities to address one or more civil justice needs identified through community-based research.

\(^{43}\) See generally INNOVATION FOR JUST., EMBEDDING REGULATORY REFORM-BASED CIVIL JUSTICE PROBLEM-SOLVING IN PATIENT CARE (2023), https://docs.google.com/document/d/1H56m_msHnwXxAheVS-3Op9UCt_e9oxsx/edit?usp=sharing&ouid=110542258061871093043&rtpof=true&sd=true.
community members pursuing workforce development.\textsuperscript{44} Further development of the CJWs in Healthcare Initiative continues in the 2023-2024 academic year.\textsuperscript{45}

II. OTHER STATE-LEVEL REGULATORY REFORM EFFORTS

Regulatory reform efforts in other states can be sorted into three categories: 1) \textit{community-based advocacy initiatives} that are similar to i4J’s DVLA, MDLA, HSLA, and CJWs in Healthcare models, 2) \textit{“allied legal professional”} (“ALP”) models similar to the LP and LPP programs in Arizona and Utah,\textsuperscript{46} and 3) \textit{alternative business structure} (ABS) efforts.

The following subsections explore each of these categories of reform, with a focus on the ways that they diverge from, overlap, and mirror those of Arizona and Utah.

A. Fellow Community-Based Advocacy Initiatives

Each of i4J’s aforementioned initiatives are authorized through state supreme court Administrative Orders or the Utah Sandbox. In other jurisdictions, similar community-based advocacy initiatives have emerged, including:

- \textbf{Alaska} - The Supreme Court of the State of Alaska has adopted Bar Rule 43.5, authorizing the provision of certain legal services by nonlawyers, with lawyer supervision.\textsuperscript{47} Alaska Legal Services Corporation (ALSC) began the Community Justice Worker program in 2019, and as of 2022 these Community Justice Workers may provide limited-scope legal help with the supervision of ALSC lawyers.\textsuperscript{48}
- \textbf{Delaware} - The Delaware Supreme Court adopted Rule 57.1, permitting nonlawyer advocates to give legal advice to tenants in

\textsuperscript{44} \textit{Id.} at 15.
\textsuperscript{45} \textit{See} INNOVATION FOR JUST., COMMUNITY JUSTICE WORKERS IN PATIENT CARE: A COLLABORATION BETWEEN INNOVATION FOR JUSTICE AND UNIVERSITY OF UTAH HEALTH 5 (2023), https://docs.google.com/document/d/1CD2SuRTFV0-4NmZs12q74RBPQfR1Frwa-csHcwS26_l/edit?usp=sharing.
\textsuperscript{46} Because each state has a different term for their Allied Legal Professional, i4J is using ALP across states and programs within this article for consistency. \textit{See} HOULBERG & DROBINSKE, \textit{supra} note 1, at 4-6 (outlining the requirements and terms for Allied Legal Professionals, such as Licensed Paralegal Professionals (UT), used in each state.
eviction court. These Qualified Tenant Advocates are supervised by legal aid agencies in Delaware.49

- **New York** - In New York, the nonprofit *Upsolve* created “a free legal advice program for low-income New Yorkers facing debt collection lawsuits.”50 The state attorney general’s enforcement of UPL laws currently prohibits *Upsolve* from providing these services, and *Upsolve* has filed a complaint challenging enforcement. Despite an initial ruling in *Upsolve*’s favor, the case is currently on appeal by the state to the Second Circuit. Twenty-three “empirical scholars who study the legal profession, the provision of legal services across jurisdictions, and people’s interaction with the legal system” have issued their support for the district court’s initial decision, and they have filed an Amicus Brief with the Second Circuit containing empirical support for *Upsolve*’s program.51

**B. Other Allied Legal Professional Programs**

ALP programs in other states, similar to the LP and LPP programs in Arizona and Utah, permit modification of/exemption from UPL restrictions in order to allow individuals other than lawyers to provide legal services and legal advice. These programs are generally authorized through a jurisdiction’s bar or highest court.

- **Colorado** - The Colorado Supreme Court authorized an LLP program in March 2023.52 These LLPs will be authorized to practice in family law, providing help to clients with divorce, custody, and protection orders.53

- **Connecticut** - Connecticut is developing a proposal for a limited legal advocate program.54

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51 See Brief for Law Professors in Support of Plaintiff-Appellees and Affirmance, *Upsolve*, Inc. v. James, (2d Cir. 2023), petition for cert filed (No. 22-1345).


53 *Id.*

54 *Houlberg & Drobinske*, *supra* note 1, at 13-14.
• **Minnesota** - The Minnesota Supreme Court ordered the implementation of its LP program in September 2020; 23 LPs have been trained as of November, 2022.55

• **New Hampshire** - The New Hampshire legislature passed a bill providing for a two-year initiative program to allow for limited legal services provided by paraprofessionals; this program began in January 2023 and is limited to courts in three cities.56

• **New Mexico** - The New Mexico Supreme Court created a committee to develop recommendations for a licensed legal technician program in July 2020.57

• **New York** - New York is working to implement a program that will allow social workers to provide limited-scope legal services.58

• **North Carolina** - The Subcommittee on Regulatory Change of the North Carolina Bar has recommended that the State Bar Council pursue development and implementation of a license for “qualified nonlawyers to provide legal services.”59

• **Oregon** - The Oregon Supreme Court authorized a licensed paralegal program in July 2022.60 Licensure to provide limited services in housing and family law is set to begin in January 2024.61

• **South Carolina** - South Carolina is developing the South Carolina Certified Paralegals Program which will allow voluntarily certified paralegals to provide some legal services.62

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55 *Id.* at 10-11; see also *Roster of Approved Legal Paraprofessionals*, MINN. JUD. BRANCH, https://mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/LPPP-Roster-of-Approved-Legal-Paraprofessionals.pdf (last updated July 14, 2023) (indicating thirty-one LPs since its update in July).

56 *HOULBERG & DROBINSKE,* supra note 1, at 11; N.H. REV. STAT. ANN. § 311:1-a (2022) (authorizing paraprofessionals to provide services in courts in Manchester, Franklin, and Berlin).

57 *HOULBERG & DROBINSKE,* supra note 1, at 14.

58 *Id.* at 15.


60 *HOULBERG & DROBINSKE,* supra note 1, at 12.


• **Texas** - The Texas Supreme Court recently requested an examination and modification of existing rules in order to allow paraprofessionals to provide limited legal services.  

• **Vermont** - The Vermont Bar Association has formed a Joint Commission on the Future of Legal Services which has recommended the expansion of the role of paralegals working under the supervision of a licensed lawyer.

• **Washington** - The Washington Supreme Court adopted the Limited License Legal Technician (“LLLT”) program in 2012. Ninety-one LLLTs were trained and licensed before the program was sunset; these LLLTs may continue to provide services to the public.

• **Washington, D.C.** - Finally, the Washington, D.C. courts have established a Civil Legal Regulatory Reform Task Force to obtain input from stakeholders regarding the potential creation of a Specially Licensed Legal Professional Program.

Several states, including California, Florida, and Illinois, have opted not to pursue ALP programs at this time.

C. Alternative Business Structure Efforts

Similar to Arizona’s ABS program, a few jurisdictions are exploring regulatory reform strategies related to the nonlawyer ownership of legal services:

• **California** - California has made efforts to establish a regulatory sandbox, but those efforts are currently on hold.  

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64 *Houberg & Drobinske, supra* note 1, at 17.
65 *Id.* at 8.
66 *Id.*
68 *Houberg & Drobinske, supra* note 1, at 17-19.
69 Stephanie Francis Ward, *California bill signed into law restricts state bar sandbox proposal*, ABAJ. (Sept. 21, 2022, 1:42 PM), https://www.abajournal.com/news/article/california-bill-signed-into-law-restricts-state-bar-sandbox-proposals (stating that in California, both nonlawyer ownership of law firms and paralegals performing certain legal services were proposed by the State Bar of California, but in September of 2022 the governor “signed a bill requiring legislative approval for regulatory sandbox spending.”).
• **Connecticut** - Connecticut is contemplating ABS through the Connecticut Bar Association’s Advancing the Legal Industry through Alternative Business Models subcommittee of the State of the Legal Profession Task Force.\(^7\)

• **Florida** - Florida has a limited ABS exception. The Florida Supreme Court amended Rule 4-5.4, now allowing not-for-profit legal service providers to organize as corporations. Additionally, not-for-profit legal services providers can allow “nonlawyers to serve on their boards of directors.”\(^7\)

It is worth noting that Utah’s regulatory sandbox initially began as an ABS mechanism,\(^7\) though new applications to this framework have been halted at this time.

Absent from the aforementioned legal service innovations are service models that do more than tinker around the edges of the legal services market. The following section of this article documents the widespread need and opportunity for non-market-driven innovations in states’ regulatory reform of UPL.

### III. THE NEED FOR NON-MARKET OPPORTUNITIES IN EMERGING REGULATORY REFORM

Some of the stated goals of regulatory reform include 1) access to justice, 2) encouraging innovation, and 3) improving access to legal services/affordability of legal services.\(^7\) Here, “access to justice” refers to the ability of individuals to receive some kind of legal assistance in handling

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\(^7\) Houlberg & Drobiske, supra note 1, at 13.


Legal problems.\textsuperscript{74} Regulatory reform has the potential to meet that goal through reforming unauthorized practice of law restrictions that prevent anyone but a lawyer from providing legal assistance. With regulatory reform, states can authorize legal service providers other than lawyers and expand the number of authorized legal service providers available for those who need them.\textsuperscript{75}

As states look to Utah, Arizona, and other early adopters of regulatory reform, it is critical that those driving change position the justice needs of their community as a North Star without losing sight of the current failed state of the legal services ecosystem. Regulatory reform is being considered by courts across the U.S. because of the staggering failure of current legal service offerings to meet the needs of consumers. “BigLaw” is rising, and the People’s Lawyer is disappearing. The “PeopleLaw” sector of the legal profession has been declining since the mid-1970s; this sector shrank by nearly $7 billion between 2007 and 2012.\textsuperscript{76} In fact, nearly 70% of the legal industry in 2017 served businesses while only 25% of the industry served people.\textsuperscript{77} The inadequacy and unavailability of legal services for low-income Americans has been well-documented.\textsuperscript{78} However, the lack of legal services also affects middle-class Americans: between 40 and 60% of middle class legal needs are not being met by currently existing legal services.\textsuperscript{79}

These market-based statistics alone demonstrate that consumers cannot afford, or do not see value in purchasing, legal services. But reforming legal regulations to allow new market-driven services potentially ignores a gaping legal need among low-income Americans. Fifteen percent, or approximately 50 million Americans, live in households below 125\% of the poverty threshold.\textsuperscript{80} Seventy-four percent of low-income households have experienced at least one civil legal problem within the past year; 62\% of households experienced at least two civil legal problems; 39\% of households experienced at least five civil legal problems; and 20\% of

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\textsuperscript{75} \textit{Id.} at 74.
\textsuperscript{78} LEGAL SERVS. CORP., \textit{supra} note 3, at 31-32.
\textsuperscript{79} Kathryn Graham, \textit{Increasing Access to Legal Services for the Middle Class}, 33 GEO. J. LEGAL ETHICS 537, 537 (2020).
\textsuperscript{80} LEGAL SERVS. CORP., \textit{supra} note 3, at 22.
\end{flushleft}
households experienced at least 10 civil legal problems.\textsuperscript{81} Thirty-five percent of low-income households experienced a civil legal problem that overall “substantially impacted” their lives.\textsuperscript{82} These substantial impacts arise from a variety of problems: 54\% of low-income Americans who reported a substantial impact on their lives reported a housing legal problem, 52\% reported a family and safety problem, and 42\% reported a consumer issue problem, and 30\% reported a healthcare problem.\textsuperscript{83}

While a large percentage of low-income Americans experienced a civil legal problem within the last year, only 19\% sought legal help for these problems.\textsuperscript{84} Thirty-three percent of low-income Americans sought legal help for family and safety problems, while 22\% sought legal help for housing help, 14\% sought legal help for consumer issues, and 13\% sought legal help for health care problems.\textsuperscript{85}

The current systems in place are inadequate to provide legal aid to all of the Americans who are experiencing a legal problem.\textsuperscript{86} All licensed lawyers are encouraged to engage in pro bono work every year, though this expectation is not nearly enough to adequately address the legal needs for all Americans experiencing a civil legal need. As estimated by the Institute for the Advancement of the American Legal System, it would take 180 hours of pro bono work from each licensed lawyer to provide only one hour of legal assistance to every household experiencing a civil legal problem.\textsuperscript{87}

In the current justice-needs ecosystem, more than market-driven innovation is needed. In order to facilitate access to justice, innovation must be encouraged to improve access to legal services by including the justice needs of the low-income population in the design of regulatory reform. This includes authorizing new service models that can serve those needs through non-market-driven innovation.

\textsuperscript{81} Id. at 32.
\textsuperscript{82} Id. at 37.
\textsuperscript{83} Id. at 38.
\textsuperscript{84} Id. at 44 (reporting that 25\% sought legal help for problems that substantially impacted their lives).
\textsuperscript{85} Id. at 45.
\textsuperscript{86} See id. at 48 (stating that 92\% of low-income Americans do not get any or enough legal help for the problems that have substantially impacted their lives).
\textsuperscript{87} Zachariah DeMeola, Pro Bono Work Should Be Encouraged and Celebrated, But Much, Much More is Needed, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Oct. 18, 2019), https://iaals.du.edu/blog/pro-bono-work-should-be-encouraged-and-celebrated-much-much-more-needed; see also INNOVATION FOR JUSTICE, REPORT TO ARIZONA’S LP AND UTAH’S LPP PROGRAM TO ADVANCE HOUSING STABILITY 30 (2022), https://docs.google.com/document/d/1j-K2L1FOn6iFlkXKkS7Z89MeEumuFeGuBQj28ocTx3w/edit.
A. Positioning Legal Help Where It Is Most Wanted and Needed

The current system governing the ability to provide legal services falls short in three ways: 1) there are too few individuals trained and authorized to help; 2) the legal help comes too late in the process; and 3) the legal services are too far separated from other services that the individuals experiencing a legal issue need to adequately address the problem. As previously explained, pro bono hours will not fix the access to justice problem faced by so many Americans. While training more lawyers may seem like an option to address the problem, the number of applicants and applications to law schools has begun to dip over the past couple of admission cycles. As of the end of October 2022, the number of law school applications reported by the Law School Admission Council was down 16.2% when compared to the same time in the 2022 application cycle.\(^8^8\) This decline might suggest a decreasing interest in formal legal training, a reality that threatens the viability of any plan to “out-lawyer” the justice gap.

Furthermore, when individuals actually seek assistance for their legal problems, it can be too late to adequately address the issue before adverse consequences occur. As our years of community-led research have illustrated,\(^8^9\) the odds often weigh in favor of an individual or organization filing a lawsuit in many types of civil cases, such as medical debt collection.\(^9^0\) However, many individuals experiencing a civil legal need do not realize that they are experiencing a problem until the legal consequences begin to affect them.\(^9^1\) Ultimately, Americans are not seeking the available legal help until it is too late.

In most jurisdictions, the legal assistance available to individuals navigating a legal problem is too separate and too siloed from the other services needed to adequately address the issue. For many civil legal problems, individuals typically seek help from social services and other

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\(^8^8\) Susan Krinsky, *Early Trends in the 2023 Admission Cycle*, LSAC (Nov. 2, 2022), https://www.lsac.org/blog/early-trends-2023-admission-cycle (providing that further analysis of admission trends revealed the 2023 cycle is also down 12.8% from the 2021 application cycle).

\(^8^9\) See generally BAISEL ET AL., *supra* note 40.

\(^9^0\) See generally INNOVATION FOR JUST., DECEMBER 2020 INTERIM REPORT: LEVERAGING THE UTAH SANDBOX TO ADVANCE LEGAL EMPOWERMENT FOR UTAH COMMUNITY MEMBERS EXPERIENCING MEDICAL DEBT (2020), https://docs.google.com/presentation/d/1Zkpb_Sq-xhnTFGQ55nApml9IBoa46f1WHTg7Zp4DXo/edit#slide=id.gb29913e6ba_0_133.

organizations that are not trained or authorized to give legal advice. In order to receive all of the services needed to adequately address a civil legal problem, individuals generally must seek out several different organizations, a dynamic that puts them at risk of re-traumatization or disengagement in their journey across organizations, contacts, and systems. These negative effects might be combated through the diversification of options for the provision of legal advice. Under such a model, the individuals experiencing a civil legal problem might be able to visit fewer organizations in their journey to justice. Regulatory reform presents the opportunity to position legal aid directly where there is legal need, ensuring that communities do not have “too many doors” standing between them and the resolution of their problem.

B. The Justice Awareness Gap

It must be recognized that regulatory reform efforts continue to emerge in the context of a broader socio-economic problem—namely, that 1) individuals typically do not identify legal problems as legal in nature and that 2) low-income community members typically do not seek help from lawyers, even when aware that their problem is legal. As prior scholarship has noted, many Americans are more likely to do nothing than seek help when faced with a legal problem. One reason for this trend is that individuals typically do not realize that their problem is legal in nature. Rather, they believe that the situations they find themselves in are simply “bad luck/part of life,” “part of God’s plan,” or that their problems are “private” and should not be shared with third parties. These community members—individuals experiencing civil legal problems without recognizing that their problem is legal—can be said to be in the “justice awareness gap.” Those in this category of need will never be served by traditional legal service models that assume consumers will seek out legal assistance.

By focusing on market-driven innovation, regulatory reform efforts run the risk of failing to reach those in both the justice and “justice awareness gaps.” This, in turn, misses the opportunity to radically re-consider who can and who should receive access to legal education and help from our

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92 See BALSER ET AL., supra note 40, at 26-27.
93 See id. at 27.
94 See id.
96 Id. at 814.
97 Sandefur, supra note 91, at 725 (providing that only 9% of legal problems were described as “wholly or partially” legal in nature).
institutions. The nonprofit sector, including community-based organizations, has the potential reach and proximity to the problem to re-anchor the drive of innovation. As evidenced by recent mapping efforts in Alaska, expanding the number of pathways to civil justice problem solving has the potential to radically multiply the entry points and likelihood of consumers accessing legal services. Additionally, community-based organizations potentially interface with consumers at an earlier point in the timeline of their civil legal needs (i.e., the rent “eats first,” so community members experiencing housing instability may likely go to a food pantry before a housing lawyer). These organizations, then, work as a network of resources to offer what is referred to as “continuum-of-care,” or wrap-around services that UPL restrictions have typically siloed legal services from.

Regulatory reform strategies that permit nonlawyer ownership of legal services and modify UPL restrictions are generally believed to invite the changemaking that communities most need. This assumption includes the anticipated investment of organizations in new forms of legal services, the perceived regulatory space for novel and life-saving innovation, and the creation of new service models that leverage local economies to meet basic legal needs through technology and triaging efforts by nonlawyers. But what about the consumer who simply does not think of legal services as a solution or who will not be able to afford legal services, whether that cost is $500 or $2000?

i4J’s research explores whether that consumer—an individual in the current legal ecosystem who either does nothing, attempts self-help, or goes unserved because of the limited resources of legal aid—could be helped by non-market-driven legal service innovation. Specifically, our work seeks to build the bench of those in the nonprofit social service sector equipped to engage in preventative civil justice problem-solving.

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98 STACEY MARZ, MARA KIMMEL & MIGUEL WILLIS, ALASKA CT. SYS. ACCESS TO JUST. COMM., ALASKA’S JUSTICE ECOSYSTEM: BUILDING A PARTNERSHIP OF PROVIDERS 7-8, 28 (2017), https://drive.google.com/file/d/1LPtHFvUq4On3cAw2aKAV-c93Q?nny974/view?pli=1 (In Alaska, researchers found that if the pathway to civil justice problem-solving included legal services, social services, medical services, and information services providers, there would be approximately 1,500 possible entry points of legal aid for consumers. These increased entry points would act as a “force multiplier” that “more efficiently and appropriately connects people to the resources they need.”).
IV. 14J’S RESEARCH FOCUS: FOUR STAKEHOLDERS CENTRAL TO COMMUNITY-LED REGULATORY REFORM

Researchers have speculated that librarians, social workers, organizers, counselors, and navigators might become a new nonlawyer sector. Early adopters of the regulatory reform pathways in Arizona and Utah, however, do not support this hypothesis. One possible explanation for the limited reach of emerging innovations is that regulatory reform decision-makers have been lawyers and judges from within the legal service monopoly they are tasked with reforming. Membership of the Arizona Innovating Legal Services Task Force, for instance, included five judges and justices and thirteen individuals who are lawyers or who otherwise work within the court system. In Utah, the state’s regulatory sandbox was designed by approximately thirteen lawyers, with additional input in design and implementation from two researchers, two court administrators, and a city council member. Similarly, four of the five Board Members of the Office of Legal Services Innovation in Utah have legal training and/or experience.

To date, the outside voices of nonlawyers have not been widely included in the design and implementation of regulatory reform strategies. But “[i]nnovation requires deep knowledge[]” and unique perspectives of the problems facing communities. The judges and lawyers who have called for regulatory reform are to be commended for their willingness to embrace change, but their relation to and assets in the conversation are limited; they bring the “deep knowledge” to the table. To serve the access to justice goals of regulatory reform, the lived experiences and perspectives of those who are historically and systematically excluded from the current system need to be included for the lived knowledge and expertise they bring to this work. Regulatory reform decision-makers should be listening to the voices of nonlawyers, consumers, and community-based organizations when making


100 See Lauren Sudeall, The Overreach of Limits on “Legal Advice”, YALE L. R. F. 637, 643 (2022) (providing that protectionism has insulated the legal profession from serving the public’s legal needs).


102 Recollection of the author.

103 Who We Are, UTAH OFF. OF LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/about/staff-list/ (last visited Nov. 17, 2022).

104 GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD 223 (2016).
decisions on what reforms to make to the rules governing the provision of legal services.

To remEDIATE the siloing that occurs when evaluating and addressing the access to justice crisis, i4J research intentionally centers four key stakeholder categories in the design of new legal regulation: 1) community-based organizations, or resource hubs that are public or private nonprofits that provide services to a targeted population within the community; 2) consumers, or people experiencing one or more civil justice problem(s); 3) regulatory reform decision-makers, generally state Supreme Courts, State Bar Associations, and lawyers who are part of commissions making recommendations to both courts and bar associations; and 4) a design hub, or a research and design neutral who can gather information on legal need(s) from the first three stakeholders with the goal of synthesizing the potentially divergent goals of these three stakeholders into effective new legal service models.

These key stakeholders interface at various opportunity spaces in the system of civil justice problem-solving. Consumers are interacting with community-based organizations when they are experiencing problems and seek help. Regulatory reform decision-makers interact with both consumers and community-based organizations by making decisions about the regulation of legal services, including whether community-based organizations can provide legal advice and to what extent. The actions of decision-makers, in turn, impact both consumers and community-based organizations by dictating where and who can provide legal advice. The design hub acts as the link connecting these stakeholders. They interface with community-based organizations, consumers, and regulatory reform decision-makers in this work; they centralize data and communication between stakeholders and they work to design replicable, scalable innovative service models. The design hub brings key stakeholders together to create systems that are more equitable and informed by the multiple, different experiences of consumers and community-based organizations.

A. Community-based Organizations

Community-based organizations often engage with under-represented populations before “human problems” become “legal problems.” These organizations are well-positioned to provide upstream preventative civil legal problem-solving in permissive regulatory environments for several reasons. First, community-based organizations want to give legal advice to their clients if their employees have been trained adequately in this area. Community members already ask individuals at community-based

\[105\text{ See infra Part V(A).}\]
organizations legal questions; training is needed to ensure that clients are being given proper information. Second, community-based organizations have the capacity to give legal advice to their clients within their existing client interaction structure. In this model, legal training is seen as another skill set for their employees. Third, community-based organizations are frustrated with the siloing of services. Community members do not usually experience justice needs without other related, intersecting needs. Community-based organizations are typically unable to help clients with their justice needs. This forces clients to engage many different services to get their needs met, increasing the risk of re-traumatization and disengagement. Fourth, community-based organizations are interested in creating educational pathways and providing more services to their clients. These organizations see legal training as an important additional resource for their staff.

While community-based organizations are willing and capable of providing important legal services to the community, several barriers stand in their way. These barriers include: 1) concern about liability; 2) opposition from legal professionals; 3) potential conflict with ethical codes for some helping professions if permitted to provide concrete legal advice; and 4) the time, education requirements, and financial cost of ALP training are too high. Reducing the time and cost barriers associated with change, however, may increase participation in regulatory reform opportunities.

B. Consumers

For the purposes of this research, “consumers” particularly refers to under-represented populations that are currently only served by legal aid organizations or who qualify for and need free civil legal services in the current legal market. These consumers are woefully underserved due to lack of legal aid and pro bono assistance. Regulatory reform decision-makers often cite their concerns for consumer protection and need to prevent consumer harm in the design of new legal service models. But regulatory reform decision-makers who are judges and lawyers may bring assumptions to the table about who can safely provide legal services and the risk that consumers who are currently excluded from services entirely are willing to bear. This article seeks to question and upend these assumptions.

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106 See infra Part V(B).
107 LEGAL SERVS. CORP., supra note 3, at 48.
In i4J’s experience, consumers trust an individual who has legal training but not a formal law degree more than they trust a lawyer as their legal advocate. Consumers see finding a lawyer as a waste of time and money, and lawyers are viewed as being out of touch with the communities they serve. Second, consumers are more likely to try to solve their problems independently rather than seeking assistance from a lawyer. Third, consumers want legal advice from a social worker. In fact, when consumers are experiencing housing instability they trust social workers almost as much as they trust their friends and family when they are experiencing certain legal problems. Fourth, consumers are comfortable speaking with advocates about many justice needs. Fifth, consumers want the same person to help them throughout the problem-solving process. Such a model is not available in the current market-driven legal ecosystem. Sixth, consumers want easily-digestible information specific to their situation. Finally, consumers want upstream intervention rather than waiting until the problems become court-involved.

C. Decision-makers

Regulatory reform requires amendment to the existing rules governing the profession. For this reason, any changemaking in service of communities requires the endorsement of decision-makers with the authority to change those rules. Two separate mechanisms of change have been explored: state supreme court-driven change and state bar-driven change.Change in Utah and Arizona has been driven by the supreme courts. Other states, like California and Florida, have attempted to implement reforms through working groups that were formed by their respective state bar association. Following a deeply troubling report on the California State Bar and the representational dangers permitted by the state, the California legislature passed a new law that limited the State Bar’s ability to pursue regulatory reform efforts. This legislation also halted any further exploration of ALP licensing in California.

i4J’s early experiences in this work suggest that regulatory reform is most successful when it is championed by state judicial leadership. However, judges and lawyers who design regulatory reform structures without nonlawyer input run the risk of embedding new barriers and

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109 See infra Part V(C).
110 Engstrom et al., supra note 1, at 17-18.
111 Id. at 18.
113 Ricca & Ambrose, supra note 108.
obstacles for community-based organizations and consumers. In Utah, for example, the state’s sandbox application process was not designed for community-based organizations, making it difficult for these organizations to be authorized to provide legal services to the community. The current design of ALP programs assumes that applicants have a paralegal education and experience or have the time, money, and flexibility to complete the course work, experiential requirements, and certification exam. The current landscape of innovations primarily consists of market-driven options, the likes of which can pose problems for community-based organization participation in regulatory reform opportunities. It is important for decision-makers to include other, historically excluded perspectives in the design and implementation of innovations. This ensures that community-based stakeholders have the opportunity to provide feedback on the feasibility of eligibility, training, certification, ethics, and discipline requirements associated with regulatory reform.

D. A Design Hub

Across our work, a design hub can best be understood as an organization well-versed in design and systems thinking research methodologies that is engaged with communities as co-creators of new and innovative approaches to solving legal problems. By bridging sectors and siloes, the design hub uses an interdisciplinary approach to advance changemaking. In the present article and research, i4J played the role of design hub, but any state considering regulatory reform should consider partnering with a research and design neutral that can serve in this capacity.

Such a role would necessarily include gathering legal need information from the first three stakeholders and helping synthesize the potentially divergent goals of these stakeholders into effective new legal service models. The use of a design hub can help bridge the gap between the other three stakeholders in four ways. First, the design hub can gather information as a trusted intermediary across sectors. Second, it can synthesize information and ensure goals of varied stakeholders are accounted for. Third, the design hub can trouble-shoot the design and implementation of regulatory reform efforts. Finally, the design hub may engage law students in building new regulatory reform efforts, as future leaders of innovative efforts and members of the profession.

V. i4J’S RESEARCH AND DESIGN APPROACH

i4J’s interdisciplinary research teams conduct action-based, community-engaged research that exposes inequalities in the legal system

\[^{144}\text{See infra Part VI.}\]
and creates new, replicable strategies for legal empowerment using design and systems thinking research methodologies. i4J’s design and systems thinking framework engages in problem identification and problem-solving through a highly visual, five-part iterative design process: empathize, define, ideate, prototype, and test. This process is, then, layered with systems thinking strategies and practiced across our work.\textsuperscript{115}

i4J’s two-pronged design and systems thinking approach seeks to position community at the center of the design process as solution co-creators.\textsuperscript{116} This aim is reinforced with trauma-informed practices that are responsive to the needs of low-income populations experiencing civil justice problems.\textsuperscript{117} i4J recognizes that interactions with legal service providers and the justice system can be traumatizing and utilizes trauma-informed practices when engaging with all community members.\textsuperscript{118} i4J’s trauma-responsive work\textsuperscript{119} includes mitigating re-traumatization to the extent possible. Re-traumatization occurs when someone experiences the symptoms of the traumatic event after the event has concluded. Re-traumatization can create or worsen trauma symptoms.\textsuperscript{120} i4J’s work is guided by the understanding that “legal advocates have a duty to align our work to uplift the voices and demands of those who don’t have a seat at the table.”\textsuperscript{121} Our methodology is further rooted in the concept that it is not the

\textsuperscript{115} See BALSER ET AL., supra note 40, at 28 (containing more information about i4J’s application and design systems thinking methodologies); INNOVATION FOR JUST., supra note 43, at 41-45 (same).


\textsuperscript{118} These trauma-informed practices include, but are not limited to: recognizing that anyone can experience a traumatic event and have varying reactions to that event; minimizing the risk of re-traumatization through creating a safe environment and supporting control, choice, and autonomy; collaborating with community members throughout the entire initiative; showing organizational commitment to trauma-informed care; and discussing secondary trauma and self-care strategies with all research team members throughout the research process.

\textsuperscript{119} As used in this article, “trauma-responsive” refers to the implementation of trauma-informed practices.

\textsuperscript{120} See Balser, supra note 117 (providing more information about re-traumatization and how i4J is implementing trauma-informed practices in the classroom and within the community).

\textsuperscript{121} Allyssa Victory & Janani Ramachandran, Call to Action: The Need for Community Lawyering, ALAMEDA CNTY. BAR ASS’N (Mar. 18, 2021), https://www.acbanet.org/2021/03/18/call-to-action-the-need-for-community-lawyering/.
lawyer’s role to lead change, but rather to “assist the communities that do to reach their goals.”

Since 2019, i4J has been leveraging the unauthorized practice of law reform opportunities in Arizona and Utah to design and implement new legal service models grounded in community-based advocacy and partnerships with community-based organizations. As previously explored, these Initiatives are in various stages of implementation and evaluation.

VI. RESEARCH QUESTIONS AND FINDINGS

Over the course of four years designing, building, and testing non-market driven legal service models with and for low-income community members, i4J’s research and center of inquiry has targeted three of the key stakeholders identified above: community-based organizations, consumers, and decision-makers. These research questions, and the key findings from our research, are summarized in the subsections that follow.

A. Community-based organizations

Creating opportunity for community-based organizations to leverage unauthorized practice of law reform is only a worthwhile endeavor if they want to be a part of a new frontier of civil legal help for low-income community members. To explore the interest and needs of this stakeholder, this research focused on three research questions.

iii. Research Question 1. Are community-based organizations aware of regulatory reform opportunities?

Community-based organizations are generally not aware of regulatory reform opportunities. Most of i4J’s research in this area has focused on the awareness of ALP programs in Arizona and Utah. In the instances in which community-based organizations have heard of ALP programs, they are not familiar with the requirements or scope of authorization after certification.

At the start of each i4J regulatory reform Initiative, the research team engages with many stakeholders, including community-based organizations, which work in the system. These conversations center around explaining the project, often including education about regulatory reform vehicles and the scope of possibility

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122 Id.
124 See BALSER ET AL., supra note 40, at 42-44.
when leveraging those vehicles. This is often new information for the community-based organizations and requires further explanation.

While most of i4J’s research in this area has focused on awareness of ALP programs, most community-based organizations are also unaware of the ways they could leverage Utah's regulatory sandbox. As discussed in the regulatory reform decision-makers section of this report, the sandbox application process is confusing for community-based organizations. Additionally, i4J has often observed that community-based organizations are overburdened, under-resourced, do not have the capacity to complete the arduous sandbox application process, and struggle to keep up with the data reporting requirements.

iv. Research Question 2. Do community-based organizations want to give legal advice to their clients?

Community-based organizations see the opportunity to provide legal advice in-house as a valuable solution to the current challenges caused by the siloing of legal services. Justice needs and health needs intersect and impact each other, but are often treated in silos. Typically, consumers have to go to many different services to get their needs met, often when the event that precipitated these needs was a singular incident. This process of having to explain one’s situation to multiple providers over and over increases the risk of consumer re-traumatization. The current siloing of services requires consumers to interact with multiple providers to problem-solve, which in turn leads to consumer disengagement with the justice system. Consumers often prioritize housing, financial, and health needs over civil justice problem-solving, meaning that if they have to seek legal services somewhere beyond where they are already going for help, it often does not happen.

One interviewee for i4J’s CJWs in Healthcare Initiative expressed their frustration with the siloing of services, saying that “social service providers are all doing really incredible work, but are not legally empowered to assist clients with these needs.” Community-based organizations desire more coordination between service providers— both legal and nonlegal— to

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125 Interview with Salt Lake Cty. cmty. member (Sept. 2, 2022) (transcript on file with author).
126 See generally Negar Katirai, Retraumatized in Court, 62 ARIZ. L. REV. 81 (2020) (discussing more information about re-traumatization as a barrier to justice).
127 Interview with Salt Lake Cty. cmty. member (Sept. 10, 2022) (transcript on file with author).
128 Id.
129 Id.
streamline and meet consumer needs in a helpful and efficient way. One staff member of a community-based organization expressed frustration with unauthorized practice of law restrictions. During an interview for i4J’s Housing Stability Legal Advocate Initiative they said, “it is difficult to explain the eviction process without giving legal advice and getting into potential jeopardy.”

Community-based organizations want to give legal advice to their clients, with adequate training. The ability to give legal advice to clients that community-based organizations are already serving is a strong incentive for participation in advocate training. People are already asking community-based organizations legal questions, and staff would like training to properly advise clients. Knowledge from legal training can seamlessly fit into services that community-based organization staff are already providing to consumers. However, community-based organizations have stressed the necessity that this training be manageable and not take significant time away from their existing duties. Community-based organizations indicated that proper training would assuage their fear of providing the wrong information. They also expressed desire for any legal training to have the standard markers of credibility (e.g., an accompanying certificate, endorsement by a university or the state, etc.).

Community-based organizations have the capacity to give legal advice to their clients within their existing client interaction structure. i4J learned from community health workers in Utah that their interactions with clients are long enough to provide legal advice and that many of their clients would benefit from legal advice. They see this training and certification as a way of furthering their community health worker skills, and this certification would help them provide more complete services.

Community-based organizations are interested in creating educational pathways and providing more services to their clients. One

130 Interview with Utah cmty.-based org. staff member (Sept. 10, 2020) (transcript on file with author).
131 See BALSER ET AL., supra note 40, at 42-44.
132 See generally Id.
133 See generally id.
134 See generally id.
136 See generally INNOVATION FOR JUST., supra note 90; BALSER ET AL., supra note 40.
137 See generally INNOVATION FOR JUST., supra note 90.
138 Id.
139 Id.
community-based organization staff member in Utah said, “any way you can open doors for people is powerful. Such as educational pathways.”

When asked about limited-scope legal training for landlord-tenant issues, one staff member at a community-based organization said it “would be a great added resource for agency staff that are faced with these situations all the time who are not comfortable with providing that advice or have to refer them out to legal aid.” In Utah, university and professional organizations are exploring various educational pathways specifically for community health workers. This exploration of opportunities includes providing legal training through university courses or via continuing education requirements for certification.

v. Research Question 3. What barriers limit community-based organizations’ ability to leverage regulatory reform opportunities?

Concern about liability is a barrier to community-based organizations leveraging regulatory reform opportunities. One of the most-identified barriers to community-based organizations’ ability to leverage regulatory reform is the concern about liability. Some of the common questions that organizations have in discussions of regulatory reform include: Who would be responsible for malpractice insurance? Who would be willing to insure nonlawyers providing legal advice? What standard would advocates be held to – that of a lawyer or that of their existing role? What happens if the advocate provides the wrong information?

Community-based organizations also expressed concerns about overstepping the bounds of certification, and desire specific modules within training to explain the scope of legal services they would be authorized to provide.

Providing concrete advice is in conflict with ethical codes for some helping professions, many of whom are employed at community-based organizations. To date, similar duties and obligations as lawyers have been

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141 See INNOVATION FOR JUST., EXPANDING ARIZONA’S LP AND UTAH’S LLP PROGRAM TO ADVANCE HOUSING STABILITY 43 (2022), https://docs.google.com/document/d/1j-K2L1FOM6DFkXKks89McEumuFeGtuBQ12-8ocT5x5w/edit.

142 See generally INNOVATION FOR JUST., supra note 43.

143 Id.

144 See generally INNOVATION FOR JUST., supra note 90; BALSER ET AL., supra note 40.

145 See INNOVATION FOR JUST., supra note 140, at 48.
applied to individuals providing legal services who are not lawyers.\textsuperscript{146} However, this is not always compatible with other professions’ ethical codes. For example, the Rules\textsuperscript{147} conflict with social workers’ code of ethics in two main areas: confidentiality and giving advice.\textsuperscript{148} The Rules prohibit breaking confidentiality, with few exceptions.\textsuperscript{149} In contrast, the National Association of Social Workers (NASW) code of ethics allows for more confidentiality exceptions, and imposes more comprehensive mandatory reporting requirements on social workers.\textsuperscript{150} Further, the role of a legal service provider necessitates giving advice to achieve the desired case outcome. This conflicts with the NASW Standard for self-determination – where social workers help clients to identify and clarify goals, while allowing clients to determine their best course of action. It is generally accepted that this standard does not include providing advice about courses of action to take.\textsuperscript{151}

The conflict between ethical codes and professional rules must be reconciled before this service model is implemented, so both service provider and consumer will know the scope of services.\textsuperscript{152} As communities know best, “[a]nyone doing this type of [housing] advocacy would need to know when they have to say, ‘I don’t know’ and direct them to a lawyer.”\textsuperscript{153}

**The time, education requirements, and financial costs of ALP training and certification are too high.** Community-based organization leadership expressed concerns about having enough staff and time within work schedules to participate in training.\textsuperscript{154} ALP eligibility assumes prior traditional legal experience such as paralegal training or higher-education-based legal education. In contrast, social service providers have a range of

\textsuperscript{146} See *Innovation for Just.*, *supra* note 32 (providing an example of creating rules for advocates who are not lawyers).

\textsuperscript{147} “Rules” refers to the American Bar Association’s (A.B.A.) Model Rules of Professional Conduct (2009).

\textsuperscript{148} For a more in-depth examination of these challenges, see Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J. L. & POL’Y 131 (2001).

\textsuperscript{149} Model Rules of Pro Conduct r. 1.6 (AM. BAR ASS’N 2020) (providing that exceptions include permissive, not mandatory, exceptions).

\textsuperscript{150} NAT’L ASS’N SOC. WORKERS, CODE OF ETHICS (2021) (explaining that mandatory reporting includes suspected child and vulnerable person’s abuse).

\textsuperscript{151} Coleman, *supra* note 148, at 144 (“A social worker’s goal is not to give advice to his clients but rather to help his clients think and act for themselves.”).

\textsuperscript{152} Some possible ways to reconcile include explicitly stating what rule or code takes precedent in which situation within authorizing documents, with input from ethics experts in both law and social work.

\textsuperscript{153} BALSER ET AL., *supra* note 40, at 44. While this quote is from i4J’s research around housing instability, this sentiment has been echoed by consumers, community-based organizations, and legal professionals throughout all i4J regulatory reform Initiatives.

\textsuperscript{154} *Id.*
education experience: 21.7% have a high school diploma or equivalent, 34.7% have some college experience, 22.9% have a college degree, and 12.8% have an advanced degree.\textsuperscript{155} While many community-based organization staff interviewed in the development of i4J Initiatives had at least an associate’s degree, no community-based organization staff had substantive legal experience. The training time commitment and cost were the next greatest concerns. Community-based organization staff could not dedicate a full-semester of work while working a full-time job in the public sector. The costs of the programs were also seen as large barriers: between 25% and 27% of social service providers providing individual and family services earn an income below 200% of the federal poverty guidelines.\textsuperscript{156}

i4J’s DVLA Initiative was the first of i4J’s Initiatives to identify the barrier that time-intensive training presents to community-based organizations who wish to train advocates. i4J worked with DVLAs to balance their lives as working professionals, navigating the needs of their job while still providing enough training for them to confidently provide competent legal advice to the consumers they interact with. Creating the training online offered flexibility for advocates to participate in the Initiative, and the inclusion of an in-person meet-up allowed the advocates to ask questions and receive in-person feedback about their training.\textsuperscript{157} The DVLA Initiative’s authorization through Administrative Order allowed for more flexibility in design, in contrast to other i4J Initiatives that attempted to leverage other already-existing regulatory reform mechanisms such as ALP programs or the Utah Sandbox.

Reducing the time and cost barriers may increase community-based organization participation in regulatory reform opportunities. If cost, education, and experience requirements were reduced, a majority of community-based organizations that i4J spoke with would be interested in participation in training and enthusiastic about such a program.\textsuperscript{158} As our years of research have demonstrated, there is evidence of engagement and collaboration among community health workers, and a desire to create more education pathways for workforce development, more broadly.\textsuperscript{159} The executive director of one community-based organization told i4J: “if the training were free, both staff and volunteers would take it. Volunteers

\begin{footnotesize}
\begin{enumerate}
\item[156] Id. at 8. This statistic includes those providing food, housing, and emergency services to communities.
\item[157] INNOVATION FOR JUST., supra note 32, at 10.
\item[158] See generally BALSER ET AL., supra note 40.
\item[159] See generally INNOVATION FOR JUST., supra note 43.
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always are looking [sic] to do more help, and this would be a nice thing to offer to staff.”

B. Consumers

Embedding new forms of preventative civil-justice problem-solving within community-based organizations is only a worthwhile endeavor if consumers want to receive civil legal help from said organizations and view these organizations as trusted intermediaries. To explore the interest and needs of consumers as stakeholders, this research focused on three research questions.

i. **Research Question 1. Will people experiencing civil legal issues trust someone with legal training but not a JD as their legal advocate?**

Consumers trust someone with legal training but no JD more than they trust a lawyer as their legal advocate. Consumers think engaging with the justice system is pointless, and that “lawyers are for rich people.” Consumers view interacting with lawyers as time consuming, expensive, and intimidating. One individual who has previously experienced housing instability told i4J that finding legal help “will probably just be a waste of time and money. I know lawyers are expensive, and I wouldn’t even know where to go.” Consumers don’t think that lawyers look like or understand the community. Consumers want a safe and supportive venue for expressing their concerns and learning how to successfully navigate their justice issues. They are excited about advocates who know the systems and would be able to provide direction about resources and what to do next.

When consumers were surveyed as part of the HSLA Initiative design, 66.7% of respondents were interested in receiving legal advice from an advocate, compared to only 16.7% interested in receiving legal advice from a lawyer. This is consistent with other responses across i4J service model design efforts, including MDLA and CJWs in Healthcare Initiatives. Consumers already ask community-based organizations legal questions,

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160 BALSER ET AL., supra note 40, at 43.
161 Interview with Salt Lake Cty. cmtv. member (Sept. 6, 2022) (transcript on file with author).
162 See INNOVATION FOR JUST., supra note 140, at 55.
163 BALSER ET AL., supra note 40, at 33.
164 See generally INNOVATION FOR JUST., supra note 43.
165 See generally BALSER ET AL., supra note 40.
166 Id.
167 See generally INNOVATION FOR JUST., supra note 35; INNOVATION FOR JUST., supra note 43; INNOVATION FOR JUST., supra note 135.
indicating that consumers are comfortable with these services and would like them to also help with legal problems. When experiencing housing instability, consumers trust social workers almost as much as they trust friends and family when they are experiencing a problem, followed by places of worship next, and lawyers last.\textsuperscript{168}

**Consumers are more likely to try to solve problems on their own than seek help from a lawyer.** In both CJWs in Healthcare and HSLA Initiative design, consumers reported preferring to solve problems on their own instead of seeking help from a lawyer. One consumer who participated in an HSLA Initiative interview said, “I like to solve these issues by myself. Because, you know, you seek legal help. That's like more money, you know, you're spending more money for someone to help you.”\textsuperscript{169} Similarly, when asked how likely they were to seek help from various people, surveyed Utah consumers said they were more likely to try to handle the problem themselves instead of contacting a lawyer.

**Consumers are comfortable speaking with advocates about a wide range of justice needs.** When surveyed, 69 Utah consumers were asked whether they would be comfortable speaking with a CJW\textsuperscript{170} about specific justice needs. These consumers indicated that they were most comfortable speaking with a CJW about housing issues. Disability insurance was the second-highest need that Utah consumers reported being comfortable speaking to a CJW about. Consumers indicated that they were less comfortable seeking help from a CJW for issues of health insurance and custody, separation, or divorce issues. Finally, these Utahns stated that they were least comfortable approaching a CJW for help with financial issues, including debt, and domestic violence.\textsuperscript{171}

**Early evaluations of the DVLA Initiative indicate that consumers trust DVLAs and find them to be helpful.** While the evaluation is still ongoing, data from exit surveys in the DVLA Initiative indicate that the majority of consumers who interact with a DVLA report positive, helpful interactions. One consumer said that she felt like the DVLA she worked with “was very detailed, knowledgeable, and kind”\textsuperscript{172} and that the DVLA

\textsuperscript{168} See generally BALSER ET AL., supra note 40.
\textsuperscript{169} Id. at 33.
\textsuperscript{170} A Community Justice Worker, in this prototype, is someone in the community who is not a lawyer but has been trained to provide legal advice and problem-solving help on specific issues. To learn more about this proposed service model, see INNOVATION FOR JUST., supra note 43.
\textsuperscript{171} See id. These responses were a result of an online survey, where participants were not speaking with a person and minimal context was provided about the relationship between the participant and the prototype service provider. Further research about the impact of familiarity and relationship on comfortability is recommended.
\textsuperscript{172} See INNOVATION FOR JUST., supra note 135, at 6.
“was incredibly understanding about the situation.” Another respondent said that the DVLA “was pleasant and very knowledgeable. She stressed important points to remember and that helped a lot.” One consumer emphasized that the DVLA’s patience and kindness “helped a lot.” Additionally, consumers reported that “the support at any given time was much appreciated” and that the DVLAs were “helpful” and “amazing.”

ii. Research Question 2. What will effectively nudge consumers to engage with advocates who have legal training but not a JD?

Consumers want the same person to help them throughout the problem-solving process. Consumers want help at the first sign of a problem and feel that continuity of service is critical. When asked to rank what is most important to them when seeking help, every respondent experiencing housing instability selected “working with the same person until the problem is solved (not having to work with multiple people).” They want a person who is there to help them “throughout the entire process” so that things don’t get lost between steps. This continuity would also increase and align with trauma-informed practices, because it would reduce the number of times a consumer has to risk re-traumatization by explaining their situation to siloed service providers. When it isn’t possible for the same person to help throughout the process, warm handoffs between providers are more desirable than providing resources that the consumer must contact themselves. Consumers also prioritize speaking to a real person, as opposed to using technology, when problem-solving their justice issue.

Consumers want assurances that their advocate is properly trained and certified. Consumers want to know that the person providing services completed the requisite training for certification and is providing

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173 Id.
174 Id.
175 Id.
176 See INNOVATION FOR JUST., supra note 140, at 59.
177 Id.
178 Id.
179 BALSER ET AL., supra note 40, at 40.
180 See id.
181 See generally INNOVATION FOR JUST., supra note 35; INNOVATION FOR JUST., supra note 43; Katirai, supra note 126.
182 See generally INNOVATION FOR JUST., supra note 43.
183 See generally INNOVATION FOR JUST., supra note 40.
information and advice that the consumer can trust and rely on.\textsuperscript{184} When asked about what advocate qualifications are important, Utah consumers ranked “hours of experience” as most important, followed by references from certified experts. Third was recommendations from someone they know, fourth was number of outside certifications, and least important was training at a recognized university.\textsuperscript{185} Consumers want to know that their advocate knows the extent of their training and accompanying limitations—they expect a referral when services are outside the scope of what the advocate is authorized to provide.\textsuperscript{186}

**Representation is very important to consumers when seeking legal services.** Consumers want to seek services from legal advocates who look like the consumers to whom they are providing services; they prefer individuals who understand their experiences and are trusted members of their community.\textsuperscript{187} On a scale of 1-5 (with “5” indicating high levels of agreement and “1” indicating high disagreement), the average response of 20 survey participants was 4.5, that the provider speaks the same language as the consumer.\textsuperscript{188} This is especially important in diverse areas. For example, shared language between consumer and service provider emerged across three distinct rounds of community engagement in i4J’s CJWs in Healthcare Initiative in West Valley City, Utah. In a city where over 100 languages are spoken and that is home to a vibrant, diverse community who experience many civil justice needs, this finding cannot be overstated.\textsuperscript{189}

\textbf{iii. Research Question 3. What types of legal advocate services are most important to people experiencing civil justice issues?}

Regardless of scope of service, trauma-informed care should be the standard when providing services. Generally, people who are experiencing a civil justice need are dealing with some of the worst moments of their lives. Further, interacting with the civil justice system can be a trauma experience, regardless of what is going on in the consumer’s life outside of court involvement. One individual who had previously experienced housing instability shared: “the psychological impact of being

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\textsuperscript{184} See generally id.; INNOVATION FOR JUST., supra note 35.

\textsuperscript{185} See generally INNOVATION FOR JUST., supra note 43.

\textsuperscript{186} See id. This is also important to community-based organization staff who may become advocates as well as the current bench and bar including regulatory reform decision makers.

\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} Civil justice needs data on file with the author; see generally BALSER ET AL., supra note 40; see also Health + Innovation + Impact, UNIV. OF UTAH: W. VALLEY, https://westvalley.utah.edu/ (last visited Jan. 13, 2023).
\end{flushleft}
in survival mode still has effects to this day.”\footnote{190} In a different interview, a community-based organization staff member explained the importance of consistency when interacting with someone experiencing housing instability: “we need to be alongside the person because they are traumatized and they can’t really do it alone, so you need to be with them going through this.”\footnote{191}

To date, all i4J regulatory reform Initiatives have incorporated a trauma-informed practice module. This seems to be the exception, rather than the rule, when innovative service models are proposed and authorized. Out of all states that have active and proposed ALP programs, only California required that every ALP complete additional trauma-informed practice training.\footnote{192} However, it must be noted that California is no longer moving forward with their paraprofessional program.\footnote{193} Minnesota, meanwhile, requires trauma-informed training for ALPs working on child and domestic abuse cases.\footnote{194}

Consumers want upstream intervention, before problems become court-involved. Consumers experiencing housing instability want help at the first sign of a problem, as soon as they think they might miss a rent payment.\footnote{195} People experiencing medical debt want the opportunity to speak with an advocate as soon as they receive a medical bill, especially if they know they will not be able to pay it in full.\footnote{196} Even when a specific justice need is not identified, consumers still want upstream intervention. Out of 69 surveyed Utah consumers, 30 indicated that they would like problem-solving help with a legal issue when the problem begins interfering with their daily life.\footnote{197} Participants felt that this timing “seem[ed] to be the most appropriate use of resources,”\footnote{198} that this “is when [they] would be the most stressed out and need help,”\footnote{199} and that they “wouldn’t want to bother [anyone] unless it interfere[d] with [their] life.”\footnote{200} Additionally, consumers identified this timing as the point at which the problem “is no longer ignorable”\footnote{201} and “it would become more difficult to manage”\footnote{202} and they
“would need more help.” 203 24 out of 69 surveyed Utah consumers indicated it would be most helpful to be contacted even further upstream, when they think it might become a problem. 204 Participants felt that this timing “would give … the most control over the situation,” 205 would be “before things get out of hand,” 206 would “prevent the worst from happening,” 207 and that it would be “best to receive help before it becomes a bigger problem.” 208 Further, consumers told the research team that it’s “better to solve the problem early on” 209 and problem-solve whether “what was becoming a stress factor was a real issue.” 210

Consumers have different priorities for what types of legal advocate services are most important depending on the legal issue.

DVLA scope: DVLAs are authorized to assist domestic violence (DV) survivors by giving legal advice on urgent legal needs during initial intake, giving legal advice during completion of forms, giving legal advice about case preparation, and having a quiet seat at the table when consumers go to court hearings. Consumers, family law judges, law professors, and practitioners provided feedback on the DVLA scope of service. Findings from those feedback interviews included that “[DVLAs] should identify both legal and emotional issues and the type of help that [consumers] need to navigate the legal process.” 211 It was suggested that DVLAs should have a seat at the table during hearings “because as someone who would prepare the [consumers] for the hearings, they would be well-equipped to assist them during the hearings.” 212 The DVLA Initiative was “designed to fill the specific legal knowledge gaps of DV lay legal advocates.” 213 This training was designed to supplement the real-world experience that the lay advocates already have, not to provide them with a JD-level of comprehensive legal training. 214

MDLA scope: The MDLA Initiatives have varying intervention points to meet the needs and desires of a wide range of consumers and other stakeholders. Consumers expressed a desire for CHWs to do all negotiations with healthcare providers, but want to take a more active role and

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203 Id.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id.
211 INNOVATION FOR JUST., supra note 32, at 6.
212 Id.
213 Id. at 9.
214 Id.
collaborate with their advocate during negotiations with creditors. The court diversion Initiative is focused on intervention further downstream from CHW intervention, but still seeks to problem-solve before the complaint is filed. At this stage in the medical debt journey, consumers want help from an advocate navigating the system, filing documents, preparing for court, and finding and accessing other legal resources. Accordingly, MDLAs scope of service can include assisting with insurance coverage, Medicaid, billing, negotiating payment plans, financial assistance programs and debt management, fees, court procedure, settlement, garnishment, and bankruptcy options. However, the MDLA curriculum is modular, allowing the community-based organizations participating in the MDLA Initiative to customize their advocates’ learning for offering either upstream or court-adjacent legal help.

**HSLA scope:** Consumers experiencing housing instability want to work with an advocate when it comes to completing legal paperwork, negotiating with landlords, and planning next steps for problem-solving their housing situation. Consumers are more confident in an advocate's ability to prepare legal paperwork for them than they are in their own ability to prepare legal paperwork.

Given what i4J learned from consumers when designing the HSLA Initiative, the proposed scope of the Initiative has five parts: first, community-based organizations issue-spot for housing instability at intake and know the scope and limits of their authorization as a legal advocate. Issue spotting at intake is often before consumers recognize that their housing problem is also a legal problem, and allows for consumer-desired upstream intervention. Second, HSLAs will help tenants problem-solve before a housing issue goes to court. This continues the issue-spotting process, and adds providing legal advice and negotiating with landlords on behalf of tenants. Third, HSLAs give legal advice to tenants about engaging with the civil legal system. HSLAs will be positioned to advise consumers who have received an eviction notice about the process and timeline, completion of forms, and the potential value of interacting with the civil legal system during the eviction case. Fourth, HSLAs will be trained to identify viable defenses and assist tenants in asserting those defenses. Last, HSLAs would be able to assist tenants after eviction. This includes identifying any potential appeals, navigating any debt collection actions that result from the eviction suit, and aiding in finding housing.

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215 See generally INNOVATION FOR JUST., supra note 35.

216 See BALSER ET AL., supra note 40, at 49-52.

217 Id. at 50.

218 Id. at 49-50 (explaining that in some states, like Utah, the debt collection case is a continuation of the eviction case, where most consumers do not know that they have to
C. Regulatory Reform Decision-Makers

Successful regulatory reform efforts in Arizona and Utah were launched by the Supreme Courts of each respective state. By contrast, failed efforts to stand up regulatory reform in California through the State Bar seem to suggest that regulatory reform is likely going to be most successful when it is designed and implemented by state court leaders. For this stakeholder, the goal of increasing access to affordable legal services must be balanced against the responsibility of consumer protection. Regulatory reform decision-makers are charged with ensuring that the people and technologies that provide legal help in a new legal services frontier are properly trained, that consumers are not harmed by these new forms of legal services, and that regulatory oversight is in place to monitor for consumer harm. Recent scholarship sets out a useful framework for these regulatory considerations. In addition to the above-mentioned components of regulatory structure, i4J’s research focused on three research questions.

i. Research Question 1. Are regulatory reform decision-makers considering non-market-driven innovation in the design and implementation of regulatory reform?

i4J’s early experiences in Arizona and Utah suggests that regulatory reform decision-makers are not considering non-market-driven innovation when designing and implementing regulatory reform, but that they are open to changing that. ALP programs and the Utah sandbox present barriers and challenges specifically for community-based organizations trying to leverage the mechanisms for non-market-driven services.

The Utah sandbox application process was not designed for community-based organizations. As i4J has recorded across our advocacy Initiatives, Utah’s sandbox application process is confusing for community-based organizations who are seeking authorization in five key areas. First, the required disclosure language for entities that are not law firms is geared update their address with the court after they leave their housing, and therefore do not receive important court communications about the debt collection action).


220 These areas were identified through i4J’s work assisting community-based organizations in drafting Sandbox applications for the Medical Debt Legal Advocate Initiative. These applications were prepared between January and April 2021, when the September 20, 2020 and March 22, 2021 versions of the Sandbox manual were available. The Sandbox is actively engaged in ongoing iteration and improvement of its processes and forms.
towards a for-profit model. The references to “ownership” and “company” in the required disclosure to consumers is confusing because community-based organizations often have several funding sources and typically do not consider themselves to be “owned.”

Second, the use of the words “business,” “corporate,” and “company” in the sandbox application’s Confirmation of Eligibility section is confusing for community-based organization applicants because they do not have business motives, but want to answer the questions fully and accurately. Community-based organizations generally do not have traditional business structures or relationships and have expressed concern about the time it could take to list all donors, grant funding, or government funding sources. There is confusion about whether company or business relationships are encompassed in the structure of a 501(c)(3) nonprofit, and anxiety about whether questions were answered correctly based on the community-based organization’s interpretation of “business,” “corporate,” and “company.”

Third, the risk category for sandbox projects is currently determined by the level of lawyer involvement. However, the distinction between nonlawyers with lawyer involvement and nonlawyers without lawyer involvement is unclear because the relevant language describing “involvement,” while encouraging innovation by being open-ended, is largely focused on software and technology-based regulatory reform projects – not community based involvement. Because lawyer involvement reduces the risk categorization and has corresponding differences in reporting requirements, resolving this uncertainty early is important for community-based organizations considering the sandbox. Organizations who seek to make an informed decision about the resources they will need to commit to a sandbox proposal will greatly benefit from this regulatory clarification.

Fourth, understanding Utah’s sandbox reporting requirements is important for community-based organization applicants, who often have existing case management systems and are concerned that employees will be burdened with having to duplicate work. Community-based organizations who are considering entering Utah’s sandbox face challenges including limited funding, personnel, and time vis-a-vis the community’s need for services/existing caseloads. While they recognize that leveraging the sandbox’s opportunity for new legal service models has great potential to benefit the communities they serve, interested community-based organization applicants are concerned about ensuring they understand the reporting obligations should the service model they propose be authorized. They want to be able to streamline data entry so that the employees who are working directly with the consumers can meet the organization’s existing case management requirements and the sandbox’s reporting requirements
in one submission at the end of each session. They also seek processes that allow them to pull sandbox-required data from their systems in just one click for stipulated monthly submissions. Organization’s concerns about the difference between with- and without-lawyer involvement heightened their concerns about how much data reporting might burden their staff because of the differences in risk categorization.

Fifth, the required risk assessment category that a consumer might “purchase an unnecessary or inappropriate legal service” is also confusing for community-based organization applicants who do not propose to charge for their legal advice or services. Community-based organizations that serve low-, middle-income, and minority communities may have concerns about charging consumers even marginal fees for their legal services. Instead, they can offer free legal services and fund their personnel and operations costs through grant or donor funding. By doing so, organizations then would be positioned to emphasize the low- to no-cost nature of providing said services to communities when assessing the risk that a proposed service model may pose to their target population.

The design of ALP programs assumes that the applicant has a paralegal education and legal experiential background, or has the time, financial means, and work flexibility to complete the course work, experiential requirements, and a certification exam. As mentioned above, the education and experience requirements for ALP programs are too arduous for most staff at community-based organizations to undertake.221 Additionally, ALP programs are inherently a market-driven approach. They exist to create a group of legal professionals who are a step above paralegals and will charge for services, but at a lower rate than fully licensed lawyers. An often-cited reason for the steep education and experience requirements of ALP programs is consumer protection. However, there is a glaring absence of empirical evidence in the literature and fieldwork demonstrating that more education and experience mitigates consumer harm.222

Courts are generally receptive to changes that make space for non-market-driven innovation. In both Arizona and Utah, the Supreme Courts have been willing to collaborate with i4J to make space for authorizing non-

221 See HOULBERG & DROBINSKE, supra note 1, at 7-19 (providing a comprehensive list of existing and contemplated ALP programs around the country).
222 See KYLE SWEETLAND & DICK M. CARPENTER III, INST. FOR JUST., RAISING BARRIERS, NOT QUALITY: OCCUPATIONAL LICENSING FAILS TO IMPROVE SERVICES 2-3 (2022), https://ij.org/wp-content/uploads/2022/10/Raising-Barriers-Not-Quality-10142022-WEB-REVISED.pdf (indicating that occupational licensing is more likely to increase barriers instead of increasing the quality of service provided).
market-driven service models. The Arizona Supreme Court has authorized the DVLA Initiative through administrative order, and is working with i4J on an expansion cohort. Similarly, i4J’s HSLA Initiative was authorized in Arizona also through administrative order. Throughout the creation of the MDLA Initiative, i4J worked with Utah sandbox leadership to support community-based organizations through the application process. While challenges were identified, sandbox leadership has continued to work with i4J seeking feedback on usability and ways to mitigate those challenges. Sandbox leadership wants to see more community-based organizations enter the sandbox and are working towards lowering the barriers for entry to make that happen.

The HSLA initiative was initially designed as an expansion of ALP programs in both Arizona and Utah. Ultimately, it was decided in both states that rewriting the rules to accommodate lessening the educational and experiential burdens for ALPs was too steep. However, both states acknowledged that barriers exist to ALP certification, and they are committed to seeing the initiative succeed through other regulatory reform mechanisms.

**ii. Research Question 2. What practical limitations do regulatory reform decision-makers face in designing and implementing regulatory reform to include non-market-driven innovation?**

When regulatory reform decision-makers are judges and lawyers, they bring assumptions about who can safely provide civil legal services. Because of the long tradition of legal service monopolies with only lawyers authorized to provide legal advice, decision-makers have used lawyers as the baseline for evaluating the potential consumer harm associated with new service models. However, this is not an accurate baseline for two reasons. First, there is no empirical evidence of lawyers

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223 Alaska Ord. No. 1994 (2022) (stating that in addition to Arizona and Utah, Alaska has recently authorized a UPL waiver for nonlawyer advocates supervised by Alaska Legal Services Corporation).

224 Utah Standing Order No. 16 (effective Mar. 9, 2023); Ariz. Admin. Order 2023-19 (Jan. 18, 2023).

225 As of October 2022, The Office of Legal Services Innovation is creating focus groups to solicit feedback about the application process in an effort to make it more user-friendly, less cumbersome, and increase engagement with community-based organizations and other nonlawyer service models.

226 HSLA is poised to proceed through the Sandbox in Utah, and through Administrative Order in Arizona.

227 See ENGSTROM ET AL., supra note 1, at 10-18 (discussing entity-based and individual-based regulation).
and consumer harm.\textsuperscript{228} The recourse that consumers have for subpar legal services is to file a complaint with the state bar association in a lawyer’s respective jurisdiction or to bring a malpractice suit. Both of those options presume that the consumer knows how to contact the state bar or has the expendable capital to pursue court action against the lawyer. Second, lawyers are not the right baseline for comparative evaluation of new service models for the low-income community, as the current status quo for low-income consumers is self-representation, not lawyers. In a regulatory reform landscape, low-income consumers are not choosing between a lawyer and an advocate – they are choosing between navigating the system with an advocate or alone.\textsuperscript{229} Comparing advocate outcomes to lawyer outcomes is not indicative of the reality for low-income consumers, and should not be the measuring standard.

**Regulatory reform decision makers must consider consumer harm and are not currently including the consumer perspective.** Recognition of low-income civil justice needs has largely been anecdotal during policy creation. Outside, nonlawyer voices are generally not included in the process until the public comment period, and few members of the public engage in the process.\textsuperscript{230} Commissions and task forces created by state courts to make recommendations about regulatory reform are generally made up of lawyers, with minimal involvement from nonlegal professions, and rarely including consumer perspectives.\textsuperscript{231} In addition, consumer risk must be balanced against the reality of the unmet civil legal needs in the

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\item \textsuperscript{228} Rebecca Haw Allensworth, *The hypocrisy of lawyer licensing: Are we using the profession’s bad apples to bridge the access-to-justice gap?*, STAN. L. SCH. (May 12, 2023) (noting that the draft was prepared for the “New Voices in Access to Justice” conference) (on file with author).
\item \textsuperscript{229} See LEGAL SERVS. CORP., *supra* note 3, at 48 (stating that 92% of low-income Americans receive inadequate or no civil legal assistance).
\item \textsuperscript{230} Data provided by the Office of Professional Competence, State Bar of California, indicates that during California’s public comment period, comments were received from 760 lawyers (73% of whom opposed regulatory reform) and 32 members of the public. See Memorandum to ATILS Task Force on Staff Summary of Outreach and Public Input (Oct. 2, 2019) (on file with author). The Arizona Supreme Court involved the public when implementing their LP program through an open comment period. However, they did not specifically seek feedback from community-based organizations or consumers about capacity and desire.
\end{itemize}
Asking consumers the level of harm that they are willing to risk would be beneficial when making decisions about threshold level of risk acceptability.

Regulatory reform decision makers are navigating uncharted waters with limited court resources for design and implementation. Courts leading the way in adopting regulatory reform are creating pathways to new service models that will require evaluation and iteration. However, advancing these new regulatory reform efforts must be balanced with the many other demands on the courts’ time and staff capacity. Creating ABS, ALP, and/or sandbox structures also requires staffing and funding to administer these new programs. Moreover, those who serve on task forces and committees charged with developing these new programs are volunteering their time on the task force or committee and balancing that with other work commitments.

iii. Research Question 3. What tools and strategies can assist regulatory reform decision-makers in diversifying perspectives in the design and implementation of regulatory reform to allow for non-market-driven innovation?

Include community-based organizations in design and implementation so they can provide feedback on the feasibility of eligibility, training, certification, ethics, and discipline requirements associated with regulatory reform. Regulatory reform building blocks for nonlawyer service providers include eligibility, training (including continuing legal education), certification, ethics and discipline. Giving community-based organizations and consumers a seat at the table during design and implementation helps ensure that these building blocks are equitable and inclusive.

Eligibility: Community-based organizations can inform decisions about what level of education and experience community-based advocates can realistically bring to the work of justice-making. This creates an opportunity space for courts to realistically, instead of arbitrarily, supplement the existing real-world experience that community-based organization staff already possess.

Training and Continuing Legal Education: Community-based organizations can inform decisions about what level of training they have capacity for. Additionally, they are able to provide information about what they have already learned through work experience. Consumers can weigh in on the types of services they really want and need to help limit the scope

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232 See generally LEGAL SERVS. CORP., supra note 3, at 7-10 (discussing the unmet civil legal needs in the United States).
of community-based organization advocate services. Years of i4J research have shown that community-based organizations are interested in Continuing Education (CE) opportunities. DVLAs have asked to be included in bar association Continuing Legal Education (CLE) and CE activities and the continued mentoring of lawyers. Prototype test data from MDLA and HSLA Initiatives are consistent, with participants reporting increased comfortability with providing limited-scope legal services when there are opportunities for further training and updates after initial certification.233

Certification: Building the certification process to include non-market-driven models out of the gate can save time and re-design energy later. In i4J’s research in Arizona and Utah, establishing community-based advocacy models has required problem-solving to retro-fit the existing regulatory reform processes, codes, rules, and forms to make them accessible for nonprofit services. This work could be avoided in future regulatory reform jurisdictions by including consumers and community-based organizations at the outset.

Ethics and Discipline: Lawyer ethical rules assume fee for service. The administrative orders authorizing i4J’s DVLA and HSLA Initiatives include a code of conduct that is adapted to fit nonprofit legal services. This was done by redlining each line of the existing code to fit the proposed service models. Additionally, ethical rules applied to lawyers assume that they are only acting as a lawyer and do not have another ethical code by which they must abide. When designing training and certification for community-based advocates, special attention must be paid to potential ethical conflicts based on the advocate’s existing role in the community.234 Thoughtful, critical consideration and problem-solving of these ethical code conflicts prior to authorization may increase community-based organization staff interest in leveraging regulatory reform opportunities.

VII. THE ROLE OF THE DESIGN HUB

This research was initially designed to better understand the needs and capacities of the three aforementioned stakeholders, but additional findings emerged over the course of this work regarding the value that a design hub can bring to systems-level changemaking. While i4J is an example of a design hub housed in a university setting, any entity that is not involved in the direct provision of legal services or the regulation of the legal profession could serve as a capacity-building design hub.

233 See generally INNOVATION FOR JUST., supra note 35; BALSER ET AL., supra note 40.
234 While many exist, one example of this is the conflict between the Model Rules and the National Association of Social Workers Code of Ethics.
The design hub has three main functions. First, the design hub engages in information gathering as a trusted intermediary. To do this successfully, leaders in the design hub must first build trust within the community. This begins through thoughtful engagement of existing leaders in the community who are subject matter experts and serve the target population. The design hub’s role is to help bring diverse perspectives together, not to assert its agenda onto a community. Second, the design hub synthesizes the information gathered from diverse perspectives into a comprehensible narrative. Where old problem-solving methods are limited by information existing in silos, the design hub is positioned to make new connections and reimagine the system by identifying the forces that are inhibiting or promoting the outcomes in question. Third, the design hub trouble-shoots the design and implementation of regulatory reform efforts as they play out in the real world. Beyond these functions, the design hub helps to build the bench of future regulatory reform thought-leaders, innovators who will be embedded in various positions and capacities in the field with subject matter expertise on regulatory reform.

CONCLUSION

When states consider adopting regulatory reform, they should be guided by actionable data and community-engaged research in order to invest in the most promising and impactful UPL experiments. If those experiments are successful, it increases the likelihood that other states will consider regulatory change as an effective tool in deepening the reach of access to justice efforts. As a field, the threshold issue of clarifying the goals of regulatory reform must be addressed first. If the primary aim is to increase access to civil legal help, does that include free, preventative civil legal problem-solving for those who face the largest social and financial barriers to accessing the civil legal system? Assuming that is true, it is crucial to include diverse voices, including community-based organizations and consumers, at the outset of designing and implementing regulatory reform efforts.

235 By gathering feedback from community-based organizations and presenting that feedback to decision-makers, the design hub can serve to further the access to justice goals of regulatory reform by decreasing barriers to entry for community-based organizations. Where regulatory reform is based on administrative provisions, the design hub can play a role in reviewing and redlining those provisions to help decision-makers iterate and improve in ways that allow community-based organizations to more easily integrate into these new opportunities.

236 This is most easily done in University settings, where students from the legal and adjacent disciplines are first forming their perspectives on the role of lawyers and legal professionals.
Creating permissive regulatory environments which relax UPL restrictions to allow for roles beyond lawyers will not, in-and-of-itself, expand legal services for low-income consumers. Intention must precede innovation. Community-based organizations see the value in empowering their clients with legal help and legal advice, but they feel powerless to provide that help not only because UPL prevents them from doing so, but also because they have no legal training. States considering regulatory reform should prioritize partnerships with legal educators and re-think who has access to legal education with the goal of democratizing that access. It’s law school, not lawyer school, after all.

Thoughtfully and intentionally engaging diverse perspectives improves the process for both those seeking to participate in regulatory reform opportunities and the consumer communities that regulatory reform seeks to serve. While states and regulatory reform decision-makers may not have the capacity to take these steps directly, a design hub can serve as a neutral capacity-building intermediary guided by these goals. Legal designers can help build the bench of future professionals by training law students, communities, and allied professionals in taking a leading role in changing the tide of the provision of legal services. As community-based advocates know, the work of tomorrow begins today.
PRISON SITING FROM AN ENVIRONMENTAL JUSTICE PERSPECTIVE: THE TOXIC CYCLE OF MASS INCARCERATION

By: Jacqueline Cochrane*

“Prisons represent a way of understanding how particular bodies and communities suffer from birth through death.”

-David Pellow

“No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

-Nelson Mandela

INTRODUCTION

The Environmental Protection Agency ("EPA") defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”1 Based on this definition, toxic prison siting should be regarded as an environmental justice issue more easily addressable by the Eighth Amendment to the United States Constitution. In addition, new law and policy must be adopted to hold state and federal actors more accountable in their enforcement of environmental regulations impacting prisons. After all, subjecting an individual to a toxic prison is a form of cruel and unusual punishment that disproportionately impacts a minority group of people. This paper argues that United States laws and regulations must take prison siting into consideration with respect to environmental justice because the persons who reside with them are uniquely vulnerable to toxic environments.

To analyze the connection between criminalization and environmental injustice, this paper will utilize the environmental justice framework to discuss the ways in which state and federal prison siting disregards those who are subject to their control. This paper will also examine relevant historical background regulating the connection between mass incarceration and environmental justice, and the detrimental impact it has on minority and

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low-income populations. Next, it will highlight the lack of federal policies regarding toxic prisons and the current issues with bringing Eighth Amendment prison conditions claims for environmental harms. Finally, this paper proposes various solutions to toxic prison siting such as a lower culpability standard for Eighth Amendment prison condition claims and the adoption of the United Nation’s Mandela Rules into United States law and regulations.

I. DEFINING ENVIRONMENTAL JUSTICE

In addition to the EPA’s definition of environmental justice, fair treatment requires that no population or community should be forced to bear a disproportionate share of exposure the negative impacts of pollution “due to a lack of political or economic strength.” Professor Bunyan Bryant further defines environmental justice as referring to “those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and protective.” These definitions of environmental justice imply two common themes: (1) all persons are entitled to the fair distribution of environmental burdens and favorable policies or regulations to combat them and (2) incarcerated persons should not be forced to bear disproportionate burdens of environmental policies.

Avi Brisman seeks to build a more expensive concept of environmental justice by analyzing the connection between crime and the environment. Brisman is concerned not only with the equal distribution of environmental hazards with respect to prisoners but also with “social transformation directed toward meeting human needs and enhancing the quality of life . . . .” Prisons are not often addressed as an environmental justice issue, but prison siting is a real threat to the bodies of prisoners and the communities that surround them. Building on Brisman’s efforts, prison siting seeks to serve environmental justice efforts by including incarcerated individuals in its initiatives and strengthening the environmental justice movement as a whole.

II. THE ENVIRONMENTAL JUSTICE FRAMEWORK

Studies have already demonstrated that people of color, indigenous peoples, immigrants, and low-income persons are disproportionately
impacted by environmental health threats from corporate institutions.\textsuperscript{5} Consequently, environmental injustices take place when these communities are disproportionately exposed to environmental health risks polluting the air and groundwater within their homes, neighborhoods, schools, parks, workplaces, and other places that are a part of daily life. To combat these disproportionate effects, the environmental justice framework has adopted three dimensions of justice to help incorporate environmental justice within vulnerable communities.\textsuperscript{6} Harmful prison conditions have sparked a variety of movements since the late 1960s.\textsuperscript{7} However, unsafe prison conditions have not been analyzed within the environmental justice framework. Throughout this paper, the dimensions of environmental justice and their application to toxic prison siting will be further explored.

The first dimension of environmental justice, referred to as \textit{distributive justice}, is defined as “the equitable distribution of burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs.”\textsuperscript{8} Distributive justice calls for the equal protection of all communities and can be achieved by the general lowering of environmental risks.\textsuperscript{9} The second provision, known as \textit{procedural justice}, is defined as “the right . . . to equal concern and respect in the political decision about how . . . goods and opportunities are to be distributed.”\textsuperscript{10} In other words, procedural justice is the equal participation of citizens in decision-making processes that affect their communities and environments.

\textit{Corrective justice}, the third provision, involves the duty to hold those who break the law responsible for the damage they cause. Though similar to concepts such as “retributive justice” or “compensatory justice,” corrective justice emphasizes the duty to \textit{repair} losses rather than simply allow lawbreakers to pay compensation and imply that their unjust actions were acceptable.\textsuperscript{11} When it comes to prisoners, these concepts of justice are plainly absent.


\textsuperscript{6} Kuehn, \textit{supra} note 2, at 10683.

\textsuperscript{7} Heather Schoenfeld, \textit{Mass Incarceration and the Paradox of Prison Conditions Litigation}, 44 LAW & SOC’Y REV. 731, 731 (2010).

\textsuperscript{8} Kuehn, \textit{supra} note 2, at 10682.

\textsuperscript{9} Id.

\textsuperscript{10} Id. at 10688.

\textsuperscript{11} Id. at 10694.
III. ENVIRONMENTAL JUSTICE AND PRISONERS: THE CONNECTION BETWEEN CRIMINALIZATION, MASS INCARCERATION, AND ENVIRONMENTAL JUSTICE

Toxic prisons are a distributive justice issue because there is an unequal distribution of environmental burdens being imposed upon a minority group of people. Toxic prison siting disproportionately impacts those members of society that we deem “criminals.” Moreover, the United States imprisons racial minorities and low-income communities at disproportionately higher rates compared to white people.12 This indicates that members of these groups are subjected to an increased risk of exposure to environmental hazards. David Pellow13 discusses this link between criminalization, climate injustice, and environmental justice. Historically, the United States prison system has been inherently rooted in “constructing, maintaining, and deepening brutal hierarchies.”14 This hierarchy has unequally subjected people of color to disproportionate incarceration rates.15 Therefore, the traditional approaches of environmental justice must expand their principles to recognize the direct connection between criminalization and environmental racism.16 Pellow argues that criminalization forces particular communities to suffer throughout their entire lives.17 The vicious cycle follows members of these communities from growing up in toxic neighborhoods, attending schools near toxic sites, working in toxic industries, and becoming incarcerated in toxic prisons.18 Pellow suggests a revised environmental justice definition that includes not only places where we live, work, learn, and play, but also those spaces where we serve time.19 To implement this, states and federal agencies must recognize the vulnerability of prisoners and protect them by holding states and local governments that site prisons in unsafe and unhealthy environments accountable.

12 Pellow, supra note 5, at 57.
13 David Pellow is a professor of environmental studies and Director of the Global Environmental Justice Project at the University of California, Santa Barbara.
14 Pellow, supra note 5, at 59.
15 Id.
16 Id.
17 Id. at 61 (“[P]risons represent a way of understanding how particular bodies and communities can suffer the brutality of environmental racism as criminalization from birth through death, from living in toxic homes and residential communities that are also occupied by police forces . . . .”).
18 Id.
19 Id.
A. Mass Incarceration Has an Adverse Impact on Low-Income Communities and People of Color

To further understand the connection between mass incarceration and environmental justice, it is important to look at the history of America’s prison boom that emerged in the 1970s. Many scholars have linked this prison boom to the 1950s as conservatives began to act on their opposition to civil rights movements and desegregation. As a result of the political dynamics that focused on maintaining law and order, a large number of prisons were constructed and incarceration rates among people of color began to soar.

Today, the United States imprisons more people per capita than any other country in the world. Currently, there are around two million people in jail or prison. Based on data collected by the NAACP, from 1980 to 2015 the number of people incarcerated has increased from roughly 500,000 to 2.2 million. Additionally, while only thirty-two percent of the U.S. population is represented by people of color, they make up nearly fifty-six percent of the incarcerated population. African Americans, in particular, constitute nearly one million of the total population and are incarcerated at nearly six times the rate of whites. As this data suggests, mass incarceration is defined by extreme rates of imprisonment with a concentration of those in the confinement of groups that are the most marginalized. This paper argues that the result of this reality is that an already disadvantaged population is being further harmed by the disproportionate exposure to toxic prison environments.

The prison industry in the United States has often shown little concern for where its facilities are located. The escalated incarceration numbers that began in the 1970s brought on a rush of prison building—often in environmentally unsafe areas. As the numbers above demonstrate,

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21 Id.
22 Paola Scommegna, U.S. Has World’s Highest Incarceration Rate, POPULATION REFERENCE BUREAU (Aug. 10, 2012), https://www.prb.org/resources/u-s-has-worlds-highest-incarceration-rate/ (explaining that The United States has had the highest incarceration rate in the world since 2002).
25 Id.
27 Nicole Greenfield, The Connection Between Mass Incarceration and Environmental
minority groups are incarcerated at an unequal rate because of the prejudicial “tough on crime” and “war on drugs” policies that were implemented to combat the power of social movements and resistance from communities of color.\textsuperscript{28} Confining large groups of people in closed facilities causes a number of human rights problems that have been well researched and documented.\textsuperscript{29} The connection between mass incarceration and environmental justice, however, has often been overlooked in both prison reform and environmental justice initiatives. To fully address both of these issues, it is crucial to acknowledge and improve the dangerous environmental conditions that prisoners currently face.

IV. TOXIC PRISON SITING
Prisons often sit on some of the least desirable and heavily contaminated sites in the United States.\textsuperscript{30} These sites are often linked to various public and environmental threats.\textsuperscript{31} A 2016 study conducted by Paige Williams and the Prison Ecology Project examined the proximity of adult prisons to Superfund sites.\textsuperscript{32} The study found that at least 589 federal and state prisons are located within just three miles of a Superfund site on the EPA’s National Priorities List.\textsuperscript{33} In addition, 134 of those prisons were located within just one mile.\textsuperscript{34}

An investigative journalism series, “America’s Toxic Prisons,” explored mass incarceration and environmental justice on a national scale.\textsuperscript{35} The investigation found that drinking-water contamination affects many prisons across the country.\textsuperscript{36} In fact, according to the EPA’s enforcement database, federal and state agencies brought 1,149 informal actions and seventy-eight formal actions against regulated prisons, jails, and detention

\textsuperscript{28}Id.
\textsuperscript{29}Id.
\textsuperscript{30}Harrison Ashby, Jasmine Vazin & David Pellow, Superfund Sites and Juvenile Detention: Proximity Analysis in the Western United States, 13 ENV’T JUST. 65, 65-74 (2019) (discussing the proximity of adult prison sites to Superfund cleanup sites and how it relates to juvenile detention centers).
\textsuperscript{31}Id.
\textsuperscript{32}Id.
\textsuperscript{33}Id.
\textsuperscript{34}Id.
\textsuperscript{36}Id.
centers during the past five years under the Safe Drinking Water Act—more than under any other federal environmental law.\(^{37}\) While these numbers are high, they only constitute a fraction of the state and local prisons and jails throughout the United States since the EPA’s database only includes 1,605 facilities out of approximately 6,000 federal, state, and local prisons and jails nationwide.\(^{38}\)

Given the number of reports and the lack of action, it seems that prison exposure to environmental harms is of little concern to many governmental actors. For example, in *Rouse v. Caruso*, the Court explained that prison facilities are *not* required to provide a “maximally safe environment, one completely free from pollution or safety hazards.”\(^{39}\) This reasoning was partly based on the notion that non-incarcerated persons are also exposed to such environmental hazards, and the Eighth Amendment does not guarantee a cleaner environment than what the general public enjoys.\(^{40}\) While it is true that incarcerated and non-incarcerated persons alike suffer from environmental hazards, prisoners are disproportionately located in communities filled with toxic waste and other environmental hazards.\(^{41}\) More importantly, they severely lack the agency to remove themselves from these harms.

### A. Examples of Toxic Prisons and Issues Nationwide

A report by *Prison Legal News* in 2007 revealed the prevalence of environmentally hazardous prisons by collecting data over several years and across seventeen states.\(^{42}\) The study highlighted wastewater backups that caused life threatening illnesses such as salmonella poisoning and Hepatitis-A.\(^{43}\) The report also documented various instances of contaminated drinking-water issues in prisons.\(^{44}\) California prisons in particular have been cited for major water pollution problems. One example is the California

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\(^{38}\) *Id.*

\(^{39}\) Elisa L. Toman, *Something in the Air: Toxic Pollution in and Around U.S. Prisons*, 25 PUNISHMENT & SOC’Y 867, 871 (2023) (discussing the ways incarcerated persons rely on the state for their well-being and the minimum standards the state is judicially obligated to provide).

\(^{40}\) *Id.*

\(^{41}\) *Id.*


\(^{43}\) *Id.*

\(^{44}\) *Id.*
Institute for Men in Chino, which became overrun with nitrate from fertilizer. To combat the decades of prior agricultural contamination, the prison needed a nitrate filtration system. Though the facility’s employees were given bottled water to drink, inmates had no such option. Similarly, prisoners at the California Rehabilitation Center in Norco were infected with a stomach illness caused by the bacterium Heliobacter pylori. Prisoners claimed it came from the brown water seeping from the water pipes, but officials denied that the water caused the outbreak and instead blamed poor personal hygiene.

V. PRISONERS ARE AN ESPECIALLY VULNERABLE GROUP UNPROTECTED AGAINST ENVIRONMENTAL HARMs

The EPA and its environmental justice initiatives do recognize that low-income communities and communities of color suffer a disproportionate impact from environmental hazards. Those initiatives, however, fail to address the unique vulnerability of persons residing in prison facilities. Elisa Toman compares incarcerated persons to school children. More specifically, she argues that incarcerated persons—like children—do not get to decide which prison they occupy. Moreover, they are likely unaware of the environmental harms that await them inside the facility. And even if they do become aware of such harms, incarcerated persons lack the ability to remove themselves from the harm and therefore must rely on the state for their safety. They are thus deprived of the capacity to provide for their own health and protection. Legal scholars like Sharon Dolovich share this view. Because the state places people in potentially dangerous conditions when it places them in prison, it in turn has an obligation to protect them

45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Elisa Toman is a professor of Criminal Justice and Criminology at Sam Houston State University.
52 See Toman, supra note 39 at 871 (“While vastly dissimilar in nearly all categories, incarcerated individuals share this [lack of agency] commonality with school children.”).
53 Id.
54 Id.
55 Id.
56 Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. REV. 881, 891 (2009) (discussing the duty the State has to protect prisoners from physical and psychological harm).
from serious physical harm. But given the way society tends to treat incarcerated persons, this duty is rarely, if ever, fulfilled.

Ultimately, the state is responsible for the safety of those incarcerated persons and their exposure to toxic substances. Courts have recognized this principle. In DeShaney v. Winnebago County Department of Social Services, the Supreme Court explained that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” The Court also recognized that “when the State . . . restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment.” This holding, however, creates a dangerous paradox. As Toman explains it, “[t]he state charged with keeping incarcerated persons ‘safe’ is the same agent which enforces (and benefits from) imprisonment in and around toxic lands to begin with.” As a result, states have a responsibility to balance the scale between its duty to confine individuals who have been deemed a danger to society with its obligation to oversee their safety and overall well-being.

VI. FACTORS THAT CONTRIBUTE TO TOXIC PRISON SITTING
A. Lack of Policy

Given the available data that illustrates how pollution and toxic prisons disproportionately expose certain groups of people to environmental hazards, why does the mistreatment of prisoners continue? One major reason for this ongoing issue is a lack of policy that governs and regulates prison siting. Though there have been various policies and orders put forth to promote environmental justice for vulnerable communities, they all fail to adequately protect prisoners from the harms created by toxic prisons.

For example, the National Environmental Policy Act (“NEPA”) has failed to adequately protect prisoners from harms that result from toxic prisons. Under NEPA, the federal government and its agencies are required to assess the environmental impact of proposed federal action prior to making decisions. NEPA requires that agencies evaluate the “cumulative impacts of proposed projects,” but this directive has its limitations. First,

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57 Id.
59 Id.
60 Toman, supra note 39 at 871.
NEPA regulations only apply to actions that are carried out, funded by, or otherwise within the regulatory network of the federal government. Therefore, some local and state prison construction may be outside NEPA’s purview. Second, although proposed projects subject to NEPA are usually required to submit an Environmental Impact Statement (“EIS”) that examines the environmental impacts of that proposed action, federal courts have severely limited its effect. Courts have interpreted NEPA as “imposing only procedural rather than substantive requirements on federal agencies” and therefore does not require that agencies select the least environmentally harmful action among multiple potential actions. Instead, NEPA “merely prohibits uninformed—rather than unwise—agency action.” Consequently, NEPA does not effectively regulate prison siting and its harmful impact on prisoners.

Another example of a policy that has failed to adequately protect prisoners from environmental harm is Executive Order 12898, which was issued by President Bill Clinton in 1994. The Order’s purpose was to promote nondiscrimination in federal programs that disproportionately impacted human health and the environment in minority and low-income communities. It directed federal agencies to identify the human health impacts of their policies on vulnerable communities and the environment as a way to implement environmental justice. However, scholars have argued that compliance with Executive Order 12898 has lacked any real contemplation and have largely concluded that there has been no real environmental justice impact since its implementation.

Lastly, and more crucial to this essay’s purpose, prisoners are not directly considered in any policies adopted by the federal government or the EPA. Highlighting that throughout the United States prisoners are disproportionately people of color and generally low income, the Human Rights Defense Center (‘HDRC’) found “no information pointing to any intention of the EPA to recognize the population of people in prison, despite the fact that they constitute the most vulnerable and overburdened citizens in the country.” Moreover, the EPA’s Region III office stated,

63 Id.
64 Id. at 412.
65 Id.
66 Id.
68 Id.
70 Bradshaw, supra note 37, at 410.
Correctional institutions have many environmental matters to consider in order to protect the health of the inmates, employees, and the community where the prison is located. Some prisons resemble small towns or cities with their attendant industries, population, and infrastructure. Supporting these populations, including their buildings and grounds, requires heating and cooling, wastewater treatment, hazardous waste and trash disposal, asbestos management, drinking water supply, pesticide use, vehicle maintenance and power production, to name a few potential environmental hazards. . . . From the inspections, it is clear many prisons have room for improvement.\(^71\)

This statement from the EPA’s Region III office came after a series of prison inspections that took place after a number of citizen complaints.\(^72\) This “Prison Initiative” found violations in almost every prison they visited from 1999 to 2003.\(^73\) Though this action by the EPA offered a flicker of hope for prisoners’ rights, no other region conducted a similar inspection.\(^74\)

While its inspections were a small success, Region III’s initiative still failed to mention environmental justice regarding prisoners. Moreover, the EPA in general still does not categorize prison populations as a vulnerable group within its environmental justice agenda. It is important to recognize here that the EPA did add a “prison layer” to its Environmental Justice Screening and Mapping Tool (“EJSCREEN”) that allows public users to access possible exposure near prisons. While this is indeed a step in the right direction, it does not adequately address toxic prison conditions or provide relief to prisoners that are suffering from the impact of these conditions.

### B. Lack of Procedural Justice in Prison Site Proposals

Prison siting also represents a procedural justice issue because prisoners are not involved in the decision about where they will be housed for a significant portion of their lives. As it has previously been mentioned, procedural justice is not necessarily the right to the equal distribution of opportunity, but “to equal concern and respect in the political decision about how . . . goods and opportunities are to be distributed.” \(^75\) Currently,

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\(^72\) *Id.*

\(^73\) *Id.*

\(^74\) *Id.*

\(^75\) See generally Kuehn, supra note 2.
prisoners in the United States have no say as to where they will reside. It is within the complete control of the government to decide where a prisoner will serve their sentence. Though local governments and community members do often get the chance to voice their opinions on a potential prison site, those who will actually be residing within them do not have a voice or opinion on the matter. This presents a monumental procedural justice issue without equal concern or respect in the political or economic decision for those who stand to be most affected.

C. Prisons are Not Analyzed as LULUs
Tara Ospal and Stephanie Malin argue that prisons should be analyzed as locally undesirable land uses (“LULUs”). In a critique of the little scholarship that has been done on the connection between environmental justice and prisons, Ospal and Malin contend that the most important socio-environmental impacts of prisons are ignored when environmental justice scholarship fails to analyze prisons as LULUs. For some background, LULUs refer to certain land uses that are perceived as risky or dangerous when conducted near communities where people live, work, or play. These locally unwanted land uses are also defined as “those projects or facilities that are needed by the community-at-large to solve a community problem, but are opposed by the immediate neighbors who see them as a threat to property values, safety, or health.” Traditionally, LULUs are discussed as mining and other extraction activities, waste incinerators, and hazardous landfills. LULUs are a central component of environmental justice research and analyses given their connection to environmental problems and public health. Yet despite the similarities that prisons share with LULUs, environmental justice researchers have yet to systematically characterize and analyze prisons as LULUs or focus on their community health risks.

Ultimately, Ospal and Malin argue that the most effective way to bridge the gap between environmental harms and prisoner injustice is to link the

76 Tara Ospal and Stephanie Malin, professors of sociology at Colorado State University, discuss green criminology. Green criminology is defined as the intersection of environmental justice and criminology that analyzes environmental injustice from a criminological perspective.

77 See Tara Ospal and Stephanie A. Malin, Prisons as LULUs: Understanding the Parallels Between Prison Proliferation and Environmental Injustices, 90 SOCIO. INQUIRY 579 (2019).

78 Id. at 583.

79 Id. at 581.

80 David Schichor, Myths and Realities in Prison Siting, 38 CRIME & DELINQ. 70, 72 (1992).

81 Ospal et al., supra note 77, at 582.
research agendas of green criminologists and environmental justice scholarship. By analyzing prisons as LULUS, environmental justice scholars can more effectively “link important inquiries between structural inequities and the way they institutionalize unequal exposure to environmental risks.” Moreover, collaboration will paint a clearer picture of the impact of prison siting and mass incarceration in the United States.

VII. ONE SOLUTION TO TOXIC PRISON SITING: THE EIGHTH AMENDMENT AND PRISON CONDITIONS CLAIMS

One way prisoners may bring environmental justice claims is by challenging the harmful effects of a prison site under the Eighth Amendment. However, these lawsuits tend to be quite challenging for a plaintiff to win. The Eighth Amendment prohibits cruel and unusual punishment in the United States. Legal precedent establishes that serious health risks may provide a basis for unconstitutional conditions claims under the Eighth Amendment. Based on this reasoning, human-made environmental harms should establish the basis for an individual to bring a prison conditions claim. There are three ways in which the Cruel and Unusual Punishment Clause has been generally used to monitor state-sanctioned criminal punishment. First, to limit the kinds of punishment that may be imposed on convicted persons. Second, to prohibit punishments that are grossly disproportionate to the severity of the crime that was committed. And third, to proscribe limits on what can be criminalized. It is the second limitation—prohibiting punishment that is disproportionate to the crime—that is most often invoked in unconstitutional prison conditions claims.

A. History of Prison Condition Claims Under the Eighth Amendment

There are two cases that established a prisoner’s right to bring a prison condition claim. The efforts in Estelle v. Gamble and Rhodes v.
Chapman\textsuperscript{92} laid the groundwork for macro-level challenges of facility-wide failures of care. Estelle invoked the deliberate indifference standard, which established the constitutional relevance of the defendant’s state of mind in prison conditions claims.\textsuperscript{93} The Court also explained that the Constitution does not mandate comfortable prisons, but it does prohibit states from denying “the minimal civilized measures of life’s necessities.”\textsuperscript{94} The right to clean water and a healthy environment should certainly be deemed as one of life’s necessities. Moreover, Rhodes suggested a totality of the circumstances test where, under some circumstances, a defendant’s culpability may be inferred from the character of the prison conditions themselves.\textsuperscript{95} Ultimately, the defendants prevailed in both cases, but the plaintiffs sufficiently established precedent for future Eighth Amendment claims as a way to reinforce a prisoner’s constitutional right to safe conditions.

B. The Current Legal Standard for Unconstitutional Prison Conditions Claims

A new series of cases in the 1990s shifted the law to where it currently stands today. In the 1991 case of Wilson v. Seiter, a prisoner brought a challenge of macro-level conditions against Hocking Correctional Facility in Ohio.\textsuperscript{96} Wilson argued that Rhodes only required an objective examination of prison conditions and that when conditions are continuous or ongoing, a prison official may be presumed to be aware of them.\textsuperscript{97} The Court rejected Wilson’s argument and held that Rhodes does not eliminate the subjective component of an Eighth Amendment prison conditions claim.\textsuperscript{98} Therefore, the Court reaffirmed the deliberate indifference standard and the principle that a prison conditions claim depends on the culpability of the official rather than its effect on the prisoner.\textsuperscript{99}

Two years after its decision in Wilson, the Court was confronted with a question about the objective element of a prison conditions claim in Helling

\textsuperscript{92} Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (“Conditions other than those in Gamble and Hutto, alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities. Such conditions could be cruel and unusual under the contemporary standard of decency . . . .”).
\textsuperscript{93} Estelle, 429 U.S. at 104.
\textsuperscript{94} Id.
\textsuperscript{95} Rhodes, 452 U.S. at 347.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 298.
\textsuperscript{99} Id. at 303.
v. McKinney. In its decision, the Court held that future injuries could suffice in some circumstances by concluding that “the [Eighth] Amendment’s protection [may] be available even though the effects of exposure might not be manifested for some time.” Helling is remarkable in its interpretation of the objective standard that plaintiffs need to meet to establish prison conditions claims. In response to prisoner-plaintiff McKinney’s claim that secondhand smoke constituted an unconstitutional condition, defendants argued that McKinney was required to prove a current injury for an Eighth Amendment claim. The Court disagreed and found that the substantial risk of serious harm in the future could satisfy the objective prong of the standard. The Court made it clear that “a remedy for unsafe conditions need not await a tragic event,” and cited a variety of contexts where future injury claims had been successful. Additionally, the Court explained that prisoners could “successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery,” which suggests that prisoners could successfully complain about environmental hazards without waiting for a serious injury or illness to materialize.

One year later, in Farmer v. Brennan, prisoner-plaintiff Dee Farmer brought an action against federal prison officials for their deliberate indifference to her safety. The Court granted certiorari and defined deliberate indifference as the equivalent of criminal recklessness. The Court also laid out the two-prong test that a successful prison conditions claim must satisfy. Farmer states that a prison official acting or failing to act with deliberate indifference to a substantial risk of serious harm is recklessly disregarding that risk. In other words, an official cannot be held liable “unless the official knows of and disregards an excessive risk to inmate health or safety.” Thus, for a successful prison conditions claim, a plaintiff must prove that (1) the plaintiff faced a substantial risk of serious

101 Id.
102 Id.
103 Id. at 32.
104 Id. at 35-36.
105 Id. at 33-34.
106 Id. at 33.
108 Id. at 839-40.
109 Id. at 836.
110 Id.
111 Id. at 837.
harm and (2) the defendant was deliberately indifferent to that risk. This test adopts both an objective and a subjective component. A serious risk of harm to the plaintiff must objectively exist and the official must be aware of facts “from which the inference could be drawn that a substantial risk of serious harm exists.” Consequently, the presence of objectively inhumane prison conditions alone is not sufficient for a successful constitutional.

VIII. SOLUTION ONE: HUMAN-MADE TOXIC ENVIRONMENTS SHOULD BE SUBJECT TO EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAIMS

The Eighth Amendment prohibits cruel and unusual punishment. Given the prevalence of imprisonment in the United States, it is vital that we recognize all the conditions that may make punishment cruel. Yet the Supreme Court has not yet answered the question regarding prisoners being subjected to a toxic environment. By holding that officials must actually know of and disregard a substantial risk of serious harm to prisoners, dangerous environments are not effectively being considered “punishment” under the Eighth Amendment. As a result, a powerless group of individuals under the state’s complete control are being subjected to environmental conditions that endanger their health. This seems to fit the very meaning of cruel and unusual punishment.

A. A Lower Culpability Standard Must be Adopted for Redress

As Lawrence Sager has argued, the Supreme Court will sometimes decline to enforce a constitutional provision to its “full conceptual boundaries” out of certain institutional concerns. The separation that the Court creates between the Eighth Amendment’s values proscribed in its Cruel and Unusual Punishment Clause and governing judicial doctrine cannot be justified on institutional grounds. However, culpability standards are within the judiciary’s discretion and do not give rise to legitimate institutional competence concerns. Refusing to adopt a lower standard like constructive knowledge within these cases speaks to the long and concerning history of the institutional mistreatment of incarcerated people by those who have been charged with the duty to protect them. Moreover,

\[112\text{ Id.}
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\[113\text{ Id.}
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\[115\text{ See Sharon Dolovich, Evading the Eighth Amendment, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020).}
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the Court’s recklessness standard merely holds states and officials accountable for risks and conditions they happen to notice. This encourages willful blindness despite the fact that not paying attention exposes incarcerated persons to the worst forms of suffering and abuse.

Without meaningful laws regulating the environments of incarcerated persons, courts are one of the only available mechanisms to hold states accountable for their treatment of prisoners. This lack of redress is a corrective justice issue. Without the ability to bring claims under the Eighth Amendment—or any other meaningful law for that matter—prisoners and their advocates are unable to adequately hold states and federal agencies accountable for their actions that threaten their livelihood. Indeed, dangerous environmental conditions within and around toxic prisons are not being addressed or corrected. And as the data demonstrates, prisoners and their well-being have long been neglected. Without proper recourse, the theory of corrective justice and the duty to hold wrongdoers responsible for the damage they cause is inherently missing.

IX. SOLUTION TWO: THE UNITED STATES SHOULD ADOPT THE MANDELA RULES INTO ITS LAWS AND REGULATIONS

Another way the United States can protect its prisoners from the adverse impact of environmental harms that come with toxic prison siting is by adopting the United Nations’ Mandela Rules. In 1955, the United Nations adopted “The Standard Minimum Rules for the Treatment of Prisoners.” In 2015, the United Nations General Assembly expanded its rules on the treatment of prisoners. They are referred to as the “Nelson Mandela Rules” and provide detailed guidelines for states and how they can better protect the rights of both pre-trial detainees and sentenced prisoners. At the heart of these rules is the obligation to treat all prisoners with the respect and decency they deserve as human beings. These rules can apply directly to the environmental injustices of toxic prison siting because they address basic human necessities that every person is entitled to, which includes the right to a healthy environment.

To achieve this in the United States and prevent prisoners from suffering environmental harms, Congress should adopt legislation that directly addresses prisoner safety as it relates to toxic siting. Once this legislation is

116 See Dolovich, supra note 56.
118 Id.
119 Id.
passed, the EPA should implement it into its various regulations and enforce its requirements. While there is a comprehensive list of 122 Nelson Mandela Rules pertaining to various issues such as food, bedding, clothing, and solitary confinement, there are very few provisions that more directly address a prisoner’s environment. But Rule 42 provides that states shall provide general living conditions that includes the right to drinking water. And Rule 18 requires that prisoners be provided with water “necessary for health and cleanliness.” As it has been discussed, healthy drinking water has been a long-standing issue within prisons. At SCI Fayette, a prison located near Pittsburgh and surrounded by toxic coal ash, prisoners became accustomed to drinking brown water with a “funky smell.” In Navasota, Texas, prisoners had no choice but to drink arsenic-laced water until a federal judge ordered the Texas Department of Criminal Justice to provide safe drinking water. In California, multiple state prisons have been cited for major water contamination issues due to old scrap metal, industrial manufacturing, contaminated soil, raw sewage, and more. Healthy drinking water is a basic, essential human need that no person—incarcerated or not—should be deprived of.

Another applicable Nelson Mandela Rule is an investigatory one. Rule 71 requires the prison head to report health issues or serious injury to an independent authority responsible for conducting prompt and impartial investigations into such circumstances. The rule further states that this obligation equally applies when there are grounds to believe treatment is torturous, cruel, or inhumane. Given that prisoners are currently left out of the EPA’s current regulations, there is currently no formal complaint system for toxic prisons specifically. Implementing a system that requires prison heads to report environmental issues in and around prisons would further the enforcement of environmental laws as it pertains to prisoner safety. Moreover, deliberately ignoring these issues and refusing to report them to the appropriate authority should be penalized.

121 Id. at 6.
122 See Bernd et al., supra note 35.
123 Id.
124 Dannenberg, supra note 42.
125 See UNITED NATIONS OFFICE ON DRUGS AND CRIME, supra note 120, at 21 (“[T]he prison director shall report, without delay, any custodial health, disappearance or serious injury to a judicial or other competent authority that is independent of the prison administration and mandated to conduct prompt, impartial and effective investigations into the circumstances of such cases.”).
126 Id.
Lastly, Nelson Mandela Rule 83 provides a system by which regular inspections of prisons shall occur. This requirement ensures that prisons are being effectively managed in accordance with existing laws, regulations, and procedures that have been implemented to protect the rights of prisoners. Regular inspections to ensure compliance with environmental laws are paramount to the goal of safe prison siting. While NEPA requires agencies to examine and disclose the environmental impacts of a proposed decision, it does not require those agencies to produce any kind of progress report monitoring the continuous impact of a particular site. By requiring both internal and external inspections of both new and existing prison sites, prison officials will be forced to address environmental harms and their adverse impacts on prisoners more regularly. Ideally, these inspections would advance the safety of our prisons by eliminating toxic prison sites and therefore have a positive effect on the overall health of those who live there.

All things considered, adopting some of these Nelson Mandela Rules may combat the adverse health effects of toxic prison siting by forcing state and prison officials to uphold their duty to protect their constituents who reside within prisons. To correct the current practices, efficient laws must be put in place that directly govern the treatment of prisoners with respect to their environment. Moreover, regular inspections will be crucial to ensuring that these minimum standards are followed. Without consistent oversight, states are given the ability to neglect their duty to provide a safe environment for prisoners.

**Conclusion**

Environmental harms and health problems have disproportionately plagued vulnerable communities for years. One of the most defenseless and neglected communities that suffers from environmental harms is our nation’s prison population. Across the United States, correctional facilities rest on hazardous waste sites and are still being actively sited on or near them. Though prisoners are not the only group that falls victim to unsafe

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127 See United Nations Office on Drugs and Crime, supra note 120. Nelson Mandela Rule 83 provides that “[t]here shall be a twofold system for regular inspections of prisons and penal services: (a) [i]nternal or administrative inspections conducted by the central prison administration [and] (b) [e]xternal inspections conducted by a body independent of the prison administration, which may include competent international or regional bodies.” Id. Rule 83 continues by noting that “[i]n both cases, the objective of the inspections shall be to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected.” Id.

128 Id.
environmental siting, they are unique in the way that they are subject to complete governmental control.

The war on drugs, mass incarceration, and other discriminatory practices are affecting minorities and low-income communities at a highly disproportional rate. The number of complaints and citations for environmental violations make it clear that the lack of oversight by state and federal agencies is inexcusable. It is time for the federal government and its agencies to include toxic prisons in the environmental justice efforts to hold prison officials accountable. Otherwise, our prisoners will continue to be mistreated in a way that the Eighth Amendment was designed to protect.
ANSWERING THE QUESTION OF INTENT IN STRUCTURAL RACISM: A TORTIOUS FRAMEWORK FOR ESTABLISHING INTENTIONAL DISCRIMINATION IN ENVIRONMENTAL JUSTICE

By: Mai Rubin*

ABSTRACT

The American legal system’s handling of discriminatory siting claims is fundamentally broken. Under Arlington Heights, challenges to discriminatory siting must prove explicit racial animus to prevail. Discriminatory siting is a product of systemic factors that drive market forces against communities of color, usually without any racist intent by project managers or permitters. Since Arlington Heights excludes such circumstances, siting challenges almost never succeed. Limiting the scope to racial animus not only excludes most sources of siting, but also stems from a fundamental error in Washington v. Davis. Davis departed from both the intent of the Fourteenth Amendment and longstanding common law, both of which accounted for discriminatory state action outside the boundaries of racial animus. The solution is to apply a new legal framework to siting claims based on tort law. Doing so improves outcomes for marginalized people while hewing closer to the original intent of the Equal Protection Clause.

INTRODUCTION

In the American legal system, environmental racism is a rampant problem that often comes about without conscious racial animus by decision-makers. This makes it nearly impossible to demonstrate intent to harm minorities when making siting decisions that disproportionately impact communities of color.1 Much legal action to remedy this has relied upon the Fourteenth Amendment’s Equal Protection Clause.2 Through the latter half of the 20th century, the Supreme Court has come to view whether an actor has an intent to cause harm to racial minorities, hereon known as

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2 Id.
racial animus, as dispositive in Equal Protection cases. While intent was initially demonstrable by disparate impact alone, the Court held in Washington v. Davis that intent cannot be established absent a finding of racial animus.

As a result, the modern intent framework makes challenging racist policies excessively difficult. The current framework effectively excludes acts of structural racism from legal redress, as they often occur without a conscious intent by individual actors or where other causal explanations exist for the siting. This has facilitated environmental racism, as harms like hazardous siting occur largely due to perverse economic incentives created by historically racist policies. For instance, practices like segregation and redlining have led to longstanding disparities in property values or access to infrastructure which made siting cheaper in communities of color. Consequently, communities of color are left with scarce tools to defend themselves against acts of environmental racism in the legal system.

The thesis of this article is that the current Equal Protection intent framework is an error deviating from common law tradition, and the solution is a legal framework that instead conceives of implicitly racist policies as intentional actions without a wish for the consequences. The new framework has a rich foundation in common law dating back to England, as this principle has existed within tort law for two centuries. Correcting this error would empower communities of color by providing significantly greater avenues to legal redress for environmental racism and facilitate the mitigation of its resulting health and economic harms. Ultimately, drawing upon common law tort precedent, structural racism should be demonstrable by the following elements: (1) an intentional state action that (2) causes a significant and racially disparate impact.

I. **STRUCTURAL RACISM AND THE INTENT PROBLEM**

A. **Structural Disparities and Environmental Racism**

Communities of color suffer disproportionate environmental harms from polluting facilities relative to predominantly white communities. Across America, polluting facilities are alarmingly prevalent in the vicinity

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4 Id.
5 De Guire, supra note 1, at 228-30.
6 Id. at 227.
8 De Guire, supra note 1, at 228-30.
9 See Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891); see also Hoffman v. Eppers, 41 Wis. 251, 253-54 (1876).
10 De Guire, supra note 1, at 228-30.
of communities of color. Seventy-eight percent of black people in America live within thirty-five miles of a coal-burning plant, and seventy-one percent live in counties in violation of federal air quality standards. This is much greater than the white communities in such conditions, as only a bit more than half of white Americans live in areas fitting either category. The United Church of Christ’s Commission on Racial Justice conducted the most comprehensive study of discriminatory siting to date in 1987, evaluating all 415 commercial hazardous waste sites in the contiguous United States at the time. The Commission found a pattern of racial inequality even when controlling for economic factors like income.

The consequences to public health are dire, as pollutants disproportionately harm communities of color. In minority communities, pollutants cause or exacerbate a variety of diseases, including but not limited to asthma and Chronic Obstructive Pulmonary Disease (“COPD”). In turn, children of color are significantly more likely to be born with chronic health conditions due to these pollutants. Consequently, disease mortalities are disproportionate, as black people suffer from an asthma mortality rate that is three times higher than that of white people. Similar disparities exist for Latino people.

This inequity is no accident: it results from decades of structural racism. When slavery was abolished outside prisons by the Thirteenth Amendment, communities of color were left without the intergenerational wealth of white communities. Thus, many people of color were deprived of the money needed to live in expensive white communities, forcing poor people of color into areas with lower property values. This demographic

11 Id. at 230-31.
13 Id.
14 UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES xiii (1987).
15 Id.
16 Lovvorn, supra note 12.
17 Id.
19 Lovvorn, supra note 12.
20 Id.
21 Bullard, supra note 7, at 275.
22 See id. at 274.
23 See id.
distribution was effectively codified by segregation, forcing people of color to be insulated from white community spaces.\textsuperscript{24}

Even after de jure segregation ended, white flight and racist policies like redlining caused de facto segregation which deprived communities of wealth.\textsuperscript{25} Property values decreased in areas affected by white flight due to racial stigma and its effects on property value, such as a belief that the areas were unsafe places to live.\textsuperscript{26} Policies like redlining deepened this problem, as they made purchasing land impossible, prevented the accumulation of wealth, and ensured the continuance of segregation.\textsuperscript{27} Likewise, since most economic opportunities were foreclosed to those areas by racist policies, the natural accumulation of wealth was precluded.\textsuperscript{28} Altogether, racist policies plundered wealth from communities of color and minorities’ collective wealth.

**B. The Evolution of Intent in Equal Protection Jurisprudence**

Since the inception of the Fourteenth Amendment’s Equal Protection Clause, jurisprudence about racism has been mired in confusion about what constitutes racist intent. In \textit{Strauder v. West Virginia}, the Court made its first major effort at defining discrimination, outlining three categories of discriminatory state action.\textsuperscript{29} The first category was classification, which referred to laws that explicitly single out people of color and implement harmful regulations against them.\textsuperscript{30} The second category was subordination, meaning policies that deny people of color the ability to participate in government activities or have the effect of lessening the ability for people of color to enjoy their rights.\textsuperscript{31} This does not encompass any infringement of rights, but rather, infringements that are disproportionate relative to other groups in society. The third and final category was intent, meaning policies that brand inferiority or encourage prejudice in society.\textsuperscript{32} Branding inferiority describes policies that are otherwise qualified, but in some way imply that people of color are inferior.\textsuperscript{33} Encouraging prejudice

\textsuperscript{24} See id.
\textsuperscript{25} See id.
\textsuperscript{26} See id.
\textsuperscript{27} See id. at 275.
\textsuperscript{28} See id. at 274.
\textsuperscript{30} See id.
\textsuperscript{31} See id.
\textsuperscript{32} See id.
\textsuperscript{33} See id.
encompassed policies that emboldened or legitimized discriminatory actions in society by tacit endorsement.34

While Strauder is considered part of the anti-canon, its foundational conception of discrimination is significantly broader than what would come later. The first category was almost entirely focused on outcomes, namely whether a state action undermined the lives of minorities.35 The first category implies that a law may be discriminatory if it classifies and harms minorities, implying that a law that classifies without causing harm would be justified.36 This implies that classification is value-neutral, a contention that would be made explicit in Plessy v. Ferguson.37 Nevertheless, Strauder has no explicit requirement that one may wish to harm minorities, meaning animus was not initially required to establish discriminatory classification.38

The second category is almost entirely dependent on the consequences. Subordination is action that is not facially discriminatory, but rather, has the effect of lessening people of color relative to others in society.39 Subsequently, a state could show no animus yet still subordinate a group due to consequences.40 The consequence-focused reading was present in case law on anti-subordination, as the Court in Yick Wo evaluated a facially neutral law that effectively barred a city’s entire Asian population from using laundromats.41 The law was found to be subordinative discrimination, as it prevented Asian people from participating in a facet of society in practice.42 The Court did not look deeply into whether there was an intent to deprive Asians of their rights, but rather, looked at whether rights were actually deprived.43

The third category sets the foundation for the current standard. Intentional discrimination under Strauder is that a law may fail if it is done for the purpose of ensuring the inferiority of people of color.44 This implies that the intent stems from both intentional action and an intent to cause harm to minorities under the umbrella of racial animus.45 This is a crucial component of the early Strauder framework which would soon develop to

34 See id.
35 See id.
36 See id.
38 SeeStrauder, 100 U.S. at 307-08.
39 See id.
40 See id.
42 See id.
43 Id.
44 Strauder, 100 U.S. at 306-08.
45 See id.
become the centerpiece of establishing discrimination in Equal Protection cases. While the contours of racial animus have changed throughout the Court’s history, it will soon become clear that animus remains the yardstick by which instances of racism are measured.

In *Plessy v. Ferguson* and *Brown v. Board of Education*, the Court’s understanding of intent fluctuated around classification. In *Plessy*, the Court held that the type of discrimination intended to be protected by the Fourteenth Amendment was discrimination which undermined the enjoyment of legal and civil rights by minorities. Segregation laws were wrongly found to not have been discriminatory because they kept material conditions equal between segregated groups, which is why the Court claimed segregation on racial grounds did not brand inferiority. Rightfully recognizing this as abhorrent, *Brown* overturned *Plessy* by deeming that racial classification for segregation in public schools violated the Fourteenth Amendment. The Court held that classification on the basis of race was inherently harmful and always constituted a brand of inferiority upon those targeted. In doing so, the Court found that regulating races was not a compelling government interest and that explicitly doing so gives rise to an inference of racially malicious intent.

While *Brown* was a much needed remedy to the injustice of *Plessy*, *Brown* also marks a movement into the modern framework of racist intent by the Court. Racist intent became a fundamentally interpersonal notion that the Court conceived of as resulting from individuals with racial malice. *Plessy* places intent as solely being explicit and finds a public interest in regulating racial groups, while *Brown* perceives policies like segregation as so inherently discriminatory that they cannot help but intend to harm minorities. Undergirding these holdings is the notion that what makes a law impermissible is whether it stems from animus rather than effects on minorities. Where the Court differs is whether sufficient evidence existed of animus based on the discriminatory design of the policy.

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46 See id.
48 Id.
50 Brown, 347 U.S. at 492-95.
51 See id.
52 See id.
53 See id.
In overruling *Plessy*, *Brown*’s majority unwittingly established the foundation for error in later cases.\(^{55}\) While *Brown* was anti-subordination and anti-classification, the Court speaks explicitly of how classification for school segregation is harmful because it comes from a place of racial animus.\(^{56}\) Additionally, the Court held that racial animus can be inferred from sufficiently racist actions and that racial animus can make a law abhorrent.\(^{57}\) This may seem to decompartmentalize the *Strauder* factors, as the Court’s language could indicate that subordination or classification is only harmful vis a vis underlying racial animus.\(^{58}\) While still clothed in the language of anti-subordination and anti-classification, *Brown* relied on animus in arguing why classification could not achieve “separate but equal” conditions.\(^{59}\) Classification in itself is said to produce the harm of branding inferiority on minorities, which is said to come from a desire to inflict harm on people of color.\(^{60}\)

Worryingly, the interlinkage of intent and subordination in *Brown*’s holding evolved to make the animus requirement dispositive in every case. In *Washington v. Davis*, the Court held that discriminatory laws could only be established with racial animus.\(^{61}\) In justifying this, the Court implicitly alluded to dicta in *Brown* which interlinked intent and subordination to argue that “separate but equal” was horrific because it was so inherently discriminatory that it could only have come from animus.\(^{62}\) The Court took this reading and extrapolated it to mean that all Equal Protection claims would require animus.\(^{63}\)

The significant narrowing in *Davis* marks a complete departure from the three distinct categories of *Strauder*, as only one of the three categories required anything akin to animus.\(^{64}\) The classification and subordination categories were concerned largely with whether a given action produced a harmful outcome, rather than the intent underlying it. The former found laws unconstitutional if they harmed minorities, while the latter struck down facially neutral laws that had the effect of subordinating people of color.\(^{65}\) Under *Davis*, the question of animus goes from absent in those inquiries to

\(^{55}\) See *Brown*, 347 U.S. at 492-95.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.


\(^{62}\) See *id.*

\(^{63}\) See *id.*


\(^{65}\) Id.
Accordingly, a law that is merely discriminatory as applied no longer provokes strict scrutiny by disparate impact, unless the application is so egregiously unequal under *Yick Wo*. This makes explicit the notion that unequal outcomes for minorities cannot alone establish that a law is discriminatory, and intent can only be demonstrated by conscious racial animus. While intent can be inferred with sufficient circumstantial evidence, discrimination cannot be established without also proving racial animus, making it the centerpiece of the analysis.

This marks a turning point in Equal Protection from an analysis that could have turned on either disparate impact or animus to one of animus alone. Due to discriminatory intent being predicated on animus, *Davis* limits punishable racist state actions to ones that have a wish for a racially harmful outcome at their core. Thus, the validity of challenges is gauged by how much animus can be demonstrated by the facts of the case. Since structural racism is defined by putting people in situations where they move the machinery of racist policy outside their will, *Davis* shields defendants if it cannot be proven that the defendants actively seek to hurt minorities. The less that a wish for a racist outcome exists, the less likely that the challenge to the law will stand.

By contrast, two of the three *Strauder* factors do not require animus whatsoever. In *Yick Wo*, the Court did not concern itself with wishes for harm and instead focused on the impact of subordinating Asian people. Rather than finding the outcomes discriminatory because of racist intent, *Yick Wo* held that the impact itself was sufficient to deem the law discriminatory. By contrast, the Court in *Davis* did not even find action taken knowing that the result would be a racially disparate harm established animus. In short, *Yick Wo* viewed disparate impact from voluntary state action itself to be sufficient to establish a discriminatory law, while *Davis* only considered circumstances to the extent that they proved intent. Consequently, findings of discrimination in Equal Protection cases are

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66 See *Davis*, 426 U.S. at 245-48.
67 Id.
68 Id.
69 Id.
70 See id.
72 Id.
73 Id.
75 Id.
76 See *Davis*, 426 U.S. at 245-48.
77 Id.
made to explicitly turn on their proximity to racial animus, a departure from past jurisprudence.\textsuperscript{78}

In response to the legal battles that followed \textit{Davis}, the Court in \textit{Village of Arlington Heights v. Metropolitan Housing Dev. Corp.} set forth six factors that may serve as circumstantial evidence from which discriminatory intent may be inferred in Equal Protection claims.\textsuperscript{79} These factors are the disparate impact of the policy, the historical background of the policy, the specific events leading up to the policy, departures from normal procedural practice, substantive departures where the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached, and the legislative or administrative history of the policy.\textsuperscript{80} For these factors to be satisfied to the extent that proves a discriminatory purpose, the factors must be particularly severe.\textsuperscript{81} Oftentimes, substantive matters of the policy’s text or implementation need to be egregious in their inequality to support discriminatory intent, narrowing those factors to cover a small amount of instances.\textsuperscript{82} For events, procedures, or history to support intent, there must be very clear indications that the lawmakers specifically wanted to inflict harm on communities of color.\textsuperscript{83} Such evidence is scarce, making the \textit{Arlington Heights} test an uphill battle for most communities of color.\textsuperscript{84}

While the Court has since outlined ways to infer racial animus from particularly disparate impacts or application of laws, the Court ultimately still focuses on racial animus. Circumstances may allow one to work backward to find intent, but the endpoint of the analysis is still the necessity of animus to find discrimination.\textsuperscript{85} Given the lack of conscious animus in the daily functioning of structural racism, racially disparate circumstances rarely present sufficient evidence to meet the strict burden the courts view these cases with.\textsuperscript{86} Thus, structurally racist action tends not to give rise to inferable racial animus even when there is a substantial harm to people of color.\textsuperscript{87}

In practice, this fixation on racial animus has forced communities of color to weather environmental racism. In \textit{Bean v. Southwestern Waste Management Corp.}, a court did not find racial intent in permits to the

\begin{flushleft}
\textsuperscript{78} See id.
\textsuperscript{80} Id.
\textsuperscript{81} See id.
\textsuperscript{82} See id.
\textsuperscript{83} See id.
\textsuperscript{84} See id.; Lovvorn, supra note 12.
\textsuperscript{85} See Vill. of Arlington Heights, 429 U.S. at 266-71.
\textsuperscript{86} See id.
\textsuperscript{87} See id.
\end{flushleft}
placement of solid waste sites being granted at much higher rates in communities of color than elsewhere, specifically with 82.4% of facility placements being in areas where 26-50% of residents were people of color. The court based its reasoning on the potential for other motives in site placement, such as lower property values that decreased costs for establishing a facility on the land. Even a quantifiable disparate impact was insufficient because the court did not believe that the decisionmakers consciously wanted to hurt people of color.

Animus makes redress for environmental racism difficult because systemic racism largely functions outside the intent of its executors. As indicated in Section II(a), historical racism has inflicted economic disparities on communities of color which skews market forces and makes nonwhite communities economically desirable locations for hazardous sites. For instance, redlining makes property values lower in a community of color, making it cheaper to build hazardous waste sites there. A completely good faith actor could be driven entirely by market forces to approve such a siting without knowing the historical context and inflict significant harm without wishing for or even knowing about the harm.

Subsequently, structural racism is ultimately about the character of the machinery making up the system rather than the desires of those inside the system, leading a focus on animus to cast too narrow of a net. Many policies that are especially harmful to people of color are created or enforced without an explicit desire to harm minorities, which would leave those actions outside the reach of Brown. Problematically, this interpretation of Brown leaves people of color without legal redress for most structurally racist laws under Equal Protection claims. Since causal factors other than animus would void such claims, policies that inflict concrete intergenerational harms will likely be upheld no matter how great the negative outcome.

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89 Id.
90 Id.
92 Id. at 334-35.
93 See id.
94 See id.
95 See id.
96 See Lovvorn, supra note 12.
97 See id.
98 See id.
Cases like Bean demonstrate how the Equal Protection framework fails to capture systemic racism. It may well be that there was no racial animus by the developers whatsoever, and their decisions were entirely driven by market forces. An entity will seek to maximize profit, and that requires minimizing costs. Due to the economic conditions caused by structural discrimination, alternative causality defenses almost always prevail in cases of environmentally racist siting. This makes defeating siting decisions nigh-impossible under the Equal Protection Clause, with the Court only ever having done so once post-Davis in Buchanan v. Warley.

At surface level, market forces and economic incentives on their own are seen to justify racially disparate siting, yet the current framework does not interrogate why those market forces are the way they are. What makes structural racism so insidious is that it creates economic incentives by structurally depriving communities of color of property value and opportunity to make costs of operation lower. Thus, there is a perverse economic incentive for developers to build these facilities in communities of color, creating disproportionate health harms. If Equal Protection claims fail to remedy these many instances of racial injury, then it is clear that the current framework has failed in its purpose to defend minorities against harmful state action.

C. Tortious Intent

In contrast to racism jurisprudence under the Fourteenth Amendment, tort law demarcates intent to carry out an action and intent to cause a certain outcome. The former refers merely to one carrying out an action voluntarily and does not implicate a wish for a certain outcome. After the voluntary action occurs, it is determined separately whether the defendant had a desire to cause a harmful outcome to the plaintiff. Consequently, it is possible for a plaintiff to demonstrate intent for an action without showing intent to cause the injury suffered by the plaintiff. This distinction has a
strong foundation in common law, as it is foundational to battery and trespass jurisprudence.\textsuperscript{111}

In trespass doctrine, the intent analysis is entirely limited to whether the act was undertaken voluntarily. In \textit{Burns-Philp v. Cavalea Freight}, a defendant moving and disrupting the property of another while believing the property belonged to the defendant was sufficient to prove intent.\textsuperscript{112} The reason why is that trespass only required voluntary touching of another’s property and did not require an intent that trespass be committed.\textsuperscript{113} This demonstrates that, in trespass doctrine, intent is considered solely in regard to whether the act which led to the trespass was voluntary.\textsuperscript{114}

In battery cases, intent to make physical contact is separate from whether there was an intent to cause harm or offense to the plaintiff as a result of that contact.\textsuperscript{115} In \textit{Vosburg v. Putney}, the court held that an intentional shoving that unintentionally broke a bone still qualified as battery and that the defendant was liable for damages stemming from the unintended injury.\textsuperscript{116} Not only may the voluntariness of the action satisfy intent in battery cases, but even unintended consequences resulting from that act may provoke liability.\textsuperscript{117}

Likewise, negligence is an entire field of law predicated on penalizing carelessness that leads to harming others. In assessing whether a duty of care is breached, a court will analyze whether harm caused by an action was foreseeable to a reasonable person.\textsuperscript{118} This foreseeability analysis includes seeing if the effects of a given action could spill over to parties outside the one directly interacted with.\textsuperscript{119} Consequently, one who takes an action despite a reasonably foreseeable risk of inflicting injury on another would be liable for negligence.\textsuperscript{120} This could all be true even if the defendant had

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.,} 135 F.3d 526, 528-29 (7th Cir. 1998); \textit{see also} \textit{Restatement (Second) of Torts \S 164} (Am. L. Inst. 1965) (“One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor . . . .”).

\textsuperscript{113} \textit{See Cavalea Cont'l Freight,} 135 F.3d at 528-529.

\textsuperscript{114} \textit{See Restatement (Second) of Torts \S 158} (Am. L. Inst. 1965).


\textsuperscript{116} \textit{Vosburg v. Putney,} 50 N.W. 403, 404 (Wis. 1891).

\textsuperscript{117} \textit{See Vosburg,} 50 N.W. at 404; \textit{see also} \textit{Restatement (Second) of Torts \S 13} (Am. L. Inst. 1965).

\textsuperscript{118} \textit{Restatement (Second) of Torts \S 296} (Am. L. Inst. 1965).

\textsuperscript{119} \textit{See Mussivand v. David,} 544 N.E.2d 265, 270-71 (Ohio 1989); \textit{see also} MacPherson \textit{v. Buick Motor Co.,} 111 N.E. 1050, 1051 (N. Y. 1916).

\textsuperscript{120} \textit{See Mussivand,} 544 N.E.2d at 270-71; \textit{see also} \textit{Restatement (Second) of Torts \S 296} (Am. L. Inst. 1965).
the best of intentions, showing that liability looks primarily to carelessness and consequences rather than intent in determining liability.\textsuperscript{121}

The tort concept of intent diverges drastically from the Equal Protection framework. Under the tort framework, intentional torts need not always include a wish for the outcome, but may be limited to the action itself being a voluntary one.\textsuperscript{122} By contrast, racial animus under Equal Protection mandates that not only must there be a voluntary act inflicting harm upon racial minorities, but that there is also a conscious desire to cause harm to racial minorities.\textsuperscript{123} All of these components make tortious intent much easier to prove than the Equal Protection doctrine’s racial animus and encompass a substantially broader range of conduct.

While the Equal Protection clause does not explicitly evince tort law, the \textit{Strauder} categories are rooted in the same common law foundation as tortious intent. \textit{Strauder} reflects the tortious understanding of intent because subordination does not require intent to harm minorities, only a disparate injury that lessens minority stature in society.\textsuperscript{124} This view stems from a centuries-old lineage of common law that finds liability for intentional acts with unintended harms, and it is present throughout civil law.\textsuperscript{125} For instance, \textit{Vosburg}, decided in 1891, is one of many cases in the nineteenth century which turn upon the court distinguishing intent to act from intent to cause a certain outcome.\textsuperscript{126} Even by itself, \textit{Vosburg} predates the codification of the animus standard in \textit{Davis} by over eighty years.\textsuperscript{127} In the negligence context, cases as early as \textit{Frank v. Avery} in 1866 established that merely a rash action without regard for consequences made one liable for the resulting injuries.\textsuperscript{128} Even \textit{Strauder} conveys this understanding in its separation of intent from policies that cause disparate outcomes.\textsuperscript{129} Taken together, common law long predating \textit{Davis} indicates a clear understanding

\begin{footnotesize}
\textsuperscript{121} See \textit{Mussivand}, 544 N.E.2d at 270-71; see also \textit{Restatement (Second) of Torts} § 296 (Am. L. Inst. 1965).

\textsuperscript{122} \textit{Restatement (Second) of Torts} § 13 (Am. L. Inst. 1965).


\textsuperscript{125} See generally \textit{Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA}, 559 U.S. 573, 581-83 (2010) (arguing that intentional liability for voluntary actions which inflict harm without the desire to cause legal injury is deeply rooted in civil and criminal law).

\textsuperscript{126} \textit{Vosburg v. Putney}, 50 N.W. 403, 404 (Wis. 1891); see also \textit{Hoffman v. Eppers}, 41 Wis. 251 (1876) (holding that the defendant did not intentionally touch the plaintiff when they were being moved involuntarily).

\textsuperscript{127} \textit{Vosburg}, 50 N.W. at 404.

\textsuperscript{128} \textit{Frank v. Avery}, 21 Wis. 166, 169-70 (1866).

\textsuperscript{129} See \textit{Strauder}, 100 U.S. at 307-08.
\end{footnotesize}
that intent to carry out an act was not the same as intent to cause a certain consequence.\textsuperscript{130}

In light of the historical divergence between Equal Protection and tortious intent, it becomes clear that the \textit{Davis} framework is an error and needs correcting. In the beginning of Equal Protection jurisprudence, the three categories of discriminatory state action sought to encapsulate not just state action taken with racial animus, but also policies that disproportionately hurt minorities without clear animus.\textsuperscript{131} This comports closely with the common law notion of intent to act being separate from the intent to cause a consequence and the consequence itself in the analysis.\textsuperscript{132} The \textit{Davis} Court erred by narrowing the holding to animus, departing dramatically from the common law tradition in the process and thereby foreclosing necessary remedies for environmental racism.\textsuperscript{133}

Consequently, the broader reach of the tortious framework is better suited for proving discriminatory intent than the current Equal Protection scheme. The current framework allows for actions which do significant and disproportionate harm to minority communities to advance untouched by courts. Thus, the tortious framework of intent should be incorporated into Equal Protection jurisprudence to correct the errors of history. The tortious framework allows communities of color to make courts redress injuries that are otherwise left to fester in the status quo. This provides more tools to communities of color with which they may combat structural discrimination.

\section{A Tortious Approach to Racism}

When considering whether a policy is discriminatory, courts should evaluate whether there was an intentional state action that caused a significant and disparate injury to racial minorities. This is an element test, and it ought to replace the current animus standard for evaluating whether a policy is discriminatory under Equal Protection. This section will explain what the changes are, why these elements have been chosen, and how they may be proven or disproven.

\subsection{Intentional State Action}

Intentional state action refers to an action deliberately and voluntarily taken by the state. Subsequently, all that needs to be proven is that the state chose to undertake the action at issue. Where this differs from the existing standard is that the existing standard confounds intent to act and intent to

\textsuperscript{130} See \textsc{Restatement (Second) of Torts} §§ 13, 158, 296 (Am. L. Inst. 1965).

\textsuperscript{131} See \textit{Strauder}, 100 U.S. at 307-08.

\textsuperscript{132} See \textsc{Restatement (Second) of Torts} §§ 13, 158, 296 (Am. L. Inst. 1965).

cause a certain consequence, which, as outlined in Section II(a), was not the case in early Equal Protection jurisprudence.\textsuperscript{134} This new standard instead decouples intent to act from intent to cause a certain consequence, which in turn makes this much more in line with intentional torts. In trespass and battery cases, tortious conduct occurs when the touching of the land or the person is voluntary even when the subsequent outcome is not. Structural racism mandates that sort of view, as it often inflicts its harms without the conscious desire for harm in its executors.

Proving intentional state action would be done in the same manner as establishing the liability for state officials in their private capacity under 42 U.S.C. § 1983.\textsuperscript{135} While that test may be for suing state officials in their private capacity, the “color of state law” test interpreted in \textit{Monroe v. Pape} measures whether an action could be considered a harmful state action.\textsuperscript{136} The test in \textit{Monroe} has a substantive body of case law available to guide judges about finding intentional state actions which they could refer to if using this test.\textsuperscript{137} Consequently, the \textit{Monroe} test would lend clarity to courts by giving analogous case law to guide them and minimize the risk of error.

To determine whether intentional state action occurred, courts should ask whether the action at issue was taken under color of state law. To answer this question, the court would question whether a reasonable person who is an outsider to the situation would perceive the action as being done by state law and being possible only by virtue of state law.\textsuperscript{138} Courts generally have to exercise discretion in applying this test, as it necessarily depends upon the facts of the case. Not only does this provide a clear guideline for how both plaintiffs and defendants can establish a state action occurred, but this also provides an additional remedy if a challenged siting decision is somehow found to not be intentional state action. The plaintiff could seek an injunction in a different matter against the developers for not actually having been vested the right to develop by a state entity. This forces states to keep their proceedings clear and well-recorded while also allowing people of color recourse in the face of procedural errors by the state.

\begin{footnotes}
\footnote{\textsuperscript{134} See \textit{Strauder}, 100 U.S. at 307-08.}
\footnote{\textsuperscript{135} 42 U.S.C. § 1983 (1996).}
\footnote{\textsuperscript{137} See \textit{Monell}, 436 U.S. at 690; see also \textit{Maine v. Thiboutot}, 448 U.S. 1, 7 (1980).}
\footnote{\textsuperscript{138} Monroe, 365 U.S. at 183-84 (holding that a violation of constitutional rights could give rise to private liability under § 1983 when an objective outsider would (1) view the wrongdoer’s action as meeting the standard for the applicable violation, and (2) believe the violation was done under color of state law, meaning that it was done by virtue of state law and made possibly only by the perceived authority of state law).}
\end{footnotes}
B. Causing a Significant and Disparate Injury to Racial Minorities

Once a voluntary state action is established, the plaintiffs would then have the burden to show that the state action caused a significant and disparate injury. Before touching on significant and disparate injury, it first must be established that causality should be proven through the tortious framework of causation. This means that plaintiffs have the burden to show that the voluntary state action is both an actual and proximate cause of the injury.

Tortious causation lends clear guidelines to courts and raises fair avenues for defenses. To be an actual cause, the injury must not have occurred if the state action had not occurred.\textsuperscript{139} To be a proximate cause, the state action must be the most significant of all of the causes.\textsuperscript{140} There are two reasons this framework for causation was chosen, and the first is that it has an extensive case law background in negligence jurisprudence which courts can use as guidance.\textsuperscript{141} The second reason is that it ensures these actions will be fair for both sides, as it provides concrete guidelines to plaintiffs while also facilitating the fact-finding process for determining damages or injunctions.

If the intentional state action is an actual cause but is not also the proximate cause of injury in a damages case, courts should apply a pure comparative fault rule. In accordance with pure comparative fault, the state should have a percentage of liability accorded to it and have to pay that percentage of the total damages.\textsuperscript{142} States could use this to raise a defense with the non-party at fault doctrine, wherein they could attribute fault to other causes in order to partly or fully negate the calculated damages.\textsuperscript{143} Simultaneously, plaintiffs could get some level of financial benefit even if they lose, which is often crucial for the disadvantaged communities that would be bringing these actions to begin with.

\textsuperscript{139} See Mussivand v. David, 544 N.E.2d 265, 270-71 (Ohio 1989) (demonstrating the duty not to injure others as applied in tort cases between private citizens); see also MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (demonstrating the duty not to injure others as applied in tort cases between private citizens and private businesses).

\textsuperscript{140} See Mussivand, 544 N.E.2d at 270-71.

\textsuperscript{141} See generally Vosburg v. Putney, 50 N.W. 403, 403 (Wis. 1891) (“If the intended act is unlawful, the intention to commit it must necessarily be unlawful.”); Buick Motor Co., 111 N.E. at 1051; Mussivand, 544 N.E.2d at 270-71.

\textsuperscript{142} See United States v. Reliable Transfer Co., 421 U.S. 397, 405-06 (1975) (demonstrating how comparative fault applies in tort cases between private entities).

Once causation is established, the courts then turn to the question of significant and disparate injury. As the wording implies, it is not sufficient to merely prove that there is a significant injury or that there is a disparate impact; rather, one needs to establish both. Establishing significance is relatively straightforward, as it can be defined as potential damages exceeding the jurisdictional small claims limit. That is the necessary bar to clear for tort claims to get their day in court, so it is only fair that the threshold remains the same in these cases.

The greater question lies in how disparate impact is determined, and the answer lies in historical context. Courts would look at the historical developments of the plaintiff’s area to determine how, if at all, past discriminatory policy might have created market forces or other factors in the area that make it disproportionately vulnerable to or targeted by harmful state action. For instance, a court could see that redlining lowered property values in an area, creating a perverse incentive to build hazardous waste sites which led to many such siting decisions throughout municipal history. If such historical context exists, then disparate injury is found.

This definition of disparate injury ought to be such because its guidelines make the process fairer for all involved. This framework sets forth straightforward guidelines to courts about what factors are relevant in the historical analysis while also helping communities of color gain many more causes of action for policies that undermine the collective well-being of the communities. Moreover, it provides a fair defense for defendants, as they could use their own historical data to attack the chain of causation or disprove that the affected area is one of the historically marginalized areas this framework intends to protect. Lastly, since there is a significant amount of requisite data to find liability under this definition, this framework would help filter out frivolous claims from those outside marginalized communities who would not satisfy the causal, significance, or disparity requirements.

III. Benefits of the Tortious Approach
The first major benefit of the tortious approach is that it allows communities of color significantly greater remedies for racially harmful siting than the status quo. Currently, people of color face an extremely high burden to clear in order to establish discrimination in hazardous siting.\textsuperscript{144} This results in many siting challenges failing no matter how disparate the impact may be for want of evidence establishing animus.\textsuperscript{145} Consequently,

\textsuperscript{145} See generally R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (finding that plaintiff did not meet the burden to establish intentional discrimination in violation of Equal Protection Clause of the Fourteenth Amendment); E. Bibb Twiggs Neighborhood Ass’n v.
the vast majority of siting challenges have failed under the Equal Protection clause, leaving these communities legally defenseless against hazardous siting.\textsuperscript{146} This injustice goes against procedural justice, as it effectively locks communities of color out of the courtroom when battling discriminatory siting absent exceptionally rare smoking guns showing animus.\textsuperscript{147}

Under the tortious framework, many of these cases would have turned out more favorably by deemphasizing the role of animus and allowing communities to prove their injuries with the significant disparate impacts they endured. For example, this framework would have led to a favorable result in \textit{Bean}, as siting hazardous facilities at a much higher rate in areas with minority populations as high as 82.4\% compared to largely white communities created both a great harm and one disproportionately suffered by people of color.\textsuperscript{148} For marginalized communities like the one in \textit{Bean}, this could have led to an injunction preventing the worsening of the already fragile public health of communities located near so many hazardous sites. Additionally, the harms from these siting decisions could have at least partially been offset by damages, providing these communities wealth that site-permitting officials may have deprived them of by their actions.

The tortious framework is beneficial to environmental justice. The framework improves procedural justice by allowing communities of color a mechanism to advocate for themselves against environmental racism and have a direct say in what their remedies are in court.\textsuperscript{149} Additionally, this framework secures corrective justice, as plaintiffs can use injunctions to stop polluters and government officials from inflicting injuries on the public health of communities of color.\textsuperscript{150} There is also a furtherance of distributive justice, as actions for damages redistribute the wealth from polluters to these communities and can be used to bolster the economic well-being of these communities.\textsuperscript{151} Not only does this improve quality of life for these

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\textsuperscript{147} \textsuperscript{147}CLIFFORD \textit{VILLA}, NADIA AHMAD, REBECCA BRATSPIES, ROGER LIN, CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O’NEILL, \textit{Environmental Justice: Law, Policy and Regulation} 13 (3rd ed. 2020).
\textsuperscript{148} \textit{Bean}, 482 F. Supp. at 679-80.
\textsuperscript{149} \textit{Villa}, supra note 147, at 13.
\textsuperscript{150} \textit{Id.} at 15-16.
\textsuperscript{151} \textit{Id.} at 12.
\end{footnotesize}
communities, but it also enforces corrective justice by punishing polluters and negligent state agencies for their wrongdoings.\textsuperscript{152}

Despite the opportunity for redress, a limitation of this framework is that it does not go far enough because a lack of community resources impedes accessing courts in the first place. Since racist policies have historically deprived these communities of economic and social capital, they often lack the resources to mount challenges against discriminatory siting.\textsuperscript{153} A court remedy is thus not often available to these communities even when constructed favorably, as getting in court with effective legal advocacy in the first place is difficult.\textsuperscript{154} However, this limitation exemplifies that the framework is not a perfect solution rather than an active harm created by this framework. In the scenarios where communities do go to court with effective advocacy, the new framework makes success feasible where it was once nigh impossible. Thus, the new framework is still comparatively better than the status quo, and still worth implementing. More than that, the framework significantly increases the likelihood that the significant financial risk these communities incur for litigation results in a victory in court rather than being taken by a loss.

The second reason this approach is helpful is that it provides clearer guidelines to the courts which comport more closely with common law. Currently, courts do not have substantial guidance as to what constitutes an impact that is sufficiently disparate as to support an inference of racial animus.\textsuperscript{155} This is arguably part of why findings of discriminatory intent are almost never made in siting cases, as it is unclear how much of a disparity is too much.\textsuperscript{156} This likely incentivizes courts to look to explicit evidence of animus out of caution rather than risking too great an analytical leap and being overruled at the appellate level.\textsuperscript{157}

However, the analysis becomes much clearer for courts under the tortious framework, as all the court has to determine with regards to the intentional action is whether the state deliberately made that action. There

\begin{itemize}
\item \textsuperscript{152} Id. at 15-16.
\item \textsuperscript{153} De Guire, supra note 1, at 227-30.
\item \textsuperscript{154} Id.
\item \textsuperscript{156} See Bean, 482 F. Supp. at 679-80 (finding that plaintiffs failed to establish intentional discrimination in violation of the Fourteenth Amendment); E. Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cnty. Plan. & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989) (finding that plaintiffs failed to establish intentional discrimination in violation of the Fourteenth Amendment), aff’d, 896 F.2d 1264 (11th Cir. 1989).
\item \textsuperscript{157} See Bean, 482 F. Supp. at 679-80.
\end{itemize}
is no more of a need for subjective inquiries into the psychologies of defendants, which in turn makes the standard more objective and straightforward. Additionally, judges have an extensive body of tortious common law to refer to when issues arise, leaving many more cases for courts to use as guidance in these cases. Not only does that convey the benefit of clarity, but it also makes Equal Protection jurisprudence much more consistent with the rest of common law by doing away with the mistaken changes from *Davis*.

In addition to helping courts, the clarity from consistency with tortious common law also increases access to environmental justice for plaintiffs. This satisfies corrective justice by rectifying the error of *Davis* and allowing for other discriminatory siting decisions to be challenged when they otherwise could not be.\(^{158}\) Likewise, this also helps procedural justice by simplifying these cases, allowing plaintiffs to assess their likelihood of winning at trial much more consistently and accurately.\(^{159}\) Not only does that predictability make lawsuits more fair for these plaintiffs, but the quicker resolutions also decrease litigation costs and make legal remedies more accessible to the marginalized plaintiffs who need them.

While clarity facilitates proceedings, a likely subsequent issue is a surge in plaintiff lawsuits. Due to a mixture of increased accessibility and greater confidence that plaintiffs could win, there will almost certainly be a large number of new lawsuits based on the new standard. This increase in litigation would significantly worsen the caseload of the judiciary and risk overburdening the courts, creating court clog. Court clog undermines judicial expediency, as it would delay other matters by months if not years.\(^ {160}\) Worryingly, many of these new cases may also come from plaintiffs outside marginalized communities seeking to take advantage of the new norm for money. That raises an independent concern that the tortious framework may benefit those outside the intended communities.

Both potential problems with plaintiff lawsuits are outweighed by the benefits to the public and economic health of marginalized communities. Regarding court clog, the underlying point of the judicial system is to provide an avenue for remedying people’s wrongs. That is nearly impossible under the current framework, the cost of expediency is significant given that public health harms from pollutants disproportionately affect areas predominantly occupied by minorities. A loss of judicial expediency is preferable to a significant loss of life, limb, and intergenerational opportunity. Moreover, the harm is slightly

\(^{158}\) See VILLA, *supra* note 147, at 15-16.
\(^{159}\) *Id.* at 13.
diminished by the clear guidelines making it possible to finish existing Equal Protection cases much more quickly. Likewise, in the pretrial stage, court clog and non-marginalized plaintiffs could be filtered out through motions to dismiss or motions for summary judgment based on them not hailing from communities with the historical context the framework would demand.

A third benefit is that the risk of a drawn out trial creates a financial incentive for state permitting agencies to be careful in their siting decisions. Litigation is exceedingly expensive, and that is a cost the government does not take lightly in making its decisions. Given that there would be significantly more risk of losing a lawsuit and a likely increase in plaintiffs, the implicit legal costs of inadvertently discriminatory siting decisions would hang in the heads of officials. Thus, there is a financial incentive to be as careful with siting decisions as possible to minimize the risk that the government sinks time, effort, and money into a lawsuit, even if the government is likely to win. This furthers social justice because it incentivizes the government to be more effective in designing its policies when they affect marginalized groups.

**CONCLUSION**

Ultimately, *Davis*’s mistaken departure from common law intent has inflicted grave injury on vulnerable communities which must be corrected by a return to tortious norms. The current animus standard sets the bar for discrimination so high that many hazardous facility siting decisions are defensible in court no matter how disproportionately they affect minorities. This was not always the case. The Supreme Court’s pre-*Davis* jurisprudence was more consistent with the common law intent which separated intent to act, intent to cause a consequence, and the consequence itself.

Instead, the current Equal Protection framework should evaluate whether an intentional state action causes a significant and disparate impact to communities of color. This would provide a legal remedy where almost none existed prior. Marginalized plaintiffs could use these lawsuits to defend public health by using injunctions to stop harmful state action as well as redistribute wealth away from polluters to the communities that need them. More than that, the court system will become more accessible and friendly to disadvantaged plaintiffs.

This is not a perfect solution, as the courts would remain inaccessible to many people of color and there would be a significant increase in court clog from new plaintiff lawsuits. However, the benefits outweigh these issues, as the former does not negate that this is still comparatively better than the status quo. Regarding the latter, the public health of these communities is more important than judicial expediency.
At the end of the day, the Equal Protection doctrine is meant to safeguard people of color from hostile state action and should be judged according to how it executes that purpose. Currently, communities of color across the nation are left defenseless against an onslaught of discriminatory siting decisions and environmental racism thanks to Davis’s animus requirement. Even if there was no error that departed from common law norms, it is still an injustice that must be corrected if Equal Protection fails to provide any recourse in so many instances of environmental racism. That injustice must be corrected by changing the way Equal Protection approaches discriminatory intent, for the collective well-being of generations of people of color hangs in the balance.
EDUCATIONAL EQUALITY, EDUCATIONAL ADEQUACY: A
CONJUNCTION FOR THE FUTURE

By: Esteban Ortiz*

ABSTRACT
Proper education for all. This single, short sentence is one that people around the United States can agree is a common goal. However, the question of what qualifies as a proper education has been at contention. The author highlights two common theories that are discussed when talking about what a proper education is—adequate or equal—and finds rather than having both on different sides of the equation, conjoining them is the best move forward. By doing so, children’s educational and social needs would be met and adequately addressed.

INTRODUCTION
The importance of implementing and maintaining a proper education has been an established priority in the United States ever since the creation of public schools—which have been credited as the main reason for the formation of local colonial governments—and the judicial branch’s established belief that “education is a major determinant of an individual’s chances for economic and social success in our competitive society.”2

While the importance of obtaining a proper education has been established in society, the definition of what is proper has been at contention. On one side of the debate, adequacy theorists believe that a “proper education” is one that meets the bare minimum standards. On the other side, equality theorists find that a “proper education” is one where all children have access to substantively equal educational opportunities. They

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1 See Cushing v. Inhabitants of Newburyport, 51 Mass. (10 Met.) 508, 511 (1845) (concluding that the establishment of schools—a prudential concern in which individuals had a common interest—was one of the objects for which powers were conferred upon certain associations of persons living together in townships).

advocate through material approaches such as ending racial disparities via diversity programs, securing more capital for lower-income schools, and establishing procedural and substantive educational rights for children.³

Beginning in the late twentieth century, many state courts began interpreting specific state constitutional language to establish that a proper education requires the state to provide an adequate public education for all children.⁴ As a result, adequacy theorists have interpreted educational justice under the lens of the sufficiency doctrine. They simply believe that if K-12 children meet the bare minimum standards required by the state, then their education is adequate and thus proper. Conversely, those in the equality theorist camp believe in a K-12 system built upon substantive equality.

While both sides have historically kept both theories separate, legal analysts have begun to investigate the work of educational reformers and now suggest that both equality and adequacy are intertwined rather than stand-alone concepts.⁵ Through these works, there are new-age theories that merge both adequacy and equity together with the aim of creating a “meaningful educational opportunity” that would bring positive change to K-12 education.⁶

Despite this new era, there are still several equality and adequacy theorists who advocate that one theory rule over the other.⁷ This discussion of how to utilize both theories in the educational realm has furthered the reluctance that courts have in entering this debate, as they would rather leave such educational judgments to educational experts.⁸

⁸ See Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) (“Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context.”); see also Scott R. Bauries, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61 ALA. L. REV. 701, 741 (2010); see also Erik V. v. Causby, 977 F. Supp. 384 (E.D.N.C. 1997).
Given the complexity of the philosophical and legal theories at work, it is necessary to explore the theories of adequacy and equity as defined by statutes, constitutional principles, and theorists. This analysis will assist in guiding the educational system onto a path where both theories coincide harmoniously so that children can experience an education that is “adequately equal and equally adequate.” The aim of this article is to first highlight the key points of educational equality and adequacy. Then, those theories will be reviewed in the practice of K-12 education with the intent to show how a convergence of both would be beneficial for our K-12 system and for society.

Part I explains the concept of equality. Part II defines and investigates adequacy and shows how it has become the prevailing standard in contemporary American education. Finally, Part III reviews the current debate alongside the previous two parts’ content to justify a way to coincide both theories. My critiques and analysis offered throughout this article aim to propose an idea that not only conjoins both terms but also leads to the development of a third: equity.

I. Equality

Equality of opportunity is not, strictly speaking, equality of results. Equality of educational opportunity does not suggest that children reach the same level of educational attainment; it instead promotes the idea that everyone deserves a fair and equal chance to achieve equal educational outcomes.

A. Equality of Opportunity

The idea of equality of opportunity, a fair chance, is the most compelling element of our national ideology. While some associate equality of opportunity into three traditional views, I reject this as I believe that equality of opportunity can be defined as nondiscrimination with discrimination being disparate impact. Disparate impact occurs “when policies, practices, rules, or other systems that appear to be neutral result in

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11 See DOUGLAS RAE, DOUGLAS YATES, JENNIFER L. HOCHSCHILD, JOSEPH MORONE & CAROL FESSLER, EQUALITIES 64 (1981).
13 Id.
14 Weishart, supra note 10, at 486.
a disproportionate impact on a protected group” and thus cause discrimination.\(^\text{15}\) By using a definition of equality of opportunity that means nondiscrimination with discrimination being defined as disparate impact, a more fair and ethical form of competition would emerge as people would be able to call out policies or rules that have a negative result whether it is intentional or unintentional.

\section*{i. Nondiscrimination}

While the above discussion touched upon my rationale for my definition of equality, the reasoning for my belief comes from the idea that “fairness in individual competition for opportunities . . . is a widely cherished American ethic.”\(^\text{16}\) It is also aided by the fact that the idea of coinciding equality of opportunity with nondiscrimination is not a new one. This has been a well-established concept in several international conventions, as the concept of equality of opportunity in education is defined as a system in education where everyone has the right to be free from any form of discrimination.\(^\text{17}\) Instead, the state of California prohibits nondiscrimination in education based on “disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes.”\(^\text{18}\)

As it stands, nondiscrimination is linked with the equality of opportunity as it prohibits people from taking into consideration the outside factors and treats everyone as equal in the educational system. For example, it is important to investigate the way school funding works within the context of discrimination and education. I therefore define nondiscrimination as a lack of disparate impact on different minority groups including ones that have not been recognized as a defined class, such as those who are lower income. By defining “nondiscrimination” as simply a lack of intentional discrimination, we risk a colorblindness approach that ignores different minority struggles.

Equality of opportunity requires that not only a fair competition process be in place; it also requires that a meaningful opportunity to develop the qualifications necessary for success be in place. It is often expected to see a child with parents in a higher tax bracket overachieve in comparison to a child of a lower income status who is more likely to deal with issues such


\(^{18}\) CAL. EDUC. CODE § 220 (West 2023).
as hunger and lower-funded schools. Therefore, I conclude that school finance relates back to nondiscrimination as a lack of a disparate impact, since making disparate impact the standard would allow for a better distribution of funds and a fairer K-12 outcome.

For that reason, my definition of formal equality of opportunity requires positions and posts that confer advantages to all applicants so that society can make up for past discrimination. A positive outcome of this theory, practically, would be seen when the applicant deemed most qualified according to appropriate criteria is offered the position regardless of their background, as they would be starting from the same position as their other peers.\(^1\) As discussed later, for this form of nondiscrimination to work, we must first establish a minimum standard for all K-12 children to meet not only academically but also socially.

If all a system provides is a fair competition process, then the idea of nondiscrimination is just that, an idea. The K-12 system would continue to fail the child starting on first base as they would continue to compete against those starting on third base without the proper tools. While there may be criticism regarding this idea since we would be treating certain children differently from others, this treatment would give children the proper tools and create equity in the K-12 system, which in turn would lead to the equality of opportunity we hold dearly in this country.

For this reason, nondiscrimination that follows an establishment of an equitable minimum standard is the definition of equality of opportunity. While it is true that discrimination can take many forms, including school funding structures that disparately impact students from certain groups, the focus of my paper will be on funding itself as I believe that once this base of the system is fixed, we can build a better overall educational system.

**ii. History of Equality in Education Standards**

The belief that K-12 children should have an equal opportunity for success has a long history. The colony of Massachusetts in 1647 passed an act requiring each town of 50 households to create a common school to teach all the local children reading and writing uniformly with the understanding that each child that received an education in the colony would be given the tools they needed to have the same chance of success.\(^2\) This was the reason that the first department of education was established in 1837 in Massachusetts, followed by state compulsory education laws in 1852.\(^3\)

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\(^2\) Jenkins v. Inhabitants of Andover, 103 Mass. 94, 97 (1869).

\(^3\) See generally Victoria J. Dodd, *PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY* (2nd ed. 2010).
Colonial and state constitutions of the eighteenth and nineteenth centuries frequently contained language ensuring a right to a public education for all children within a state.\textsuperscript{22}

Of course, during the early days of this country, education was restricted to a certain type of person, so the idea of “equity” for all did not come until much later. The view of a substantively equal K-12 system came to fruition in the early 1970s. For example, President Lyndon B. Johnson’s belief that education was the ticket to escape poverty resulted in the passage of the Elementary and Secondary Education Act (“ESEA”) in 1965.\textsuperscript{23} This was followed by the Equal Educational Opportunities Act of 1974 (EEOA), which, among other things, prohibited discrimination in schools.\textsuperscript{24} A push towards K-12 test adequacy during the same time as these acts, however, halted the hope that each would equalize the educational field and provide every child with an equal chance of success regardless of their background.

II. ADEQUACY

“Adequacy, one of the most widely used . . . school indicators,”\textsuperscript{25} has often been defined with a common-sense meaning.\textsuperscript{26} I conclude, however, that adequacy can and should be defined as an expression of the positive thesis of “sufficienarianism,” which stresses “the importance of people living above a certain threshold, free from deprivation” and dismisses the idea of a negative thesis, which “denies the relevance of certain additional distributive requirements.”\textsuperscript{27} I do so because few take issue with the idea that it is morally wrong for people to live below a societal threshold of opportunity, even if they cannot agree on what that threshold should be.\textsuperscript{28} Defining adequacy with this positive sufficienarian ideal helps aid in the further discussion of conjoining adequacy and equality, which would thus help create equity.

A. Democratic Equity and Sufficienarianism Justice

Like other scholars who have investigated the idea of adequacy in the educational setting, I also found Elizabeth Anderson’s essay \textit{What Is the
Point of Equality? helpful in explaining the sufficientarian conception of adequacy.29 In her essay, Anderson believes that compensating people for their luck—such as being born into poverty, bad parents, or illnesses—is troubling.30 Instead, what should be looked at is not the distribution of resources but rather the relationships between those who are and those who are not advantaged.31

Anderson believes, like the positive thesis above, that the aim should be to ensure that all people have a) sufficient internal capacities and external resources to enjoy against oppression and b) have enough resources to function as an equal in society.32 Furthermore, she explains that to allow for both of those to happen, there must be an effective means to basic needs and “access to the basic conditions of human agency.”33 Keeping these concepts in mind, I next turn to explain how these play a part in her defense of the adequacy standard in education.

B. Sufficientarian Standards in Education

Anderson has found that access to education does not translate to equal education as she doubts that equal educational opportunities are necessary to realize educational equity.34 Instead, she believes there needs to be fair educational opportunities resulting in a sufficientarian or adequacy standard such that every student with potential and interest can receive a K-12 education sufficient to enable him or her to succeed at a college.35 Keeping this in mind, there have been many institutions, as discussed below, that reinforce Anderson’s ideas of adequacy and sufficientarianism.

C. Development of National and State Educational Standards

The current educational reform towards adequacy began to brew in 1983, when the highly impactful report, A Nation at Risk, was published.36 In the report, American students were found to be the lowest scoring in the industrialized world in seven out of nineteen academic subjects.37 A Nation at Risk was very influential in the development of more rigorous state

30 Id. at 288-89.
31 Id. at 312.
32 Id. at 320.
33 Id. at 317.
34 Anderson, supra note 7, at 618-19.
35 Id. at 597.
37 See id.
educational standards. Areas of concern in the report included graduation requirements from high school, developing or strengthening competency testing for students and teachers, and increasing overall education funding.\(^{38}\)

*A Nation at Risk* contributed to the creation of the National Assessment of Educational Progress (“NEAP”): a federal educational assessment program that reports state-by-state results on the various NEAP tests in fields like math, history, science, and geography.\(^{39}\) Since 1988, the National Assessment Governing Board, a bipartisan group, has developed the educational standards that NEAP tests aim to measure.\(^{40}\) President George H. W. Bush also began an effort in 1989 to articulate national educational standards in a number of broad areas.\(^{41}\) Consequently, ten years later, NEAP test results rose rather than fell.\(^{42}\)

President G.W. Bush emphasized tests in his educational proposals.\(^{43}\) This led to the creation of the “No Child Left Behind Act.”\(^{44}\) The No Child Left Behind Act (“NCLBA”) required all states that are receiving federal funding to develop a plan that demonstrates “that the State has adopted challenging academic content standards and aligned academic achievement standards.”\(^{45}\) Early state educational standards efforts frequently focused on basic skills but have increasingly evolved to targeted increases in specific academic areas.\(^{46}\)

These standards would be updated under the Obama administration.\(^{47}\) “In the summer of 2009, Obama and Education Secretary Arne Duncan announced” a $4.35 billion grant program for states called “Race to The...

\(^{38}\) See id.

\(^{39}\) See 20 U.S.C. § 9622.

\(^{40}\) Id.


\(^{46}\) E.g., LA. STAT. ANN. §§17:10.1-10.3 (West 2017); 36:651(G) (West 2011).

Top."48 This money was used by the administration “to encourage . . . states to embrace its education policies, including charter schools, college and career-ready standards and evaluations of teachers using student test scores.”49

While the administration did not create any new educational standards, “the Education Department made the adoption of new college and career-ready standards” called “common core,” which became “a key component of applying for the grant money.”50 States did not have to adopt “common core” standards, but they knew that doing so would aid in receiving federal funds.51 Today, many states still use common core standards or some variation of them within their state standards.52

All these historical decisions help prove Anderson’s idea of sufficienarianism because they help show that social justice has become linked with the American education system, as adequacy “measures whether the amount raised and spent per student is sufficient to achieve a certain level of output.”53 This is the idea that K-12 children should receive a fair chance at opportunities is recurring as these policies consistently push for states to meet minimum educational standards. While the standards may vary by state, the goal is the same: to achieve a bare minimum that in theory should give children the chance to become capable of participating within society.

III. EQUALITY AND ADEQUACY

Scholars have begun to look into the work of educational reformers and now suggest that both equality and adequacy are intertwined rather than stand-alone concepts.54 At the state level, for example, adequate levels of funding can mask disparities across districts within that state.55 Given the discussion and advancements we have seen regarding both concepts, I propose that equality and equity are able to conjoin on two principals: a) the principle of equity as discussed by Anderson b) and the advancement of social equality.

48 Id.
49 Id.
50 Id.
51 Id.
53 Allegretto et al., supra note 25.
54 See Black, supra note 5, at 1372-73.
A. Equity

The term “equity” refers to fairness and justice and is distinguished from equality, which means providing the same to all. This article suggests that equity means recognizing that we do not all start from the same place and must acknowledge and adjust imbalances. The process is ongoing, requiring us to identify and overcome intentional and unintentional barriers arising from bias or systemic structures.\footnote{Equity Definition, NAT’L ASS’N OF COLLS. AND EMPRS., https://www.naceweb.org/about-us/equity-definition/ (last visited Sept. 18, 2023).} I find that this concept is the key to bringing both adequacy and equality together.

Sufficientarians, as discussed, follow the idea of a positive thesis, the idea that one must spend in order for there to be a change. However, they are not the only ones. “Self-proclaimed ‘educational egalitarians’ Brighouse and Swift”\footnote{Weishart, supra note 10, at 529.} argue that “[e]veryone should receive an education sufficient for them to be effective and deliberative in the political process . . . to be able to deal with those more advantaged.”\footnote{Harry Brighouse & Adam Swift, Putting Educational Equality in Its Place, 3 EDUC. FIN. & POL’Y 444, 462 (2008).}

Once again, equality of educational opportunity promotes the idea that everyone deserves a fair and equal chance to achieve educational outcomes.\footnote{Derek Bok, The State of the Nation: Government and the Quest for a Better Society 10 (1996).} This is parallel to the idea of adequacy presented by Anderson, as both camps believe that K-12 children should receive an education that a) provides “sufficient internal capacities and external resources to enjoy” against oppression and b) provides kids with enough “to function as an equal in society.”\footnote{Anderson, supra note 7, 620.} Once these are achieved, children not only will become able to receive a fair and equal chance to achieve educational outcomes but also will be able to function as equals with those who might have had an advantage over them at the beginning. Of course, it is again important to restate that this can only be achieved when both equality and adequacy take into consideration external factors (levels of parent’s education, tax brackets, etc.). The legislature and courts debate how much they should consider external factors and how much to provide for an equitable society, but the idea that an equal education leads to an adequate citizen capable of participating in society is within reach and is compatible with both equality and adequacy.
B. Social Equality

To further the discussion above, it is important to note that in recent years “a fully satisfactory theory of justice in education should account for the importance of both adequacy and equality.”61

Some people argue that for some children, the resources that they would need to receive an equal education as their more privileged peers would be “virtually insatiable.”62 However, even if this was the case, it is my opinion that we have a moral obligation to ensure that equal chances for educational achievement is the standard. A state’s obligation should be to provide an adequate education, with the standard of providing K-12 students equal opportunities in the education realm, thus giving each the opportunity to succeed in society after their graduations. This is especially important because “an educational system that . . . preclude[s] the students of poorer families from competing in the same labor market and society as their wealthier peers cannot be adequate.”63

C. Turning Adequacy and Equality into Equity

As the first subpart of this section discussed, our government pillars are always discussing how much is enough consideration of external factors and how much they should provide to create an equitable society. Therefore, it is imperative that I discuss the issue of what the new bare minimum should be before discussing how this will build equality.

I believe that adequacy should be seen as a positive right, meaning people should have their basic needs met. I also believe that everyone, no matter their race, gender, or socioeconomic status, should be given food. Therefore, I submit that food, school resources, and after-school care should all become the bare minimum standard. This way, we can help ensure that children are not hungry, that they have the proper tools for success, and that they are given after-school tutoring which would allow parents who work late to have their children in a safe environment. This minimum should be instituted for everyone, or at the very least, everyone should be given the opportunity to opt in. The question then turns into “how” the state should provide these necessities. This should come through a change in financial distribution within the K-12 system.

61 Darby et al., supra note 9, at 369.
IV. Educational Opportunity in America

To begin to understand the complexity of the “how” it is important to walk through the history of financial litigation in a K-12 educational setting.

A. Financial and Litigation History

The flagstone case in the discussion of educational equity comes in Brown v. Board of Education.64 There, the court made it clear that the opportunity for an education was a right that “must be made available to all on equal terms.”65 However, it is important to note that the Supreme Court ironically ruled in favor of the aforementioned ideal for the first time in the infamous Plessy v. Ferguson decision.66 Brown’s holding that state sanctioned segregation in K-12 education is unconstitutional shifted the tides in American politics and inspired many educational scholars and advocates to turn to another form of discrimination: unequal school funding.67

During the first wave of school finance litigation in the late 1960s and early 1970s, school funding systems were challenged as violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.68 The common belief was that students should not be discriminated against due to their school district’s finances and should thus receive equal funding regardless of race.69

Progress was made on the legislative front with the passage of the Elementary and Secondary Education Act of 1965 (“ESEA”), which provided financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means.70 While this legal theory was starting to gain supporters in the lower courts,71 it did not hold for long.

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65 Id. at 493.
66 Plessy v. Ferguson, 163 U.S. 537, 551 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954) (“When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting the social advantage with which it is endowed.”).
68 Weishart, supra note 10, at 500.
69 Id.
71 Weishart, supra note 10, at 500; see Van Dusartz v. Hatfield, 334 F. Supp. 870, 877
In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that education was not a fundamental right under the U.S. Constitution, and thus strict scrutiny did not apply since those in lower-income districts were not a suspect class. This led to the second wave (1973-1989) of school finance litigation. The focus was still formal equality of educational opportunity, however, litigants lowered their expectations and sought to achieve either horizontal equity or at least fiscal neutrality so that revenues available to a school district would not be dependent on the property wealth of school districts. Unfortunately, only seven of twenty-two second-wave decisions were successful. However, there was an increase in per-pupil spending equity across districts in the states where they won.

The third wave of school finance litigation (1989-present) was triggered by the Supreme Court of Kentucky in *Rose v. Council for Better Educ., Inc.*, where the court concluded that the state’s entire system of common school violated the education clause of the Kentucky state constitution and thus ordered the legislature to “provide for an efficient system of common schools throughout the State.” This case started a wave of successful decisions across the country, shifting the belief in equality to one where plaintiffs would prevail by seeking adequacy. This can be seen in recent cases. For example, in *Gary B. v. Whitmer*, students in a very low performing school in Detroit brought a claim against the district as they asserted that due to the absence of qualified teachers, lack of structurally sound buildings, and insufficient tools, the school left many students virtually illiterate. The Sixth Circuit originally agreed and issued a

(D. Minn. 1971) (holding that Minnesota’s school financing system making spending per pupil a function of the school district’s wealth violated the equal protection of the Fourteenth Amendment); see also Robinson v. Cahill, 287 A.2d 187, 217 (N.J. Super. Ct. Law Div. 1972) (holding that New Jersey’s school financing system discriminated against pupils in districts with low property wealth, and discriminated against taxpayers by imposing unequal burdens for a common state purpose).

73 Koski et al., *supra* note 67, at 47.
77 Rose, 790 S.W.2d at 200; KY. CONST. § 183.
79 Weishart, *supra* note 10, at 503.
80 Gary B. v. Whitmer, 957 F.3d 616, 621-28 (6th Cir. 2020), *reh’g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).
landmark decision holding that there was a “fundamental right to a basic minimum education . . . .”\textsuperscript{81} In reaching this decision, the Sixth Circuit acknowledged that the “Plaintiffs [sat] in classrooms where not even the pretense of education takes place, in schools that are functionally incapable of delivering access to literacy” and attended “schools in name only, characterized by slum-like conditions and lacking the most basic educational opportunities . . . .”\textsuperscript{82} Sadly, while this case could have led to the conjoining of both adequacy and equality in the K-12 system via the judiciary, this holding does not maintain any legal precedent as of June 10, 2020.\textsuperscript{83} After the original holding, the Sixth Circuit of the U.S. Court of Appeals signed an order dismissing the case, thus vacating the legal precedent for the constitutional right to an education.\textsuperscript{84}

Following the denial of the plaintiff’s claims in Detroit, the Center for Educational Equity initiated another class action suit in Rhode Island because the state has no requirement for civic courses and minimal history requirements.\textsuperscript{85} The case was filed on behalf of 14 public school students in Providence who argued that the U.S. Constitution entitles all students to an education that prepares them to participate effectively in a democracy.\textsuperscript{86} It alleged that Rhode Island was failing to provide tens of thousands of public school students throughout the state with the basic education and civic-participation skills that they will need to meaningfully participate in activities that are guaranteed by the Constitution, such as exercising their free-speech rights and voting.\textsuperscript{87}

This case was first dismissed by a District Court in Rhode Island as the judge stated that while the case was “a cry for help from a generation of young people who are destined to inherit a country which we—the generation currently in charge—are not stewarding well,” there was no legal precedent to pull from.\textsuperscript{88} The First Circuit of the Court of Appeals affirmed for similar reasons.\textsuperscript{89} Before moving the case upwards in the Court ranks,
there was an agreement made by both parties.\textsuperscript{90} Under the agreement, the Rhode Island Department of Education agreed to establish a civic education task force, having some of the student plaintiffs and their attorneys assist and advise the state.\textsuperscript{91} In return, the plaintiffs said they will not proceed with filing a petition for review of the case by the Supreme Court.\textsuperscript{92}

These cases, while exciting for those of us who believe that the right to education should be constitutionally protected, demonstrate once more that the Courts may not be the proper place to have the discussion on how to create a more equitable K-12 system. I argue that the responsibility lies with the legislature. While many might find this to be ironic given the hyper-politicization of many legislatures, a legislative solution is not impossible. I maintain the idea that the fastest way for this to happen would be by establishing new school funding laws at a national level.

\textbf{B. Current Funding Laws – California Sufficentarianism}

Before explaining potential alternatives, it is important to first explain the current funding laws to highlight their shortcomings. For this section, I have decided to primarily look at California because they have a direct democracy system, a major economy, and a complex funding system. However, while doing so I want to highlight the following chart\textsuperscript{93} as I believe it is important to see the distribution of funds and how much it varies from state to state.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{Public education expenditures vary widely across states. Per-student expenditures for public elementary and secondary schools, by state, 2017–2018.}
\end{figure}

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Allegretto et al., supra note 25.
It is important to note that public schools in the United States often derive their funding from three sources: a) the federal government, b) state government, and c) local cities or school districts.\(^94\) Federal funds generally comprise a small portion of a school district’s revenue. Depending on the state, state funding may constitute the largest source of revenue for public education.\(^95\)

In California’s overall tax system, there are roughly equal parts: a) personal income tax, b) property tax, and c) sales and use taxes.\(^96\) Education in the state is being funded by a mix of these sources, especially the first two.\(^97\) This was not always the case, however, as up until the late 1970s, California used local property taxes to fund its schools like most other states.\(^98\) The change occurred when voter-approved Proposition 13 limited the local property tax rate to 1 percent and capped the annual increase in the assessed value at no more than 2 percent each year.\(^99\) The proposition led to an immediate and significant decline in state and local revenues.\(^100\) Since 1977, property tax revenues have declined 12 percent.\(^101\) To compensate, California state income tax revenues have increased by up to 226 percent, and sales tax revenues have increased by up to 107 percent.\(^102\)

California, which has the highest poverty rate in the nation when accounting for the cost of living, has had its income inequality worsened in recent years. The issue is that California’s revenues now rely more heavily on income tax, which can be highly vulnerable to economic fluctuations.\(^103\) Indeed, when there is an economic downturn in California, the income tax base in the state declines.\(^104\) This also implies that inequities between poor and affluent school districts may become more apparent when looking at children living in poverty and their non-impoverished peers during economic downturns.

It is important to highlight that “over the past four decades, California’s K-12 education spending has increased by 1.5 times and higher education

\(^94\) See Lesson 8.3 Who Pays for Schools: Where California’s Public School Funds Come From, ED 100, https://ed100.org/lessons/whopays#:~:text=Most%20of%20the%20money%20for,many %20other%20functions%20of%20government (last visited Nov. 15, 2022).
\(^95\) Id.
\(^96\) Id.
\(^97\) Id.
\(^98\) Id.
\(^99\) Allegretto et al., supra note 25.
\(^100\) R.C. AUXIER, T. GORDON & K. REUBEN, TAX POL’Y CTR., CALIFORNIA’S STATE AND LOCAL REVENUE SYSTEM 4 (2020).
\(^101\) Id. at 9.
\(^102\) Id.
\(^103\) Allegretto et al., supra note 25.
\(^104\) Id.
spending has increased by 1.7 times.”¹⁰⁵ But, “[s]tate spending on education has [also] grown at a slower rate than spending on other program[s].”¹⁰⁶ For example, “spending on police and corrections has nearly tripled and spending on health and hospitals and public welfare has more than quadrupled.”¹⁰⁷ Consequentially, “the percentage of overall state and local spending on K-12 education has decreased from 25 to 18 percent, and the percentage of spending on higher education has decreased from 11 to 9 percent.”¹⁰⁸ Regardless of this decrease in spending compared to other programs, there have been record K-12 funding levels” due to federal pandemic aid.¹⁰⁹ For example, “[i]n 2021–22, state, local, and federal funding for California K-12 public schools was roughly $136 billion, compared to roughly $135 billion in 2020-21 (estimates as of July 2022).”¹¹⁰ All the while, the federal government allocated “$23.2 billion in one-time aid in 2020-21 and another $9.2 billion in 2021-22.”¹¹¹ “Federal funds accounted for 23% of K-12 funding in 2020-21 and 12% in 2021-22.”¹¹² In contrast, “in most non-recession years, the federal share is only 6 to 9 percent.”¹¹³ “State K-12 funding increased nearly 50% between 2017-18 and 2021-22.”¹¹⁴ Despite record funding levels, there are still many fiscal challenges with K-12 funding as “spending is not nearly enough, on average, to provide students with an adequate education.”¹¹⁵ For comparison, “in 2018, California spent $12,498 per pupil compared with $12,612 nationally, still well below” states such as New York, which just spent roughly $25,000 per pupil.¹¹⁶ Additionally, due to declining birth rates and migration away from the state of California, K-12 student enrollment has been declining.¹¹⁷ COVID-19 caused drops in enrollment to be larger than expected, leading

¹⁰⁶ Id.
¹⁰⁷ Id.
¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹¹ Id.
¹¹² Id.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Allegretto et al., supra note 25.
¹¹⁶ Hahnel, supra note 105.
¹¹⁷ Id.
most districts and counties to grapple with the fiscal challenges of downsizing over the next decade.\textsuperscript{118} Estimates imply that “districts will need at least $7.4 billion in additional state funding for modernization needs through 2025.”\textsuperscript{119} School facility funding is primarily funded locally, with the state School Facility Program (SFP) providing some support.\textsuperscript{120} However, because of this method, SFP funding has disproportionately benefited more affluent areas.\textsuperscript{121} As a result, schools are faced with a situation in which they can either “bite the bullet and make budget cuts now, or delay them and face even more painful decisions” in the future.\textsuperscript{122}

Therefore, while local property tax funding has been found by the Court to be a rational method of furthering a legitimate state interest in control of local education,\textsuperscript{123} this is clearly failing in states like California where voters can change the dynamics of funding. This form of funding is not only abnormally complex, but highly problematic as it creates larger issues of inequality. For example, “38 percent of California’s K-12 students are or have been English learners.”\textsuperscript{124} This is an important figure because while the state is spending more in districts serving higher percentages of low-income students and English learners, it is still not enough as “schools in the top quartile of student poverty would need to spend 46 percent more to meet these students’ needs.”\textsuperscript{125} Since these high-poverty schools “serve primarily Black and Latinx students,” this has led to an issue of “long-standing neighborhood segregation and systemic racism,” which in turn leads to an educational equity problem.\textsuperscript{126}

California’s system of funding is obviously failing the goal that K-12 students are provided equal opportunities in the education realm. As previously stated in this article, the issue with the complexity of school funding, to me, is one that comes because of a lack of a core base minimum for states to adhere to. While I do believe that increased federal resources are a good start, the sad reality is that without any concurrent policy, the State will be simply throwing money at the issue hoping that something works out. This is inadequate, the State must plan in a more long-term-

\begin{itemize}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Lafortune et al., supra note 110, at 2.
\item \textsuperscript{120} Julien Lafortune, Niu Gao, & Joseph Herrera, Pub. Pol’y Inst. Of Cal., Equitable State Funding For School Facilities 3 (2022).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Emily Hoeven, California Schools Are Running Out Of Money, Cal Matters (Oct. 19, 2021), https://calmatters.org/newsletters/whatmatters/2021/10/california-schools-funding/.
\item \textsuperscript{123} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).
\item \textsuperscript{124} Hahnel, supra note 105.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\end{itemize}
minded manner. As a Californian who has gone through the public school ranks, I understand the reality of our education system. Despite having one of the strongest economies in the country, the complexity of our education system has magnified systematic issues that have ultimately led to an unequal and inadequate system of education.

C. Potential Alternatives

Due to the complexity of the K-12 funding system, I conclude that the federal government must establish a base standard for states to meet so that the K-12 system can become more efficient.

Prior to describing an alternative, it is important to highlight some other issues that come with the complex system of K-12 funding. First are the unique American troubles that come with our conception of federalism. Given that states decide their funding allocated to public schools rather than there being a national standard, funding levels vary across the states. As a result, our current system is inadequate and inequitable as funding for public schools “shortchanges students, particularly low-income students.”¹²⁷ Below is a chart¹²⁸ that gathered district poverty measured by the percentage of children “living in [a] school district with family incomes below the federal poverty line.”¹²⁹ This chart compares the money required to achieve national standards to the actual spending per pupil.

<table>
<thead>
<tr>
<th></th>
<th>Required spending</th>
<th>Actual spending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest-poverty (poorest)</td>
<td>$18,231</td>
<td>$13,096</td>
</tr>
<tr>
<td>High-poverty</td>
<td>$13,928</td>
<td>$10,850</td>
</tr>
<tr>
<td>Medium-poverty</td>
<td>$11,999</td>
<td>$10,499</td>
</tr>
<tr>
<td>Low-poverty</td>
<td>$9,917</td>
<td>$10,532</td>
</tr>
<tr>
<td>Lowest-poverty (affluent)</td>
<td>$8,313</td>
<td>$10,239</td>
</tr>
</tbody>
</table>

This chart illustrates that “relative to the wealthiest districts, the highest-poverty districts need more than twice as much spending per student to provide an adequate education.”¹³⁰ Consequentially, as the actual spending shows, there is a gap in the K-12 standards. Therefore, I propose that the United States create and use a new system that conjoins adequacy and equality, as described above, with the aim at creating equity.

To do this, it is imperative that we take into consideration an increase in funding to schools serving students with greater needs. To me, “needs” can

¹²⁷ Allegretto et al., supra note 25.
¹²⁸ Id.
¹²⁹ Id.
¹³⁰ Id.
span a great range as they can mean extra academic, socioeconomic, or health needs. Nonetheless, the key is that schools that accommodate these children receive more resources and spend more to meet those needs than schools with a lower concentration of disadvantaged students. Currently, as discussed, schools fail poorer districts. This is why I propose that poorer school districts, based upon the census data available, receive an increased level of federal funding. Not only would this aid the children but an increase in federal spending could boost the wider economy as “countries with a greater portion of their population attending and graduating from schools see faster economic growth than countries with less-educated workers.”

However, I again caution any spending done without a plan. Before the federal government disburses any funds, they should have the Department of Education expand its power just enough to establish a basic sufficientarian standard that requires schools to not only achieve a bare minimum in educational standards but also in providing children necessities such as food and clothing. If this is done, not only will a child be put in the same starting position as their wealthier peers, but it will also allow a child to be just that, a child. By having their basic needs met, children would have the proper tools and be equal in their competition for positions in the “real world” as they would be able to focus solely on school.

Even if the above discussion on spending is met with controversy, it is my belief that at a bare minimum, each school across the nation should also be given funds that provide an adequate amount for teachers’ classroom spending and new textbooks. While it might be the case that a school does not need to buy a history textbook every year, the Department of Education should have a standard that prevents books from being used in schools that are outdated over a certain number of years. This would relate back to the nondiscrimination principle I have previously described because giving kids the same or at least similar edition of a textbook would allow them to each be learning from the same tool.

Finally, it is important for me to note that I do not believe that there should be a limit to educational spending. To me, this limit would be the readily available “required spending” per district. This number might change based on my proposed “required spending” limit that includes meals and uniforms in the school budget. If this required spending limit is met, we would have an adequate standard that establishes equity and, once achieved, everyone would have an equal opportunity in the outcome. Additionally, while there might be those who oppose the idea of more federal government

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oversight, there is already extensive government oversight over education. While this might expand any of the Department of Education’s powers, this expansion would aid in the creation of a more equitable K-12 system. This in turn would keep the wheels of our economy spinning for future generations as our population would be aided in having children solely focused on learning rather than on hunger or any other external issues.

By conjoining both adequacy and equality, we would create equity and see the marketplace of ideas blossom. Doing so would create the ideal system discussed since the beginning of the country. This time, however, such a system would include minority populations and reflect our society more fittingly.

**CONCLUSION**

While how much or how little should be given to different areas of society is up for debate, it is my opinion that the amount should be that in which morally, society agrees that we have provided the best resources to our children. It is immoral to expect children who lack basic resources such as clothes and food to tie up their shoelaces and just work hard. I conclude that these types of moral obligations will allow both camps of adequacy and equality scholars to come together and form a conjoint effort to achieve a more socially equitable K-12 education that will improve our nation in every way possible.