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A Realistic and Meaningful Opportunity for Release: Recommendations for Parole Review for People Serving Long Sentences for Crimes Committed as Youth

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INTRODUCTION

In the late 1980s and 1990s, rising crime rates and the myth of the juvenile superpredator led many states to change the way that people were prosecuted and sentenced for crimes they committed under age 18, to devastating effect. The confluence of harsher penalties, mandatory minimum sentences, and easier, and sometimes automatic, transfer from juvenile to adult court, meant that thousands of children across the country received adult sentences for their crimes, often without any consideration of their youth. Over the same period, developmental research began to emerge that demonstrated that the adolescent brain is not yet fully developed and that the psychosocial maturity of youths differs fundamentally from that of adults. Studies confirmed that young people exhibit heightened immaturity, impulsivity, risk taking, and susceptibility to peer pressure. But studies also showed that youths are likely to outgrow criminal behavior, which for young people typically reflects the transient qualities of youth rather than irreparable criminality.

In a series of decisions beginning in 2005, the United States Supreme Court, citing this emerging understanding of neurological and psychosocial

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development, acknowledged that children are different for purposes of sentencing, less culpable and more capable of change than adults who commit the same crimes. It therefore held that the Eighth Amendment prohibits treating children the same as adults in sentencing, imposing categorial prohibitions on the death penalty for crimes committed under age 18 and on life without parole for nonhomicide crimes committed under age 18. It further held that life without parole is a disproportionate sentence for most people who commit homicide crimes under age 18, and that the penalty may be imposed only after consideration of the mitigating factors of youth, and only in the rare instance in which a homicide crime reflects irreparable corruption rather than the transient immaturity of youth, although no express finding is required. Taken together, these decisions require a realistic and meaningful opportunity for release for the vast majority of people sentenced for a crime committed under age 18.

Thus, states began to reform how they sentenced children by abolishing juvenile life without parole, implementing individualized resentencing proceedings, expanding eligibility for sentence modification or parole, or some combination of these and other reforms. In the wake of such reforms, however, more people than ever are serving life or long sentences with parole eligibility. For many serving parole eligible sentences, parole processes and procedures also implicate Eighth Amendment protections. Parole processes that don't enable realistic review or a meaningful opportunity to demonstrate post-crime maturity or rehabilitation may also raise due process, state constitutional, or other legal issues. More broadly, robust parole processes offer an important course correction. For anyone in this cohort, parole offers an opportunity to reevaluate long sentences in light of what we now know about youth psychosocial and neurological development. Meaningful parole consideration in this context can promote the rehabilitative ideal and support people sentenced as children in realizing productive adult lives outside of prison.

In recent years, people serving life or other lengthy sentences for crimes committed under age 18 have filed lawsuits challenging parole processes and procedures that, they argue, fail to provide the requisite consideration of youth or realistic and meaningful opportunity for release. These lawsuits challenge decision-making criteria that fail to emphasize youth-related factors, or that focus on offense conduct to the exclusion of post-crime maturity and rehabilitation. They also challenge parole procedures that limit opportunities to correct the record or ensure accuracy, impede a meaningful showing of post-crime growth and change, or preclude judicial review. The results of these lawsuits have been mixed at best—some courts have rejected any efforts to apply the Supreme Court's Eighth Amendment jurisprudence in this context, and others have affirmed anemic parole processes under which few are ever released. But, in some states, these lawsuits have resulted in judicial decisions or settlement agreements that offer guidance on what

parole should look like in this context. And elsewhere, litigation has complemented or catalyzed legislative reform efforts, resulting in new policies and procedures for parole review of this cohort. Building on the case law and legislative reforms, this article proposes model policies for robust constitutional compliance and meaningful, comprehensive parole review for people serving long sentences for crimes committed as youth.

The article proceeds as follows:

PART I describes the changes in law in the late 1980s and early 1990s that resulted in a marked increase in young people sentenced to life or life-like sentences, as well as the evolving understanding of psychosocial and neurological development that followed.

PART II summarizes the U.S. Supreme Court's Eighth Amendment jurisprudence on this topic.

PART III discusses the subsequent changes that states across the country have made to the ways that they sentence people for crimes committed under age 18, the ensuing rise in parole-eligible life and life-like sentences for that cohort, and the ways in which existing parole systems fell (and continue to fall) short.

PART IV explores the constitutional dimensions of parole review in this context and the judicial decisions that have begun to fill in the contours of the relevant requirements.

Finally, PART V offers model policies, with commentary, addressing the substantive and procedural components of parole review for people sentenced for crimes committed under age 18. The model policies aim to ensure a realistic and meaningful opportunity for release that is based on assessment of youth and post-crime maturity and rehabilitation, with procedures to support decision-makers in comprehensive and accurate parole review.

I. BACKGROUND: THE MYTH OF THE JUVENILE SUPERPREDATOR, CHANGES IN YOUTH PROSECUTION AND SENTENCING, AND AN EMERGING UNDERSTANDING OF PSYCHOSOCIAL AND NEUROLOGICAL DEVELOPMENT

In the late 1980s and early 1990s, crime, including violent crime, was at a high point in the United States,[1] including a marked rise in violent crime committed by people under the age of 18.[2] This rise in crime captured the attention and fear of the public, and led to criticism of the juvenile justice system as inadequate to confront these perceived threats.[3] During this

[1] Crime and violent crime rates peaked in that era in 1991. *See* MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUST., CRIME TRENDS: 1990–2016, 3, 6 (2017).

[2] *See, e.g.*, JEFFREY BUTTS & JEREMY TRAVIS, URB. INST.: JUST. POL'Y CTR., THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, 2 (2002) (reporting that the number of juvenile arrests for "Violent Index" offenses grew 64 percent between 1980 and 1994, and that the juvenile arrest rate for murder grew 167 percent between 1984 and 1993 alone).

[3] *Id.*

period, a theory emerged that purported to explain this rise in violent crime by youths: the juvenile "superpredator."[4] Political scientist John J. DiIulio, Jr., then a Princeton University professor, first used the term in 1995, with clear racial undertones,[5] to describe the "ever-growing numbers of hardened, remorseless juveniles who were showing up in the system" and to predict "a sharp increase in the number of super crime-prone young males," raised in "abject moral poverty" and poised to "do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high."[6] DiIulio predicted the "need to incarcerate at least 150,000 juvenile criminals in the years just ahead."[7] The superpredator theory at once described and fueled a phenomenon already visible in changes being made to how states, and judges, sentenced young people: a belief that youths who committed serious crimes were somehow *more* dangerous than adults and *more* deserving of the harshest penalties.

During this era, nearly every state in the nation reformed the way that it prosecuted and sentenced people under age 18 for serious crimes, redrawing the boundaries of the juvenile court and exposing many more youth to the adult criminal justice system and its penalties.[8] Previously, transfer to adult court and imposition of adult punishment was rare.[9] In this period, however, states amended laws to make it easier to try young people in the adult system, including lowering the minimum age of adult court jurisdiction, shifting discretion to prosecutors to initiate proceedings in adult court through charging decisions, expanding the kinds of crimes that enabled or mandated transfer to adult court, and withdrawing juvenile jurisdiction for certain categories of crimes.[10] Simultaneously, changes made to many

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[4] *See, e.g.*, State v. Belcher, 342 Conn. 1, 14 (2022) (noting that DeIulio's "dire predictions centered disproportionately on the demonization of Black male teens").

[5] *Id.* at 13.

[6] John DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators.

[7] *Id.*

[8] *See The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later; John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 584–85 (2016) ("From 1992 to 1999, forty-nine states and the District of Columbia amended their transfer statutes to make it easier for juveniles to be tried in adult court and face adult sentences.").

[9] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 4 (2008).

[10] *See, e.g.*, HUM. RTS. WATCH & AMNESTY INT'L, THE REST OF THE THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005), https://www.hrw.org/report/2005/10/12/rest-their-lives/life-without-parole-child-offenders-united-states (noting that rates of JLWOP for black youth were ten times greater than for white youth); *Mills*, *supra* note 8, at 585 (describing changes including lowering the minimum age of transfer, expanding the catalogue of offenses permitting or requiring transfer, shifting discretion from judges to prosecutors, and noting that by 1999, more than half of states had mandatory transfer for some crimes); *see also,* MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, SENT'G PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 17 (2004) (noting that between 1992 and 1995, 40 states and the District of Columbia passed laws making it easier to try people under age 18 in adult court, and that many of these laws provided for automatic transfer); PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, U.S. DEP'T OF JUST., TRYING

adult criminal justice systems increased the prevalence of mandatory minimum sentences, reduced opportunities for early release under a Truth in Sentencing model, abolished parole in many states, and, generally, increased the penalties imposed.[11] And many parole boards across the country reformed their approach to parole during this era, changing decision-making criteria and procedures for people serving life sentences in ways that drastically reduced release rates.[12]

Thus the nation began to condemn young people to die in prison in staggering numbers and with racially disparate effect.[13] Between 1985 and 1994, the number of people tried as adults for crimes committed under age 18 increased by 71%, and black youth were more likely than white youth to be transferred to the adult criminal justice system.[14] By the year 2000,

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JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (Sept. 2011), https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf ("In the 1980s and 1990s, legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts."); Katie Rose Quandt, *Why Does the U.S. Sentence Children to Life in Prison?*, JSTOR DAILY (Jan. 31, 2018), https://daily.jstor.org/u-s-sentence-children-life-prison/ ("[B]etween 1990 and 1996, forty states passed laws making it easier for juveniles to be prosecuted as adults.") (citing "a 1999 report [finding] that when juveniles were transferred to adult court and convicted of murder, they received, on average, longer sentences than adults convicted of the same crime"); ASHLEY NELLIS, SENT'G PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT (2019), https://www.sentencingproject.org/fact-sheet/youth-sentenced-to-life-imprisonment/ (describing the changes in crime policy after the crime wave of the late 1980s, including mandatory minimum sentences that limited judicial discretion in the adult system).

[11] Nellis, *supra* note 10; *see also* Mauer, King & Young, *supra* note 11, at 3 (noting that between 1992 and 2003, the lifer population in United States prisons increased by 83%); DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 12 (2001), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf ("Two-thirds of the States established truth-in-sentencing laws under the 85-percent test. To satisfy the 85-percent requirement, States limited the power of parole boards to set release dates, the power of prison managers to award good-time, or earned-time, or both."); TIMOTHY A. HUGHES, DORIS JAMES WILSON & ALLEN J. BECK, U.S. DEP'T OF JUST., TRENDS IN STATE PAROLE, 1990–2000 (2001), https://bjs.ojp.gov/content/pub/pdf/tsp00.pdf ("By the end of 2000, 16 States had abolished discretionary release from prison by a parole board for all offenders. Another four States had abolished discretionary parole for certain violent offenses or other crimes against a person.").

[12] For example, between 1993 and 2005, Michigan rehauled its Lifer Parole processes with the explicit purpose of "making more criminals serve more time and keeping many more locked up for as long as possible." CITIZENS ALL. ON PRISONS AND PUB. SPENDING, NO WAY OUT: MICHIGAN'S PAROLE BOARD REDEFINES THE MEANING OF "LIFE" 10 (2004), https://static.prisonpolicy.org/scans/cappsmi/fullliferreport.pdf (citing, too, comments made on behalf of the state's parole board members in 2001 that "[t]he parole board believes a life sentence means life in prison"). Changes during this period included increasing the minimum amount of time served before parole eligibility, new decision-making guidelines, eliminating the right to appeal denial of parole, and eliminating the requirement that the board provide written reasons for denial. *Id.* at 10–11. These changes, and the resulting increase in the lifer population in the state, tracked national trends; the nation's lifer population doubled from 1984 to 1992, and then grew by an additional 83% from 1992 to 2003. *Id.* at 17.

[13] *E.g.*, *Mills*, *supra* note 8, at 579–80 (describing the racial inequities and noting "[n]on-whites are overrepresented among the JLWOP population in ways perhaps unseen in any other aspect of our criminal justice system" and that "[t]his kind of disparity harkens back to the inequitable sentencing practices that developed during the Jim Crow Era.").

[14] CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, THE ORIGINS OF THE SUPERPREDATOR: THE CHILD STUDY MOVEMENT TO TODAY (2021), https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf; *see also* HUM. RTS. WATCH & AMNESTY INT'L, *supra* note 10 (noting that from the early 1980s to the mid-1990s, the relative percentage of black youth admitted to prison grew steeply, while declining for white youth).

estimates suggested that 250,000 children annually were charged as adults in the United States.[15] Many of these children faced life- or life-like sentences, and remained behind bars years later, even as sentencing practices affecting young people began to change, albeit with persistent racial disparities.[16]

Youth crime was in decline by the mid 1990s,[17] undermining the superpredator theory, which DiIulio himself soon repudiated.[18] Acknowledging the misguided approach to sentencing young people in that era, at least one court has since found that a sentencing court's reliance on the "materially false" superpredator theory required resentencing, citing the "dehumanizing racial stereotypes" underlying the theory and noting that "[b]y labeling a juvenile as a superpredator, the very characteristics of youth that should serve as mitigating factors in sentencing . . . are treated instead as aggravating factors justifying harsher punishment."[19]

And at the turn of the century, a new understanding of psychosocial and neurological development began to emerge that contradicted the then-prevailing narratives. New research made clear that the brain does not fully develop until a person is in their early-to-mid 20s; before this time, the undeveloped frontal cortex affects judgment and behavior in important ways.[20] Moreover, psychosocial and behavioral studies demonstrated that, as compared to adults, young people are more impulsive, less capable of weighing risks and rewards or understanding the consequences of their actions, and more susceptible to negative influence and peer pressure.[21] In this context, researchers posited, crimes committed by immature young people typically reflect the transient qualities of youth, rather than

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[15] MARCY MISTRETT, THE SENT'G PROJECT, *YOUTH IN ADULT COURTS, JAILS, AND PRISONS* 1 (2021), https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf.

[16] *See, e.g.*, HUM. RTS. WATCH & AMNESTY INT'L, *supra* note 10 (noting that rates of JLWOP for black youth were ten times greater than for white youth).

[17] Shay Bilchik, U.S. Dept. of Just., *Challenging the Myths,* 1999 NAT'L REP. SERIES, at 2 (Feb. 2000), https://www.ojp.gov/pdffiles1/ojjdp/178993.pdf (noting that by 1995, juvenile violent crime had returned to its traditional level, contrary to the superpredator crime wave predictions); *see also* Butts & Travis, *supra* note 2, at 10 ("Whatever forces combined to produce the drop in violent crime after 1994, they appear to have had their strongest effects on young people, the very demographic group that some experts believed would overwhelm American society by the end of the 1990s with alarmingly high levels of violence. The juvenile 'super predators' did not appear as predicted.").

[18] *E.g.*, Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-youngsuperpredators-bush-aide-has-regrets.html.

[19] State v. Belcher, 268 A.3d 616, 628–29 (Conn. 2022).

[20] SCOTT & STEINBERG, *supra* note 9, at 13–16.

[21] *See, e.g.*, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 43 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013), https://nap.nationalacademies.org/catalog/14685/reforming-juvenile-justice-a-developmental-approach; Brief for the American Psychological Ass'n, American Psychiatric Ass'n, National Ass'n of Social Workers & Mental Health America as Amici Curiae Supporting Petitioners at 3–4, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

intractable bad character, because most young people will outgrow criminal behavior in adulthood.[22]

But the damage wrought by changes to youth prosecution and sentencing had been done and continued. By 2013, there were more than 10,000 people serving life or life without parole sentences for crimes they had committed under age 18.[23] Moreover, a 2005 report found that black children received life without parole sentences at ten times the rate of white children,[24] and a 2009 report estimated that of the 6,807 people serving life or life without parole sentences for crimes committed under age 18, 77% were people of color.[25]

II. U.S. SUPREME COURT JURISPRUDENCE: EIGHTH AMENDMENT LIMITS ON SENTENCES FOR CRIMES COMMITTED UNDER AGE 18

In a series of decisions beginning in 2005, the United States Supreme Court made clear that youth matters in sentencing and that the Eighth Amendment's prohibition on "cruel and unusual punishments"[26] limits the sentences that may be imposed on people convicted of crimes committed under age 18. These decisions reflected the emerging understanding of neurological and psychosocial development and sparked changes to the sentencing landscape for young people across the country.

The Court first addressed the issue in 2005 in *Roper v. Simmons*, which held that the Eighth Amendment prohibited the imposition of the death penalty as punishment for crimes committed under age 18.[27] Looking to the emerging developmental research, in a majority opinion by Justice Kennedy, the *Roper* Court reasoned that "juvenile offenders cannot with reliability be classified among the worst offenders," citing their "comparative immaturity and irresponsibility," heightened susceptibility "to negative influences and outside pressures," and transitory personality traits, which "render suspect any conclusion that a juvenile falls among the worst offenders."[28] Ultimately, the Court concluded that because it is impossible to accurately distinguish "between the juvenile offender whose crime reflects unfortunate yet transient immaturity," for whom the death penalty would be a disproportionate sentence, and "the rare juvenile offender whose crime

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[22] Brief for the American Psychological Ass'n at 4, *Graham*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

[23] *See* ASHLEY NELLIS, SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA (2013), https://www.sentencingproject.org/reports/life-goes-on-the-historic-rise-in-life-sentences-in-america/.

[24] HUM. RTS. WATCH & AMNESTY INT'L, *supra* note 10, at 1.

[25] ASHLEY NELLIS & RYAN S. KING, SENT'G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (2009), https://www.sentencingproject.org/app/uploads/2023/01/inc_NoExit Sept2009.pdf.

[26] The Eighth Amendment, applicable to the states through the Fourteenth Amendment, reads, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[27] Roper v. Simmons, 543 U.S. 551 (2005).

[28] *Id.* at 569–70.

reflects irreparable corruption," the sentence could not constitutionally be imposed.[29]

In 2010, in *Graham v. Florida*, the Court held that life without parole sentences violated the Eighth Amendment when imposed on people under the age of 18 convicted of nonhomicide crimes.[30] Citing the "twice diminished moral culpability" of a young person who did not kill or intend to kill,[31] Justice Kennedy again wrote for the Court, and explained that "[l]ife without parole is an especially harsh punishment for a juvenile," who is likely to serve more time and a greater percentage of his or her life than an adult.[32] Ultimately, the Court concluded that although a state need not "guarantee eventual freedom," it must provide "some [realistic and] meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[33] That is, a state cannot at the time of sentencing determine that a person who committed a nonhomicide crime under age 18 will never be able to demonstrate fitness to reenter society; it must therefore offer a realistic and meaningful opportunity for release, which it might opt to do through a parole process that enables the person to show that they have rehabilitated.[34]

Two years later, in *Miller v. Alabama*, the Court, in an opinion by Justice Kagan, held that a life without parole sentence is an unconstitutional penalty for people who commit homicide under age 18.[35] The Court noted that such crimes most often "reflect[] the transient immaturity of youth," and such an extreme penalty may constitutionally be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption," and only after the sentencer has accounted for "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[36] Under this holding, a *mandatory* life without parole sentence imposed for a homicide crime committed under age 18 violates the Eighth Amendment because it precludes the requisite consideration of the mitigating circumstances of youth.[37] Instead, a sentencer must consider in mitigation the person's age and its hallmark features, including: immaturity, impetuosity, failure to appreciate risks and consequences, family and home environment, circumstances of the offense including extent of participation and familial and peer pressures, and the incompetencies of youth and their effect on the investigation and judicial proceedings.[38] After such

[29] *Id.* at 573–74, 578–79.
[30] Graham v. Florida, 560 U.S. 48 (2010).
[31] *Id.* at 69.
[32] *Id.* at 70.
[33] *Id.* at 75, 82.
[34] *Id.*
[35] Miller v. Alabama, 567 U.S. 460, 465 (2012).
[36] *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
[37] *Id.* at 489.
[38] *Id.* at 477–78.

consideration, the Court reasoned, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[39]

In *Montgomery v. Louisiana*, in 2016, the Court confirmed that *Miller*'s prohibition on mandatory life without parole sentences for offenses committed under age 18 applied retroactively to all persons serving such sentences.[40] Justice Kennedy's majority opinion explained that such sentences could be remedied in resentencing proceedings, after which life without parole could be reimposed only after adequate consideration of the mitigating factors of youth, or by "consider[ation] for parole . . . ensur[ing] that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."[41] Parole eligibility in this context must provide the requisite "opportunity for release . . . to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[42]

Finally, in *Jones v. Mississippi*, in 2021, the Court held that a sentencer need not make a factual finding of permanent incorrigibility nor provide an on-the-record sentencing explanation with an implicit incorrigibility finding before imposing a discretionary life-without-parole sentence.[43] Instead, in an opinion written by Justice Kavanaugh, the *Jones* Court confirmed that *Miller* and *Montgomery* require a discretionary sentencing regime that permits "the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age."[44] The Court re-emphasized language from *Montgomery* to make clear that it was limiting the procedural reach of its jurisprudence while keeping the substantive requirement—that life without parole is a disproportionate sentence for "a child whose crime reflects transient immaturity"—intact.[45] Though the *Jones* decision reflected a changed Court and the new conservative majority's circumscription of this line of cases, *Miller* and *Montgomery* remain good law. Justice Sotomayor emphasized in her dissent that "[s]entencers are thus bound to continue applying those decisions faithfully," either through the robust procedures states have implemented "to give effect to *Miller* and *Montgomery*" or through the responsibility "on individual sentencers to use their discretion to 'separate those juveniles who may be sentenced to life without parole from those who may not.'"[46]

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[39] *Id.* at 479.
[40] Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).
[41] *Id.* at 212.
[42] *Id.*
[43] Jones v. Mississippi, 593 U.S. 98 (2021).
[44] *Id.* at 111–12.
[45] *Id.* at 106 n.2 (quoting *Montgomery*, 577 U.S. at 211).
[46] *Id.* at 145 (quoting *Montgomery*, 577 U.S. at 210).

In sum, under the Supreme Court's Eighth Amendment jurisprudence, life without parole sentences imposed for crimes committed under age 18 should be rare—for the "vast majority"[47] of people who commit such crimes, including anyone whose crime reflects transient immaturity rather than irreparable corruption, a sentence must offer a realistic and meaningful opportunity for release.

III. PAROLE-ELIGIBLE SENTENCES ON THE RISE AFTER *GRAHAM* AND *MILLER*

In the wake of this Supreme Court jurisprudence, the total number of people serving juvenile life without parole sentences has decreased significantly, from a peak of 2,800 to 542, a number that includes people awaiting resentencing, people resentenced to life without parole after *Miller*, and new cases since *Miller* (of which there are fewer than 100).[48] And as of 2023, twenty-eight states and the District of Columbia outlaw the penalty entirely.[49] But the number of people serving life *with* parole sentences for crimes committed under age 18 has increased, from 5,054 in 2009[50] to nearly 7,000 in 2021,[51] even as the total prison population declined by nearly 25% during that same period.[52]

The prevalence of life with parole sentences derives at least in part from legislative reform and judicial relief intended to remedy sentences that violated *Graham* and *Miller*. Many states implemented so-called "*Miller*-fix" statutes to preclude mandatory life without parole for homicide crimes and life without parole for non-homicide crimes committed under age 18.[53] In so doing, several states relied on parole to "cure" sentences that would otherwise run afoul of the Eighth Amendment. For example, a 2013 Wyoming statute provided parole eligibility to all people in the state then serving a sentence of life without parole for a crime committed under age

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[47] *Id.* at 144–45 (quoting *Montgomery*, 577 U.S. at 209).

[48] *Sentencing Children to Life without Parole: National Numbers*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (May 6, 2024), https://cfsy.org/sentencing-children-to-life-without-parole-national-numbers/. The percentage of black children sentenced to life without parole since *Miller* introduced more discretion, however, has increased from 61% to 73%. *Id.*

[49] *More Than Half of All US States Have Abolished Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, https://cfsy.org/map2023/.

[50] NELLIS & KING, *supra* note 25, at 3.

[51] ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE SENTENCES (2021), https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/.

[52] RICH KLUCKOW & ZHEN ZENG, U.S. DEP'T JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 — STATISTICAL TABLES 4, https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf (showing a 24.7% decrease in the nation's prison population between 2010 and 2020).

[53] For an overview of much of the legislation enacted during this era and its effect on people serving life-without-parole or other life-long sentences for crimes committed as children, see *Legislation Elimination Life Without Parole Sentences for Juveniles*, JUV. SENT'G PROJECT (2024), https://juvenilesentencingproject.org/legislation-eliminating-lwop/; *JLWOP Data*, JUV. SENT'G PROJECT (May 2021), https://juvenilesentencingproject.org/data/. Most of the referenced legislation is also available at https://clearinghouse.net/resource/4071/.

18.[54] Similarly, in 2017, Arkansas passed a statute eliminating life without parole for juveniles and instead providing for parole after a period of years determined by the crime of conviction.[55] Indeed, as of 2021, at least ten states had granted parole eligibility *en masse* to people serving life-without-parole sentences for a crime committed under age 18.[56] In at least one instance, this was a judicially mandated fix: in 2016, Minnesota's Supreme Court ordered that any person serving a life-without-parole sentence for a crime committed under age 18 that was final before *Miller* would receive a sentence of life *with* the possibility of parole.[57] Other states provided individual resentencing proceedings at which life with parole was a possible alternative sentence to life without parole for homicide crimes, as in North Carolina[58] and Alabama.[59] Such reforms were intended to remedy *Graham* and *Miller* violations and to prevent future constitutional violations.

In addition to these *Graham* and *Miller* fixes, a handful of states extended parole or parole-like relief much more broadly. For example, in 2014, West Virginia abolished life without parole, instituting parole eligibility after, at most, 15 years for *all* persons serving sentences for crimes they committed under age 18 in the state.[60] Similarly, in addition to abolishing life without parole for people under age 18 at the time of the offense, Connecticut in 2015 also extended parole eligibility beyond that cohort, to all persons serving sentences of 10 years or more for crimes they committed under age 18 (extended to age 21, with exceptions, in 2024), with parole eligibility after the greater of 12 years or 60% of the sentence.[61] These states apparently recognized that the sentencing regimes of the 1980s, 1990s, and early 2000s produced sentences widely out of step with what we now understand about young people, and initiated broader reforms to more fully account for, and address, the missteps of this earlier era.

Such sweeping reform was limited, however, and in most states, people serving parole-eligible life, or life-like, sentences were left out of reforms altogether. This sometimes led to an incongruous regime in which people serving harsher sentences for more serious crimes were eligible for relief while people serving sentences for less serious crimes remained incarcerated with no apparent path to release. For example, Michigan's *Miller*-fix statute

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[54] WYO. STAT. ANN. §§ 6-2-101(b) (2021); WYO. STAT. ANN. 6-10-301(c) (2013).

[55] ARK. CODE ANN. § 5-4-104 (2017).

[56] *See, e.g.*, JLWOP Data, *supra* note 53.

[57] *See* Jackson v. State, 883 N.W.2d 272 (Minn. 2016).

[58] *See* State v. Perry, 794 S.E.2d 280, 281–82 (N.C. 2016) (requiring resentencing); N.C. GEN. STAT. §§ 15A-1340.19A, 15A-1340.19B(a)(2) (2012) (permitting a sentence of life without parole or life with parole eligibility after 25 years).

[59] Now, people in Alabama convicted of nonhomicide crimes committed under age 18 for which the penalty would otherwise be life without parole are sentenced to life with parole, and people sentenced for homicide crimes committed under age 18 may either be sentenced to life without parole or life with parole. *See* ALA. CODE §§ 13A-5-2(f), 13A-5-39(1), 13A-5-43(e), 13A-5-43.1, 13A-6-2-(c).

[60] W. VA. CODE § 61-11-23(a)(b) (2018).

[61] *See* CONN. GEN. STAT. § 54-125a(f) (2023); 2023 Conn. Acts 5 (Reg. Sess.) (Pub. Act. No. 23-169).

provided resentencing to everyone serving juvenile life *without* parole in the state, resulting in new term-of-years sentences, and release, for most people serving the sentence.[62] But people serving life *with* parole sentences for crimes committed as children, often sentences imposed pursuant to plea deals that avoided life without parole, faced a lifer parole review process that offered limited opportunity for review and under which few were ever released.[63] In 2022, the Michigan Supreme Court cited this incongruity in holding that life with parole sentences imposed for crimes committed under age 18 violated the state constitution.[64] Similarly, Florida reformed its sentencing procedures for juvenile life *without* parole sentences in 2014, but did not concomitantly change the parole review processes for people serving life *with* parole for crimes committed as youth, including homicide.[65] Under the statute, people serving life without parole sentences receive resentencing hearings at which the court is required to consider youth, maturity, and rehabilitation, among other factors,[66] and to modify the sentence if the person has rehabilitated.[67] For a two-year period, before the Florida Supreme Court changed course, it extended relief under the statute to people serving life *with* parole sentences—during that period, 78% of those resentenced were released, and only three were resentenced to life with parole.[68] After a changed Florida Supreme Court foreclosed further consideration under the statute,[69] more than 170 people serving life with parole sentences for crimes committed under age 18 were condemned to await parole review under a system that has released only 24 people serving such sentences in more than ten years.[70] Their challenge to this parole process is currently on appeal before the Eleventh Circuit.[71]

Ultimately, reforms that expanded access to parole without concurrently reforming parole review criteria and procedures merely

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[62] MICH. COMP. LAWS §§ 769.25, 769.25a (2014); Lindsey Smith, *About Half of Michigan's "Juvenile Lifers" Now Free from Prison*, MICH. PUBLIC (Dec. 7, 2023), https://www.michiganradio.org/criminal-justice-legal-system/2023-12-07/about-half-of-michigans-juvenile-lifers-now-free-from-prison (stating that of the 378 people who had been serving juvenile life without parole in the state, 182 have been released and another 131 have been resentenced to terms of years less than life—only 22 have been resentenced to life without parole).

[63] *See* People v. Stovall, 987 N.W.2d 85 (Mich. 2022) (holding that parolable life sentence imposed for crimes committed under age 18 violated the state constitution because it failed to provide the requisite opportunity for release based on demonstrated maturity and rehabilitation).

[64] *Id.* at 91–93.

[65] *See* Howard v. Coonrod, No. 6:21-cv-62-PGB-EJK, 2023 WL 2077489, at *3 (M.D. Fla. 2023), https://clearinghouse.net/doc/138249/.

[66] FLA. STAT. § 921.1402(6) (2024).

[67] *Id.* § 921.1402(7).

[68] Appellants' Opening Brief at 28, Howard v. Coonrod, No. 6:21-cv-00062-PGB-EJK, No. 23-10858 (2023) (ECF No. 24), https://jlc.org/sites/default/files/attachments/2023-07/D0024%202023.07.10%20Appellant%27s%20Brief.pdf.

[69] Franklin v. State, 258 So. 3d 1239, 1241 (Fla. 2018) (per curiam).

[70] Appellants' Opening Brief at 29, *Howard*, No. 6:21-cv-00062-PGB-EJK, No. 23-10858 (2023) (ECF No. 24).

[71] *See Case: Howard v. Coonrod,* C.R. LITIG. CLEARINGHOUSE, https://clearinghouse.net/case/44178/ (Mar. 11, 2024).

funneled people into parole systems that were not only ill-suited and unaccustomed to considering youth, maturity, and rehabilitation, but, in some jurisdictions, were statutorily or administratively prohibited from taking such characteristics into account.[72] Unsurprisingly, release is often an exceptional outcome.[73] Parole systems designed for adults may not be up to the task of accounting for youth at the time of the crime or discerning suitability for release based on demonstrated maturity and rehabilitation.[74] They may also lack the procedural protections necessary for accurate and thorough consideration, especially given the particular needs and challenges of this cohort.[75] Moreover, people serving life *with* parole sentences face diminished chances of early release against a backdrop of tougher parole policies for so called "lifers" in many states.[76]

Recent litigation illustrates these challenges. For example:

- In Florida, a recent lawsuit challenged the state's parole process for juveniles serving life with parole sentences, pursuant to which, according to one study, only five of the more than 100 people subject to this parole process were released between 2016 and 2020.[77] The lawsuit alleged that the Parole Commission routinely heard more than 40 cases in a single day, spent an average of 10 minutes on each case, and never spoke with or saw the parole candidates before issuing a decision.[78] Parole candidates had no opportunity to correct factual inaccuracies in the record, and no right to counsel or expert assistance in the parole process.[79] Once denied parole, most individuals were set back another seven years before their eligibility for release would be considered again. The suit alleged violations of the

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[72] *See, e.g.*, Hayden v. Keller, 134 F. Supp.3d 1000, 1009 (E.D.N.C. 2015), https://clearinghouse.net/doc/85664/ (describing, and ultimately finding inadequate, existing parole review processes pursuant to which "[t]he most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status. Absolutely no consideration is to be given for that status by the commissioners."); *see also* sources cited in note 99, *infra*.

[73] *See, e.g.*, notes 76 and 81 and accompanying text.

[74] *See, e.g.*, Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review,* 106 CORNELL L. REV. 1173, 1204–08 (2021) (discussing these required considerations and how they differ from typical parole criteria, and citing relevant cases).

[75] *See id.* at 419–28 (explaining how and why existing procedures fail to meet the unique needs of this cohort); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 398–406 (2014) (describing then-existing parole board procedures, based on the results of a national survey).

[76] NAZGOL GHANDNOOSH, SENT'G PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES 7 (2017), https://www.sentencingproject.org/app/uploads/2022/08/Delaying-a-Second-Chance.pdf ("Over the years many legislators, governors, and parole boards have toughened lifer parole policies and practices, effectively increasing prison terms for these individuals.").

[77] Class Action Complaint at 7, Howard v. Coonrod, 546 F. Supp. 3d 1121 (M.D. Fla. 2021) (No. 6:21-cv-62).

[78] *Id.* at 30.

[79] *Id.* at 54.

Eighth Amendment.[80] The district court granted summary judgment to the Florida parole board; plaintiffs' appeal to the U.S. Court of Appeals for the Eleventh Circuit is pending.[81]

- In Maryland, a lawsuit challenging life with parole sentences for people who committed crimes under age 18 alleged that no juvenile lifer had been paroled in the state in more than two decades, with issues that included reliance on risk assessment tools that were not designed to assess people who committed crimes as children, and no opportunity to correct errors in parole files.[82]
- In North Carolina, a lawsuit challenging a life with parole sentence imposed for a crime committed under age 18 noted that the plaintiff, who had been denied parole 12 times, had never been so much as interviewed by a member of the parole commission, had no knowledge of the information upon which the commission relied in denying him parole, and had never been given an opportunity to demonstrate maturity and rehabilitation.[83]

Thus, although parole was explicitly recognized by the Supreme Court as a crucial remedy in the post-*Graham* and *Miller* landscape, existing parole criteria and procedures lag behind the constitutional mandate and in many instances actually thwart that mandate.[84]

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[80] *Id.*

[81] *See Case: Howard v. Coonrod*, C.R. LITIG. CLEARINGHOUSE, (last visited Oct. 15, 2024), https://clearinghouse.net/case/44178/.

[82] Complaint for Declaratory and Injunctive Relief, and Attorney's Fees at 38, 60, Maryland Restorative Just. Initiative v. Hogan, No. 1:16-cv-01021-ELH (D. Md. 2016).

[83] First Amended Complaint at ¶¶ 57–60, Hayden v. Butler, No. 5:10-ct-2272-BO (E.D.N.C. 2013).

[84] Note that after *Graham* and *Miller*, several states opted to revise their sentencing regimes by implementing processes for judicial review and modification of sentences, rather than through parole eligibility. For example: In Washington DC, a person who has served at least 15 years for a crime committed under age 25 may file an application for sentence modification and will receive a hearing. Courts are directed to consider the diminished culpability of youth and post-offense maturity and rehabilitation, among other factors, and "shall reduce" the term of imprisonment upon a finding that the petitioner "is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification." D.C. CODE § 24-403.03(a) (2021); In North Dakota, a person serving a sentence for a crime committed under age 18 may petition for a sentence reduction after serving 20 years. The governing statute directs the reviewing court to consider factors including the diminished culpability of youths as compared to adults. N.D. CENT. CODE § 12.1-32-13.1 (2023); In Florida, people serving life without parole for crimes committed under age 18 receive a resentencing hearing after 15 or 25 years, depending on the circumstances of the offense, at which youth and post-crime maturity and rehabilitation must be considered. FLA. STAT. § 921.1402(6) (2015). The court must modify the sentence if it finds that the person has been rehabilitated and is reasonably fit to enter society. *Id.* § 921.1402(7). Counsel is provided for sentencing and resentencing hearings, and the defendant may hire experts, present evidence, cross-examine witnesses, and appeal. *See Id.* §§ 921.1401, 921.1402; Class Action Complaint at ¶ 6, Howard v. Coonrod, No. 6:21-cv-62 (M.D. Fla. Jan. 8, 2021) (No. 1). While this article focuses on *parole* processes and procedures, it looks to some of these sentence modification statutes as instructive in requiring a release decision based on consideration of youth and post-crime maturity and rehabilitation, and in providing procedures to support robust, meaningful, and accurate review.

IV. CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS FOR PAROLE REVIEW

As states turned to parole to address *Graham* and *Miller* deficiencies, courts across the country were asked to consider whether and how this jurisprudence extended to life or long sentences carrying parole eligibility.

As a threshold matter, courts have assessed whether these cases apply to life or life-like sentences *with* parole eligibility such that anyone serving such a sentence for a nonhomicide crime committed under age 18, and the vast majority of people convicted of homicide crimes committed under age 18, whose crimes reflected transient immaturity rather than irreparable corruption, must have a realistic opportunity for release grounded in consideration of youth, maturity, and rehabilitation.[85] When parole is the mechanism for ensuring a constitutionally mandated opportunity for release, as the Massachusetts Supreme Judicial Court has explained, "the parole hearing acquires a constitutional dimension."[86] Some courts have therefore concluded that parole must provide a realistic and meaningful opportunity for release, under *Graham*, and ensure that no person whose crime reflected the transient immaturity of youth spends a lifetime in prison, which would be a disproportionate and unconstitutional sentence under *Miller*.[87] Courts that have held to the contrary seemingly fail to recognize that an anemic

[85] *See* cases cited in notes 82–84, *infra*.

[86] Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 365 (Mass. 2015), https://clearinghouse.net/doc/139101/.

[87] *See, e.g.*, Howard v. Coonrod, No. 6:21-cv-62, 2023 WL 2077489, at *8 (M.D. Fla. Feb. 17, 2023), https://clearinghouse.net/doc/138249/ (quoting Montgomery v. Louisiana, 577 U.S. 190, 211 (2016)) (holding that the Eighth Amendment applies to life with parole sentences as "a necessary extension of the Supreme Court's recognition in *Montgomery* that while '[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole,' the parole process must be one that 'ensures that juveniles whose crimes reflected only transient immaturity and who have since matured—will not be forced to serve a disproportionate sentence.'"); Wershe v. Combs, 763 F.3d 500, 505–06 (6th Cir. 2014) (vacating dismissal of Eighth Amendment claim alleging a parole board's denial of a meaningful and realistic opportunity for release); Flores v. Stanford, No. 18 CV 2468 (VB), 2019 WL 4572703 (S.D.N.Y. Sept. 20, 2019), at *9, https://clearinghouse.net/doc/108054/ ("[T]he Eighth Amendment right in question attaches at the parole stage."); Funchess v. Prince, No. 142105, 2016 WL 756530, at *5–6 (E.D. La. Feb. 25, 2016) (concluding that state's two-step parole process doesn't provide the meaningful opportunity for release required under *Miller*); Greiman v. Hodges, 79 F. Supp.3d 933, 943–44 (S.D. Iowa 2015) , https://clearinghouse.net/doc/83265/ (holding that *Graham* applied outside the sentencing context because the state "must" give juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" which could only be determined by the parole board who alone had authority to grant release); Diatchenko, 27 N.E.3d at 365 ("[T]he parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate."); Hayden v. Keller, 134 F. Supp.3d 1000, 1009 (E.D.N.C. 2015), https://clearinghouse.net/doc/85664/ (holding that the failure to consider diminished culpability and heightened capacity for change during parole process failed to provide petitioner with any meaningful opportunity for release).

parole system that fails to account for youth or post-crime growth and change disembowels the substantive requirements of *Graham* and *Miller*.[88]

This section describes some of the judicial decisions that have considered what is constitutionally required for (1) the timing of the opportunity for release on parole, (2) the substance of a parole decision grounded in youth, maturity, and rehabilitation, and (3) the procedures necessary to support comprehensive, accurate, meaningful review. The Supreme Court's Eighth Amendment jurisprudence offers a starting point for this analysis, but this section also considers if and how other constitutional considerations might apply. Finally, informed by case law and, especially, recent legislative reform, this section previews specific policies and practices that can support robust constitutional compliance and meaningful parole review.

A. Timing of a Meaningful Opportunity for Release on Parole

Graham and its progeny suggest that to pass constitutional muster, the opportunity for release on parole must come at a time in the person's life that allows some chance to rejoin and reconcile with society,[89] to reenter the community, and to demonstrate rehabilitation.[90] Under this metric, a sentence may violate the Eighth Amendment if it fails to provide a chance for release at a meaningful time in an individual's life. Many courts have thus concluded that sentences that preclude parole consideration until old age violate the Eighth Amendment. For example, the California Supreme Court, in *People v. Contreras*, rejected as unconstitutional sentences of 50 years to life and 58 years to life imposed for nonhomicide offenses committed under the age of 18.[91] The court reasoned that to comply with the Eighth Amendment, a sentence imposed for a nonhomicide crime must offer a "chance for fulfillment outside prison walls, and . . . reconciliation with society," as well as an "incentive to become a responsible individual."[92] The New Jersey Supreme Court similarly rejected sentences requiring minimum terms of 55 years and 68 years, as violative of the Eighth Amendment, reasoning that release "in [the defendants'] seventies and eighties" was not sufficiently meaningful and explaining that courts must focus on the "real-

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[88] *See, e.g.*, Brown v. Precythe, 46 F.4th 879, 885–86 (8th Cir. 2022), https://clearinghouse.net/doc/138965/ (declining to extend *Miller* to parole hearings or to life with parole sentences, finding no violation after analysis of state parole process assuming Eighth Amendment applied); Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019) (same). Note, too, that most courts that have declined to extend *Graham* and *Miller* to parole hearings have done so with respect to sentences carrying parole eligibility imposed after *Miller*-compliant resentencing proceedings, or in the context of challenges to parole systems already modified, post-*Graham* and *Miller*, to require consideration of youth, maturity, and rehabilitation. *E.g.*, United States v. Sparks, 941 F.3d 748, 753–54 (5th Cir. 2019); *Bowling*, 920 F.3d at 194–95, 198–99; United States v. Morgan, 727 F.App'x. 994, 995–96 (11th Cir. 2018); *Brown*, 46 F.4th at 887.

[89] *E.g.*, *Graham*, 560 U.S. at 79.

[90] *Id.* at 74.

[91] People v. Contreras, 411 P.3d 445, 454 (Cal. 2018).

[92] *Id.* at 453 (citing *Graham*, 560 U.S. at 130).

time consequences" of a sentence.[93] These courts and others recognize that a meaningful opportunity for release must come at a time in a person's life that enables a productive life outside of prison.[94] Note, though, that some courts to consider the issue have rejected challenges to sentences that seemingly preclude release within a person's lifetime, concluding either that lengthy sentences imposed pursuant to a discretionary sentencing regime necessarily comply with the Eighth Amendment under *Jones*,[95] that *Graham* and *Miller* apply to life without parole sentences only,[96] or that the possibility of release even in old age complies with the Supreme Court's dictates.[97]

The model policies that follow in Section V below do not propose a specific timeframe for initial parole review, a determination that will vary by state. Note, though, that parole consideration must be realistic and meaningful from the outset, that is, if a sentencer or legislature (or some combination) has determined that parole eligibility begins at a particular date, then parole consideration *from that date forward* should provide comprehensive review and a realistic opportunity for release. If a person demonstrates the requisite maturity, rehabilitation, and fitness for release then parole should be granted.[98]

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[93] State v. Zuber, 152 A.3d 197, 212–13 (N.J. 2017).

[94] *See* State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (rejecting a sentence, imposed for juvenile homicide and non-homicide crimes, that precluded parole eligibility for 52.5 years, until age 69, reasoning that "[t]he prospect of geriatric release" does not provide a meaningful opportunity "to obtain release and reenter society" as the Eighth Amendment requires); State v. Kelliher, 849 S.E.2d 333, 350 (N.C. Ct. App. 2020) (applying *Graham* and *Miller* to consecutive life sentences resulting in 50 years' parole ineligibility, reasoning, *inter alia*, that "[t]o release an individual after their opportunity to contribute to society—both through a career and in other respects, like raising a family—'does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by *Graham*'" (citations omitted)). And, of course, sentences precluding parole consideration during a person's lifespan fail to pass constitutional muster. *See* Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017) (concluding that an aggregate sentence resulting in parole eligibility at age 131 was barred by *Graham*: "we cannot read the Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as 'life without parole'"); State v. Boston, 363 P.3d 453 (Nev. 2015) (concluding that and aggregate sentence requiring 100 years in prison before parole eligibility, imposed for nonhomicide crimes committed as a juvenile, violated *Graham*)..

[95] *E.g.*, United States v. Grant, 9 F.4th 186, 193 (3d Cir. 2021) (en banc) (rejecting challenge to 60-year sentence because, per *Jones*, *Miller* entitles a person to a certain sentencing process, not a particular sentencing outcome).

[96] *E.g.*, Veal v. State, 810 S.E.2d 127, 129 (Ga. 2018) (declining to apply *Miller* to sentence precluding parole consideration for 60 years, exceeding life expectancy, because *Miller* applies to life without parole sentences only).

[97] *E.g.*, Ira v. Janecka, 419 P.3d 161 (N.M. 2018) (reasoning that *Graham* may apply to lengthy, aggregate term-of-years sentences, but nonetheless denying relief because the defendant's sentence provided for parole eligibility after 46 years, the "outer limit" of a constitutionally permissibly meaningful opportunity to obtain release).

[98] *See, e.g.*, Harrington, *supra* note 74, at 1204–05 (discussing the requirement of release upon a demonstration of maturity and rehabilitation).

B. Criteria for a Release Decision Grounded in Consideration of Youth, Maturity, and Rehabilitation

Many courts and legislatures across the country have recognized that under *Graham* and *Miller*, a parole board must consider a person's youth at the time of the crime and must ground the parole decision in assessment of post-crime maturity and rehabilitation.[99] Several courts have emphasized that parole review for people who were under 18 at the time of the crime must necessarily be different than typical parole review in order to ensure consideration of these factors, and have rejected parole decisions or processes that failed to adequately account for youth, maturity, and rehabilitation.[100]

Along these lines, some courts have concluded that denial of parole based principally on the nature of the offense, a consideration properly accounted for at sentencing, may violate the Eighth Amendment. For example, a federal court in Iowa has denied a defendants' motion to dismiss an Eighth Amendment challenge to a parole process pursuant to which the parole candidate alleged he had been denied parole based solely on the seriousness of the offense and without consideration of his youth at the time of the crime or his subsequent maturity and rehabilitation.[101] Other courts have denied motions to dismiss similar challenges to parole processes alleged to rely exclusively or primarily on the crime committed or juvenile criminal history,[102] rather than on the required considerations of youth,

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[99] *See supra* notes 100–03 and accompanying text.

[100] *E.g.*, Hawkins v. Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 398 (N.Y. App. Div. 2016) (explaining that "[t]he Board [of Parole], as the entity charged with determining whether petitioner will serve a life sentence, was required to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination" and holding that petitioner was entitled to a *de novo* parole release hearing), https://clearinghouse.net/doc/139092/; Hayden v. Keller, 134 F. Supp.3d. 1000, 1009 (E.D.N.C. 2015) (concluding that the failure to distinguish parole review for juvenile offenders and to consider children's diminished culpability and heightened capacity for change "wholly fails to provide [petitioner] with any 'meaningful opportunity'" for parole); State v. Young, 794 S.E.2d 274, 279 (N.C. 2016) (explaining that the sentence review statute at issue failed to address the "central concern" of *Miller*, that a sentencing court cannot treat minors like adults, because, *inter alia*, nothing in the statute required consideration of maturation or other youth-related factors); *see also* Greiman v. Hodges, 79 F. Supp.3d 933, 944 (S.D. Iowa 2015) (denying motion to dismiss based in part on allegation that board of parole failed to take into account plaintiff's youth and demonstrated maturity and development); Geer v. Dep't of Prob., Parole, and Pardon Serv., No. 2015-002522, 2018 WL 2338201 (S.C. Ct. App. May 23, 2018) (summarily affirming administrative law court's reversal of denial of parole, citing "no evidence that [defendant's] youth was taken into account before he was deprived of the possibility of parole"); *see also In re* Perez, 7 Cal. Rptr.3d 441, 463 (Cal. Ct. App. 2016), *as modified on denial of reh'g* (Jan. 4, 2017) (remanding for new parole hearing, citing, *inter alia*, state parole board's repeated failure to account for youth at time of the offense, noting: "[h]ere, although the commissioners, as well as the evaluating psychologist, gave lip services to the need to afford 'great weight' both 'to the diminished culpability of juveniles as compared to adults,' and to 'any subsequent growth and increased maturity' of petitioner . . . the record plainly reflects that they did not take this requirement seriously").

[101] *Greiman*, 79 F. Supp.3d at 944.

[102] *See, e.g.*, Flores v. Stanford, 18 CV 2468 (VB), 2019 WL 4572703, at *9 (S.D.N.Y. Sept. 20, 2019), (denying motion to dismiss Eighth Amendment challenge to New York's parole system based

maturity, and rehabilitation.[103] However, some courts have declined to recognize any Eighth Amendment constraints on parole review, effectively gutting the requirements of *Graham* and *Miller*.[104]

Nevertheless, post-*Graham* and -*Miller* legislative reforms enacted in a dozen states across the country have uniformly required consideration of youth, maturity, and rehabilitation in the parole release decision.[105] Following these examples, the model policies in Section V include provisions requiring consideration of post-crime growth and change, incorporating *Miller*'s mitigating factors of youth, and limiting reliance on the circumstances of the offense to inform the release decision.

C. Procedures to Support Thorough and Accurate Review of Youth, Maturity, and Rehabilitation

A parole system must have certain procedures in place to support the requisite realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and in consideration of the mitigating factors of youth. Thus, although parole is usually considered a discretionary "act of grace" outside the protections of due process,[106] some courts have recognized that parole for this cohort necessitates a different inquiry. State sentencing regimes that rely on parole to comply with the Eighth Amendment dictates of *Graham*, *Miller*, and their progeny are not simply providing parole as an "act of grace"; parole must offer a meaningful opportunity to demonstrate maturity and rehabilitation, and the process must ensure release upon such a demonstration.[107] A system in which parole is intended to remedy an otherwise unconstitutional sentence creates a liberty

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on allegations that "[i]nstead of basing parole determinations on juvenile lifers' demonstrated maturity and rehabilitation, defendants allegedly 'have denied, and continue to deny, juvenile lifers release to parole supervision based *only* on the crime committed or juvenile criminal history' and '*despite* clear evidence of rehabilitation and maturity'").

[103] King v. Landreman, No. 19-cv-338, 2019 WL 2355545, at *1 (W.D. Wisc. June 4, 2019) (determining upon initial review that juvenile offenders challenging Wisconsin's parole process could proceed on their claims that the state parole board had violated the Eighth Amendment and Due Process Clause of the Fourteenth Amendment by failing to provide a meaningful opportunity for release based on "the factors required by the Supreme Court"), https://clearinghouse.net/doc/145541/.

[104] *See* sources cited in note 83, *supra*, and accompanying text.

[105] *See* sources cited in notes 123 and125, *infra*.

[106] *See, e.g.*, Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008) (noting that parole is often viewed as "an act of grace" or "dispensation of mercy"); Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review,* 106 CORNELL L. REV. 1173, 1190–94 (2021) (describing the judicial understanding of parole as wholly discretionary and outside of due process protections).

[107] *See, e.g.*, Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 533–34 (2019) ("Parole-release is a fundamental and vested right for a person who is serving a life sentence for a juvenile crime and who has demonstrated rehabilitation as an adult. Where such an individual has in fact demonstrated rehabilitation as an adult, the decision to deny parole and subject her to continued incarceration violates the Eighth Amendment.").

interest, or "protectible expectation of parole,"[108] to which due process protections may apply to require particular procedures to support meaningful review.[109]

In view of the procedural dimensions of constitutional parole reform, some courts have properly concluded that certain minimum procedures are required. These courts have cited not only the weighty constitutional implications of parole in this context, but also the "unique characteristics of juvenile offenders" and the "potentially massive amount of information [that] bears on these issues."[110] In light of these considerations, the Supreme Judicial Court of Massachusetts held that parole review for people serving mandatory life sentences for crimes committed under age 18 necessitated appointment of counsel, payment of expert fees, and limited judicial review.[111] And the Iowa Supreme Court has similarly held that "access to the file and a right to provide information to the Board" represent "the minimum due process protections."[112] Of course, not all courts considering the issue agree, and ultimately, few have recognized any due process dimension.[113] And others have approved bare-bones parole processes under which, e.g., the parole decision-makers "attest they consider these [required] factors [and] they have demonstrated their application from time to time."[114] Such decisions miss the mark. As legislatures across the country have recognized, certain procedures are essential to meaningful parole review for this cohort. To that end, several states have implemented a wide range of procedural reforms to support robust parole review, ensure consideration of youth, maturity, and rehabilitation, and promote success in the parole

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[108] Greenholtz v. Inmates, 442 U.S. 1, 11–12 (1979).

[109] *See, e.g.*, Bonilla v. Bd. of Parole, 930 N.W.2d 751, 775–78 (Iowa 2019), https://clearinghouse.net/doc/139049/ (holding that juveniles have a liberty interest in the requirement of a meaningful opportunity to demonstrate maturity and rehabilitation, and thus are entitled to due process, under federal and state law, in asserting that interest; ultimately denying relief in facial challenge to parole procedures, however, finding that Board's policies passed constitutional muster); Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 357 (Mass. 2015) ("In this context, where the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of art. 26, the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility."); Flores v. Stanford, 18 CV 2468 (VB), 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019) (declining to dismiss due process challenge to parole system because "juvenile offenders serving a maximum term of life have a cognizable liberty interest in obtaining parole upon demonstrating maturity and rehabilitation").

[110] *Diatchenko*, 27 N.E.3d at 360.

[111] *Id.* at 353.

[112] *Bonilla*, 930 N.W.2d at 780.

[113] *E.g.*, Heredia v. Blythe, 638 F. Supp. 3d 984, 997, 1000 (W.D. Wisc. 2022), https://clearinghouse.net/doc/137941/ (rejecting the assertion that "juvenile offenders are different from adult offenders in the context of a parole decision" and concluding that absent a showing "of a uniform practice by defendants to give juvenile offenders de facto life sentences or of any policy or practice that would prevent offenders from asking the commission to consider facts relevant to youth," there is no Eighth Amendment violation).

[114] Howard v. Coonrod, No. 6:21-cv-62-PGB-EJK, 2023 WL 2077489 at *21, *23 (M.D. Fla. Feb. 17, 2023) (noting, also, that the governing criteria permits lower baseline potential parole date for crimes committed at a young age; granting defendant's motion for summary judgment and finding no Eighth Amendment or due process violation).

process and upon release.[115] The model policies that follow draw principally from these reforms to propose policies for: access to rehabilitative programming and services; in-person parole hearings including the opportunity to make statements and answer questions; access to counsel and expert evaluation; ability to examine and correct the record; written parole decisions with reasons given for denial; judicial review; training for decision-makers; and oversight of the parole process.

V. MODEL POLICIES: PAROLE PROCEDURES FOR PEOPLE SERVING SENTENCES FOR CRIMES COMMITTED UNDER AGE 18

The following model policies are intended to support thorough and accurate parole review and to ensure that people serving sentences for crimes committed under age 18 have a realistic and meaningful opportunity for release. They encompass substantive considerations, such as criteria for release and appropriate bases for the release decision, as well as procedures to support comprehensive review and to ensure that this cohort is well supported in navigating the parole process and reentry. Indeed, it is essential that everyone involved in the parole process works toward a shared goal of preparing people to be released and to succeed upon release.

These policy recommendations derive from relevant litigation documents, judicial decisions, and recent legislation implemented in states across the country in the wake of *Graham*, *Miller*, and their progeny. Indeed, this is an area of the law where litigation in tandem with other forms of advocacy has been crucial to bring about change.[116] Lawsuits across the country have shed light on the inadequacies of existing parole systems to meet constitutional and practical requirements.[117] The complaints, briefing, expert reports, and other supporting documents are instrumental in illustrating the problems and their stakes. As described here, judicial decisions have helped shaped the contours of what is—or may not be—required under the Eighth Amendment, due process, or state constitutions. And settlement agreements and other injunctive relief, though rare, offer a model for possible paths forward. For example, in Maryland after the district court denied in relevant part the state's motion to dismiss a lawsuit challenging its parole processes for people serving life with parole for crimes committed under age 18, the parties engaged in negotiations resulting in a settlement agreement that required changes to the state Parole Commission's

[115] *See* sources cited in notes 135, 143, 158, 164, 174, and 181 and accompanying text.

[116] Sometimes, litigation has apparently catalyzed changes on the ground even in the absence of legislative overhaul. For example, at the time a lawsuit was filed in 2019 challenging Wisconsin's parole process for people serving life sentences for crimes committed as children, plaintiffs alleged that "[o]n information and belief, fewer than 6 parole-eligible juvenile lifers from a population of more than 120 have been released from prison in the past 15 years." Class Action Complaint at 17, King v. Landreman, No. 19-cv-338 (W.D. Wisc. 2019), ECF No. 1, https://clearinghouse.net/doc/130345/. By the time the court issued its decision granting the defendants' motion for summary judgment in 2022, 88 people from that cohort had been released. *Heredia*, 638 F.Supp.3d at 990.

[117] See lawsuits discussed *supra* Section III.

decision-making criteria and procedures.[118] Often, however, change in this area has resulted from legislative reforms that build on the requirements of *Graham*, *Miller*, and cases that followed. For example, after the Connecticut Supreme Court held that *Miller* applied retroactively to preclude life without parole or lengthy term-of-year sentences for crimes committed as juveniles, the state legislature passed a statute eliminating life without parole for juveniles in the state and providing for parole for any person sentenced to 10 years or more for a crime committed under age 18 (later extended, with some exceptions, 21).[119] Indeed, some of the most expansive reforms in this area are the result of legislative advocacy and reform.[120]

Note, as discussed in Part IV(A), that we do not offer recommendations for the timing of parole consideration—which will necessarily vary from jurisdiction to jurisdiction—although ensuring an opportunity for a productive life outside of confinement is crucial to the constitutional adequacy of any parole system intended to cure a *Graham* or *Miller* violation.[121] Note, too, that given all we know about youth, criminality, and reform, it seems prudent, if not constitutionally required,[122] to ensure more robust parole consideration for any person serving a sentence for a crime committed under age 18, regardless of sentence length. That is, as some states have enacted,[123] parole for this cohort should always give mitigating effect to youth, be grounded in assessment of post-crime growth and change, and include procedures to support meaningful consideration of these factors. Moreover, these recommendations need not be limited to people under 18 at the time of the crime, and should be considered for broader application, including to emerging adults. Research shows that the developmental characteristics underpinning *Graham* and *Miller* is now understood to

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[118] *See Case: Maryland Restorative Justice Initiative v. Hogan*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, https://clearinghouse.net/case/15371/ (last visited Sept. 6, 2024); *see also* Hayden v. Keller, 134 F. Supp. 3d 1000 (E.D.N.C. Nov. 2, 2017) (No. 5:10-ct-03123), ECF No. 96, https://clearinghouse.net/doc/94305/ (granting plaintiff's request for injunctive relief, ultimately adopting the defendant's proposed plan to reform the state's parole system).

[119] *See* Conn. Gen. Stat. § 54-125a(f) (2023). In post-*Miller* litigation in Connecticut, the Connecticut Supreme Court held that a fifty-year sentence invoked *Miller*'s protections and encouraged the legislature to act to bring state statutes into compliance with the U.S. Supreme Court's decisions. *See* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047 (Conn. 2015) ("[W]e have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of the Supreme Court's decisions in *Graham* and *Miller*."). Legislation eliminating life without parole for crimes committed under age 18 and reforming parole followed. *See* Act of June 23, 2015, Pub. Act No. 15-84, (concerning lengthy sentences and certain felonies committed by a child or youth).

[120] For an overview of these reforms, *see* sources cited in note 53, *supra*.

[121] See Section IV(a), *supra*.

[122] *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 419 (2014) (noting that given the unique challenges that people sentenced as children may face in presenting an effective case for relief, and given the weighty interest at stake when facing a lifetime in prison, due process protections may apply with more force to this cohort).

[123] *See* legislation cited *infra* notes 130, 132, 142, 150, 165, 171, 181, 183, and 189.

extend beyond the age of 18, into the early 20s.[124] During this period of "emerging adulthood," young people demonstrate similar heightened impulsivity, susceptibility to peer pressure, and riskier behavior, all of which they are likely to outgrow.[125] Thus for this group, too, "the ability to predict future criminal behavior based on prior behavior is tenuous at best."[126] In view of this, some state courts and legislatures have recently extended similar policies to emerging adults.[127]

Indeed, these model policies are intended to promote accurate, thorough, and rehabilitation-focused review that could benefit parole boards and parole candidates, regardless of age at the time of the crime, supporting a meaningful opportunity for release for any person ready to return and contribute to society outside of prison.[128]

The policies may be integrated into statutes governing state parole processes, parole board guidelines, or some combination of the two. Implementation of these policies will necessarily differ based on the

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[124] *E.g.*, B.J. Casey, C. Simmons, L.H. Somerville, & A. Baskin-Sommers, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, ANN. REV. OF CRIMINOLOGY 322 (2022).

[125] *Id.* at 326.

[126] *Id.* at 337.

[127] For example, California extends its youthful offender parole to all people under age 26 at the time of the crime. *Youth Offender Parole Hearings*, CAL. DEP'T OF CORR. AND REHAB., https://www.cdcr.ca.gov/bph/youth-offender-hearings-overview/ (last visited Aug. 28, 2024). Connecticut recently extended its "second look" parole reform from people under 18 to people under 21 at the time of the crime, with limited exceptions. 2023 Conn. Acts 23-169(g)(1) (Reg. Sess.). The Supreme Judicial Court of Massachusetts cited the neurological similarities between juveniles and emerging adults to hold that life without parole for crimes committed under age 21 violated the state constitution. *See* Commonwealth v. Mattis, 224 N.E.3d 410, 415, 420–21 (Mass. 2024) (holding that life without parole sentences imposed for crimes committed at age 18, 19, or 20, violate article art. 26 of the state's constitution, which prohibits cruel or unusual punishments, citing neurological similarities between juveniles and emerging adults as well as contemporary standards of decency). Michigan's Supreme Court recently held that life without parole sentences imposed on 18-year-olds violated the state constitution. *See* People v. Parks, 987 N.W.2d 161, (Mich. 2022) (extending to this cohort the legislative remedy for people serving JLWOP for crimes committed under age 18); People v. Poole, No. 352569, 2024 WL 201925, at *12–13 (Mich. Ct. App. Jan. 18, 2024) (holding that *Parks* applies retroactively). And Washington's Supreme Court held that mandatory life without parole was unconstitutional under the state constitution as applied to people between the ages of 18 and 21 at the time of the crime. *In re Monschke*, 482 P.3d 276, 278 (Wash. 2021) (among other similar decisions and reforms).

[128] Although mostly outside the scope of this paper, problems with parole systems are myriad, including marked racial disparities in release rates, *e.g.*, Michael Winerip, Michael Schwirtz & Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html (describing an analysis of thousands of parole decisions demonstrating that fewer than one in six Black or Hispanic men were released at first parole hearing, compared with one in four white men) (last updated Mar. 13, 2017), and problems with understaffing, limited consideration or review, and political influence, *e.g.*, Carol Shapiro & Beth Schwartzapfel, *I Joined the Parole Board to Make a Difference. Now I Call It 'Conveyer Belt Justice.'*, THE MARSHALL PROJECT (June 17, 2022), https://www.themarshallproject.org/2022/06/17/i-joined-the-parole-board-to-make-a-difference-now-i-call-it-conveyor-belt-justice. Indeed, the most recent Model Penal Code, promulgated by the American Law Institute, recommended eliminating indeterminate sentences in favor of determinate sentences, citing broad agreement that parole boards shouldn't retain the prison-release discretion that they have historically held after "more than a century of demonstrated failure." *See* MODEL PENAL CODE: SENTENCING § 6.06 cmts. a, n (AM. L. INST., Proposed Final Draft 2017), https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017.

particular characteristics and capacities of the states and parole systems that might seek to implement them. To that end, these policies are written so that they can be easily copied and pasted into a document that refines and adapts them for a particular system, including by referring to the parole decision-making entity, generally, as "[Parole Board]".[129]

1. Meaningful Opportunity for Release Based on Demonstrated Maturity and Rehabilitation[130]

a. When a person serving a sentence imposed as the result of an offense or offenses committed when the person was less than eighteen years of age becomes eligible for parole pursuant to applicable provisions of law, the [Parole Board] shall ensure that the person has a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

b. After considering the factors described in (2), the [Parole Board] shall apply a presumption that a person considered for parole under this [statute] is to be released, and must order release if it determines that the person has demonstrated maturity and rehabilitation since the time of the offense(s), that there is a reasonable probability that the person will live and remain at liberty without violating the law, and that the benefits to such person and society that would result from release substantially outweigh the benefits to such person and society that would result from continued incarceration.131

[129] The policies are available at https://clearinghouse.net/resource/4071/ in a word processing text format (without footnotes) to facilitate such copying and tailoring. CLEARINGHOUSE, LEARNING FROM CIVIL RIGHTS LAWSUITS: CRITERIA AND PROCEDURES FOR MEANINGFUL PAROLE REVIEW FOR PEOPLE SENTENCED AS YOUTH (Word Processing Version, May 2024).

[130] *See, e.g.*, CAL. PENAL CODE § 4801(c) (2018); CAL. CODE REGS. tit. 15 § 2446 (2020); CONN. GEN. STAT. § 54-125a(f)(4) (2023), 13 R.I. GEN. LAWS § 13-8-14.2(a) (2021); *see also* D.C. CODE § 24-403.03(a) (2021) (judicial sentence modification); FLA. STAT. § 921.1402(7) (2024).

[131] *See, e.g.*, WASH. REV. CODE § 9.94A.730(3) (permitting people serving sentences of twenty years or more for crimes committed under age 18 to petition for indeterminate sentence review; upon such review, the statute directs that the board "shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released") (2024); FLA. STAT. § 921.1402(7) (2024) (in the context of sentence modification hearings, providing that "[i]f the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence"); Commonwealth v. Batts, 163 A.3d 410, 459 (Pa. 2017) (holding that, under Pennsylvania law, there is a presumption against imposing a sentence of life without parole for a crime committed under age 18 and that, to overcome the presumption at sentencing, the Commonwealth must rebut the presumption against permanent incorrigibility beyond a reasonable doubt); COLO. REV. STAT. § 17-34-102(8) (2023) (creating a special program for, *inter alia*, people sentenced to adult prison for crimes committed under age 18, completion of which enables consideration for early parole pursuant to which, "unless rebutted by relevant evidence, it is presumed" that the person "has met the factual burden of presenting extraordinary mitigating circumstances" and "release to early parole is compatible with the safety and welfare of society").

2. Evaluation of Maturity, Rehabilitation, and the Mitigating Factors of Youth[132]

a. In assessing a person's overall maturity and rehabilitation since the time of the offense(s), the [Parole Board] shall consider:

i. the person's demonstrated emotional maturity and reflection, including insight into past conduct;

ii. the person's demonstrated maturity of judgment, including but not limited to improved impulse control, the development of pro-social relationships, and independence from negative influences;

iii. the person's participation in rehabilitative, treatment, and educational programs while in prison, as applicable and to the extent those programs have been made available, including any use of self-study for self-improvement;

iv. the person's history of employment in prison, if opportunities have been available;

v. obstacles that the person may have faced as a youth entering the adult correctional system;

vi. the person's institutional conduct, with greater weight given to more recent conduct occurring after the person has had time to mature and to adjust to prison;

vii. the person's ability to progress to and succeed at lesser security levels, if the ability to progress is available;

viii. the person's occupational skills, and job potential, as well as ability and readiness to assume obligations and undertake responsibilities;

ix. the person's reentry plan, including residence plans; and

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[132] *See, e.g.*, ARK. CODE ANN § 16-93-621(b)(2) (2024); CAL. PENAL CODE § 4801(c) (2018); CONN. GEN. STAT ANN § 54-125a(f)(4) (2023); MD. CODE REGS. 12.08.01.18(A)(4)–(5) (2023); MO. ANN. STAT. § 558.047(5) (West 2016); W. VA. CODE ANN. §62-12-13b(b) (West 2014); N.M. STAT. ANN. § 31-21-10.2(C) (West 2023); OHIO REV. CODE ANN. § 2967.132(E)(2) (West 2023); OR. REV. STAT. ANN. §§ 144.397(5)–(6) (West 2019); 13 R.I. GEN. LAWS § 13-8-14.2(a) (2021); VA. CODE ANN. § 62-12-13b(b); *see also* D.C. CODE §24-403.03(c) (2024) (judicial sentence modification).

x. any other information relevant to the person's maturity and rehabilitation.

b. In reaching a release decision, the [Parole Board] shall give substantial mitigating weight to the following factors:

i. the diminished culpability and heightened capacity for change of youths as compared to that of adults;

ii. the hallmark features of youth, including immaturity, impetuosity, and limited ability to assess or appreciate risks and consequences;

iii. the young age of the person at the time of the offense(s);

iv. the immaturity of the person at the time of the offense(s);

v. whether and to what extent peer or adult pressure was involved in the offense(s);

vi. the person's family and community circumstances at the time of the offense(s), including any history of abuse, trauma, poverty, and involvement in the child welfare system; and

vii. lack of ability of the person to extricate themselves from criminogenic circumstances.
Under no circumstances shall the [Parole Board] consider the person's age at the time of the offense(s) as an aggravating factor.

c. The [Parole Board] shall not deny parole based in any part on factors outside of the person's demonstrated ability to change, such as nature or effects of the offense.

A. Commentary to Policies 1 and 2

The U.S. Supreme Court has made clear that anyone convicted of a nonhomicide crime committed under age 18 and most people convicted of a homicide crime committed under age 18, whose crimes reflected transient immaturity rather than irreparable corruption, must have a realistic opportunity for release grounded in consideration of youth, maturity, and rehabilitation.[133] For a parole system to meet this constitutional requirement, the release decision must be based on assessment of post-crime growth and change, considered in the context of the person's youth before, during, and

[133] *See* discussion *supra* Section II.

after the crime. The release decision must *not* be centered on the seriousness of the offense or victim impact—such considerations are reflected in the original sentence and do not bear on assessment of post-crime maturity and rehabilitation except insofar as they might inform a baseline from which to measure change or offer context for behavior.[134] Recognizing this, states that have reformed their parole systems to better serve this cohort have uniformly required some consideration of youth as well as post-crime maturity and rehabilitation.[135]

Note that the mitigating considerations of youth bear on several aspects of the parole release decision. For example, parole decision-makers must consider the effect of youth and related challenges for the person adapting to the adult correctional system when assessing early institutional behavior[136]. Some states even preclude consideration of any disciplinary tickets incurred before a certain age,[137] or limit consideration to infractions committed within a fixed, recent period of time.[138] Policies concerning prison discipline might also distinguish between serious infractions and minor ones that should have little or no relevance to the release decision.[139]

Furthermore, because crimes committed by young people are typically the result of transient immaturity rather than irreparable corruption, and the "vast majority"[140] of people in this cohort will outgrow criminal behavior,[141] parole boards should apply a presumption in favor of release, ordering

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[134] Indeed, *Roper* and *Graham* explain that it is near-impossible to discern irreparable corruption from transient immaturity at the time or from assessment of the circumstances of the crime. *See* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); *Graham*, 560 U.S. 48, 68 (2011) (quoting *Roper*, 543 U.S. at 573).

[135] *See* sources cited *supra* notes 123 and 125.

[136] For discussion of the harms associated with incarcerating young people, including description of research finding that incarceration slows psychological maturation and exacerbates trauma, contributing to behavior challenges, see *Why Youth Incarceration Fails: An Updated Review of the Evidence*, The Sentencing Project (Dec. 2022), at 20–21.

[137] *E.g.*, New Mexico, which precludes giving weight to infractions incurred before age 25. Interview with Callie King-Guffey, Digit. Commc'ns. & Advoc. Manager, and Rebecca Turner, Assoc. Legal Dir., The Campaign for the Fair Sent'g of Youth (Oct. 5, 2023).

[138] For example, Virginia's parole board only considers the most recent two years of institutional infractions for this cohort. *Id*.

[139] *See, e.g.*, Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1276–77 (2011) (discussing evaluation of disciplinary infractions in parole process, noting that delaying parole release for a minor infraction for which the individual has already been sanctioned may raise double punishment concerns, and suggesting a distinction between "isolated or inadvertent violations" and persistent, willful, or violent misconduct).

[140] Montgomery v. Louisiana, 577 U.S. 190, 209 (2016).

[141] *See, e.g.*, Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014–16 (2003); Laura S. Abrams, Kaylyn Canlione & D. Michael Applegarth, *Growing Up Behind Bars: Pathways to Desistance for Juvenile Lifers*, 103 MARQ. L. REV. 745, 773 (2020) (studying cohort of people sentenced in California for crimes committed under age 20 and finding that "despite the odds, and without a great deal of formal rehabilitation," people found pathways to desistence).

release unless the evidence demonstrates that the person has not sufficiently matured or rehabilitated or otherwise doesn't meet the criteria for release.[142]

3. Access to Rehabilitative Programming and Services[143]

a. Within the first year of incarceration for a person eligible for parole under this [statute], the [Parole Board or Department of Corrections] shall conduct an assessment of the person and identify programming and services that would be appropriate to prepare the person for return to the community. Such assessment shall happen at least every five years during the person's incarceration.

b. At least five years before first parole eligibility, a representative from the [Parole Board] shall meet with the person to provide information about the parole hearing process and individualized recommendations regarding work assignments, rehabilitative programs, and institutional behavior, including any programming required to be completed before parole can be granted. The representative shall also advise the person on the importance of trying to collect and retain records relating to their youth, including official records, educational records, and other records that might be pertinent to parole consideration.

c. To the extent possible, the [Department of Corrections] shall make the programming that has been identified in (b) available in time for it to be completed prior to the person's parole hearing.

B. Commentary to Policy 3

Access to rehabilitative programming is essential not only to promote growth and rehabilitation, but also to offer hope for, and facilitate, a productive life outside of prison.[144] Often, people serving life sentences are

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[142] *See* CLEARINGHOUSE, *supra* note 122. For an argument that, given the constitutional nature of the inquiry in this context, parole boards should presume maturity and rehabilitation and, therefore, release unless there is clear and convincing evidence to the contrary; *see also* Harrington, *supra* note 100, at 1204–15.

[143] CAL. PENAL CODE § 3041(a)(1) (2018); 730 ILL. COMP. STAT. § 5/5-4.5-115(d) (2024); WASH. REV. CODE § 10.95.030(2)(e) (2024); WASH. REV. CODE § 9.94A.730 (2) (requiring department of corrections to assess persons eligible for sentence review five years before eligibility to recommend and make available whenever possible "programming and services that would be appropriate to prepare" for return to society); *see also* Class Settlement Agreement, Hill v. Whitmer at 3–4, No. 2:10-cv-14568, (E.D. Mich. Sept. 28, 2020), ECF No. 342-2, https://clearinghouse.net/doc/111511/ (requiring Michigan Department of Corrections Program Centralization Unit to complete a file review and propose programming recommendations for all class members—people previously serving juvenile life without parole but eligible for resentencing under the state's *Miller*-fix statute—awaiting resentencing, for review by the Michigan Parole Board, and requiring placement in or on the waitlist for recommended programming based on earliest release date as soon as possible after final recommendations enter).

[144] *See* Graham v. Florida, 560 U.S. 48, 70; *see also* People v. Contreras, 411 P.3d 445, 454 (Cal. 2018), *modified* (Apr. 11, 2018) ("[I]n underscoring the capacity of juveniles to change, *Graham* made

given lowest priority for rehabilitative programs and services, or are excluded from eligibility entirely.[145] But courts and legislatures alike have recognized that access to such programs "is vital, especially for juvenile offenders, to enhance their growth and rehabilitative potential,"[146] to support success in the parole process and, especially, upon reentry into the community. Therefore, several states encourage, if not require, collaboration between parole boards and departments of corrections to increase access to rehabilitative programming. For example, Washington requires that the state's Department of Corrections, at least five years before certain juvenile parole hearings, "conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community," and make such programming available "to the extent possible."[147] California similarly directs its parole board to meet with people six years prior to their minimum parole eligibility date and provide "information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior."[148] And the Iowa Supreme Court has held that if the state, through the parole board, wishes to condition release upon completion of certain programming, the Department of Corrections cannot unreasonably withhold such programming.[149] Along these lines, too, the settlement agreement in the *Maryland Restorative Justice Initiative v. Hogan* lawsuit includes a new regulation for the Department of Corrections and a modification to the Department's case management manual directing case managers and the Commissioner to give "significant weight" or "serious consideration" to Parole Commission requests or recommendations related to security classifications and programming.[150]

Pre-parole assessments and resulting programming recommendations—by individual(s) with the necessary expertise from either the Department of Corrections or parole board or both, as appropriate in a particular system—can support rehabilitation and help ensure access to

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clear that a juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward.").

[145] *E.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015) (describing allegation that department of correction's policy excluding participation in rehabilitative programming because plaintiff did not have a defined release date, effectively precluding parole, presented plausible claim of de facto life without parole sentence in violation of *Graham*); *see also* People v. Stovall, 987 N.W.2d 85, 94 (Mich. 2022), https://clearinghouse.net/doc/139094/ (noting that "prisoners who receive parolable life sentences are given lower priority when it comes to educational and rehabilitative programming").

[146] *Stovall*, 987 N.W.2d at 94.

[147] WASH. REV. CODE § 10.95.030(2)(f) (2024).

[148] CAL. PENAL CODE § 3041(a)(1) (2018).

[149] Bonilla v. Bd. of Parole, 930 N.W.2d 751, 786 (Iowa 2019).

[150] Attachment 1 Amicus Opposition to Plaintiffs' Rule 41 Stipulation at 23, Maryland Restorative Justice Initiative v. Hogan, No. 1:16-cv-01021 (D. Md. Mar. 24, 2021), ECF 260-2 (providing draft DOC Regulations).

programming for people serving life or long sentences. Pre-parole interaction with the parole board can also offer a touchpoint to demystify the parole process, set expectations, and help people to better navigate and prepare for parole and, ultimately, release.

4. In-Person Parole Hearing with Counsel[151]

a. At least six months before a person becomes eligible for parole pursuant to this subsection, the [Parole Board] shall hold an in-person hearing to determine the person's suitability for parole release.

b. At least twelve months prior to the hearing, the [Parole Board] shall notify the [Public Defender], the appropriate [State's Attorney], and [Victim Services] of the person's eligibility for parole release pursuant to this subsection. The [Public Defender] shall assign counsel if the person is indigent.

c. At the hearing, the [Parole Board] shall permit the person eligible for parole and the person's counsel to make statements. The parole candidate shall answer the [Parole Board's] questions, which may pertain to growth, maturity, rehabilitation, and reentry plans, among other topics.

d. The hearing shall be conducted before more than one member of the [Parole Board]. Release shall be ordered if a majority of the members presiding over the hearing vote in favor of release.

e. The hearing shall be recorded and the recording retained by the [Parole Board] until the conclusion of the person's next parole hearing and any appeal, or until the person is released on parole, whichever occurs first.

C. Commentary to Policy 4

Most states that have implemented parole reform now provide for in-person or live-by-video hearings, and many statutes make clear that parole

[151] *See, e.g.*, ARK. CODE ANN. § 16-93-621(b)(3) (2024) (permitting, though not providing, attorney representation at parole hearings); CAL. PENAL CODE § 3041.5(a)(2) (West 2023) (providing for a hearing to review parole suitability and permitting the juvenile offender "to be present, to ask and answer questions, and to speak on his or her own behalf"); CONN. GEN. STAT § 54-125a(f)(3) (2023) (providing for appointment of counsel at least twelve months prior to parole hearing); 730 ILL. COMP. STAT. § 5/5-4.5-115(e) (2024); N.M. STAT. ANN. § 31-21-10.2(D) (2023); OHIO STAT. § 2967.132(E)(1),(H); OR. REV. STAT. § 144.397(12); Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 361 (Mass. 2015) (construing MASS. GEN. LAWS ch. 211D § 5 (2024) to include provision of counsel for juvenile parole hearings, as determined to be required to ensure a meaningful opportunity for parole under the state constitution); Defendant's Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 3, Hayden v. Butler, 5:10-CT-3123 (E.D.N.C. Oct. 24, 2016), https://clearinghouse.net/doc/94303/; MD. CODE REGS. 12.08.01.18(C)(4) (2023); *see also* D.C. CODE § 24-403.03(b)(2) (2024) (judicial sentence modification).

candidates may speak at their hearings.[152] These kinds of parole hearings, permitting real-time exchange between parole candidates and decisionmakers, allow parole decisionmakers to ask questions directly and to more accurately assess insight and maturity. Live hearings also permit parole candidates to address questions, provide context and perspective, and correct or rebut any inaccurate information. When possible, in-person hearings may avoid the potential for technological difficulties, enable fuller assessment of the parole candidate (via body language or other non-verbal clues), and support connection and an enhanced sense of fairness of process.[153] But any kind of live hearing is preferrable to written submissions, which may be especially ill-suited to this purpose for people sentenced as youth, who "'will often lack the educational attainment necessary to write effectively,' and are likely to be much more capable of expressing themselves orally."[154]

Counsel is an important part of the parole process for this cohort for many reasons. People who have been incarcerated since they were youths may face unique challenges in marshalling the requisite evidence to provide the youth-related context for their crimes as well as to demonstrate post-crime growth and change.[155] Young people who commit crimes are often an especially vulnerable population—more likely to have experienced abuse and trauma, to require psychological and other professional services, to have experienced educational disruption, and to lack connections and support

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[152] *See, e.g.*, CAL. PENAL CODE § 3041.5(a)(2) (West 2023); CONN. GEN. STAT. § 54-125a(f)(3) (2023).

[153] *See, e.g.*, David Peplow & Jake Phillips, *Remote Parole Oral Hearings: More Efficient, But at What Cost?*, CRIMINOLOGY & CRIM. JUST. 9 (Apr. 7. 2023), https://journals.sagepub.com/doi/epub/10.1177/17488958231163278 (noting some potential challenges to remote hearings, including technology issues, inability to assess non-verbal body language, and difficulties establishing rapport, and suggesting that such challenges ought to be considered, in addition to efficiency and other advantages of in-person hearings).

[154] Russell, *supra* note 116, at 423 (quoting Goldberg v. Kelly, 397 U.S. 254, 269 (1970)); *see also* ASHLEY NELLIS, SENT'G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (March 2012) (noting that two in five respondents had been enrolled in special education classes and that fewer than half had been attending school at all at the time of the offense) [hereinafter The Lives of Juvenile Lifers].

[155] *E.g.*, Russell, *supra* note 116, at 419–21 ("The first challenge is that many will lack the self-confidence, education, and organizational skills required to make a persuasive presentation. Some of these individuals have been incarcerated since they were thirteen or fourteen years old and thus grew up in prison. Many had limited education prior to incarceration and have not had opportunities within prison to develop critical skills. Some were victims of trauma and abuse before their arrests and have been further victimized in prison. Some suffer from depression or other mental illnesses. A second challenge is the prisoner's access to relevant mitigating information. An individual may not have a clear memory of his or her childhood, particularly if it was marked by exposure to stress and trauma. Some information-such as the prisoner's prenatal exposure to drugs-may not be known at all by the prisoner. The individual, having grown up in prison, may have lost ties to family members or others who could help supply relevant details. In addition, an individual may not accurately remember the crime itself, especially if mental illness or drug use was involved. Extensive investigation of a person's background is necessary to present an accurate picture to the releasing authority, and usually an evaluation by a mental health expert will be required. . . . Yet a prisoner detained since childhood cannot be expected to muster the resources for a thorough investigation and mental health evaluation on his or her own.").

outside prison, among other vulnerabilities.[156] Counsel, among other procedural supports, may be essential to enable this cohort to navigate the parole process and to prepare for successful release, including developing a release plan.[157] In addition, these kinds of parole hearings require inquiry into the circumstances of youth and subsequent efforts toward rehabilitation, which necessitates "a potentially massive amount of information . . . including legal, medical, disciplinary, educational, and work-related evidence."[158] In this context, counsel is crucial to ensuring that the parole board is presented with all relevant information, which may require extensive investigation into background, evaluations from mental health experts, and procurement of other records and testimonies.[159] Full, adequate presentation of relevant evidence permits the parole board to make an informed, accurate assessment of maturity and rehabilitation and to avoid erroneously incarcerating people who should otherwise be released.[160] Presence of counsel can further support the parole decision-makers by directing focus on the proper factors, especially in a context that differs from typical parole consideration in light of the characteristics of the parole candidates, the lengthy sentences that they may be serving, and the nature of the crimes of conviction, which are often more serious than the kinds of crimes that parole boards are accustomed to reviewing.[161] In addition, counsel can correct or dispute aspects of the record, or provide youth-related

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[156] *See, e.g.*, Nellis, *The Lives of Juvenile Lifers*, *supra* note 146154, at 2–3 (concluding from survey results that juvenile lifers experienced high levels of exposure to violence in their homes and their communities and faced significant educational challenges); AM. C.L. UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 26 (Nov. 29, 2016), https://www.aclu.org/publications/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences [hereinafter False Hope] ("Several studies show that [juvenile offenders] tended to be raised in poor neighborhoods, had limited education, had mental disabilities, and were themselves subject to physical and sexual violence.").

[157] *See, e.g.*, Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1079 (2014) ("When they finally near their first parole hearings, many [juvenile offenders] have few contacts in the outside world, no job prospects, and no previously-forged relationships; in other words, they are even less prepared for reentry than their adult counterparts. They thus come before the Board in a high 'risk state,' unlikely candidates for release unless their circumstances are considered from an appropriate developmental perspective."); Russell, *supra* note 116, at 421 (noting the role that counsel can play in helping develop a release plan and the challenges that might otherwise face this cohort in doing so).

[158] Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 360 (Mass. 2015) (explaining that "[a] parole hearing for a juvenile homicide offender . . . involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources").

[159] See generally Russell, *supra* note 116, at 420–21.

[160] *See, e.g.*, Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363 (2011) (finding in the context of removal proceedings that counsel was one of the two most important variables affecting outcome), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 420 (2001) (finding that tenants with representation did "significantly" better in housing court than tenants that did not have representation).

[161] Interview with Richard Sparaco, former Executive Director of the Connecticut Board of Pardons and Paroles, in his personal capacity (Oct. 3, 2023).

context to the crime, so that these important functions can occur without potentially casting the parole candidate as combative or as failing to accept responsibility.[162] Counsel can also help navigate the process after any denial of parole, including accessing a record of the hearing and decision and providing support in the judicial review process.

Participation of counsel can support parole candidates and decision-makers alike, without transforming the process into an unduly adversarial one. For example, in Connecticut, counsel prepares a written submission focused on offering context for consideration of maturity and rehabilitation and other statutory factors, supports the parole candidate in preparing for the hearing, and makes a statement at the hearing, without cross examination or sustained back and forth with the Board or with counsel for the state (who is also permitted to make a statement but not to cross-examine).[163]

Some involvement by counsel in the parole process is not unusual—in a survey conducted in 2014, 39 states reported considering input from counsel in the release decision.[164] Of course, in order to effectively serve this essential role, any appointed counsel must be properly trained and supported in performing their duties, including with compensation that affords sufficient time devoted to these matters.[165] Of course, there is a cost associated with providing counsel in this context. If such an expense is not yet feasible, systems ought to consider how best to otherwise support people in preparing for and navigating the parole process and in ensuring a comprehensive and accurate record for review, for example through access to social work or similar support independent from departments of corrections or parole systems.

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[162] Interview with Deborah LaBelle, Attorney (Sept. 14, 2023); Russell, *supra* note 116, at 421 ("[I]t is difficult for someone to focus on remorse for a terrible act while at the same time cataloging one's accomplishments. And it is extremely hard for a person to express remorse and take responsibility for the crime at the same time as he or she suggests mitigation regarding an offense.").

[163] CONN. GEN. STAT § 54-125a(f)(3) (2023); Interview with Alexandra Harrington, Associate Professor, Director of the Criminal Justice Advocacy Clinic, Director of the Innocence and Justice Project, Univ. of Buff. Sch. of L. (Sept. 7, 2023); Interview with Richard Sparaco, *supra* note 153.

[164] Russell, *supra* note 116, at 402.

[165] *E.g.*, Bell, *supra* note 101, at 488 (in assessing California's juvenile lifer parole decisions, noting "substantial differences" between appointed counsel and retained counsel, with higher parole grant rates for people with retained counsel, attributable in part to the additional time that retained counsel can devote to helping people understand and navigate the parole process).

5. Examination by Psychiatrist or Psychologist with Relevant Expertise[166]

a. The [Parole Board] may, before holding the hearing described in subsection (4), provide the parole candidate the opportunity to undergo examination by a psychiatrist or psychologist, at state expense if the person is indigent.

b. Within 60 days of any such evaluation, the psychiatrist or psychologist shall file a written report of findings and conclusions with the [Parole Board] and must also provide a certified copy of the report to the person and the person's counsel.

D. Commentary to Policy 5

Independent psychological evaluations and reports from experts, including those with special training in psychosocial development, may support a parole board in adequately accounting for youth and assessing maturity, rehabilitation, and fitness for release. While these expert reports may not be required in the ordinary course, the opportunity for expert assessments or evaluations should be available, and funded, for people who might benefit from such assessment, including, for example, in cases involving mental illness or sex crimes.[167] Experts trained in adolescent psychology, for example, can help the board understand an individual's circumstances and motivations at the time of the crime, post-crime development, and conduct in prison. Massachusetts's highest court has explained that assistance of a psychologist or other expert witness "may be crucial to [a] juvenile's ability to obtain a meaningful chance of release."[168] The court construed a relevant statute to authorize courts to permit payment of experts to assist with parole proceedings "in certain limited contexts—specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending."[169] Access to specially trained

[166] CAL. PENAL CODE § 3051(f)(1) (2023); 730 ILL. COMP. STAT. 5.5-4.5-115(h) (2024); OR. REV. STAT. § 144.397(4) (2019); Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 363 (Mass. 2015) (construing MASS. GEN. LAWS ch. 261 §§ 27A-27G (2024) to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts); ARK. CODE ANN. § 16-93-621(b)(2)(I) (2024) (directing consideration of "[t]he results of comprehensive mental health evaluations conducted by an adolescent mental health professional . . . at the time of sentencing and at the time the person becomes eligible for parole"); LA. STAT. ANN § 15:574.4(D)(2) (2024) (requiring that "each member of the panel . . . be provided with and . . . consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior").

[167] Interview with Alexandra Harrington, *supra* note 155.

[168] *Diatchenko,* 27 N.E.3d at 362.

[169] *Id.* at 362–63.

psychological experts may also be important because there is a higher prevalence of mental impairments among young offenders than among those not involved with the justice system; lack of access to experts increases the risk that parole is denied based on undiagnosed psychiatric or cognitive impairments, which may go untreated in prison.[170] Note, though, that just as typical parole procedures may be ill-suited to people serving sentences for crimes committed as children, so, too, may typical experts, untrained in adolescent development or mental health, be unable to sufficiently evaluate the particular characteristics and needs of this cohort.[171] Accordingly, some states require parole boards in cases involving juvenile offenders to consider reports from experts in adolescence.[172]

6. Use of Risk Assessment Tools[173]

a. Upon request of the parole candidate or determination by the [Parole Board] that sufficient cause supports requiring assessment of risk, a risk assessment may be performed.

b. Any risk assessment or similar evaluation considered for purposes of the parole release decision shall include dynamic risk factors, shall account for the mitigating features of youth, shall have been validated to be free of racial bias, and shall permit the professional administering the tool to exercise independent clinical judgment in assessing risk.

c. The parole candidate and/or counsel shall have access to any risk assessment performed under subsection (b) as well as the opportunity to review for accuracy, including in scoring, underlying facts, and conclusions, and to present any corrections to the [Parole Board].

d. Any assessment performed under subsection (b) shall be completed in sufficient time so as not to postpone the parole hearing required in 4(a) or otherwise delay release.

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[170] *See generally* Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT. J. ENVIRON. RES. & PUB. HEALTH 228 (2016); EQUAL JUSTICE INITIATIVE, ALL CHILDREN ARE CHILDREN: CHALLENGING ABUSIVE PUNISHMENT OF JUVENILES 12 (2017), https://eji.org/sites/default/files/AllChildrenAreChildren-2017-sm2.pdf.

[171] *See, e.g.*, Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (2022) at 45 (recommending that "[b]ehavioral health professionals likely to conduct forensic evaluations, provide forensic expert testimony, or provide clinical testimony . . . strive to be currently informed of relevant research domains" and noting that "[s]tandard clinical training is ordinarily insufficient to provide proficiency in working with younger offenders, and, in any event, the continuing development of research in this area requires an ongoing process of professional development and learning").

[172] *E.g.*, ARK. CODE ANN. § 16-93-621(b)(2)(I) (2023).

[173] MD. CODE REGS. 12.08.01.18(A)(7) (2023) ("Any risk assessment tool used by the Commission for determining the risk of an inmate shall include dynamic risk factors as a method for assessing risk and shall require the healthcare professional administering the tool to exercise independent clinical judgment in assessing risk.").

E. Commentary to Policy 6

The risk assessment tools typically used to support parole board decision making are ill-suited to people who commit crimes as youths, have not been validated for people who spend a long time in prison, risk reinforcing racial stereotypes and exaggerating risk based on systemic disadvantage, and may lend a clinical imprimatur to what ought to be legal and administrative considerations.[174] Many of the static factors that inform evaluation of risk implicitly situate youth as aggravating, rather than mitigating. For example, people who did not graduate from high school, are not married, and/or who have never held a job outside of prison may be deemed more risky, even though these factors are usually true for any person who was first incarcerated as a child.[175] Moreover, the tools may assign a higher risk score to people who committed crimes at younger ages, as all in this cohort will have done,[176] notwithstanding evidence of lower rates of recidivism for this population.[177] To combat this skew, any risk assessment tool must include consideration of dynamic factors that account for post-crime growth and change, and should enable exercise of independent judgment that allows the assessor to, for example, downgrade assessment of risk to account for youth.[178] Moreover, assessors must have context for how prisons operate, and must be willing and able to consider collateral sources other than prison authorities.[179] For example, in the settlement agreement in the *Maryland Restorative Justice Initiative v. Hogan* litigation, the parties modified the existing parole statute to provide that risk assessments must include dynamic factors and permit exercise of independent judgment, and also modified the Department of Corrections' case management manual to

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[174] For an argument that the psychological evaluation/risk assessment processes in California are more prejudicial than probative in parole hearings, see generally Jeremy Isard*, Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, 105 CAL. L. REV. 1223 (2017).

[175] Interview with Alexandra Harrington, *supra* note 155; Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 BROOK. L. REV. 119, 160–61 (2014).

[176] Annitto, *supra* note 166, at 158–60 (2014) (describing this phenomenon, and noting that "[o]n the one hand, the offender's youth makes him less blameworthy and less culpable for his actions because he has a greater potential for change; on the other hand, data driven risk assessment instruments are based upon empirical evidence suggesting that early onset of criminal or delinquent activity correlates with a greater likelihood of future criminal behavior.").

[177] *See, e.g.*, TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 2 (2020) (finding a 1% recidivism rate among the 174 juvenile lifers released on parole in Philadelphia, as compared to a 30% recidivism rate within 2 years nationally for people convicted of homicide), https://www.msudecisionmakinglab.com/philadelphia-juvenile-lifers; Presentation of Sukhmani Singh & Joshua Adler, Connecticut Sent'g Comm'n September Meeting (Sept. 28. 2023), at 41:00–42:05, https://ct-n.com/ctnplayer.asp?odID=22169 (noting "incredibly low" 11% rate of recidivism among 108 people released on parole under Connecticut's juvenile parole statute, compared to rates of 50-65% for comparable adult populations).

[178] Interview with Sonia Kumar, Senior Staff Att'y, ACLU of Maryland (Sept. 20, 2023). Attorney Kumar emphasized her general skepticism of the utility of risk assessment tools and concerns about the errors that they can introduce.

[179] *Id.*

make clear that case managers are to consider youth in security classification decisions as well as in preparing pre-parole summaries.[180] Parole decision-makers, too, must be educated about the efficacy of risk assessment tools for this particular population.[181] Finally, parole candidates and their counsel must have the opportunity to review any risk assessment for error.[182]

7. Access to the Record; Ability to Contribute to and Correct the Record[183]

a. At least 30 days, and ideally 60 or more days, in advance of the parole hearing, the [Parole Board] shall permit the person and the person's counsel to review information that the [Parole Board] will consider in determining the person's suitability for release, including any statements concerning the circumstances of the offense(s) and any risk or psychological assessment conducted.

b. In advance of the parole hearing, the [Parole Board] shall permit the person to submit materials to the [Parole Board] including, but not limited to, letters of support, court records, expert reports, and records relating to the person's childhood and efforts at rehabilitation, and any corrections to the existing record.

c. The [Parole Board] shall permit persons with knowledge of the parole candidate before the offense(s), or the parole candidate's growth and maturity since the time of the offense(s), to submit statements for review in advance of the parole hearing. This may include, but is not limited to, family members, friends, school personnel, faith leaders, community representatives, and others with relevant knowledge.

F. Commentary to Policy 7

People eligible for parole for crimes committed as youth must have access to all information used by the parole decisionmakers, and an ability to correct or rebut that information. Otherwise, parole candidates cannot dispute or correct inaccuracies or provide alternative accounts or reports that may be helpful to the release decision. Permitting access and opportunity to correct the record helps ensure that the parole release decision rests on accurate information. Indeed, at least one court has recognized that this is

[180] Appendix to DOC Case Management Manual, Maryland Restorative Justice Initiative v. Hogan, No. 1:16-cv-01021 (D. Md. 2016) (ECF 260-2) at 26.

[181] Interview with Sonia Kumar, *supra* note 169.

[182] *See, e.g.*, Brief of the ACLU of Maryland et al. as *Amici Curiae* in Support of Petitioner, Michael Farmer at 22–25, Farmer v. Maryland, No. 31 (Md. Ct. App. Dec. 6, 2021) (describing errors found in risk assessments of juvenile lifers in Maryland).

[183] CAL PENAL CODE §§ 3041.5(a)(1) (West 2023), 3051(f)(2) (2020); CONN. GEN. STAT § 54-125a(f)(3) (2023) (permitting prospective parolee to make statement at hearing and counsel to submit reports and other documents); 730 ILL. COMP. STAT. § 5/5-4.5-115(f) (2024).

not just good policy but a constitutional imperative, holding that access to parole files and the ability to provide information and correct misinformation is a due process requirement.[184]

8. Release Decisions and Judicial Review[185]

a. If the [Parole Board] denies release, it shall provide a written statement of the reasons supporting its decision, including the youth-related factors and evidence of maturity and rehabilitation that it considered and the evidence found to overcome the presumption of release. Denial that relies in whole or in part on the result of any risk assessment performed pursuant to 6(a) shall provide detail as to the specific aspects of the risk assessment supporting denial. The [Parole Board] shall also offer guidance as to what will improve the person's likelihood of release upon subsequent consideration, including, for example, any specific educational or rehabilitative programs that the person must complete.

b. If the [Parole Board] determines that continued confinement is necessary, the [Parole Board] shall reassess a person's suitability for parole at a hearing no more than two years after any decision denying parole.

c. Decisions of the [Parole Board] shall be subject to judicial review under an abuse of discretion standard.

G. Commentary to Policy 8

Judicial review helps ensure that the parole decision complies with constitutional and statutory requirements. As the Massachusetts Supreme Judicial Court has explained, the "purpose of judicial review" is to discern "whether the board has carried out its responsibility to take into account the [required] attributes or factors"[186]—a determination that may have constitutional significance.[187] To support meaningful judicial review, parole boards should provide a statement of reasons for the denial and guidance for

[184] Bonilla v. Bd. of Parole, 930 N.W.2d 751, 780–81 (Iowa 2019) (ultimately denying relief in facial challenge to parole procedures, however, finding that Board's policies passed constitutional muster).

[185] CAL. CODE REGS. tit. 15 § 2445(d) (2020) ("If a hearing panel finds a youth offender unsuitable for parole, the hearing panel shall articulate in its decision the youth offender factors present and how such factors are outweighed by relevant and reliable evidence that the youth offender remains a current, unreasonable risk to public safety."); CONN. GEN. STAT § 54-125a(f)(5) (2023) ("After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision."); MD. CODE REGS. 12.08.01.18(E)(3) (2023); OHIO STAT. § 2967.132(G) (2019); Defendant's Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 4, Hayden v. Butler, 5:10-CT-3123-BO (E.D.N.C. Oct. 24, 2016).

[186] Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 365 (Mass. 2015).

[187] *See* Harrington, *supra* note 100, at 366.

the person to improve the likelihood of parole release in the future. A complete statement of reasons for the parole decision may also minimize use of improper bases for denial, as requiring explanation on the record can reduce some forms of cognitive bias.[188] A statement of reasons may also prepare the parole candidate for future parole review by pointing to programs or treatments that could best prepare the person for release. Review under an arbitrary and capricious or abuse of discretion standard aligns with majority practice of states permitting judicial review.[189] Finally, permitting parole re-review after two years offers an opportunity for the person to complete additional programming, solidify reentry plans, and otherwise prepare for rehearing, without unduly extending their period of incarceration.

9. Data, Monitoring and Review[190]

a. The [Parole Board] shall annually conduct a review of all people currently serving sentences for crimes committed under age 18 to ensure that parole eligibility hearings are timely and appropriately conducted.

b. The [Parole Board] shall collect and maintain data, including how many parole review hearings are held annually under [this statute] and the results, as well as a statistical breakdown on the basis of age, race, ethnicity, gender, type of offense, and any categorization based on risk assessment or similar evaluation.

c. The [Parole Board] shall also put in place mechanisms for reviewing and improving parole processes, including upon annual review conducted under (a).

10. Qualifications and Training[191]

a. All [Parole Board] members and relevant staff shall receive training at initiation of the position, and at least annually thereafter, in: adolescent psychology, development, and decisionmaking, and how it relates to the applicable parole considerations; low rates of recidivism for people released post-Graham and Miller; the application of risk assessment tools to this

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[188] Annitto, *supra* note 166, at 166.

[189] *See* Harrington, *supra* note 100, at 1197 ("Twenty-two states provide for general review of the parole board's decision under some variation of an arbitrary and capricious or abuse of discretion standard.").

[190] N.M. STAT. ANN. § 31-21-10.2(F) (2023); Defendant's Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 4, Hayden v. Butler, 5:10-CT-3123-BO (E.D.N.C. Oct. 24, 2016); Interview with Richard Sparaco, *supra* note 154 (describing planning, research, and development unit that gathered data on parole hearings conducted under Connecticut's Public Act 15-84).

[191] *See, e.g.*, Exhibit 2 to Plaintiff's Response to Defendants' Plan for Compliance, Expert Opinion of Heidi L. Rummel, at 4, 14, Brown v. Precythe, No. 2:17-cv-04082-NKL (W.D. Mo. Jan. 10, 2019), ECF No. 166-2 (noting the importance of a parole board trained in adolescent brain development and the relevant legal issues).

population; the requirements of this [statute], including appropriate and inappropriate bases for the release decision, and the meaning of key terms, including maturity and rehabilitation, in this context; and the role of parole in the broader sentencing and punishment scheme.

b. Whenever possible, [Parole Board] members and supporting staff shall have some relevant background in adolescent development, and should reflect a diversity of experiences and perspectives, with greater emphasis on people reflective of the communities most affected by mass incarceration, and people whose orientation is towards social work and services, rather than law enforcement and corrections.

H. Commentary to Policy 10

Training upon assumption of duties and annually thereafter ensures that all parole decisionmakers remain informed about relevant topics, even as membership changes. Decisionmakers should be trained in adolescent development and related issues, and in why and how the parole release decision for this cohort is to be grounded in assessment of youth, maturity, and rehabilitation. Other relevant training topics may include: the impact that psychosocial development and trauma may have on institutional conduct during early incarceration; the effect of youth on navigating criminal proceedings;[192] age-crime desistence;[193] low rates of recidivism for people released post-*Graham* and *Miller*;[194] juvenile crime and remorse;[195] and the superpredator myth and related sentencing trends in the 1990s and early 2000s. Direct engagement, including with people currently incarcerated or people who have been released on parole after serving sentences for crimes committed under age 18, can also be beneficial.[196]

CONCLUSION

In sum, parole processes for people serving long sentences for crimes committed as youth must ensure a realistic and meaningful opportunity for release that is grounded in consideration of youth, maturity, and rehabilitation. In the wake of *Graham*, *Miller*, and their progeny, more people than ever are serving life-long sentences with parole eligibility for crimes committed as young people. Robust parole review—centering the proper factors, with procedures to support accurate, comprehensive review

[192] Interview with Callie King-Guffey & Rebecca Turner, *supra* note 137

[193] Interview with Alexandra Harrington, *supra* note 163.

[194] See sources cited *supra* note 163.

[195] *See generally* Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. & SOC. CHANGE 99 (2014).

[196] The Campaign for the Fair Sentencing of Youth can be a resource in training parole boards and in connection decisionmakers with people serving long sentences for crimes committed as children who people have been released on parole in the wake of *Graham* and *Miller*. Interview with Callie King-Guffey & Rebecca Turner, *supra* note 137.

and success upon release—is essential to ensure that such sentences do not violate the Eighth Amendment or raise due process or other federal and state constitutional concerns. It also offers an opportunity to further correct course in light of what we now know about juvenile psychosocial and neurological development. Meaningful parole consideration for this cohort promotes the rehabilitative ideal and offers an opportunity to support people sentenced as youth in achieving productive lives outside of prison.

Criminalization of Landlord/Tenant Law: Arkansas' "Failure to Vacate" Statute

ANASTACIA GREENE

INTRODUCTION

Arkansas is not a notable state. It is often confused with Kansas or Alabama. It is difficult for most Americans to find on a map. Perhaps Arkansas has few distinctions. However, it is the only place in the country where a tenant can be thrown in jail for missing a rental payment. The legal landscape of Arkansas is unique in many ways, primarily in its old-fashioned, even archaic, view of property law.

First, this article examines the history behind the Failure to Vacate statute. Next, this article reviews the constitutional challenges that the statute has faced, and recent litigation. Then, this article reviews the data gathered regarding enforcement of Failure to Vacate across the state. Next, the article examines and analyzes these findings. Finally, the article makes final recommendations on how the failure to vacate should be changed and amended.

I. FAILURE TO VACATE STATUTE

Arkansas is the only state that criminalizes a tenant's failure to pay rent.[1] Under 18-16-101, a tenant may be criminally charged if they do not pay rent. This statute specifically criminalizes "failure to pay rent," and cannot be used for other types of lease violations. In other states, landlords follow a civil eviction process against unpaying tenants. However, under the "Failure to Vacate" law, the non-paying tenant is instead convicted of a crime.

This statute is not a civil eviction and does not actually return possession of the dwelling back to the landlord. Instead, the notices, charges, convictions and fines are a means of encouraging tenants to move out of the dwelling. As the Arkansas Attorney General has made clear, criminal judges cannot issue eviction orders or force tenants to leave the property.[2]

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[1] See Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 2 (2013) for a discussion about the novelty of Arkansas housing law.

[2] Off. Att'y Gen., Opinion Letter on A.C.A. §18-16-101 (June 14, 2004), *as reprinted* in Ark. Op. Atty. Gen. No. 2004-148 (Ark. A.G.), 2004 WL 1475631 ("This Code section, a copy of which is enclosed for your convenience, authorizes the *criminal prosecution* of tenants who fail to pay rent when due and who hold over after receiving a written ten-day notice from their landlord to vacate the premise. . . . [T]he tenant will be convicted of a misdemeanor and fined. A judge does not, however,

Under this statute, any tenant that fails to pay rent when due "shall at once forfeit" all right to occupy the dwelling.[3] This means that, if the tenant is even one day late with the rent, he has "forfeited" and lost any right to remain in the dwelling. It does not contain any grace period to allow tenants to pay their rent late. The statute says that the forfeiture occurs "at once," meaning that the "forfeiture" occurs automatically as soon as the rental payment is not made. The landlord or the lease does not need to declare a "forfeiture." Finally, this forfeiture can occur if the rent is even one dollar short.[4] Once the tenant fails to pay rent, the landlord can then initiate the criminal process.

A. Notice to Vacate — § 18-16-101 (b)

After the tenant misses rent, the landlord or agent must give the tenant a written 10-day "notice to vacate."[5] The statute does not specify any required format or content for this notice to vacate. For example, it does not require the landlord to include any information regarding the effects of the tenant's failure to vacate, inform the tenant of their legal rights, etc. In addition, the notice does not have to notify the tenant that they may face criminal charges for failing to leave.

Similarly, Arkansas does not have a particular form for the "notice to vacate." The notice can be hand-written, from the landlord, or his agent or attorney. This notice does not come from the State, but from the individual landlord. The statute does not specify how the landlord must give the notice to vacate to the tenant. The notice to vacate could be posted, mailed, handed in person, or delivered by other means.

After the landlord gives the tenant a 10-day notice, if the tenant "willfully refuses" to vacate and surrender possession to the landlord, the tenant is then guilty of a misdemeanor.[6] The tenant can be criminally charged with "failure to vacate" and brought before a judge. "Failure to vacate" cases are heard at the district criminal court level.

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order a tenant's eviction pursuant to § 18-16-101. Eviction is a *civil* remedy that may be pursued under A.C.A. §§ 18-60-301–312, the unlawful detainer statutes that comprise the civil counterparts to A.C.A. § 18-16-101. . . . Although subsection 18-16-101(a) provides that the tenant shall 'forfeit all right to longer occupy the dwelling' by failing to pay rent when due, there is no procedure under this statute for removing the tenant from the property. Instead, the tenant is subject to criminal prosecution if he fails to vacate after receiving the requisite notice. It thus cannot be contended that the judge must force the tenants to leave pursuant to A.C.A. § 18-16-101." (citations omitted)).

[3] ARK. CODE ANN. § 18-16-101 (West 2017).

[4] *See* Colin Boyd, *Property Law—Beyond Repair: The Persistent Unconstitutionality of the Failure to Vacate Statute*, 44 U. ARK. LITTLE ROCK L. REV. 379, 388 (2022) ("There is no minimum amount in controversy; therefore, a landlord could allege that he or she is the victim of a tenant's failure to vacate the property even if the tenant falls only one dollar short or one day behind on rent.").

[5] ARK. CODE ANN. § 18-16-101 (West 2017).

[6] *Id.* § 18-16-101(b)(1).

After the tenant is convicted, the tenant can be fined between one and twenty-five dollars per offense. Each day that the tenant stays in the dwelling after the ten-day notice expires is considered a separate offense; thus, a tenant may be fined per day.[7] The statute is an "unclassified misdemeanor," which does not provide for jail time.[8]

As an example of how the statute works, let's say Tom Tenant has a one-year written lease with Larry Landlord, with rent of $600 due on the first of the month. On April 1, Tom does not pay the rent. Pursuant to §18-16-101, by failing to pay the rent on the date due, he has "at once" forfeited all right to occupy the apartment. On April 2, Larry Landlord can issue a "10-day notice" telling Tom to vacate the apartment. Larry can hand-write this notice himself and post it to Tom's front door. By April 12, the 10-day notice has expired. If Tom has not moved out, Larry can then call the police and ask the police to arrest Tom for failing to vacate the premises. The police can go to Tom's door and issue a citation or arrest him. Tom will receive a court date of April 20. On that date, Tom can go to court to defend himself. If the judge finds that Tom violated the statute, Tom will be found guilty of a misdemeanor and ordered to pay a fine for each day he remained in the apartment after April 12.

Notably, the "failure to vacate" statute does NOT actually allow judges to evict tenants from the property.[9] Instead, landlords that want to receive an order of possession must follow the civil eviction process.[10] District court judges do not have jurisdiction to enter orders regarding possession of real property. In a 2004 opinion, the Arkansas Attorney General ("AG") confirmed that a judge cannot order the eviction of a tenant under the "failure to vacate" statute.[11] Instead, the tenant can simply be charged and fined. The AG clarified that, even though the statute states that a tenant "forfeits" his tenancy, there is no procedure under the statute to actually remove the tenant. Judges can find the tenant guilty of a crime, but they cannot force the tenant to move out.[12]

In Arkansas, the criminal "failure to vacate" process co-exists alongside traditional civil eviction laws. If a tenant misses rent, a landlord may choose to file an "unlawful detainer" action in civil circuit court to

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[7] *Id.* § 18-16-101(b)(2)(B)

[8] ARK. CODE ANN. § 5-1-108 (West 1975).

[9] Off. Att'y Gen., *supra* note 2, at 1.

[10] *Id.*

[11] *Id.* ("A judge does not, however, order a tenant's eviction pursuant to § 18-16-101. Eviction is a *civil* remedy that may be pursued under A.C.A. §§ 18-60-301–312, the unlawful detainer statutes that comprise the civil counterparts to A.C.A. § 18-16-101."); ARK. CODE ANN. § 18-60-309(c)(1)–(2) (West 2007) (providing the civil remedy to recover the property).

[12] Off. Att'y Gen., *supra* note 2, at 1 ("Although subsection 18-16-101(a) provides that the tenant shall 'forfeit all right to longer occupy the dwelling' by failing to pay rent when due, there is no procedure under this statute for removing the tenant from the property. Instead, the tenant is subject to criminal prosecution if he fails to vacate after receiving the requisite notice."); ARK. CODE ANN. § 18-16-101(a) (West 2017).

receive possession and damages,[13] or a civil eviction action in district court pursuant to the 2007 Residential Landlord/Tenant Act.[14] Finally, the landlord may initiate criminal "failure to vacate" charges pursuant to §18-16-101. These statutes create three different legal processes that can be taken against a non-paying tenant — two involving civil court evictions, and one involving charges against the tenant in criminal court.

Since the "failure to vacate" statute is not an actual eviction, it does not comply with federal rules for subsidized housing. Tenants in federally-subsidized housing cannot be subjected to "failure to vacate" charges.[15] The United States Department of Housing and Urban Development ("HUD") has determined that "failure to vacate" is not a "judicial action for eviction" and cannot be used against tenants in HUD-subsidized housing.[16] Subsidized-housing landlords must pursue civil eviction instead. The "failure to vacate" statute remains on the books in Arkansas, a unique hybrid of criminal law and landlord/tenant law. Unlike every other state in the United States, a landlord in Arkansas may choose to pursue criminal charges against a tenant that fails to pay rent.[17]

II. HISTORY OF THE FAILURE TO VACATE STATUTE

A. Legislative History

The failure to vacate statute was originally passed in 1901.[18] It was controversial at its outset; Senators had a spirited debate on the floor regarding the bill's morality and purpose. One senator described it as "simple class legislation in favor the landlord, no more, no less," while another opined that it "amounted to nothing more nor less than to give the landlord the right to throw his tenant in jail if he failed to pay the rent."[19] Another raised concerns that a tenant who could not pay the fine would be "sent to jail and compelled to work it out."[20] Another opponent said that

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[13] ARK. CODE ANN. § 18-60-304 (West 2005).

[14] ARK. CODE ANN. § 18-17-701 (West 2009).

[15] Memorandum from Robert E. Moore to Sterling Cockrill, Hous. Urb. Dev., Area Director, Roger N. Zachritz, Deputy Area Director, and Andy L. Watts, Dir., Hous. Mgmt., (May 24, 1978) [hereinafter Moore Memorandum] ("It is our opinion that it is inappropriate for management of a subsidized multi-family housing project to utilize 50-523 as the tool for eviction . . . . It is our opinion that 50-523 is not a judicial action for eviction. It is merely a criminal statute that is utilized to force a tenant to vacate the property under threat of fine."); *see also* Foster, *supra* note 1, at 11 (discussing HUD actions on the "failure to vacate" law).

[16] *See* Moore Memorandum, *supra* note 15, at 1.

[17] Only one other state, Florida, has ever passed a similar statute. *See* 1933 Fla. Laws 422 (repealed 1973 Fla. Laws 770). However, Florida's statute, enacted in 1933 and repealed in 1973, criminalized tenants that "held over" on the premises after their tenancy had ended. In contrast with the failure to vacate statute, it did not criminalize tenants who simply failed to pay rent during their tenancy.

[18] Boyd, *supra* note 4, at 382.

[19] *Id.* at 383.

[20] *Id.*

the bill "allowed a man to be put in jail for debt." In contrast, supporters stated that the bill was "intended to compel men to come up to their contracts," "only provides for a fine," and "sought to give relief to landlords who were unable to eject tenants who would not pay their rent."[21] The bill ultimately passed the Senate by one vote, and the failure to vacate statute became law.[22]

The law remained virtually unchanged from 1901 until 2001, when the Arkansas General Assembly amended the statute.[23] The 2001 bill created a higher penalty and imposed additional requirements on tenants.[24]

It raised the daily penalty from a allowing a range between $1–$25 to a flat rate of $25 a day. And the bill added a new section—(c)(1)—to the statute, with higher penalties. This section required tenants to deposit the rent allegedly owed to the court, and it imposed a higher criminal penalty on tenants if the rental payments were not made.[25] Under this section, if a tenant wanted to plead "not guilty," the tenant must first deposit to the court any rent allegedly due. The tenant must continue to pay monthly rent to the court throughout the criminal proceedings.[26]

If a tenant is found guilty, or pleads "not guilty" or "nolo contendere," and has not paid the required monthly rent to the court, the tenant is guilty of a Class B misdemeanor.[27] Class B misdemeanors subject the defendant to 90 days in jail and a fine of up to $1000.[28]

After several successful court challenges (discussed below), the Arkansas General Assembly again amended the statute in 2017.[29] This changed the failure to vacate statute back to its original form, deleted section (c)(1), eliminated the requirement to pay into the registry, and removed the elevated Class B misdemeanor.[30] The statute remained an "unclassified misdemeanor," with a daily fine of between $1 and $25.[31]

Legislators have introduced bills to repeal the failure to vacate statute. In 2015, one such bill repealing the failure to vacate statute was defeated in committee.[32] Most recently, in March 2021, State Representative Clowney introduced a bill (H.B. 1798) that would repeal the failure to vacate law.[33]

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[21] *Id.*
[22] *Id.* at 384.
[23] ARK. CODE ANN. § 18-16-101 (West 2017).
[24] 2001 Ark. Acts 1733 (H.B. 2291).
[25] ARK. CODE ANN. § 18-16-101(c)(1) (West 2001).
[26] *Id.*
[27] *Id.* § 18-16-101(c)(3).
[28] ARK. CODE ANN. § 5-4-401(b)(2) (West 1983); ARK. CODE ANN. § 5-4-201(b)(2) (West 2009).
[29] 2017 Ark. Acts 159 (S.B. 25).
[30] *Id.* § 2(c)(1).
[31] *Id.* § 2(c)(3).
[32] Maya Miller, Ellis Simani & Benjamin Hardy, *Bill Aims to Repeal Arkansas's Unique 'Criminal Eviction' Law*, ARK. TIMES (Mar. 19, 2021, 12:47 PM), https://arktimes.com/arkansas-blog/2021/03/19/bill-aims-to-repeal-arkansass-unique-criminal-eviction-law.
[33] *Id.*; H.R. 1798, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

However, this bill faced stiff opposition from landlords. In a House Committee hearing, the president of the Arkansas Landlords Association spoke against the bill.[34] The 2021 bill was ultimately narrowly defeated in a House Committee.[35] The failure to vacate law remains effective in Arkansas and is a part of the current Code.

B. Court Challenges

1. State Court

Due to its unique features, the failure to vacate statute has faced several challenges to its Constitutionality. In the case of *Poole v. State*, the Arkansas Supreme Court upheld the constitutionality of the failure to vacate statute.[36] In this case, Patricia Poole, a Little Rock tenant was charged with failure to vacate.[37] She pled not guilty, was tried and found guilty.[38] Poole then appealed the conviction to the Arkansas Supreme Court, arguing that the failure to vacate statute itself should be declared unconstitutional.[39]

Poole argued that the statute constituted an invalid and unreasonable exercise of the State's police power, and that it derived her of her due process rights under the Fourteenth Amendment.[40] However, the court disagreed.

First, the Arkansas Supreme Court found that the statute was not unconstitutional.[41] The court stated that statutes passed are presumed to be constitutional, and will not be struck down unless obviously unconstitutional.[42] The Court pointed to the statute's long existence (since 1901), as evidence of its validity.[43] Secondly, the Court found the statute to be a valid exercise of the State's police power to protect the public safety and welfare. By willfully failing to pay rent, tenant has essentially "become a trespasser on property."[44] Further, the court stated that "public . . . welfare is always threatened when a person wrongfully trespasses on

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[34] Max Brantley, *House Committee Defeats Repeal of Criminal Eviction Statute*, ARK. TIMES (Apr. 5, 2021, 11:01 AM), https://arktimes.com/arkansas-blog/2021/04/05/house-committee-defeats-repeal-of-criminal-eviction-statute ("William Jones, president of the Arkansas Landlords Association, opposed the bill. He said it is an 'effective tool.' It saves him money because he doesn't have to use an attorney.").

[35] *Id.*

[36] Poole v. State, 428 S.W.2d 628, 631 (Ark. 1968).

[37] *Id.* at 629.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 630.

[42] *Poole*, 428 S.W.2d at 630.

[43] *Id.*

[44] *Id.*

another person's property."[45] Because preventing wrongful trespass is within the police power of the State, the court found this statute to be a valid exercise of State power.[46] Further, the court found that a 10- day notice to vacate is sufficient procedural due process.[47] The Arkansas Supreme Court affirmed the tenant's conviction for failure to vacate. *Poole* strongly affirmed the constitutionality of the failure to vacate law. In later court challenges, judges would cite to *Poole* in their decisions upholding the statute.[48]

In *Duhon v. State*, the Arkansas Supreme Court again weighed in on the failure to vacate law.[49] In this case, a Little Rock tenant challenged the constitutionality of the statute.[50] The tenant relied upon recent decisions in *Greene v. Lindsey* and *Gorman v.Ratliff* that recognized additional tenant rights;[51] *Greene* held that posting a notice to vacate on the front door was not sufficient notice for due process, and *Gorman* outlawed Arkansas landlords using self-help to remove tenants.[52] However, the Arkansas Supreme Court felt that these cases were not enough to outweigh the presumption of constitutionality, and it reaffirmed *Poole*'s holding.[53]

In a vigorous dissent, Justice Purtle stated that "[t]he majority has, with all the speed of a crawfish, backed into the 19th century."[54] He pointed out that Arkansas is the only state that imposes criminal sanctions for failure to pay rent, and stated that he believed *Gorman* opinion meant the state was "joining the rest of the country" in "rendering an enlightened decision on the relationship between landlord and tenant."[55] He further pointed out that the tenant was pulled out of bed by police and taken to jail for failing to pay rent.[56] The dissent also stated that holdover tenants are no longer considered trespassers because renters have a property interest.[57] Echoing some of the earliest opposition to this bill, Justice Purtle stated that the "state has simply lent her hands to landlords," and it "criminalizes a breach of contract for failure to pay a debt."[58] He believed the majority's

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[45] *Id.*

[46] *Id.* at 630–31; However, the crime of trespass can never be brought against a tenant, because the tenant has not illegally entered the property. "Failure to vacate" is the only proper charge against a current tenant. *See* Williams v. City of Pine Bluff, 683 S.W.2d 923 (Ark. 1985).

[47] *Poole*, 428 S.W.2d at 631.

[48] *E.g.*, Duhon v. State, 774 S.W.2d 830, 835 (Ark. 1989).

[49] *Id.* at 832.

[50] *Id.* at 832–34.

[51] *Id.* at 835 (citing first Greene v. Lindsey, 456 U.S. 442 (1982); then citing Gorman v. Ratliff, 712 S.W.2d 888 (Ark. 1986)).

[52] *See Greene*, 456 U.S. at 444; *Gorman*, 712 S.W.2d at 891.

[53] *Duhon*, 774 S.W.2d at 835.

[54] *Id*. at 836 (Purtle, J., dissenting).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 837.

[58] *Id.*

opinion conflicted with the theme of the *Gorman* opinion.[59]

While *Duhon* still upheld the law, the opinion reveals dissent and doubts regarding the enforcement and overall fairness of the statute. After the 2001 amended statute was enacted, the statute faced more court challenges. And, for the first time, judges refused to affirm the statute.

In the 2015 case *State v. Smith*,[60] a Little Rock Circuit Court judge found the failure to vacate statute unconstitutional.[61] The judge noted that the decisions in *Poole* and *Duhon* upholding the statute were issued prior to the 2001 amendment, so they considered the amended statute's constitutionality anew.[62]

The judge was most concerned about the statute's new requirement that tenants must pay rent to a court registry in order to plead not guilty.[63] This would effectively deprive the tenant of property (rent money) before any hearing is held on the merits. The judge found that this registry provision did violate the tenant's procedural due process rights under the Fourteenth Amendment.[64] In addition, the court found that the registry to plead not guilty also has a chilling effect on the defendant's right to pursue a jury trial under the Constitution.[65]

The judge further found that the statute imposed "cruel and unusual punishment" under the Eighth Amendment, and it would not survive equal protection analysis as a "narrowly tailored" means to accomplish compelling government objectives.[66] Finally, the court found that the law creates an impermissible debtor's prison. The Arkansas Constitution prohibits "imprison[ment] for debt . . . unless in cases of fraud,"[67] and the Arkansas Supreme Court has previously struck down other laws that criminalized debt.[68] While the court stated that some of the due process concerns could be resolved by excising the registry requirement, it nonetheless held that the statute itself was facially unconstitutional.

As a result of this ruling, Pulaski County halted all prosecutions for "failure to vacate."[69] This opinion also reflected an impetus for circuit courts to prohibit failure to vacate cases. In 2014, at least two other circuit court judges found that the failure to vacate statute was unconstitutional

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[59] *Duhon*, 774 S.W.2d at 836–37 (citing Gorman v. Ratliff, 712 S.W.2d 888 (Ark. 1986)).

[60] State v. Smith, No. 2014-2707, 2015 WL 991180 (Ark. Cir. Pulaski County Jan. 20, 2015).

[61] *Id.* at *7.

[62] *Id.* at *2.

[63] *Id.* at *2–3.

[64] *Id.* at *4.

[65] *Id.*

[66] *Smith*, 2015 WL 991180 at *5.

[67] *Id*. at *5 (quoting ARK. CONST. art. II, § 16).

[68] *Id.* at *5 (citing State v. Riggs, 807 S.W.2d 32 (Ark.1991) (striking down law that criminalized contractors' failure to pay for materials)).

[69] Max Brantley, *Eviction Lawsuit Victory a Landmark, Advocates Say*, ARK. TIMES (Jan. 22, 2015, 12:31 AM), https://arktimes.com/arkansas-blog/2015/01/22/eviction-lawsuit-victory-a-landmark-advocates-say.

and unenforceable.[70] As a result of these decisions, fewer and fewer jurisdictions brought charges for failure to vacate. In 2017, the Legislature responded to *State v. Smith* and the similar cases by amending the statute to remove the registry requirement.[71]

2. Federal Court

Some court challenges to the failure to vacate statute have also been brought in federal court. In *Munson v. Gilliam*, tenants charged with criminal failure to pay rent sought an injunction against the prosecutions.[72] A federal district court granted the preliminary injunction. However, on appeal, the Eighth Circuit Court of Appeals found that there was not enough evidence of bad faith to justify the injunction, that state courts could vindicate the tenant's constitutional rights, and that a state may determine that a non-paying tenant is effectively stealing from the landlord to allow criminal punishment.[73]

Tenants have recently brought claims in federal court against Arkansas agencies, with unclear results. In 2016, the American Civil Liberties Union (ACLU) of Arkansas filed suit on behalf of Purdom.[74] Purdom asked his landlord for permission to have an emotional-support dog. The landlord initially denied this request. After Purdom complained to Arkansas Fair Housing, the landlord then told him he could keep the dog if he paid a $500 pet deposit fee. When Purdon refused to pay the fee, the landlord gave him a 10-day notice to vacate.[75] Purdon filed a federal lawsuit against the landlord and city attorney of Mountain Home. In his complaint, Purdon requested an injunction against enforcement of the law and a declaration that the statute was unconstitutional.[76] The federal district court issued a preliminary injunction preventing the city attorney from enforcing the statute.[77]

While the federal action was pending, Purdon moved out of the premises, and the Arkansas legislature enacted the bill amending the failure to vacate statute. The court found that Purdon's claims against Morgan

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[70] *See* Order at *3, State v. Jones, Nos. 2014-389 & 2014-390 (Ark. Cir. Poinsett County Apr. 15, 2015); Order at *4, State v. Bledsoe, No. 2014-77-2 (Ark. Cir. Woodruff County Apr. 24, 2015).

[71] ARK. CODE ANN. § 18-16-101 (West 2017).

[72] Munson v. Gilliam, 543 F.2d 48, 50–51 (8th Cir. 1976).

[73] *Id.* at 53–55.

[74] Purdom v. Morgan*: Criminalizing the Failure to Vacate*, ACLU OF ARK., https://www.acluarkansas.org/en/cases/purdom-v-morgan (last visited Sept. 20, 2024); John Lynch, *ACLU of Arkansas Sues Over Law Allowing Courts to Jail Tenants with Unpaid Rent*, ARK. DEMOCRAT GAZETTE (June 15, 2020, 6:09 PM), https://www.arkansasonline.com/news/2020/jun/15/aclu-arkansas-sues-over-law-allowing-courts-jail-t/.

[75] Complaint at 4–5, Purdom v. Morgan, No. 16-3072 (W.D. Ark. June 13, 2016).

[76] *Id.* at 13–14.

[77] *See* Purdom v. Morgan, No. 3:16-CV-3072, 2017 WL 6327582, at *1 (W.D. Ark. Dec. 11, 2017).

were rendered moot, and it dismissed the action with prejudice, never reaching the merits.[78]

In June 2020, another tenant filed a federal action challenging the failure to vacate statute.[79] In his complaint, the tenant alleged that the failure to vacate statute was unconstitutional because it impermissibly chilled his right to trial, constituted cruel and unusual punishment, and violated his right to due process under the Arkansas and U.S. Constitutions.[80] The tenant brought a civil rights action pursuant to 42 U.S.C. § 1983, naming the McGehee City Attorney, Desha County Sheriff, and Chief Clerk of McGehee as defendants.[81]

In the case, Allen said that he fell behind on the rent after losing his job as a factory worker.[82] He received a notice to vacate from the Sheriff and was told to move out of the house in two days.[83] However, Allen said he had no other place to go. The lawsuit asked the federal judge to issue a temporary restraining order preventing enforcement until a later trial on the constitutional merits of the statute.[84] However, in contrast with *Purdom*, the judge denied the temporary restraining order, stating that Allen was unlikely to succeed on the merits at trial.[85] The judge cited to the two Arkansas Supreme Court cases upholding the statute.[86] Allen also moved out while the proceedings were pending, and the case was dismissed.[87]

Most recently, a federal class action was filed in 2021, *Easley v. Howell.*[88] The Easleys moved into a house in Malvern, Arkansas in 2019, where they paid $400 a month on a month-to-month lease.[89] In August 2020, the water tank stopped working, and the Easleys did not have running water.[90] They asked the landlord to fix the tank, but that was never done.[91] In November 2020, the Arkansas Department of Health condemned the home's water distribution system, and ordered that water service be terminated until the landlord fixed it.[92] The landlord waived November 2020 rent, but then demanded rent anyway.[93] In December 2020, the

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[78] *Id.* at *3.
[79] Complaint at 1, Allen v. Ferguson, No. 2:20-cv-132 (E.D. Ark. June 15, 2020).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 3–4.
[83] *Id.* at 4.
[84] *Id.* at 11.
[85] Order at 2, Allen v. Ferguson, No. 2:20-cv-00132, (E.D. Ark. June 17, 2020), ECF No. 6; *see also* Maya Miller and Ellis Simani, *When Falling Behind on Rent Leads to Jail Time*, PROPUBLICA (Oct. 26, 2020, 11:30 AM), https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time.
[86] Order at 3, Allen v. Ferguson, No. 2:20-cv-00132, (E.D. Ark. June 17, 2020), ECF no. 6.
[87] *See* Miller & Simani, *supra* note 85.
[88] Complaint at 1, Easley v. Howell, No. 6:21-cv-06125 (W.D. Ark. Sept. 2, 2021).
[89] *Id.* at 9.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

Easleys stopped paying rent due to the lack of running water.[94] In April 2021, the Hot Spring County Sheriff served them with a 10-day notice to vacate the premises or face charges for failure to vacate.[95] However, the Easleys were not able to find other housing during that time.[96] They both had disabilities and used wheelchairs, relying upon Social Security Disability payments.[97] The house still had no running water.[98] In May 2021, the prosecutor opened a criminal case against the Easleys.[99]

On September 2, 2021, the Easleys filed a federal class action against the Hot Springs County Sheriff and the Hot Springs Prosecuting Attorney. Similar to Allen, the Easleys brought § 1983 claims alleging that the statute violated Fourteenth Amendment's Procedural Due Process Right and Right to Equal Protection, and Eighth Amendment right to be free from cruel and unusual punishment or excessive fines.[100] In response, on September 14, 2021, the prosecutor filed a nolle prosequi of the criminal case against them.[101]

Both the prosecutor and sheriff filed motions to dismiss the federal class action. These motions argued that the Easleys could not state a claim that the statute was unconstitutional under the Eighth or Fourteenth Amendments.[102] Also, the motions argued that the plaintiffs lacked standing, and their claims were moot, so that the Court lacked subject-matter jurisdiction.[103] Specifically, the Sheriff argued that their claims were moot because the tenants moved to Michigan in May 2022, and were no longer under threat of prosecution.[104]

The District Court judge did not rule on the statute's constitutionality. The court found that the tenants did have standing because they faced a threat of injury. However, the court found that their claims were now moot as a result of moving to Michigan.[105] Although a threat of prosecution existed while they were in the premises of the state, the court found that their relocation to another state "struck a large blow" to the possibility of

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[94] Complaint at 10, Easley v. Howell, No. 6:21-cv-06125; *see also Cynthia and Terry Easley v. Hot Spring County*, EQUAL JUSTICE UNDER LAW, https://equaljusticeunderlaw.org/easley-v-hot-spring-county.

[95] Complaint at 10, Easley v. Howell, No. 6:21-cv-06125.

[96] *Id.* at 10–11.

[97] *Id.* at 10.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 13–26.

[101] *Cynthia and Terry Easley v. Hot Spring County*, EQUAL JUSTICE UNDER LAW, https://equaljusticeunderlaw.org/
easley-v-hot-spring-county.

[102] *See* Risha Bijlani, *Case:* Easley v. Howell, CIVIL RIGHTS LITIGATION CLEARINGHOUSE (Jan. 26, 2022), https://clearinghouse.net/case/18231/.

[103] *Id.*

[104] *Id.*

[105] Order of Dismissal at 15, Easley v. Howell, 6:21-cv-6125 (W.D. Ark 2021).

prosecution.[106] For that reason, the court found that there was no longer a live case or controversy, making their claims moot, and dismissed the Easleys' case without prejudice.[107] The court did not reach or consider any of the Plaintiffs claims regarding the constitutionality of the statute.

In all of these cases (*Purdom*, *Allen*, and *Easley*), the tenants were low-income renters, facing financial difficulties. Purdom and the Easleys were disabled as well. And in at least two cases, the failure to vacate case originated out of a separate dispute with the landlord. In the *Easley* case, the landlord was able to bring criminal charges against the Easleys after failing to provide running water for months, while in *Purdom*, the case began with a dispute with the landlord over the tenant's emotional support dog. In addition, the transient nature of the housing situation made it difficult for the tenants to show continuing imminent harm. In each case, the State dismissed the charges after the federal case was filed. And in both *Easley* and *Allen*, the cases were eventually dismissed on mootness grounds because the tenants moved out of the property. Because each case was dismissed on procedural grounds, federal district courts never reached a conclusion on the underlying merits of the constitutional challenges.

However, these results also show how the statute could escape review in civil rights claims. It is easiest to simply nolle prosequi or dismiss the criminal case prior to the federal case being heard. Tenants, especially low-income tenants facing dispossession, are in a transient state and seeking alternative housing. If tenants end up moving out of state while the action is pending, the claim can then be dismissed for mootness.

C. Continuing Controversy and Questions

During all this controversy, and all the legislation and litigation, people have acted without knowing how common failure to vacate cases actually are. The *Easley* case received significant media coverage, and those articles included information about the statistics regarding failure to vacate cases. For example, one article stated that "the number of failure-to-vacate arrests per year has not exceeded 30 since 2014, when it peaked at 70, according to the data from the past decade."[108] Since 2011, "324 tenants have been arrested under the failure to vacate statute, according to the Arkansas Crime Information Center."[109] The *Easley* complaint also relied on data from the Arkansas Crime Information Center,[110] which showed that Black women accounted for more than 25% of those arrests. Based on

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[106] Bijlani, *supra* note 102.

[107] Order of Dismissal at 16, Easley v. Howell, 6:21-cv-6125.

[108] Tess Vrbin, *Arkansas' Unique Eviction Law, Source of 324 Arrests since '11, Challenged in Federal Court*, NW. ARK. DEMOCRAT GAZETTE (Sept. 12, 2021), https://www.nwaonline.com/news/2021/sep/12/arkansas-unique-eviction-law-source-of-324/.

[109] *Id.*

[110] Complaint at 7, Easley v. Howell, No. 6:21-cv-06125-SOH (W.D. Ark 2021).

these statistics, failure to vacate charges would seem to be a somewhat rare and uncommon occurrence.

However, a ProPublica investigation found far more cases, finding that over 1,050 criminal evictions were heard in Arkansas courts from 2018 to October 2020.[111] ProPublica further found that over 200 cases had been filed between mid-March and late-October 2020, despite the then-ongoing pandemic,[112] and at least seven women were detained or sentenced to jail based on these charges. ProPublica also included examples of several tenants that moved out without ever realizing that criminal charges had been filed against them, only to be later arrested and held on bond. Their investigation found these cases continued to be tried in 2021, with three dozen new cases filed from January to March 2021, despite a moratorium on evictions by the Center for Disease Control and Prevention ("CDC").[113]

One thing that is consistent is the lack of consistency. Almost all sources agree that the statute is enforced inconsistently across the state, with some counties heavily prosecuting tenants, and other counties refusing to enforce the statute at all. Consistently, women, especially Black women, seem to form a disproportionate number of cases.

In order to form an informed opinion, people would need to know the overall impact of this statute on the people of Arkansas. This information would also be useful to judge the ultimate constitutionality of the failure to vacate statute. Is the statute being enforced fairly? Or are certain populations disparately impacted? Are excessive fines being imposed pursuant to the Eighth Amendment? Is sufficient notice being given to tenants to guarantee due process rights? Is this statute, in fact, creating a debtors' prison?

However, the public could form very different impressions on the overall weight on the population based on these varying statistics and articles. Is the failure to vacate statute rare, or common? Is enforcement still prevalent, or is this law an obsolete anachronism? What is the burden it is imposing on tenants? Are tenants being fined, or jailed? How many failure to vacate cases are actually being heard in Arkansas? How are those cases being tried? Where is it being enforced? How is it currently being enforced across the state? It seems like no one knows for sure. There appears to be no reliable database that collects or counts the total number of failure to vacate cases across the state.

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[111] Miller & Simani, *supra* note 85.

[112] Maya Miller, *There's Only One State Where Falling Behind on Rent Could Mean Jail Time. That Could Change*., PROPUBLICA (Mar. 19, 2021, 1:00 PM), https://www.propublica.org/article/theres-only-one-state-where-falling-behind-on- rent-could-mean-jail-time-that-could-change.

[113] Miller & Simani, *supra* note 85.

III. PROJECT INVESTIGATING ENFORCEMENT OF FAILURE TO VACATE

This project attempts to take a peek behind the curtain to evaluate how the failure to vacate statute is being enforced across Arkansas. In this project, the clinic targeted various areas, gathering data from state, county, and local agencies regarding their enforcement of the failure to vacate statute. Primarily, this data was gathered via Freedom of Information Act (FOIA) requests or other requests for information.

A. Methodology

First, the Clinic requested information from the Arkansas Crime Information Center (ACIC). This is a state agency that is "responsible for providing information technology services to law enforcement and other criminal justice agencies in Arkansas."[114] The ACIC maintains the National Crime Database, which receives information from law enforcement throughout the state, and their database reports have been cited in several news articles regarding this statute.[115] However, the ACIC stated that law enforcement participation in this database is completely voluntary, meaning each law enforcement entity can decide if it would like to share its department's information or not. Without having complete information from local law enforcement, ACIC reports would be incomplete and present a lower number of cases than actually exist.

The Clinic issued FOIA requests to 25 counties throughout the state.[116] Each FOIA request was for failure to vacate cases from 2016, 2017, and 2022. Typically, FOIA requests were issued to the county-level law enforcement—the Sheriff and local police forces. Each request asked for the following: "public records under the criminal failure to vacate statute, Ark. Code Ann. § 18-16-101," "Failure to pay rent — Refusal to vacate upon notice — Penalty." This includes failure to vacate notices, citations, arrests, reports, court dockets, court records, and dispositions for the years 2016, 2017, and 2022. FOIA requests were also issued to District Courts in each county, likewise asking for court records related to the failure to vacate statute.

On a state level, FOIA requests were issued to the Arkansas State Police requesting their records for these same years. Finally, a FOIA

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[114] About Us, *Arkansas Crime Information Center*, ARKANSAS DEPARTMENT OF PUBLIC SAFETY, https://www.dps.arkansas.gov/crime-info-support/arkansas-crime-information-center/about- us/ (last visited Sept. 13, 2024).

[115] *See generally* Tess Vrbrin, *Eviction Threatens State-Law Challenge; Lawsuit's Filers Told to Get Out*, ARK. DEMOCRAT GAZETTE (Feb. 11, 2022, 6:57 AM), https://www.arkansasonline.com/news/2022/feb/11/eviction-threatens-state-law- challenge/.

[116] These counties were: Arkansas, Ashley, Benton, Carroll, Clark, Craighead, Crawford, Faulkner, Garland, Hot Spring, Jefferson, Lincoln, Lonoke, Miller, Mississippi, Montgomery, Polk, Pope, Pulaski, Randolph, Saline, Scott, Sebastian, Sharp, Washington, White.

request was issued to the Administrative Office of the Court, requesting court cases from 2016, 2017, and 2022. All FOIA requests were for the years 2016, 2017, and 2022 to create a uniform data set.

B. Summary of Findings

Below is a summary of findings from this data set. In the following section, this article will expand upon each of these findings in depth. First, the article will give a larger overview of the patterns found in the data set, before zooming in with specific findings on particular issues.

1. Findings:

- 25 counties were surveyed in all. Of these counties, 13 counties did not enforce the failure to vacate statute,[117] and 12 counties did.[118]
- The failure to vacate statute is still being enforced across the state.
- Enforcement varied widely from county to county, or even from city to city in the same county.
- Different counties followed vastly different processes for failure to vacate cases.
    - For example, in Lonoke County, an arrest warrant was issued for each failure to vacate case, while in Sebastian County, tenants were simply given a citation.
- Different counties reached very different results in failure to vacate cases.
    - For example, in some districts almost all failure to vacate cases were dismissed or declared nolle prosequi, while in others almost all resulted in a guilty sentence.
- Some unusual practices were found related to failure to vacate cases.
    - Cases were brought with insufficient landlord affidavits.
    - In at least one county, failure to vacate cases are still being brought and reported as a Class B misdemeanor, resulting in potential fines and jail time.
    - Even though failure to vacate is now an "unclassified misdemeanor," some tenants are still being jailed for long periods of time, especially due to charge stacking.
    - Cases were reported that did not actually involve a landlord-tenant situation.

[117] Counties that did not have responsive records regarding failure to vacate cases: Arkansas, Ashley, Benton, Carroll, Craighead, Crawford, Faulkner, Lincoln, Mississippi, Pulaski, Randolph, Saline, Sharp.

[118] Counties that did have responsive law/court records of failure to vacate cases: Clark, Garland, Hot Spring County, Lonoke County, Miller County, Montgomery County, Polk County, Pope County, Scott County, Sebastian County, Washington County, White County.

- For example, in Katlynn County
  - HUD housing authorities have brought failure to vacate actions against tenants.
  - Cases were reported where defendants lacked the ability to receive a public defender.
  - "No Contact" orders were issued for buildings.

C. Enforcement Patterns

1. Heavy enforcement throughout the state

The "failure to vacate" statute is still being heavily enforced across the state. At least 2,423 criminal "failure to vacate" cases were prosecuted in Arkansas courts in the period from 2016– 2022, according to data from the Administrative Office of Courts (AOC).[119] And the total number is actually higher (much higher) than that because many counties do not report their court data to the AOC. The AOC data shows enforcement in 12 different counties.[120]

The AOC also maintains "CourtConnect," an online database. Users can look up individual court cases in CourtConnect, by party or case number. However, the information on CourtConnect is incomplete because many counties do not report their cases to the AOC database. In fact, most Arkansas counties do not participate or submit their District Court records to AOC.[121] Failure to vacate cases are heard only in district court. This means that the 2,423 failure to vacate cases reported to AOC are likely a small percentage of the cases heard statewide during that time period. The state apparently does not have a central database of all "failure to vacate" cases, making it difficult to evaluate how many cases are filed across the state and where they are all filed.

In order to gather additional data, it is necessary to go to the county/local level. For this project, we surveyed 25 counties across Arkansas, requesting "failure to vacate" records from local law enforcement and district courts. Of these counties, almost half (12) did have records showing enforcement of the "failure to vacate" statute; while the other half (13) counties did not have any records showing enforcement

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[119] Failure to Vacate Data from Arkansas Administrative Office of Courts, on file with the author.

[120] *Id.*

[121] *It's Time to Retire Public CourtConnect and Introduce Search ARCourts!*, ARCOURTS, https://caseinfoold.arcourts.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_srch_options (last visited Sept. 13, 2024). The AOC, and subsequently CourtConnect, receives data from the following District Courts: Crawford County, Craighead County, Crittenden County, Faulkner County, Garland County, Hot Spring County, Independence County, Poinsett County - Tyronza Dept., Polk County, Pulaski County, Pulaski County - Little Rock Dept., Van Buren County, White County - Searcy Dept.; and receives partial information from Arkansas, Ashley, Bradley, Chicot, Clay, Crittenden, Desha, Drew, Greene, Independence, Jackson, Lafayette, Lawrence, Perry, Randolph, Sebastian, and Stone County.

of the statute. This was not a complete sample, as Arkansas has 76 counties in all. However, these results indicate that the "failure to vacate" law is still very alive in Arkansas, and that it is being enforced across the state.

2. Vastly uneven enforcement throughout the state

However, enforcement is vastly uneven throughout the state. Many critics have pointed to this uneven enforcement when challenging the statute's validity.[122] The results can vary drastically depending simply on where a tenant lives in the State. Many counties simply refuse to enforce the "failure to vacate" statute at all, based on either a Circuit Court judicial order, or the county prosecutor and/or law enforcement's own discretion.[123]

In the sample above, a slight majority of counties had no failure to vacate records at all, meaning no cases had been brought since at least 2016. Other counties, right next door, did enforce the statute. This unequal enforcement leads to a patchwork approach and can lead to tenant uncertainly about what they can face as a result of missing a rental payment. A tenant in Miller County will likely face criminal charges for missing a rental payment, while a tenant in Lafayette County, the neighboring county, would only receive a civil eviction. A few miles difference can completely change the tenant's legal rights and the legal consequences of missing a rental payment.

This difference in enforcement can even differ from city to city within the same county. For example, Clark County's capital and largest city is Arkadelphia (population 10, 380).[124] However, the Arkadelphia Police Department does not enforce the failure to vacate statute, and so no citations are issued to tenants in this city. In contrast, Caddo Valley (population 595),[125] a much smaller city in the same county, does enforce the statute, and so several failure to vacate citations were issued in that city. These micro-differences in enforcement can make it almost impossible for a tenant to know where a failure to vacate case may be brought against them.

3. Heavy vs. light enforcement of the statute

Finally, even in areas that enforced the statute, the level of that enforcement varied wildly. Some counties that do enforce the statute nonetheless had very few failure to vacate cases, while others had a much

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[122] Foster, *supra* note 1, at 10–11.

[123] *E.g.*, Brantley, *supra* note 34, at 2 ("[A] retires law professor who's long worked on the issue[] said she believed only about 20 percent of the state's district courts still enforce the law, with about 350 cases in the last year, mostly in Garland and Miller counties).

[124] CITY OF ARKDELPHIA, https://arkadelphia.gov/ (last visited Sept. 13, 2024).

[125] U.S. CENSUS BUREAU, CADDO VALLEY, ARKANSAS (2020), https://data.census.gov/all?q=Caddo%20Valley%20town,%20Arkansas (last visited Sept. 13, 2024).

larger number of cases with a smaller population. The enforcement levels vary from light to heavy enforcement. This variation resulted in drastically different numbers of cases from one county to another. For example, Miller County served over 1000 tenants with "notices to vacate" during 2016, 2017 and 2022, while Sebastian County served just 17 during the same time period.[126]

Some areas are "hot-spots" for failure to vacate cases, with high numbers of cases far beyond what would be expected based on their population. The hottest of these hot spots is Hot Springs, Arkansas. Hot Springs has a population of 37,930 people[127] and yet files more failure to vacate cases that any other area of the state. Hot Springs has gained somewhat of a reputation as a "hub of criminal evictions," [128]often appearing in media reports and legislative hearings[129] about the statute.

That reputation is justified according to our data. According to the AOC, Hot Springs City alone heard over 1,699 criminal failure to vacate cases from 2016–2022. This means that, out of the 2,423 cases reported to the AOC, the vast majority of cases were heard in Hot Springs City, with only 714 cases from the rest of the state district courts.

A FOIA request to Hot Springs Police produced 389 criminal citations that police had issued in 2016, 2017, and 2022.[130] Compiling this data reveals Hot Springs Police issue an average of 14 citations every month.[131]

What does this mean for the average tenant in Hot Springs? United States census data shows 17,402 households in Hot Springs, with 55.6% living in owner-occupied housing, where the owner owns and lives in his own home.[132] That leaves about 7,726 "non-owner occupied households," or households that are renting the property they live in. With only 7,726 rental households, and 1,699 criminal failure to vacate cases, about 21% of renting households were involved in a failure to vacate case. That means the average Hot Springs tenant has a 1 in 5 chance of being tried on failure to vacate charges!

Contrast this with Cabot City, in Lonoke County, a city of similar size (27,190),[133] in a county that also enforces the failure to vacate statute.

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[126] Miller and Sebastian Counties Notices to Vacate (2016, 2017, 2022), on file with the author.

[127] U.S. CENSUS BUREAU, HOT SPRINGS CITY, ARKANSAS (2020), https://data.census.gov/all?q=Hot%20Springs%20city,%20Arkansas (last visited Sept. 13, 2024).

[128] Miller & Simani, *supra* note 85.

[129] *See*, *e.g.*, Brantley, *supra* note 34 (noting that one landlord "said judges in Hot Springs are happy to hear these cases.").

[130] Hot Springs Police Failure to Vacate Citations (2016, 2017, 2022), on file with the author.

[131] *Id.* Broken down by year, 142 citations were issued in 2016, 147 in 2017, and 74 in 2022.

[132] U.S. CENSUS BUREAU, HOT SPRINGS CITY, ARKANSAS (2022), https://data.census.gov/table/ACSDP5Y2022.DP04?q=Hot%20Springs%20city,%20Arkansas&t=Owner/Renter%20(Householder)%20Characteristics (last visited Oct. 5, 2024).

[133] U.S. CENSUS BUREAU, CABOT CITY, ARKANSAS (2023), https://data.census.gov/profile/Cabot_city,_Arkansas?g=160XX00US0510300 (last visited Oct. 5, 2024).

Using the same Census statistics, and the recorded number of Cabot "failure to vacate cases" reported to the AOC (62 cases), only 1.7% of renting households were involved in criminal failure to vacate cases. The average Cabot tenant has less than a 1 in 50 chance of being tried on these charges. In other cities of the same size (e.g., Benton, population 35,318) in areas that do not enforce the failure to vacate statute, the number of tenants tried is zero. Arkansas tenants face a risk of criminal failure to vacate charges that ranges anywhere from 1 in 5, 1 in 50, or 0 based simply on the city where that tenant lives. These vast differences in enforcement levels create vastly different, and unequal, results for tenants living in different areas of the state.

4. Vastly different processes in each county

Different counties and district courts follow very different processes for bringing "failure to vacate" charges. In some areas, like Hot Springs City, the landlord gives the tenant a 10-day notice, then calls the local police when the notice expires.[134] Police then respond and typically issue a citation to the tenant with a court date.[135] In some counties, the county Sheriff will actually escort the landlord as they issue the notice to vacate, and will sign the notice to prove it was given. In areas where police issue a citation, the tenant is typically not taken into custody, but they are told to appear for their court date.[136]

However, in other areas, like Lonoke County, the criminal process is initiated when the landlord files an affidavit with the prosecuting attorney.[137] The landlord issues a 10-day notice, and after the notice expires, contacts the prosecuting attorney asking for failure to vacate charges to be brought against the tenant. The landlord then fills out an affidavit for a warrant of arrest. In this affidavit, the landlord includes their own name, the tenant's name and address, the statute allegedly violated, and "facts constituting reasonable cause." In the last section, the landlord includes facts that show that the tenant has violated this statute. This affidavit is then presented to the district court judge. If the judge finds reasonable and probable cause, a warrant for the tenant's arrest will be issued.[138]

So, in some counties, like Lonoke County, a warrant for the tenant's arrest is issued in nearly every failure to vacate charge. This difference in process means that a tenant in Garland County will likely only receive a

[134] *See* Hot Springs Police model Failure to Vacate Citations (2017), on file with the author.
[135] *Id.*
[136] Hot Springs Failure to Vacate Citations (2017), on file with the author.
[137] Notice to Vacate Affidavits, Lonoke County (2022), on file with the author.
[138] *Id.*

citation, while a tenant in Lonoke County will receive a warrant for their arrest for the same exact criminal charge.

In many areas that issue citations, the police officer can also file an "incident report" that details what happened when they responded and why they issued the citation.[139] That police officer can also testify at the criminal hearing. But, in areas where a landlord's affidavit is filed to bring charges, the State is relying largely on the landlord's own affidavit in determining whether charges should be brought and an arrest warrant should be issued. The use of "landlord's affidavits" as a basis for criminal charges has been criticized in many scholarly articles and non-profit reports about this statute.[140] Prosecutors allegedly rarely go beyond the affidavit itself or conduct an independent investigation before seeking criminal charges.[141] This leaves open the possibility that a self-serving landlord could file a false affidavit in order to initiate criminal charges against a tenant.[142]

5. Vastly different outcomes and dispositions in each county

Finally, even in counties that enforce failure to vacate cases, the cases often have vastly different outcomes and dispositions from county to county. These different outcomes seem to be based on the policy of each district court. For example, in Sebastian County, failure to vacate charges were almost all dismissed, while in Scott County, many tenants were tried and found guilty of failure to vacate. This difference seems to depend less on the tenant's individual situation, and more on the general policy in that district. In Sebastian County, for example, the charges would typically be dismissed or nolle prosequi as long as the tenant moved out of the property. So again, a tenant in different areas of the state would face vastly different outcomes to the criminal case based on nothing more than where they live.

D. Problematic Practices

The section above takes a macro view of overall enforcement. The next section takes a micro- level view of the data, evaluating issues found in individual records. In addition to the general difference in level and quality of enforcement in different areas, some additional issues and problematic practices materialize from the data received.

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[139] Incident Reports, Failure to Vacate (2017), on file with the author.

[140] *E.g.*, HUMAN RIGHTS WATCH, PAY THE RENT OR FACE ARREST: ABUSIVE IMPACTS OF ARKANSAS'S DRACONIAN EVICTIONS LAW (Feb. 2013), https://www.hrw.org/report/2013/02/05/pay-rent-or-face-arrest/abusive-impacts-arkansass-draconian-evictions-law.

[141] Foster, *supra* note 1, at 15.

[142] *Id.*

1. Subsidized housing

As outlined above, tenants in HUD-subsidized housing should be protected from failure to vacate charges. HUD's memo specifically prohibits Arkansas-subsidized housing authorities and Section 8 landlords from initiating failure to vacate against their tenants.

Despite this, we found at least one failure to vacate case that listed a subsidized housing authority as the landlord. This failure to vacate case in Montgomery County, the landlord's affidavit was entered by the city "Housing Authority."[143]

Other landlord forms don't require the landlord to state they aren't subsidized or Section 8 landlords. In many districts, failure to vacate cases begin when the landlord files an "affidavit" showing reasonable cause. This affidavit is often created by the district court for the landlord to complete. For example, Lonoke County District Court has a form "affidavit for warrant" that landlords complete.[144] This form contains space for the landlord to fill in the crime committed (failure to vacate), and facts constituting reasonable cause, along with a space for the landlord's signature. However, the form affidavit does not contain any statement that the landlord is not a HUD-subsided or Section 8 property. Similarly, landlords are not required to include any statement in the notice to vacate.

As reviewed above, these cases are often prosecuted based solely upon the landlord's affidavit. Without any way to distinguish subsidized vs. privately-owned properties, tenants in subsidized housing could be routinely prosecuted under the failure to vacate statute. Similarly, after reviewing thousands of police reports and incident reports, not one narrative ever mentioned whether the property was HUD-subsidized, or even asked the landlord about it.[145]

In contrast, for example, during the CDC moratorium, the Arkansas Supreme Court required landlord complaints to include a statement to the effect that they are not a HUD- subsidized property.[146] No such requirement exists for criminal failure to vacate cases, in spite of the fact that these tenants should be excluded from such actions pursuant to HUD regulations.

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[143] Montgomery County Failure to Vacate Citation, against public housing tenant, on file with the author.

[144] On file with the author.

[145] Scott County Police Reports (2016), on file with the author.

[146] Jerome Wilson Jr., *Consequences of Covid: The Eviction Ban and Arkansas*, ARK. J. SOC. CHANGE & PUB. SERV. (Nov. 9, 2020) ("On April 28, 2020, the Supreme Court of Arkansas issued *In re Response to the COVID-19 Pandemic, Eviction Filings* (per curiam), wherein all new eviction complaints for nonpayment of rent or other fees filed under Arkansas Code Annotated §§ 18-60-304 or 18-17-901, or failure-to-vacate charges brought under § 18-16-101, are required to affirmatively plead that the property that is the subject of the eviction dispute is not a covered dwelling under the CARES Act.").

2. Insufficient landlord affidavits

In many districts, such as Cabot, Arkansas, a failure to vacate case begins when the landlord files an affidavit for arrest with the district court.[147] In this affidavit, the landlord must include facts showing "reasonable cause" that the tenant has violated this statute. If the district court judge finds that "reasonable and probable cause" exists, the district judge will issue a warrant for the tenant's arrest.

Although the affidavits include a section for "reasonable cause," the facts are often bare-boned and conclusory. For example, several affidavits stated simply: "*Facts Constituting Reasonable Cause*: Failed to vacate."[148]

In other cases, the affidavits would detail a long story that seemed to be a domestic dispute, instead of a landlord-tenant matter, and would not even allege rent due (e.g., "my husband and father of our three children was keeping his kids").[149] Regardless of how conclusory the affidavit was, a warrant to arrest the tenant was typically issued by the district court.

In many cases, the landlords did include enough facts to show a violation of the "Failure to Vacate" law; an affidavit from March 3, 2016, stated the tenant "was served notice to vacate for violating his lease terms on 2-22-2016 and is still occupying said address."[150]

However, an affidavit that simply states that the tenant "failed to vacate" or "violated lease" is not sufficient to show probable cause. Tenants can violate many lease terms beyond failing to pay rent; for example, having additional residents, or prohibited pets, etc. However, none of these lease violations can form the basis for a criminal failure to vacate charge.

3. Orders of Protection for Buildings

Strangely, in Hot Springs District Court, judges are also issuing "no contact" orders for buildings. A survey of the data showed at least 57 criminal "no contact" orders were issued against tenants in failure to vacate cases in 2016, 2017, and 2022.[151] These "no contact" orders used the same form as that typically used in domestic violence matters. However, instead of a person, in these cases the listed "victim" is the building itself.[152]

The "no contact" orders are issued in the failure to vacate case after defendant pleads guilty to the charge. The "no contact" orders the defendant not to contact the "victim". Here, where the victim's name would normally be filled in, the tenant's property address is listed instead. It also

[147] Cabot County Affidavits (2016, 2017, and 2022), on file with the author.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Chart of Hot Springs Citations and Corresponding Court Cases, on file with the author.
[152] Hot Springs No Contact Orders (2016), on file with the author.

states that the tenant must "immediately leave and stay away from the victim's residence/apartment complex." It orders the defendant to "stay away from the victim's workplace." Judges also check line 4: "You may not exercise visitation rights for the duration of the order."[153]

This leads to a "no contact" order that reads, for example, "You are ordered not to contact 555 Main Street (hereinafter referred to as 'VICTIM'), or victim's family. . . and [you] must stay at least 100 yards away from the victim, even if the victim seems to allow or request contact." In a slightly ridiculous way, the orders also prohibit speaking to the building's family, or visitation with the building's children, even if the building seems to want contact with the tenant.

The "no contact" orders state that a violation of the "no contact" order will constitute a violation of release, and result in the defendant's immediate arrest or warrant. These orders are typically entered along with waivers to the right to an attorney. The "no contact" orders last for one year.

i. When can No Contact Orders be issued?

Is it appropriate to issue no contact orders on behalf of buildings? Pursuant to Ark. Code §16-85-714, "no contact" orders can be issued in criminal cases for crimes involving terroristic threats, trafficking in persons, or false imprisonment in the first degree.[154] In addition, a no contact order can be issued if "[i]t appears that there exists a danger that a defendant will: (i) [c]ommit a serious crime; (ii) [s]eek to intimidate a witness; or (iii) [o]therwise unlawfully interfere with the orderly administration of justice."[155]

"Failure to vacate" is not a serious crime; it is the lowest type of misdemeanor and does not involve any jail time. While it is possible tenants may be trying to intimidate a witness, it seems unlikely in matters where the tenant is already pleading guilty. However, the last basis, "otherwise unlawfully interfere with the administration of justice," is very broad and vague. Perhaps the "administration of justice" could involve the expeditious resolution of a criminal case, or justice in the larger sense of excluding trespassing tenants. It is difficult to speculate because the no contact orders do not include a description or factual basis for their entry.

Without court transcripts, it is difficult to inquire more into why these "no contact" orders were issued. It is possible, for example, that a particular tenant was threatening or intimidating the landlord. However, the relatively large number of "no contact" orders could indicate that these orders are being issued fairly routinely as a part of the tenant's guilty plea.

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[153] *Id.*

[154] ARK. CODE ANN. § 16-85-714(b)(1)(A) (West 2023).

[155] ARK. CODE ANN. § 16-85-714(b)(1)(B) (West 2023).

However, the "no contact" orders could serve as a way around one of the key faults of the failure to vacate statute: it does not allow a judge to evict the tenant. Unlike civil cases, the criminal cases do not result in an "order of possession," evicting the tenant and returning the dwelling to the landlord.[156] It only allows the tenant to be convicted and fined. It is difficult to escape the conclusion that these "no contact" orders constitute a way of evicting tenants from the property, even though the failure to vacate statute does not create a mechanism to do so.

The "no contact" order requires the tenant to "immediately leave and stay away from the victim's residence/apartment complex." This means that, after pleading guilty, the tenant cannot go back to their residence without violating the order. Even returning to move out their personal property could violate the order. Further, the order prohibits the tenant from contacting the landlord/building in any way to arrange a move-out date, ask for permission to return, or make alternate arrangements or extensions of time. At the moment the tenant pleads guilty, he is effectively, irrevocably, and immediately removed and barred from the residence. In this way, a landlord can efficiently remove the tenant and re-rent the premises.

These "no contact" orders place a high burden upon the (now-former) tenants. Violation of a "no contact" order results in an immediate arrest or warrant being issued against the Defendant. And violation of a no contact order is a Class A misdemeanor,[157] the highest classification, resulting in sentences of up to a year in jail[158] and fines of up to $2,500 dollars.[159] Although the "failure to vacate" law itself does not allow for jail time, tenants will now risk significant jail time and fines if they ever try to return to the residence.

These "no contact" orders seem to tilt the "failure to vacate" law overwhelmingly in the landlord's favor. In addition to receiving the benefits of a criminal proceeding, the landlord can also receive the key benefit of a civil eviction: possession. The landlord no longer needs to seek a civil eviction to effectively receive an "order of possession," one that removes the tenant from the residence and returns control of the residence back to the landlord.

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[156] ARK. CODE ANN. § 18-60-307(b) (West 2023) ("Upon order of the court, shall immediately issue a writ of possession directed to the sheriff commanding him or her to cause the possession of the property described in the complaint to be delivered to the plaintiff.").

[157] ARK. CODE ANN. § 16-85-714(d) (West 2023) ("Upon conviction, violation of a no contact order issued under this section is a Class A misdemeanor.").

[158] ARK. CODE ANN. § 5-4-401(b)(1) (West 1983).

[159] ARK. CODE ANN. § 5-4-201(b)(1) (West 2009).

4. Notices to Vacate

As outlined above, pursuant to § 18-16-101, after a tenant fails to pay rent due, the landlord must send a "ten days' notice in writing" to vacate the premises. If the tenant does not move out after that point, the tenant can be found guilty of a misdemeanor.[160]

The statute itself does not lay out what form the landlord's notice must take, nor what language needs to be included in the notice. There are no other requirements beyond 1.) being in writing and 2.) giving ten days' notice to move. Would a text suffice? Does the landlord need to sign the notice? How does the landlord need to give the notice to the tenant? The statute is silent. Because this notice is issued by landlords themselves, and not attorneys or law enforcement, there could be wide variability in how landlords issue these notices, and what information is included.

As a result of FOIA requests, we received notices to vacate from two counties, Scott and Polk Counties.[161] These notices to vacate were issued by landlords, served by the Sheriff, and later became part of the "failure to vacate" court case against the tenants. An examination of these records reveals wide disparities in the form of the notice to vacates. While most are typed, some are handwritten. Some are long, hand-written letters, while others are scrawled, one-sentence notes left on the tenant's front door.

Typically, the notices included a short statement that the occupants must vacate the premises by a certain date, ten days after the notice was sent, without any indication what will happen after that point. The notices can also lead to significant confusion for tenants about the risk they face by not vacating.

Civil vs. criminal not stated – Almost none of the notices specify that the landlord can or will seek criminal charges pursuant to the failure to vacate statute.[162] This could leave tenants to believe that they will only receive a civil eviction process. As noted above, in Arkansas, landlords can choose between pursing a criminal failure to vacate case or pursing a civil eviction action (typically "unlawful detainer").[163]

What is worse, many of the notices indicated that the landlord would file a civil eviction. For example, one 10-day notice stated "[t]his notice is made pursuant to the Ark. Code Ann. Sec. 18- 60-304 'Unlawful Detainer,'" but was then followed with a citation for criminal eviction.

Three-day notices —The failure to vacate statute requires a 10-day notice,[164] while unlawful detainer actions require a 3-day notice.[165] A

[160] ARK. CODE ANN. § 18-16-101 (West 2017).

[161] Scott and Sebastian Counties Notices to Vacate (2016, 2022, 2023), on file with the author.

[162] *Id*. Only one notice to vacate from either of the counties on file stated criminal charges would result if the tenant failed to vacate.

[163] ARK. CODE ANN. § 18-60-304 (West 2005).

[164] ARK. CODE ANN. § 18-16-101(b)(1) (West 2017).

[165] ARK. CODE ANN. § 18-60-304 (West 2005).

tenant (or advocate) who is trying to determine the process they face could reasonably believe that a 3-day notice means that the landlord will seek civil, not criminal remedies.

However, in Polk County, numerous landlords actually sent "3-day" notices to vacate that gave tenants "3 days" to vacate the premises. One realty company utilized a form letter that stated "[y]ou are hereby given notice to vacate the property within 3 days," and stated that the tenant was in default of the lease for nonpayment of rent. The realty company issued this same form letter to at least five different tenants; each time, the 3-day notice was followed by a criminal "failure to vacate" citation. Two other landlords issued a three-day "Notice to Quit" for nonpayment, stating that "noncompliance will institute legal proceedings to recover rent and possession." Again, this notice contains the incorrect day and format for a "Notice to Vacate," and leads the tenant to believe that they will only face a civil eviction for rent and possession.

In two other cases, the landlord sent a form "Arkansas Three Day Notice to Quit," that said "legal action will be taken to evict you . . . and to recover all unpaid rent. THIS NOTICE IS IN ACCORDANCE WITH AR Code 18-60-304(3)." This notice specifically cites the unlawful detainer statute and gives three-day notice pursuant to that statute. A reasonable tenant would believe that this notice means a case will proceed in civil court.

While these 3-day notices suffice for unlawful detainer action, it is questionable whether this notice suffices for a criminal failure to vacate action. It does not contain the proper 10-day notice requirement. It does not notify the tenant that they will instead face criminal eviction. In fact, it is misleading the tenant to believe that the consequences are less dire than they are, and leaves the tenant surprised by the criminal citation. The tenant is not receiving any notice of the potential criminal charges against them.

Thirty-day notices — Finally, in several other cases, the notice to vacate actually gave the tenant 30 days to move out of the premises (e.g., "this is your 30[-]day notice to vacate my rental"[166]). In some cases, the landlord specified that the tenant did owe rent ("you are two months behind now . . . please remove yourself by [date 30 days later]") and may have been giving the tenant extra time to move. In other cases, the reason is not given. This raises the possibility that the landlord may instead be simply providing "30 day" notices of lease termination.

Many tenants, especially lower-income tenants, do not have a written lease. Pursuant to Arkansas law, any tenant with an oral lease is considered a month-to-month tenancy, which may be terminated with a 30-day

[166] Polk County Notice to Vacate (2022), on file with the author.

notice.[167] In these cases, the tenant has not actually missed rent, but must still leave within 30 days because the verbal lease has ended. So, are these landlords mistakenly, or perhaps gracefully, giving 30 days, instead of 10 days, to current tenants in that have missed rent? Or are landlords simply giving 30-day lease termination notices to month-to-month tenants, then proceeding on failure to vacate charges at the end of that time period? Without more information, the use of a "30 day" notice to vacate leaves open the possibility that the landlord was simply trying to end a month-to-month lease. Landlords themselves may not realize which is the proper notice to use, or the proper court to seek remedies.

One notice gave 90 days because "the owner of the property is returning and wants to live in his house. . . . I am giving 90 days[']] notice, providing your rent is kept current, so you have plenty of time to locate a new place." The notice, dated February 14, 2022, asked the tenant to move out by June 1, 2022. On June 3, 2022, a citation for failure to vacate was issued against the tenant. In this case, the landlord did not even allege that the tenant had failed to pay rent, but simply asked the tenant to leave so that the owner could move back in. After 90 days, the landlord still later sought criminal charges against the tenant.

Not for dwellings – Some notices did not appear to be for actual "dwellings" or apartments. One notice to vacate was addressed to "Executive Inn, Room 145" and posted on that hotel room door. Two others were sent to travel trailers and camp lodges.

i. Alleged facts not sufficient for Failure to Vacate

Concerningly, in some notices to vacate, the landlord did not allege non-payment of rent at all, but *other* problems they had with the tenant. None of these problems would entitle a landlord to seek "failure to vacate" charges against the tenant. For example, one 10-day notice said the tenant must vacate for "doing drugs and tried to steal a crock pot (theft)." These allegations, if true, would allow the tenant to be charged for drug abuse or theft, but do not form a valid basis for failure to vacate charges.

Another "notice to vacate," was actually a notice to remedy lease violations other than nonpayment of rent.[168] This notice, dated August 3, 2023, gave the tenant 14 days to remedy a violation of the tenant's lease "[i]n accordance with Section 18-17-201 of the Arkansas Code." It stated that "[t]he violation is described, and can be remedied, as follows: [u]npaid utilities[,] [d]amages due to trailer[,] [d]ogs allowed in when told there was to be no animals inside."[169] The notice did not allege that the tenant had failed to pay rent, but alleged other violations. It stated that if the violations

[167] ARK. CODE ANN. § 18-16-105 (West 2009).
[168] Polk County Notice to Quit (2023), on file with the author.
[169] *Id.*

are not remedied, the landlord can seek "possession of the Premises, any unpaid rent, . . . and other damages."[170] On August 18, 2023, a criminal failure to vacate citation was issued against the tenant.[171]

In this case, the landlord appears to be attempting to give the tenant a 14-day notice to cure prior to a civil eviction action. This notice states that it was issued "in accordance with Section 18-17-701 of the Arkansas Code." Pursuant to the Arkansas Landlord/Tenant Act, a landlord can also choose to pursue a civil eviction in district court if the tenant violated the lease. This section[172] states that if a tenant is not complying with lease terms (other than rent), the landlord can give tenants a 14-day notice specifying the acts that that constitute noncompliance. If the tenant has not fixed the violations within 14 days, the landlord can then terminate the lease and seek eviction and damages in civil court.[173]

In this notice, the landlord is not alleging that the tenant failed to pay rent, but alleged other lease violations (dogs, utilities, damage to the property). On its face, this notice is insufficient for a failure to vacate charge, because the landlord is not alleging that the tenant failed to pay rent.

Even if everything in the notice was true, the landlord could only seek lease termination and damages in civil court. Further, this 14-day notice is citing to, and following the exact requirements of, § 18-17-701. It appears that the landlord used a form "14-day notice of remedy," which is issued to tenant prior to a civil action for lease violations. Instead of the landlord pursuing that civil action, a criminal "failure to vacate" citation was issued to the tenant instead.

A deep dive of the "notices to vacate" reveals significant inconsistencies and problems. First, the notices to vacate almost never notify the tenant that they will face criminal charges if they fail to vacate the premises. Secondly, many notice actually contained the incorrect time periods (ranging from 3 days to 90 days) for a failure to vacate charge.

ii. Notices to Vacate – Summary

Arkansas' legal landscape may be confusing to tenants and landlords alike. The notice to vacate is made by the landlord or his agent, not by an attorney or law enforcement official. An unsophisticated landlord may just look for form "notice to vacates," without ensuring they actually follow the requirements of a criminal "failure to vacate notice". For example, a landlord could find and use a form "3-day notice to quit" meant for unlawful detainer actions, or a "14-day notice of remedy" used for non-

[170] *Id.*
[171] *Id.*
[172] ARK. CODE ANN. § 18-17-701(West 2009).
[173] ARK. CODE ANN. § 18-17-701(c)(1) (West 2009).

payment lease violations, without being aware that a 10-day notice for nonpayment is required. Alternately, unscrupulous landlords could use the criminal "failure to vacate" process to avoid the time and expense of perusing civil eviction actions against tenants who have violated other lease terms, or with whom the landlord would like to end a month-to-month lease.

However, this also means that tenants are not given proper notice, or any notice, that they will face criminal failure to vacate charges at the end of that period. Indeed, the incorrect notices to quit would mislead tenants (or advocates) into believing that the only potential consequence is a civil eviction action. Tenants would be unable to know the consequences in order to make a correct determination of the risks and benefits of remaining at the property, or to protect themselves from criminal charges. Landlords can issue "notices to vacate" in whatever form. Once the criminal justice system becomes involved, landlords can then allow that process to force the tenant out without any further action from the landlord to accomplish that goal.

5. Charge stacking

Although the current version of the statute does not include jail time, many tenants are actually going to jail as a result of failure to vacate charges. This is because a failure to vacate charge can lead to a cascade of other criminal charges and fines, resulting in the tenant's imprisonment.

In Arkansas, if a defendant fails to appear for a criminal court hearing, that defendant receives an additional charge for "failure to appear." (FTA)[174] This failure to appear will be charged at the same level as the underlying crime.[175] In addition, a bench warrant can be issued for the tenant's arrest and presentment to the next hearing. Once the tenant is arrested on FTA charges, the tenant may be held in custody until their arraignment and hearing. If bond is set, and the tenant cannot meet it, that tenant will remain in jail until their court hearing on the underlying charges. Finally, if the judge issues a fine against the tenant, and the tenant does not pay that fine, the tenant can also then be charged with "failure to pay" (FTP).

For example, in one case, the tenant "Charlotte Smith[176]" was charged with failure to vacate on October 26, 2017, with bond set at $245.[177] She pled not guilty, and the matter was set for a hearing on February 7, 2018. When she did not appear for that hearing, the judge issued a bench warrant

[174] ARK. CODE ANN. § 5-54-120 (West 2019).

[175] *Id.*

[176] Cabot Lonoke County Affidavit for Warrant of Arrest (2016, 2017, 2022), on file with the author.

[177] *Id.*

for her arrest and added an additional criminal charge for failure to appear. She was then served, arrested, and jailed on February 28, 2018, having her arraignment hearing on the jail docket on the same day. She was released pending trial on August 25, 2018.

On the trial date, she did not appear and yet another FTA warrant was issued. On October 15, 2019, she was served and again sent to jail until posting bond. On December 18, 2019, she pled guilty to contempt of court for failing to comply with a court order (FTC), receiving a sentence of 5 days in jail, suspended to pay the balance of fines. The total fines were $860.00. Charlotte pled guilty and entered into a payment plan to pay the fines. She made regular payments of $100 from January – October 2020, but she apparently did not pay off the balance. Most recently, on April 12, 2022, Charlotte was charged with contempt of court for failure to pay fines, another misdemeanor. An additional $320.00 in court fees were added onto the balance.

This is an example of "charge stacking," where a case that began with one low-level misdemeanor eventually snowballed into five separate criminal charges, with jail time and significant fines and fees. In this case, a failure to vacate case that began in October 2017 is still creating active criminal consequences for the tenant even years later.

In evaluating the data, I found several examples of tenants that ended up spending time in jail and paying high court fees, even though the failure to vacate statute does not currently allow for either. Most often, this was a result of additional charges for failure to appear or failure to

pay. If the tenant fails to appear, the defendant's driver's license may also be suspended, resulting in later charges of driving on a suspended license. These charges can result in additional criminal sentences, including imprisonment and high fines. Although failure to vacate itself may not allow these punishments, in practice, they can occur as other charges are added onto an underlying failure to vacate charge.

6. No attorney

Under the current version of the statute, tenants are not entitled to a public defender in failure to vacate cases. Public defenders can be assigned in any matter that involves the possibility of jail time.[178] Because failure to vacate is an unclassified misdemeanor, without specified jail time, defendants are not able to request or receive a public defender. In almost every failure to vacate case reviewed, the tenant is unrepresented. This means that the tenant does not have an advocate to protest potential mistreatment, inadequate evidence or misapplication of the law.

[178] ARK. R. CRIM. P. 8.2(a) (2022).

7. Failure to Vacate Listed as Class B Misdemeanor

In some areas of the state, failure to vacate is still listed as a Class B misdemeanor. As outlined in Section 2, above, "failure to vacate" was originally an unclassified misdemeanor, resulting in a fine. In 2001, the statute was amended to add a new provision, which made failure to vacate a Class B misdemeanor if the tenant did not pay rent into the court registry. This version of the statute faced several court challenges, and in 2017 the General Assembly amended the statute again, back to its original version. The 2017 amended statute no longer includes the provision making it a Class B misdemeanor if the tenant does not pay rent to the registry, and does not allow for jail time, only fines. The current statute is an "unclassified misdemeanor," where the defendant is sentenced pursuant to the terms of the statute itself (here, fines of up to $25 dollars per offense.)[179]

Nonetheless, failure to vacate cases are still listed as "Class B misdemeanors" in many areas. For example, the certified dockets of Cabot District Court always listed failure to vacate charges as Class B misdemeanors in cases extending into 2022.[180] So, for example, one certified docket states "Violator: 18-16-101, Level: Class B Misdemeanor, Violation Date: 8-30-22."[181] In this case, the actual violation occurred in August 30, 2022, well after the statute was amended to make it an unclassified misdemeanor.

However, it is likely that the certified court dockets were not updated after the law changed. In this district, tenants who fail to appear for the hearing are charged with failure to appear, as a Class C misdemeanor (violation). Since FTAs are charged at the same level as the underlying crime, this indicates that, despite the certified court docket entry, failure to vacate cases are not actually being tried as a Class B misdemeanor.

In other districts, the court docket itself simply lists the failure to vacate charge, but the actual warrants for arrest list the violation as a Class B misdemeanor. For example, in Scott County, one tenant's court docket lists the following: "Violation: 18-16-101 MB: Fail to Pay Rent – Refusal to Vacate Upon Notice. Violation Date: 02/14/22." In this case, the failure to vacate violation occurred on February 14, 2022.[182]

The tenant failed to appear for the failure to vacate hearing and a warrant for his arrest was issued. The warrant of arrest states the following: "Warrant of Arrest Failure to Appear. It appearing that there are reasonable grounds for believing that (Defendant) has committed the following

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[179] ARK. CODE ANN. § 5-54-120(c)(6) (2019).

[180] Cabot Lonoke County, Ark. Affidavit for Warrant of Arrest (2016, 2017, 2022), on file with the author.

[181] *Id*.

[182] On file with the author.

offenses: 5-54-120(c)(4) (2015) Fail to Appear on Class B Misdemeanor (FTA) a Class B Misdemeanor. Violation Date: 6-APR-22, on the charges of: 18-16-101 Fail to pay rent, refusal to vacate upon notice, a Class B misdemeanor, Violation Date: 14-FEB-22." The defendant's bond was set at $590.00. The defendant was served with the warrant and released on promise to appear at the next court date.[183]

So, according to this warrant of arrest, on April 22, 2022, the defendant committed the Class B Misdemeanor of Failure to Appear, by failing to attend a hearing on the underlying charge of "[f]ail to pay rent," which is also listed as a Class B Misdemeanor.

However, by 2022, failure to vacate was no longer considered a Class B misdemeanor, and so failure to appear for the hearing should also not be considered a Class B misdemeanor either. However, in several counties, the warrants for arrest still routinely list both charges as a Class B misdemeanor.

Again, it is possible that the fields for the warrants have not been updated to show the current classification of failure to vacate matters. But, this still could potentially mislead the tenant about the nature of the charges they face, leading them to believe they face "Class B" misdemeanor, including 90 days jail and high fines. In addition, the Sheriff's Department executing the warrant would also have no reason to doubt the warrant, believing the underlying charge is more serious than it actually is.

In this example, the court docket also listed the FTA violation as "5-54-120(c)(4), MB: Fail to Appear on Class B Misdemeanor (FTA), Violation Date 04/06/22,"[184] so the failure to appear is listed as a Class B misdemeanor on both the warrant and the court docket. In this case, both charges were dismissed at the later hearing. In these cases, there is typically no formal order, but the judge writes "case dismissed" or other disposition on the court docket printout.

This case is one example. However, in at least three counties, failure to vacate charges from 2022 are still routinely listed as "Class B misdemeanors" on either the arrest warrants or the court dockets.

Again, one explanation is likely that the fields have simply not been updated in the warrants and the court dockets. However, it also creates a possibility that tenants are actually still being charged with Class B Misdemeanors in some districts, in spite of the fact that the law has changed. Without having court transcripts, or complete court filings/records of judgement in many districts, it is difficult to be sure about what actually occurred during the hearings.

[183] On file with the author.
[184] On file with the author.

However, the incorrect classification on both court dockets and warrants for arrest can cause confusion and misunderstandings for both tenants, law enforcement and court officials as well. And it can lead tenants to believe they face a Class B misdemeanor, when the current failure to vacate law does not actually allow that.

CONCLUSION

A. Overall Results

The failure to vacate statute has caused controversy since its very inception, with critics claiming it criminalizes debt and poverty, while advocates claim it offers a streamlined option for landlords to manage their properties. It has faced several constitutional challenges, resulting in its amendment in 2017. Despite all this, the failure to vacate statute is still a part of the Arkansas code, and it is actively enforced in many areas of the state. Just how actively it is enforced, and how it is being enforced, has remained opaque.

This project sought to look behind the curtain, looking at data at a state, county, and local level to ascertain more about how the failure to vacate statute is being enforced. Data was gathered from the state Administrative Office of Courts and State Police, as well as surveying the law enforcement and district courts in 25 different counties.

Overall, this data reveals several important issues with failure to vacate charges. First, in contrast to some reports, the statute is clearly being actively enforced across the state. This is not an obsolete or anachronistic statute, but one that is being used against thousands of tenants throughout the state.

However, that enforcement is vastly uneven in different areas. As detailed above, some counties refuse to bring failure to vacate cases at all, while other counties still enforce it heavily. Even within the same county, enforcement rates can vary from one city to another. And even where counties enforce the statute, some counties rarely bring such charges, and some counties bring a proportionally large number of cases. All of these differences mean that the law is essentially different in different areas of the state. Tenants in one county will never face these charges, in another area rarely, and in yet another area tenants commonly face failure to vacate charges. This vastly uneven enforcement can make it difficult for tenants to know where or how they will be prosecuted on failure to vacate charges, and leads to confusion on all levels as to where and when such charges are brought. The unequal enforcement levels can also lend support to arguments that the statute violates the Equal Protection Clause, by denying equal treatment under the law to tenants across the state, and creating a disparate impact on tenants in certain areas.

B. Final Recommendations

Given the uneven and unequal treatment of tenants across the state, the lack of notice in many areas, and the other problematic issues with the statute, I believe that the statute should be repealed. Landlords also have the option to pursue civil eviction, a process that is less problematic, and which also allows landlords to receive damages and an order for possession.

Even if the statute is not repealed, the data suggests that more procedures are necessary to safeguard tenant's rights and safety. Standardization of the process and forms across the state could lead to less issues. For example, instead of landlords making their own "notices to vacate," a standardized "10-day notice" form could be used instead. Landlord affidavits can be standardized to include a statement affirming that the tenant does not live in HUD-subsidized housing.

Finally, the failure to vacate statute could be amended to require notices to warn the tenant that they will face criminal charges if they do not move out. Standardization of these notices and processes would help to avoid some of the most troubling aspects of the current enforcement practices.

The Case for Reparations in Puerto Rico: A Comparative Case Study of State-Sanctioned Sterilizations in Puerto Rico, North Carolina, and California

KATHRYN RUBIN*

ABSTRACT

Throughout the 20th century, eugenic sterilization policies and practices were widely implemented across the United States and the territories, sanctioned by the Supreme Court in its infamous Buck v. Bell opinion. It is estimated that during this time, one-third of women in Puerto Rico, 7,528 in North Carolina, and 20,000 in California were sterilized. While North Carolina and California have both since engaged in reparative efforts to address this harm, the same efforts have yet to be seen in Puerto Rico, despite having had the highest rate of female sterilization in the world. This article puts forth a case for reparations for these eugenics-based sterilizations in Puerto Rico by analyzing both the sterilization programs and subsequent reparative attempts in Puerto Rico, North Carolina, and California. As two of the few states who have made attempts to repair the harm caused by sterilization programs, North Carolina and California provide robust models for advocates in other regions looking to do the same. These two reparations programs have several commonalities, including lawsuits, formal government apologies, media publications, and compensation packages developed by the legislature. This article provides an opportunity for future advocates to improve upon these models by critiquing the various methods of repair used by these two states. Finally, this article explores the distinguishing characteristics of Puerto Rico's sterilization program to better understand the unique hurdles that advocates may face in securing reparations.

"In a country that is deeply delusional about its own history, so committed to a willful amnesia, that our memory has survived at all is no minor miracle. Remembering is an act of defiance."

- COLE ARTHUR RILEY

* J.D., Northeastern University School of Law (2024). Kathryn is a Trial Attorney at the Committee for Public Counsel Services in the Mental Health Litigation Division. Acknowledgments: This article was made possible with the guidance and support of Professor Margaret Burnham and Malcolm Clarke at Northeastern University School of Law. A special thank you to Chelsea Diaz, for sharing this particular history of Puerto Rico with me, planting the seed for this article.

ARTICLE CONTENTS

INTRODUCTION

This paper analyzes the state-sponsored eugenic sterilization policies that were enacted across the United States throughout the 20th century, specifically focusing on Puerto Rico, California, and North Carolina.[1] It then

[1] International examples of forced sterilization as a tool of population control include China, India, and Singapore. *See* Sam Rowlands & Pramod R. Regmi, *The Use of Forced Sterilisation as a Key Component of Population Policy: Comparative Case Studies of China, India, Puerto Rico, and Singapore*, 68 INDIAN J. PUB. ADMIN. 271 (2022). The first countries to introduce laws sanctioning involuntary sterilization were the United States, Japan, and Canada. *See* Jean-Jacques Amy & Sam Rowlands, *Legalised Non-Consensual Sterilization — Eugenics Put into Practice Before 1945, and the Aftermath. Part 1: USA, Japan, Canada, and Mexico*, 23 EUROPEAN J. CONTRACEPTION & REPROD. HEALTH CARE 121, 123 (2018). Nine other countries in Europe followed suit: Switzerland, Denmark, Germany, Norway, Sweden, Finland, Estonia, Iceland, Austria. *See* Jean-Jacques Amy & Sam Rowlands, *Legalised Non-Consensual Sterilization — Eugenics Put into Practice Before 1945, and the Aftermath. Part 2: Europe*, 23 EUROPEAN J. CONTRACEPTION & REPROD. HEALTH CARE 194, 194–98 (2018). Latvia, Kenya, Hungarian Roma, Czech/Slovak Roma, Peru, and Uzbekistan also had sterilization programs. Paul J. Weindling, *Too Little, Too Late: Compensation for Victims of Coerced Sterilization*, *in* PSYCHIATRY AND THE LEGACIES OF EUGENICS 181, 184–86 (Frank W. Stahnisch & Erna Kurbegović eds., 2020).

explores what, if any, reparations have been provided as a form of redress.[2] Sterilization policies such as these were by no means limited to these three locales; thirty-three other states enacted sterilization policies grounded in eugenic principles.[3] This paper focuses on these locations in particular for three main reasons: first, both North Carolina and California have since engaged in various reparative efforts;[4] second, the widespread nature of Puerto Rico's sterilization program demands exploration; and third, despite having had the highest rate of female sterilization in the world,[5] there is no documentation of the survivors of the program in Puerto Rico having received reparations, as has occurred in North Carolina and California.

The eugenics movement swept the nation during the 20th century, emerging in response to several factors noted by Scholar Alfred Brophy: first, concern that government care was being directed towards disabled individuals; second, prioritization of public funds over personal autonomy; and finally, fear of threats towards white supremacy.[6] Although many of these sterilization laws were repealed in the latter half of the 20th century, the issue is far from obsolete.[7] Rather, it is of continued importance not only because of the lack of reparative efforts, but because those driving factors of the eugenics movement persist today and because forced sterilization is situated within the broader context of reproductive control. In part, this article argues that these harms have persisted throughout history because of the erasure of the violence from our collective memory as a society. Rendering such harms as invisible then fosters the environment in which such violence grows, unaccounted for, culminating in modern-day assaults on personal autonomy. To understand the current climate of reproductive control, it is critical to be grounded in this country's history of forced sterilization. Why? Because it reminds us of a question at the heart of such

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[2] Among the various countries that legalized involuntary sterilizations, few have taken responsibility or provided reparations. *See* Weindling, *supra* note 1. Alberta, Canada compensated those who litigated claims. *See id.* at 184. Germany provided a partial apology and compensation, and both Sweden and Austria compensated victims. *See id.* at 184–85.

[3] Sarah Brightman, Emily Lenning & Karen McElrath, *State-Directed Sterilization in North Carolina: Victim-Centredness and Reparations*, 55 BRIT. J. CRIMINOLOGY 474, 476 (2015).

[4] In 2015, Virginia passed compensation for victims of forced sterilization, becoming the second state to do so, after North Carolina. Alexandra Minna Stern, Nicole L. Novak, Natalie Lira, Kate O'Connor, Siobán Harlow & Sharon Kardia, Commentary, *California's Sterilization Survivors: An Estimate and Call for Redress*, 107 AM. J. PUB. HEALTH 50, 53 (2017). In 2021, California created a compensation program for survivors, becoming the third state to do so out of the thirty-three states that had eugenic sterilization laws. *See* Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. TIMES (July 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html; *see also* Brightman, Lenning & McElrath, *supra* note 3, at 474.

[5] LA OPERACIÓN, at 33:11–33:17 (Ana María García, Latin American Film Project 1982).

[6] Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. REV. 1871, 1949 (2016).

[7] Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html.

efforts to control reproduction: **who is entitled to have children?**[8] The buried history of forced sterilization calls out from its shallow grave, reminding us of a past that is still playing out today: that the decision-making power to have or to not have children is an entitlement not yet held by the people but by the lawmakers.

I. STATE-SANCTIONED STERILIZATIONS

A. Puerto Rico

1. Coerced Sterilization and Medical Experimentation

In 1937, Law 116 was enacted, which authorized sterilization and birth control experimentation in Puerto Rico.[9] The program has been described in the following way: "sterilisations were carried out under the auspices of an eugenic law with a distinct flavour of ethnic targeting."[10] Law 116 was based in eugenics principles, which promoted the reproduction only of those deemed fit to have children.[11] By the mid-1970s, about 35% of women in Puerto Rico had been sterilized,[12] more than ten times the rate among women living in the 50 states of the U.S.[13] By 1980, Puerto Rico had the highest rate of female sterilization worldwide.[14] This procedure was such a common occurrence that it was widely known as "la operación."[15] Overall, it is currently estimated that one-third of all women in Puerto Rico have been sterilized.[16]

Consent for this procedure was frequently lacking altogether or inadequate, as many people were either uncertain about what the procedure was or felt that they had no choice in the matter.[17] Many women were told that this was a reversible procedure, while others were told by their physician that sterilization was "in style."[18] One Presbyterian Hospital refused to admit women for delivery if they had three or more children, unless that person

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[8] The reproductive justice framework is grounded in the following three principles: "[T]hat all women have (1) the right to have children; (2) the right to not have children and; (3) the right to nurture the children we have in a safe and healthy environment." *Reproductive Justice*, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUST. AGENDA, https://blackrj.org/our-causes/reproductive-justice/ (last visited May 16, 2024).

[9] Rowlands & Regmi, *supra* note 1, at 278.

[10] *Id.* at 273.

[11] LA OPERACIÓN, *supra* note 5, at 7:57–8:23.

[12] LA OPERACIÓN, *supra note 5,* at 29:03–29:14.

[13] Rowlands & Regmi, *supra* note 1, at 281.

[14] LA OPERACIÓN, *supra note 5,* at 33:11–33:17.

[15] *Id.* at 2:11–2:14.

[16] *Id.* at 2:07–2:10.

[17] Rowlands & Regmi, *supra* note 1, at 278–79.

[18] LA OPERACIÓN, *supra* note 5, at 4:30–4:38, 10:18–10:27.

agreed to sterilization.[19] One woman shares that she got the operation, in large part, because she wanted to go back to work, and while it was never explicitly required by her supervisor, she recalls that it was understood that to come back to work, she needed to receive the procedure.[20] There are countless other examples that illuminate how deeply coercive these practices were in trying to increase rates of sterilization.[21]

Forced sterilization was not the only infringement upon bodily autonomy. During the same time period, Puerto Rico was also being used as a laboratory for the development of birth control,[22] which Nancy Ordover describes as "perhaps one of the most notorious abuses of medical power in birth control technology's history."[23] Beginning in 1956, birth control trials began in Puerto Rico and were largely tested on poor women.[24] The pill was a highly experimental drug at the time, and despite this, women were neither informed of any potential side effects or risks[25] nor were they told that they were a part of a clinical trial.[26] Women reported symptoms including nausea, headaches, and dizziness, but their complaints were dismissed as "coincidences."[27] It is now estimated that the contraceptives tested at that time were twenty times as strong as they are today.[28]

2. Contributing Factors to Widespread Sterilization Policy

There are several factors that contributed to the implementation of the sterilization policy in Puerto Rico. At the time, there was concern that the large population contributed to the high rates of unemployment and poverty.[29] This then led to the notion that Puerto Rico had a "surplus population," which required population control.[30] Sterilization was one such mechanism for controlling population growth in Puerto Rico.[31] However,

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[19] Rowlands & Regmi, *supra* note 1, at 278. One fieldworker reported that "[t]he policy of the hospital is to carry out sterilizations if the woman has three living children. In his [the acting director's] private practice[,] two are enough . . . It is the unofficial policy of the hospital not to admit (uncomplicated) multiparae [women who have given birth at least two times] if they do not submit to sterilization." NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM 151 (2003) (alterations in original) (quoting LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 300, 304 (1976)).

[20] Jaquira Díaz, *Let Puerto Rico Be Free*, THE ATL. (Sept. 20, 2022), https://www.theatlantic.com/magazine/archive/2022/11/puerto-rico-independence-not-statehood/671482/

[21] *See* LA OPERACIÓN, *supra* note 5, at 4:30–4:38, 10:18–10:27.

[22] *Id.* at 22:58–23:06.

[23] ORDOVER, *supra* note 19, at 151.

[24] LA OPERACIÓN, *supra* note 5, at 21:05–21:17.

[25] *Id.* at 21:14–22:36.

[26] *The Puerto Rico Pill Trials*, PUB. BROAD. SERV., https://www.pbs.org/wgbh/americanexperience/features/pill-puerto-rico-pill-trials/ (last visited Aug. 29, 2024).

[27] ORDOVER, *supra* note 19, at 152.

[28] LA OPERACIÓN, *supra* note 5.

[29] Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4 LAT. AM. PERSPS. 66, 68 (1977).

[30] *Id.*

[31] *Id.* at 69.

"U.S. officials casting an eye on island poverty overlooked their own culpability in undermining the Puerto Rican economy."[32]

Sterilization was also propped up as a tool for improving health outcomes—supported in large part by the medical community.[33] The economic hardships of a nation colonized by the United States contributed to poor health outcomes, including malaria and dietary deficiencies, among several others.[34] In the 1930s, medical professionals argued that sterilization provided a mechanism by which such health outcomes could be improved.[35] Physicians were surveyed about their opinions on sterilization, with startling results: "80 percent of those who responded favored sterilization as a medical solution to malnourishment and poor health."[36]

Beyond the specific conditions of Puerto Rico at the time Law 116 was enacted, the United States' legal landscape in the 1920s paved the way for the enactment of Law 116. In 1927, a Supreme Court decision upholding the constitutionality of a Virginia sterilization law changed the course of reproductive rights across the nation.[37] *Buck v. Bell* illustrates the Court's efforts not only to police who is fit to reproduce but also control sexuality and sex outside the confines of marriage. The plaintiff in the case, Carrie Buck, was a 17-year-old girl who was raped by her foster parents' nephew and became pregnant as a result.[38] Her foster parents then had her deemed epileptic and "feebleminded," despite the fact that Carrie was neither,[39]and had her sent away to Virginia State Colony for Epileptics and the Feebleminded.[40]

Around the same time, Virginia passed a sterilization law and was looking for a plaintiff to bring a case forward to test whether the law would be upheld.[41] Carrie effectively functioned as the pilot case for the hospital to test the law before sterilizing more people. Once at the Colony, Carrie was examined by a physician who deemed her a good candidate for sterilization after considering the following facts: both Carrie and her mother had been deemed feebleminded, Carrie's baby was potentially feebleminded, and Carrie had become pregnant out of wedlock.[42] At the requisite hearing,

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[32] ORDOVER, *supra* note 19, at 150.
[33] Mass, *supra* note 29.
[34] *Id.*
[35] *Id.* at 69.
[36] *Id.*
[37] Buck v. Bell, 274 U.S. 200, 207 (1927).
[38] Terry Gross & Adam Cohen, *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations* at 18:35, 21:00 (NPR broadcast on *Fresh Air* March 7, 2016), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations; *see also* Buck v. Bell*: Inside the SCOTUS Case that Led to Forced Sterilization of 70,000 & Inspired the Nazis*, DEMOCRACY NOW!, at 32:10 (March 17, 2016), https://www.democracynow.org/2016/3/17/buck_v_bell_inside_the_scotus.
[39] Buck v. Bell*: Inside the SCOTUS Case that Led to Forced Sterilization of 70,000 & Inspired the Nazis*, *supra* note 38, at 32:23.
[40] *Id.* at 32:20.
[41] *Id.* at 32:30.
[42] *Id.* at 20:20.

which has been described as a "sham," Carrie was deemed suitable for sterilization.[43] This order for Carrie Buck's involuntary sterilization was the order challenged in the Supreme Court case *Buck v. Bell*.[44]

Buck v. Bell was an 8–1 decision, and in the opinion, Justice Holmes infamously stated that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."[45] Justice Holmes's language and the majority support for the decision illuminates the Court's ideology that certain groups of people are unfit to reproduce and that the government ought to be afforded the power to decide who those people are. In other words, the Court revealed its support for eugenics via reproductive control,[46] which was then reinforced in a subsequent Supreme Court case.[47] In 1942, the Supreme Court was presented with the opportunity to overturn *Buck v. Bell*, when it heard *Skinner v. Oklahoma*, a case involving a state statute permitting the sterilization of a certain classification of "habitual criminals."[48] The Court ultimately struck down the state law. However, rather than prohibiting forced sterilization altogether, the Court held that the state *could* interfere with someone's right to procreate, as long as it had a compelling interest.[49] The Court failed to prohibit eugenics and instead merely said it could no longer go unpoliced.[50] Scholars have since highlighted that around the time of this decision, Nazi Germany was adopting its eugenics policies from U.S. law and policy.[51] Those on trial in Nuremberg later used this as a defense, challenging their prosecution for perpetrating mass sterilizations on the grounds that the U.S. Supreme Court had expressly supported forced sterilization.[52]

B. North Carolina

Between 1929 and 1974, 7,528 people were sterilized under a North Carolina law[53] "as a way to keep welfare rolls low, reduce poverty and

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[43] *Id.* at 21:10.

[44] Buck v. Bell, 274 U.S. 200, 205 (1927); *see also* Gross & Cohen, *supra* note 38, at 18:35, 21:35.

[45] *Buck*, 274 U.S. at 207 (1927).

[46] *See* Buck v. Bell*: Inside the SCOTUS Case that Led to Forced Sterilization of 70,000 & Inspired the Nazis*, *supra* note 38.

[47] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[48] *Id.*

[49] *Id.* at 541 (holding that "strict scrutiny of the classification which a State makes in a sterilization law is essential").

[50] *See id.* (holding that a state was permitted to authorize sterilizations as long as they had a compelling interest).

[51] *See* Buck v. Bell*: Inside the SCOTUS Case that Led to Forced Sterilization of 70,000 & Inspired the Nazis*, *supra* note 38, at 39:07.

[52] *See id.*

[53] Brightman, Lenning & McElrath, *supra* note 3, at 477.

improve the gene pool by preventing the 'mentally deficient' from reproducing."[54] Black and Native American women were disproportionately targeted by North Carolina's eugenics program,[55] which has been termed "one of the country's most aggressive eugenics programs."[56] Nial Ruth Cox, a survivor of North Carolina's program, was sterilized at 18 after being told by her doctor that the effects of the procedure would "wear off."[57] Cox and her mother resided together and received welfare.[58] To coerce Cox into compliance, the welfare worker threatened to kick the family off the welfare rolls if Cox's mother did not agree to have her daughter sterilized.[59] Thirteen-year-old Elaine Riddick, another survivor of sterilization, was raped and then forcibly sterilized at 14 while giving birth.[60] She had no knowledge of the procedure until she was older and wanted to become pregnant.[61]

Many who were sterilized were from impoverished communities and were classified as "feebleminded,"[62] but the scope of sterilization expanded, targeting not only those who were institutionalized but also the general population.[63] In fact, those who had never been institutionalized made up the majority of sterilizations.[64] Part of this expansion occurred when the state authorized social workers to file petitions for the sterilization of those on their welfare rolls.[65] The Eugenics Board, made up of five state officials, was then responsible for reviewing petitions and issuing determinations on whether to authorize sterilization.[66] The Eugenics Board was formed in 1933, in large part because the 1929 sterilization law had been struck down as unconstitutional because of the lack of an appeal process.[67] The Eugenics Board resolved this by creating such a process,[68] and individuals who had not provided informed consent were given this right to appeal.[69] To authorize a petition for sterilization, the Board was not required to obtain informed consent from the individual set to be sterilized.[70] Rather, consent only

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[54] Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html.

[55] *Id.*

[56] Eric Mennel, *Payments Start for N.C. Eugenics Victims, But Many Won't Qualify*, NAT'L PUB. RADIO (Oct. 31, 2014), https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify.

[57] Villarosa, *supra* note 54.

[58] *Id.*

[59] *Id.*

[60] Morris, *supra* note 4.

[61] *Id.*

[62] Brightman, Lenning & McElrath, *supra* note 3, at 477.

[63] Lori Wiggins, *North Carolina Regrets Sterilization Program*, THE CRISIS (2005).

[64] *Id*.

[65] Brightman, Lenning & McElrath, *supra* note 3, at 476.

[66] *Id*.

[67] Troy L. Kickler, *Eugenics Board*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/eugenics-board/ (last visited Apr. 24, 2023).

[68] *Id.*

[69] *Id.*

[70] Brightman, Lenning & McElrath, *supra* note 3, at 479.

needed to be obtained from either the person's next of kin or legal guardian.[71] At the hearings, supporting documents presented to the Board included, among other things, evidence illustrating a person's mental capacity, whether they presented a danger to society, and a hypothesis about the person's promiscuity and chances of procreation.[72] The rate at which the Board authorized petitions was remarkably high: between 1933 and 1935, 96% of petitions were authorized, and during a two-year period in the 1950s, that number increased to a 97% approval rate.[73]

C. California

California's sterilization law was passed in 1909, authorizing the sterilization of those committed to state institutions who suffered from a "mental disease."[74] Those who authorized the sterilizations considered a myriad of factors, including sexual or criminal delinquency and family history of alcoholism, adultery, or poverty.[75] About 68%—or 566—of those sterilized under California's sterilization policies were 17 years old or younger.[76] Between 1920 and 1945, about 20,000 people were sterilized under this state law, a disproportionate number of who were of Mexican descent.[77] The most aggressive period of sterilizations in California occurred between 1945 and 1949, with 48.5% of the total sterilizations taking place during this time period.[78] Similar to North Carolina, informed consent from the patient was not a requirement, and sterilization sometimes functioned as a pre-requisite for release from these state institutions.[79] Even when consent forms were signed, the conditions under which they were signed demands further inquiry into whether true informed consent was given.[80] An example of such coercive conditions occurred in 1978 when several Mexican-American women were sterilized in a Los Angeles hospital.[81] Although consent forms had been provided, the women argued that a lack of safeguards, including consent forms in Spanish, resulted in a violation of their constitutional right to procreate.[82] Beyond consent forms, the conditions under which these women were sterilized was inherently

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[71] *Eugenics Board*, *North Carolina Highway Historical Marker Program*, N.C. DEP'T OF CULTURAL RES., http://www.ncmarkers.com/Markers.aspx?MarkerId=H-116 (last visited Nov. 8, 2024).

[72] *Id.*

[73] Brightman, Lenning & McElrath, *supra* note 3, at 477–78.

[74] Stern, Novak, Lira, O'Connor, Harlow & Kardia, *supra* note 4, at 50.

[75] *Id.* at 52.

[76] *Id.*

[77] Villarosa, *supra* note 54, at 5.

[78] Stern, Novak, Lira, O'Connor, Harlow, & Kardia, *supra* note 4, at 52.

[79] *Id.* at 50.

[80] *See* No Más Bebés (Moon Canyon Films 2015); *see also* Marcela Valdes, *When Doctors Took 'Family Planning' Into Their Own Hands*, N.Y. TIMES (Feb. 1, 2016), https://www.nytimes.com/2016/02/01/magazine/when-doctors-took-family-planning-into-their-own-hands.html.

[81] Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, REPROD. RTS. & JUST. STORIES 98 (Melissa Murray, Katherine Shaw & Reva B. Siegel, eds.)

[82] *Id.* at 104.

coercive: one physician recalled observing a medical resident tell a woman in the midst of labor that if she wanted painkillers she needed to sign the sterilization consent forms.[83]

This violence reappeared in California state prisons between 2006 and 2010, when roughly 150 female inmates who were incarcerated were sterilized,[84] despite California's sterilization law being overturned in 1979.[85] The majority of those sterilized were Black and Latina.[86] Prison records indicate that between 1997 and 2013, about 1,400 people in Department of Corrections (DOC) custody were sterilized either during labor or other medical procedures.[87] At the time these sterilizations were occurring in California state prisons, both federal and state law prohibited the use of sterilization on women in prison as a form of birth control.[88] Despite this, in meeting minutes leaked by a whistleblower, the California Department of Corrections discussed the cost effectiveness of sterilizing inmates during labor and delivery, as well as ways to reclassify the procedure as medically necessary so that it could be covered by state funds.[89]

Reporter Corey Johnson interviewed the doctor who performed most of these sterilizations, and when confronted with the fact that over $100,000 of taxpayer money was funding these sterilizations, Dr. James Heinrich replied that it was "cheaper than welfare."[90] As demonstrated by Heinrich's response, justification for these sterilizations was grounded in the belief that it saved the state money.[91] Corey Johnson reflected on Heinrich's statement: "That attitude tracked precisely to the historical attitude of the California leaders of the eugenics movement. They had always used cost benefits as the justifier for why they were doing what they were doing. And so, in that

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[83] *See* No Más Bebés (Moon Canyon Films 2015); *see also* Valdes, *supra* note 80.

[84] Villarosa, *supra* note 54, at 6. Formerly incarcerated folks who have spoken out about this practice note that the program specifically targeted those who were deemed likely to return to prison. *See* BELLY OF THE BEAST (Erika Cohn 2020). The surgery became so frequent that it was commonly referred to as "the surgery of the month." *Id.* Kelli Dillon was one of many who was sterilized while incarcerated, and who was deliberately misinformed about what procedure had been performed on her. *Id*. Cynthia Chandler, an attorney at Justice Now, notes, "[t]hanks to Kelli's organizing, we were able to uncover a dozen instances of people being sterilized during other kinds of surgeries." *Id.* Another woman went in to see the doctor for back cramps. *Id.* She was told she had tumors and endometriosis which increases your chances of cervical cancer. *Id.* She was subsequently given a hysterectomy, despite the absence of cancer. *Id*. Kimberly Jeffrey, who was pregnant at the time of her incarceration, shared that she was forced to undergo a C-section, rather than vaginal delivery, for security purposes, and while handcuffed to the bed and under heavy anesthesia, was asked to place an X indicating approval for tubal ligation. *See id.*

[85] Villarosa, *supra* note 54.

[86] Shilpa Jindia, Belly of the Beast*: California's Dark History of Forced Sterilizations*, GUARDIAN (June 30, 2020), https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast.

[87] *Id.*

[88] BELLY OF THE BEAST, at 27:58–28:05 (Erika Cohn 2020).

[89] *Id.* at 27:23–27:58.

[90] *Id.* at 42:04–42:18.

[91] *See id.* at 48:00–48:38.

way, Heinrich was part of a legacy. If you just stop and make him the face of it, do you really get at the problem?"[92]

II. REPARATIONS

A. North Carolina

North Carolina provided various forms of redress for the state-sponsored sterilizations that took place throughout the mid to late 1900s.[93] Such measures would not have come about if not for the brave and persistent efforts of those who were victims and survivors of the sterilization policies.[94] In addition to the incredible work of survivors, the efforts of community members who fought alongside them to raise awareness and hold the government accountable are also deserving of recognition. These community members included researchers, journalists, and lawyers, among countless others.[95]

In 2002, the Winston-Salem Journal published a four-part series about the sterilization program that took place in North Carolina throughout the 1900s.[96] Prior to this series, no concrete steps had been taken to address the harm brought about by this program, and this series served as a major catalyst for the subsequent reparative efforts that took place afterwards.[97] It wasn't until years later that North Carolina became the first state to compensate victims of forced sterilization.[98] More recently, in 2017, PBS aired *The State of Eugenics*, which documented the forced sterilizations in North Carolina through records filed with the Eugenics Board and interviews with journalists, researchers, and surviving victims of the sterilization.[99]

In the early 1970s, Nial Ruth Cox, then 26, reached out to Brenda Feigen, anti-discrimination attorney, at ACLU's Reproductive Freedom Project to pursue legal action against the state for the involuntary sterilization she had been subjected to in 1965.[100] In 1973, Brenda Feigen and Ruth Bader Ginsburg filed a lawsuit on behalf of Cox, seeking $1 million in damages and a declaration that North Carolina's sterilization program was unconstitutional.[101] The case was ultimately barred by the

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[92] *Id.* at 48:55–49:17.

[93] Villarosa, *supra* note 54, at 6.

[94] *Reel South: The State of Eugenics* (PBS television broadcast Jan. 26, 2017), https://www.pbs.org/video/reel-south-state-eugenics/.

[95] *See* Editorial*, Against Their Will,* WINSTON-SALEM J., Dec. 10–14, 2002; *see also* Ria Tabacco Mar, Opinion, *The Forgotten Time Ruth Bader Ginsburg Fought Against Forced Sterilization*, WASH. POST, Sept. 19, 2020.

[96] Editorial, *Against Their Will*, WINSTON-SALEM J., Dec. 10, 2002.

[97] *See* Jonathan Michels, *Breaking the 'Wicked Silence' of Eugenics in North Carolina*, TRIAD CITY BEAT (June 18, 2014), https://triad-city-beat.com/breaking-the-wicked-silence/.

[98] Villarosa, *supra* note 54, at 6.

[99] *Reel South: The State of Eugenics*, *supra* note 94, at 4:30.

[100] *Id.* at 27:55–28:18.

[101] Mar, *supra* note 95.

statute of limitations, despite the fact that Cox had not even known the procedure was irreversible until 1970.[102] The case did, however, attract national attention, appearing on *60 Minutes*, which likely contributed to the ultimate dissolution of the eugenics sterilization program years later.[103]

In 2002, Governor Mike Easley issued a formal apology, likely brought about by Winston-Salem Journal's publication revealing North Carolina's sterilization program.[104] In his apology, Governor Easley stated, "[o]n behalf of the state I deeply apologize to the victims and their families for this past injustice, and for the pain and suffering they had to endure over the years[.] This is a sad and regrettable chapter in the state's history, and it must be one that is never repeated again."[105]

In *Truth Telling as Reparations*, Margaret Urban Walker explores the role of public apologies, highlighting the importance of an apology including an acknowledgment of the facts and the harm that occurred, as well as acceptance of responsibility.[106] Similarly, in 2013, the Caricom Reparation Commission developed a 10-Point Reparations Plan, noting the conditions of an apology: "A full apology accepts responsibility, commits to non-repetition, and pledges to repair the harm caused."[107] The report distinguishes between statements of regret and apologies, noting that statements of regret fall short on two grounds: first, such a statement fails to acknowledge that crimes were committed; and second, fails to demonstrate an acceptance of responsibility.[108]

Under both Urban Walker and Caricom's theories, Governor Easley's apology for the sterilization abuse in North Carolina falls short for several reasons. First, while he apologizes for the pain and suffering the victims and their family members endured, he uses passive language, thus failing to acknowledge that the harm occurred at the hands of the North Carolina government and demonstrating a lack of accountability for the harm. Second, the Governor states that such abuse should never be repeated but goes no further in detailing what the government will do to prevent such abuse in the future. An important component of reparations are guarantees of non-repetition (GNR), which include "specific actions that reduce the likelihood of recurrence."[109] GNR is less about putting the victim back to

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[102] Cox was repeatedly told by her doctors at the time of the sterilization that it was a reversible procedure. She did not learn that this was untrue until years later, when she wanted to have children and was informed by her gynecologist that this was not possible. As a result, her fiancé left her, and she was then unable to adopt because she was not married. *Id.*

[103] *Id*.

[104] *See* Editorial, *Against Their Will III*, WINSTON-SALEM J., Dec. 12, 2002.

[105] *N.C. Governor Apologizes to Sterilization Victims*, ACCESS WDUN (Dec. 13, 2002), https://accesswdun.com/article/2002/12/186617.

[106] Margaret Urban Walker, *Truth Telling as Reparations*, 41 METAPHILOSOPHY 525, 527 (2010).

[107] *10-Point Reparation Plan*, CARICOM REPARATIONS COMM'N, https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/ (last visited Nov. 10, 2024).

[108] *Id.*

[109] Naomi Roht-Arriaza, *Measures of Non-Repetition in Transitional Justice: The Missing Link?*, LEGAL STUD. RSCH. PAPER SERIES (UC HASTINGS, 2016).

where they would have been had the violation not occurred in the first place, but rather transforming the status quo and providing assurances that the status quo will not be returned to.[110] Finally, the apology leaves out altogether any plans to repair the harm. While apologies alone are insufficient to repair harm, they can play a critical role in providing accountability and advancing reconciliation.[111] However, to accomplish this, apologies should only be offered when they can be done with sincerity and intentionality.

In 2003, North Carolina's sterilization law was overturned, and in 2009, a historical marker commemorating the victims was placed in Raleigh.[112] The marker text states, "Eugenics Board: State action led to the sterilization by choice or coercion of over 7,600 people, 1933–1973. Met after 1939 one block E."[113] In 2010, the Governor formed the North Carolina Justice for Sterilization Victims Foundation, which was tasked with finding the survivors of the sterilization practices.[114] The following year, the governor appointed a task force to begin exploring what a compensation package for survivors might consist of.[115] The task force faced various challenges in the drafting of the bill, including issues of the constitutionality of the bill, whether the bill could accomplish the desired goal, and means of identifying victims.[116] In exploring the option of compensation for victims of sterilization, a state panel held a public hearing for sterilization victims in 2011.[117] Several surviving victims, including Willis Lynch and Elaine Riddick, stood before the panel and shared their experience of being deemed unfit to produce and subsequently sterilized as a result.[118] The hearing garnered national attention, appearing on several news outlets.[119]

After the Winston-Salem publications, Representative Larry Womble relentlessly sought redress for the harm brought about by these eugenic sterilization policies, filing several bills seeking compensation for survivors.[120] Such efforts were largely unsuccessful due to a lack of support, until 2011, when Representative Tillis joined Representative Womble in the fight for compensation for survivors.[121] Representatives Womble and Tillis

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[110] *10-Point Reparation Plan*, *supra* note 107.

[111] *See* Daniella Stoltz & Beth Van Schaack, *It's Never Too Late to Say "I'm Sorry": Sovereign Apologies Over the Years*, JUST SECURITY (Mar. 16, 2021), https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/.

[112] Villarosa, *supra* note 54, at 6.

[113] *Eugenics Board*, *supra* note 71.

[114] Villarosa, *supra* note 54, at 6.

[115] *Id.*

[116] *Reel South: The State of Eugenics*, *supra* note 94, at 38:15–39:00.

[117] *Id.* at 24:20–24:27.

[118] *Id.* at 24:30–25:28.

[119] *Id.* at 25:29–26:19.

[120] *Id.* at 17:00–18:28.

[121] *Id.* at 33:00–31:10.

continued to push for compensation during the 2012 Legislative Session by introducing H.B. 947, but the bill never made it out of committee.[122]

Finally, in 2013, the Legislature voted to allocate $10 million to compensating survivors,[123] which breaks down to payments of $20,000 per person.[124] This was brought about, at least in part, because of "a rare moment of unanimity across the political spectrum in terms of outrage about the state's actions, even if not a complete consensus on the morality of paying reparations."[125] While such reparative efforts are noteworthy, as of 2018, of the roughly 7,000 North Carolinians sterilized, only 220 have been compensated.[126] Additional challenges have arisen regarding who receives compensation.[127] To be eligible for compensation, a person's sterilization must have been approved by the Eugenics Board (i.e., under state authority).[128] One critique of the compensation program is that dozens, if not hundreds, of people were sterilized at county-run facilities—approved by judges and social workers—rather than at the state level.[129] Consequently, for the sterilizations that occurred at a county-run facility, the survivors are ineligible for compensation.[130] Debra Blackmon is one of those struggling to receive compensation.[131] She was just 14 years old when she was subjected to a full abdominal hysterectomy but is now categorically barred from receiving compensation because her sterilization was approved by a judge, rather than the Eugenics Board.[132] To address this gap, Senator Jackson introduced Senate Bill 532 in 2015, which sought to expand the language of the compensation program to include those who were sterilized in county facilities; however, the bill never made it out of committee.[133]

B. California

Reparations in California have been far more limited than in North Carolina. In 2003, Attorney General Bill Lockyer issued an apology for California's eugenics policy during the 20th century.[134] Lockyer provided a

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[122] H.B. 947, Gen. Assemb., 2011–2012 Sess. (N.C. 2012); *see Reel South: The State of Eugenics*, *supra* note 94, at 41:09–42:25.

[123] Villarosa, *supra* note 54.

[124] Eric D. Smaw, *Uterus Collectors: The Case for Reproductive Justice for African American, Native American, and Hispanic American Female Victims of Eugenics Programs in The United States*, BIOETHICS (Special Issue) 1, 4 (2021).

[125] Brophy & Troutman, *supra* note 6, at 1943.

[126] Smaw, *supra* note 124 at 6.

[127] *See* Mennel, *supra* note 56, at 2:30–2:50.

[128] *Claims & FAQs*, N.C. DEP'T OF ADMIN., OFF. OF JUST. FOR STERILIZATION VICTIMS, https://ncadmin.nc.gov/about-doa/special-programs/office-justice-sterilization-victims/claims (last visited Nov. 10, 2024).

[129] *See* Mennel, *supra* note 56, at 2:15–2:22.

[130] *Id.* at 2:50–3:12; *see also Claims & FAQs*, *supra* note 128.

[131] Mennel, *supra* note 56, at 0:41.

[132] *Id.*

[133] S.B. 532, Gen. Assemb., 2015–2016 Sess. (N.C. 2015).

[134] Letter from Bill Lockyer, Cal. Att'y Gen., to Dede Alpert, Chair, Cal. Senate Select Comm. on Genetics (Mar. 11, 2003).

brief overview and impact of the program and then apologized for the harm inflicted:

> I cannot change the past, but as Attorney General, I am moved to offer an apology for the injustice done to California men and women when the state permitted and promoted involuntary sterilization . . . [i]t is never too late to search our conscience, to protest discrimination, and to reject injustice inflicted by public policy or statute on helpless minorities. At the dawn of an era when cloning and genetic engineering offer both great promise and great peril, we must learn from our history, teach our children about our past and be mindful for our future. The apology offered today speaks to the past bigotry and intolerance against the disabled, developmentally disabled or others who happened to be seen as misfits of the time. It also stands as a warning to policymakers of the 21st century. We must remember and honor our common humanity and treat people with respect, no matter their race, ethnicity, religious belief, economic status, disability[,] or illness.[135]

A few hours later, Governor Gray Davis issued a formal apology of his own: "To the victims and their families of this past injustice, the people of California are deeply sorry for the suffering you endured over the years. Our hearts are heavy for the pain caused by eugenics. It was a sad and regrettable chapter . . . one that must never be repeated."[136]

Attorney General Lockyer's apology was more comprehensive than the apology offered by North Carolina's governor for several reasons.[137] For starters, Lockyer acknowledged the role of the state in permitting and promoting involuntary sterilization, thus demonstrating an understanding that the government bears responsibility for the harm.[138] Additionally, he provided an overview of the facts, detailing what occurred under this sterilization law and who was most heavily impacted, and rejected the bigotry that led to such violence in the first place.[139] However, under Urban Walker and Caricom reparation theories, Lockyer's apology still falls short for several reasons. First, he made broad commitments to non-repetition but such sweeping statements are difficult to enforce later on, if and when the

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[135] *Id.*

[136] Carl Ingram, *State Issues Apology for Policy of Sterilization*, L.A. TIMES (Mar. 12, 2003), https://www.latimes.com/archives/la-xpm-2003-mar-12-me-sterile12-story.html.

[137] Letter from Bill Lockyer, Cal. Att'y Gen., to Dede Alpert, Chair, Cal. Senate Select Comm. on Genetics (Mar. 11, 2003).

[138] *Id.* at 1.

[139] *Id.* at 2.

government fails to hold true to those commitments.[140] Second, Lockyer failed to note any plans to repair the harm.[141] The power of including such language in an apology is perhaps best reflected in what happens when it is absent, which is that there is no enforcement mechanism for holding the government accountable and ensuring that they follow through on their commitments to ensure that reparative measures are pursued and that such violence never happens again. Governor Davis's apology is even more lacking than Attorney General Lockyer's and more closely resembles the apology offered in North Carolina.

After the public apologies by Attorney General Lockyer and Governor Davis, nearly two decades passed before survivors saw any form of compensation,[142] and it was a long and arduous road to get there. There was a myriad of advocacy efforts that ultimately led to the passage of a compensation package for remaining survivors of California's sterilization policies, including those by survivors, reporters, lawyers, legislators, and filmmakers. In 2013, Corey Johnson investigated and reported on the allegations of involuntary sterilizations at California prisons.[143] Released in 2020, Erika Cohn's documentary, *Belly of the Beast*, exposed the forced sterilizations that took place in California prisons and grounded these events in the history of state-sanctioned sterilizations in California.[144] The documentary depicted the story of Kelli Dillon, who was unlawfully sterilized at the age of 24 while she was incarcerated in Central California Women's Facility.[145] The film followed the story of Dillon in the subsequent years, and her fight for redress alongside lawyer Cynthia Chandler.[146] During testimony before the Assembly Health Committee, Dillon posed the following question to the legislature: "Did this happen to me because I was African American? Did it happen to me because I was a woman? Did it happen to me because I was an inmate? Or did it happen to me because I was all three?"[147]

Due in large part to Dillon and Chandler's persistent advocacy, Senate Bill 1135 was passed in 2014, which prohibited sterilization for purposes of birth control in prisons.[148] The bill was approved by the Governor in September of 2014.[149] In 2019, Assembly Bill 1764 was brought before the

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[140] *Id.*

[141] *Id.*

[142] Villarosa, *supra* note 54, at 6.

[143] Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, REVEAL (July 7, 2013), https://revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/; *see also* BELLY OF THE BEAST, at 32:46–33:12 (Erika Cohn 2020).

[144] BELLY OF THE BEAST (Erika Cohn 2020).

[145] *Id.* at 5:30–7:10.

[146] *Id.* at 7:40–8:52.

[147] *Id.* at 1:09:07–1:09:17.

[148] S.B. 1135, 2014 Leg., Reg. Sess. (Cal. 2014); *see also* BELLY OF THE BEAST, at 1:10:51–1:11:02 (Erika Cohn 2020).

[149] S.B. 1135, 2014 Leg., Reg. Sess. (Cal. 2014); *see also* BELLY OF THE BEAST, at 1:10:51–1:11:02 (Erika Cohn 2020).

California Sterilization Reparation Hearing, which sought to provide redress to those who were sterilized under California law, including both those were sterilized throughout the 1900s as well as those who were sterilized during incarceration.[150]

Finally, in 2021, California established a compensation program for survivors of forced or involuntary sterilization, setting aside $4.5 million.[151] There are an estimated 600 surviving victims who will receive roughly $25,000 each.[152] This includes both individuals who were sterilized throughout the 1900s as well as those who were more recently sterilized in state prisons.[153] In addition to the $4.5 million to be split among survivors, the state approved $2 million for program outreach and $1 million to establish markers that commemorate the sterilizations.[154] In the announcement of the launch of California's compensation program, Governor Newsome stated, "California is committed to confronting this dark chapter in the state's past and addressing the impacts of this shameful history still being felt by Californians today. . . . While we can never fully make amends for what they've endured, the state will do all it can to ensure survivors of wrongful sterilization receive compensation."[155]

Several challenges have arisen regarding eligibility for and accessibility of the compensation program. One provision of California's Forced or Involuntary Sterilization Compensation Program is that survivors must apply for compensation before December 31, 2023.[156] This creates challenges for several reasons, including the fact that medical records are notoriously challenging to access and that many people may be entirely unaware that they were sterilized until years later, as happened in Kelli Dillon's case.[157] Additionally, procedures were performed on some individuals that effectively sterilized them, but were not medically

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[150] BELLY OF THE BEAST, at 1:17:25–1:18:00 (Erika Cohn 2020).

[151] CAL. HEALTH & SAFETY CODE § 24210; *see also* Villarosa, *supra* note 54, at 6.

[152] Morris, *supra* note 4.

[153] *California Launches Program to Compensate Survivors of State-Sponsored Sterilization*, OFF. OF GOVERNOR GAVIN NEWSOME (Dec. 31, 2021), https://www.gov.ca.gov/2021/12/31/california-launches-program-to-compensate-survivors-of-state-sponsored-sterilization/.

[154] *Id.*

[155] *Id.*

[156] *Recovery from Forced Sterilization*, CAL. VICTIM COMP. BD., (last visited May 26, 2023), https://victims.ca.gov/fiscp/ [https://web.archive.org/web/20230526203854/https://victims.ca.gov/for-victims/fiscp/].

[157] *See* BELLY OF THE BEAST, at 7:52–8:05 (Erika Cohn 2020). Dillon had been under the impression she was having a cyst removed from her ovary, but instead she was given a hysterectomy. *Id.* at 5:30–6:43. Her physician not only failed to inform her about what procedure had been performed on her but outright lied to her when she inquired into whether she would be able to have children in the future, answering in the affirmative. *Id.* at 7:00–7:10. Months later she began experiencing symptoms of surgical menopause and contacted Justice Now, an organization that provided advocated on behalf of incarcerated women. *Id.* at 7:40–8:15. It wasn't until Justice Now helped to obtain her medical records that she learned she had been sterilized. *Id.* at 8:15–8:52.

documented as a sterilization procedure, rendering them ineligible for compensation under California's program.[158]

In addition to legislative efforts, litigation also raised awareness and served to hold the State accountable for its harms. In 1978, class action *Madrigal v. Quilligan* was filed by attorney Antonia Hernández and brought by ten Mexican American women who had been forcibly sterilized by the State.[159] One of the Plaintiffs was Dolores Madrigal, who had been in labor when she was coerced into signing consent forms for sterilization.[160] The Court ruled in favor of Defendants, stating that the case was merely about a miscommunication between the patients and the doctors that resulted from the language barrier.[161] The Court further asserted that Plaintiffs' emotional distress could be contributed to Plaintiffs' "cultural background" rather than as a direct result of being forcibly sterilized.[162] In stark contrast, cultural anthropologist Carlos Velez-Ibanez's described the women's pain in the following manner: "For each women her sense of continuity with the past had been fractured, her sense of self-worth had been shattered, self-blame had been internalized, and a new social identity of impotence had been generated . . . . The final effect was acute depression."[163]

Despite the loss in court for these plaintiffs, positive reforms were accomplished as a result of the various advocacy strategies that were deployed in response to these sterilizations.[164] For example, California's Department of Health carved out additional protections for sterilization procedures by requiring materials be provided in numerous languages detailing the procedure as well as the potential consequences.[165] Additionally, one year after the ruling in *Madrigal*, California revoked its sterilization law.[166]

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[158] *See* Victoria Law, *Sterilization Survivors Who Won Reparations Now Face Another Challenge—Getting It*, THE NATION (Jan 3, 2023), https://www.thenation.com/article/society/sterilization-survivors-reparations-california/. Thus far, two trans men have been denied compensation due to such circumstances. One man received an ablation, which does not count as sterilization, but given that the procedure dramatically reduces one's chances of getting pregnant in the future, it was in effect similar to sterilization. *Id.* The second man had both of his ovaries removed, but medical records only document the removal of one of his ovaries. Because the medical records do not reflect a complete removal of both ovaries, he is ineligible for compensation. *Id.*

[159] Valdes, *supra* note 80.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] Manian, *supra* note 81, at 10–11.

[164] *A Latinx Resource Guide: Civil Rights Cases and Events in the United States*, LIBR. OF CONG., https://guides.loc.gov/latinx-civil-rights (last visited April 24, 2023).

[165] *Id.*

[166] *Id. See also* Villarosa, *supra* note 54, at 6 (stating that California overturned its sterilization law in 1979).

C. Puerto Rico

1. Advocacy Efforts

Helen Rodriguez-Trias, a grassroots organizer, activist, and physician, played a crucial role in exposing the mass sterilizations that took place in Puerto Rico and the subsequent development of reproductive rights guidelines.[167] In 1975, Rodriguez-Trias founded the Committee to End Sterilization Abuse (CESA),[168] which eventually became the Committee for Abortion Rights and Against Sterilization Abuse (CARASA).[169] This committee was "the first grassroots organization developed to combat forced sterilization."[170] In its statement of purpose, CESA asserted its commitment to working on a number of issues, including establishing guidelines on sterilization, raising awareness around the issue of sterilization abuse, demanding access to birth control, and engaging in legal action in defense of patients' rights.[171] CESA grounded these commitments in the history of sterilization in the United States:

> Population control programs have been pushed by the U.S. for people in the United States as well as in many countries abroad to do exactly that: control people and keep us from understanding the real causes of our suffering and thus keep us from dealing with the problems by eliminating oppression and exploitation. By pushing population control programs, the United States government and corporations hope to stave off the struggles of people for liberation from direct and indirect domination by the U.S.[172]

In addition to Rodriguez-Trias's efforts to raise awareness around the state-sanctioned sterilizations that were occurring across United States' states and territories, other advocacy efforts also exposed the sterilizations, including Ana María García's 1982 documentary film *La Operación*.[173] García interviewed numerous women who underwent sterilization, government officials who authorized the sterilizations, and advocates such as Helen Rodriguez-Trias.[174] The film depicts scenes of the surgeries obtained from archival footage,[175] which García asserted she included for

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[167] Laura Newman, *Obituaries: Helen Rodriguez-Trias*, 324 BMJ 242 (2002).

[168] *CESA Statement of Purpose*, CHI. WOMEN'S LIBERATION UNION (Aug. 30, 2016), https://www.cwluherstory.org/health/cesa-statement-of-purpose.

[169] Newman, *supra* note 167.

[170] *Reproductive Coercion and Sterilization Abuse*, NAT'L WOMEN'S HEALTH NETWORK (Oct. 3, 2022), https://nwhn.org/reproductive-coercion-and-sterilization-abuse/.

[171] *CESA Statement of Purpose*, *supra* note 168.

[172] *Id.*

[173] LA OPERACIÓN, *supra* note 5.

[174] *Id.* at 2:37–3:24, 17:32–18:08, 23:56–25:00.

[175] *Id.* at 36:26–37:12.

two main reasons: first, the "scenes prevent sterilization from degenerating into a concept or an intellectualization;" and second, given the continuing misconception that these procedures merely tied the tubes resulting in a reversible procedure, García wanted her audience to visibly see the tubes being cut.[176] When asked why she made her first film about the sterilizations that occurred in Puerto Rico, García shared, "[t]he film really isn't just about sterilization, although that is its focus. Its wider context is the colonization of Puerto Rico and the politics of population control. Sterilization and emigration were the results of a political and economic situation forced on Puerto Rico by the United States."[177] To date no reparative efforts have been made to address the harm of forcibly sterilizing one-third of the population.[178]

2. Challenges to a Reparations Claim

A challenge that often arises in reparations claims is determining who is owed; the answer quickly becomes complicated given that the degree of consent to these sterilizations is still disputed. Much of the literature notes that the program was inherently coercive in nature and can therefore never truly be consented to, while others warn against the equation of mainland feminism with Puerto Rican feminism, noting that sterilization in Puerto Rico was a mechanism for Puerto Rican women to have agency over their own reproductive choices.[179] Brightman asserts that "[c]onsent is not possible alongside coercion,"[180] and coercion was so deeply imbedded into these practices that it quickly becomes difficult to disentangle a truly voluntary choice from a choice made in response to coercive methods.

Nial Ruth Cox, a survivor of the North Carolina eugenics program, notes "my choice was to either let my sister and brother starve[] or take the surgery."[181] Can a choice such as that truly ever be extricated from the inherent pressure? When asked about her interpretation of the women who chose sterilization, García responds that in addition to being highly accessible and affordable as a contraceptive, "I can only speculate that sterilization gave some women the opportunity to take control of their lives under circumstances in which—because of their condition as women in a colonized situation—control of their lives was in someone else's hands."[182]

Although states, in developing a plan for monetary reparations, may hope to obtain evidence of coercion, this will be quite difficult to prove for

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[176] Kimberly Safford, La Operación *Forced Sterilization*, 29 JUMP CUT 37 (1984).

[177] Iraida López, *Interview with* La Operación*'s Ana María García: "Not Many Options for Contraception*," 29 JUMP CUT 38 (Kimberly Safford trans.) (1984).

[178] LA OPERACIÓN, *supra* note 5.

[179] LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 143–45 (2002).

[180] Brightman, Lenning & McElrath, *supra* note 3, at 479.

[181] *Reel South: The State of Eugenics*, *supra* note 94, at 4:33–4:40.

[182] López, *supra* note 177.

a variety of reasons, not the least of which may be the absence of records nearly a century later.[183] Alfred Brophy briefly addresses this question of consent and coercion: "Given how much effort the state spent to facilitate 'consent,' as well as the limited efforts the state made to protect those being sterilized, it is reasonable to presume that victims and their families were coerced. At any rate, any ambiguities should be at least resolved in favor of those who were sterilized."[184]

Simply because the question of "who is owed" presents a challenge, given the complexity around consent, does not mean that the question cannot be answered. There is, perhaps, a straightforward way to resolve this challenge. How important is it to distinguish between those who truly consented to these sterilizations versus those who were coerced or forced into the procedure? One way to reframe the answer is that because these practices were grounded in eugenics, it is less relevant to separate out those who consented versus those who did not, and rather, because the policy itself was inherently violent in nature, reparations are owed regardless of the degree of voluntariness. Alternatively, if states are adamant about limiting compensation to those forcibly sterilized—thus excluding individuals who obtained sterilization as a form of family planning—it is critical to incorporate into such program a rebuttable presumption that persons sterilized under this state eugenics program are eligible to receive compensation, shifting the burden to the government to prove voluntariness.[185]

III. COMPARATIVE ANALYSIS OF PUERTO RICO, NORTH CAROLINA, AND CALIFORNIA

North Carolina's sterilization programs operated from 1929 until 1974, during which time 7,528 people were sterilized, a disproportionate number of whom were Black and Native American.[186] California's sterilization law was enacted in 1909 and wasn't overturned until 1979,[187] during which time the State sterilized about 20,000 people, disproportionately targeting persons of Mexican descent.[188] Comparatively, Puerto Rico enacted its sterilization law in 1937 and the programs operated well into the 1980s.[189] At one point, the rate of sterilization among Puerto Rican women was 10 times that of women living in the United States.[190] That reparative measures have occurred in both North Carolina and California raises the question of why such measures have not been taken in response to the eugenic-based

[183] *See* Brophy & Troutman, *supra* note 6, at 1946.
[184] *Id.* at 1946.
[185] *Id.* at 1947.
[186] Villarosa, *supra* note 54, at 5.
[187] *Id.*
[188] *Id.*
[189] Rowlands & Regmi, *supra* note 1; *see also* La Operación, *supra* note 5.
[190] Rowlands & Regmi, *supra* note 1.

sterilizations in Puerto Rico. This article puts forth several contributing factors (non-exhaustive) that help to explain the lack of reparations in Puerto Rico. These factors are broken down into the following categories: geographic and political context, racial and ethnic makeup, and target groups.[191]

A. Geographic and Political Context

In contrast to North Carolina and California, Puerto Rico is physically separated from the mainland of the United States. It is possible that this physical separation has created a sense of psychological separation, which functions to (falsely) legitimatize the federal government's lack of acknowledgment and accountability for its promotion of eugenic sterilizations. Because Puerto Rico is a U.S. Territory and not a state, it also receives differential treatment by the federal government than do the 50 states, particularly within the political context. The political autonomy that Puerto Rico has been stripped of by the federal government presents additional challenges. While Puerto Rico has a Resident Commissioner authorized to represent Puerto Rico before the federal government, the Resident Commissioner cannot vote for the final passing of bills, including bills directly related to Puerto Rico.[192] Thus, in the event that a reparations bill makes it to the floor of Congress, Puerto Rico is not even entitled to have its elected official vote on its behalf.

Additionally, a question perhaps more pertinent to reparations in Puerto Rico is that of who owes. Reparations in both North Carolina and California came about because of legislation that carved out protections and compensation programs for survivors. This may present a greater challenge in Puerto Rico than in North Carolina and California for several reasons. Compensation in both North Carolina and California was paid out by the state. While the sterilization in Puerto Rico was expressly supported by the Puerto Rican government as a way to control population growth, the high rates of unemployment and poverty that led to "concerns" about population control can only be properly understood within the larger history of colonization and U.S. occupation of Puerto Rico. In accordance with this history, a deeper inquiry may be required to determine who bears responsibility for the sterilizations and therefore who owes.

B. Racial and Ethnic Makeup

Some scholars posit that because certain sterilization programs targeted people cross-racially, legislators were able to garner the bipartisan support

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[191] Several of these categories were inspired by the work of Rowlands and Regmi's comparative study. *See* Rowlands & Regmi, *supra* note 1 at 279–81.

[192] *What is a Resident Commissioner?*, U.S. CONGRESSWOMAN JENNIFFER GONZÁLEZ-COLÓN, https://gonzalez-colon.house.gov/about/what-resident-commissioner (last visited April 24, 2023).

that may otherwise have presented more of a challenge had the programs strictly targeted one race in particular.[193] California's sterilization, in both the 20th and 21st centuries, disproportionately impacted Latina[194] and Black women,[195] with Latina women sterilized at a rate 59% higher than non-Latinas.[196] During the initial phases of North Carolina's eugenic sterilizations, poor white individuals were targeted at higher rates, accounting for nearly four-fifths of all sterilizations between 1929 and 1940.[197] However, there was a significant uptick in the sterilizations of Black individuals during the 1960s, with Black Americans accounting for 64% of sterilizations.[198] Scholars have linked this dramatic shift to the expansion of civil rights in the 1960s, which provided greater access to public assistance for Black Americans at a time when social workers were petitioning for the sterilization of individuals on their welfare rolls.[199] Although North Carolina and California disproportionately targeted people of color, the demographic of persons sterilized was cross-racial, and some scholars argue that this component was a critical element in garnering the bi-partisan political alignment that made it possible for the reparations programs to pass in the legislature.[200]

C. Target Groups

The California sterilization programs primarily targeted individuals who were either in mental institutions[201] or prisons.[202] North Carolina, for the first few years, exclusively targeted persons deemed "mentally deficient" or "feebleminded."[203] Comparatively, although Puerto Rico's policies did target poor women, it did not narrow the scope to institutionalized persons as occurred at various points in both North Carolina and California. As it relates to a reparation claim, this may present an additional challenge in terms of obtaining records and identifying victims.

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[193] Brophy & Troutman, *supra* note 6, at 1942 ("[T]he sterilization program was not geared towards one particular race, though in practice, one race may have been more affected.").

[194] Villarosa, *supra* note 54, at 5.

[195] Jindia, *supra* note 86.

[196] Paola Alonso, *Autonomy Revoked: The Forced Sterilization of Women of Color in 20th Century America*, 13 IBID.: STUDENT HIST. J. [1], [6] (2020); *see also* Juliana Jiménez J., *California Compensates Victims of Forced Sterilizations, Many of Them Latinas*, NBC NEWS (July 23, 2021), https://www.nbcnews.com/news/latino/california-compensates-victims-forced-sterilizations-many-latinas-rcna1471.

[197] Kickler, *supra* note 67; *see also* Brightman, Lenning & McElrath, *supra* note 3, at 477.

[198] Brightman, Lenning & McElrath, *supra* note 3, at 477.

[199] *Id.*; *see also* Kickler, *supra* note 67.

[200] Brophy & Troutman, *supra* note 6, at 1942.

[201] Stern, Novak, Lira, O'Connor, Harlow & Kardia, *supra* note 4, at 50.

[202] Jindia, *supra* note 86.

[203] Brightman, Lenning & McElrath, *supra* note 3, at 477.

CONCLUSION

There ought to be a sense of urgency for reparations for the state-sanctioned sterilizations that took place in Puerto Rico for several reasons, not the least of which is the importance of addressing the harm before more surviving victims die. Reparations schemes used in both North Carolina and California, although flawed, can serve as models for other states and territories aiming to redress such harm. Reparative measures may include a myriad of approaches. Collective memory is one such approach, and one that is critical not only for reparative purposes but as a guarantee of non-repetition.[204] Rendering certain experiences as invisible allows the violence to not only persist throughout time and space, unaccounted for, but to be reimagined.[205] Villarosa writes:

> Accounts of medical violence dating back to slavery and outlandish, supposedly scientific theories by physicians . . . are greeted with shock and presented as a throwback to the past or as an aberration, the work of a few bad actors. Still, the concept of biological and psychological differences based on race and some of the deeply questionable medical theories and practices from slave times have clung stubbornly to the present, normalized in today's medical theory and practice.[206]

The failure to develop a collective memory around the horrors of this violence heavily contributes to the perpetuation of it,[207] but developing a collective memory is one tool to disrupt these cycles of misremembering. To

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[204] *See* Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, ANN. REV. L. SOC. SCI. 189, 189–211 (2007); *see also* Roht-Arriaza, *supra* note 109, at 5.

[205] *See* Transitional Justice in America, *Transitional Justice in Practice: Lessons for Change-Makers*, PODBEAN, at 15:01 (July 21, 2022). Sterilization abuse in the United States is grounded in a long and violent history of medical abuse against Black women and cannot be properly and wholly understood outside of this historical context. *See* LINDA VILLAROSA, UNDER THE SKIN: THE HIDDEN TOLL OF RACISM ON HEALTH IN AMERICA 22, 24–25 (2022); *see also Medical Exploitation of Black Women*, EQUAL JUSTICE INITIATIVE (Aug. 29, 2019), https://eji.org/news/history-racial-injustice-edical-exploitation-of-black-women/.

[206] VILLAROSA, *supra* note 205, at 39.

[207] We have seen this violence repeated more recently against immigrant women detained at Irwin County Detention Center (ICDC) in Georgia. *See* Complaint from Project South, et al., to Joseph V. Cuffari, Inspector General, Dep't of Homeland Security, et al. (Sept. 14, 2020) (on file with author), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf. In 2020, there were reports of alarming rates of detained women having hysterectomies performed on them without informed consent, such that it raised red flags both for the women who were detained as well as the nurses providing care. *Id.* Many women were confused about what procedure had even taken place, with one woman reporting she was given three entirely different responses about what the procedure would entail and what it was in regards to. *Id.* at 18–20. One woman detained at ICDC commented: "When I met all these women who had had surgeries, I thought this was like an experimental concentration camp. It was like they're experimenting with our bodies." *Id.* at 19. In response to these shocking reports, several groups filed a complaint on behalf of the women and the nurses, demanding an investigation into the allegations, as well as immediate correction of such practices. *See id.*

prevent such harms from continuing, public memory must be reshaped by developing a collective memory that acknowledges events of state-sanctioned violence. As scholar Alfred L. Brophy states, "[t]his dark chapter of [] history is critical to the legal community's collective conscious, lest we again allow an administrative apparatus of the state to overshadow and obliterate our most dearly held freedoms."[208]

Of equal importance are dual considerations: what should be done to both repair the harms of the past, that have been erased from public narrative and left unaddressed, and what can be done to equip ourselves for a future that is committed to ensuring that such violence is never repeated. The marker of any just society is its willingness to bear responsibility and respond in accordance when confronted with the harm it has perpetrated. Evolution demands reflection, and reflection is the natural predecessor of accountability. We will not truly evolve as a society until we have reckoned with and made repairs for our violent history.

[208] Brophy & Troutman, *supra* note 6, at 1872.

But For and a Good Bit More: Conflicting Nexus Standards Within Asylum Law and the Role of Animus in Forced Recruitment

SINÉAD BRENNAN-GATICA

ABSTRACT

To establish eligibility for asylum, an immigrant must demonstrate that they suffered persecution "on account of" one of the five enumerated grounds, "race, religion, nationality, membership in a particular social group or political opinion." This showing is also commonly referred to as "the nexus requirement." Recent decisions by various federal Courts of Appeals highlight the ongoing debate within asylum law spaces over the appropriate analysis to find a nexus between persecution and a protected class. The analysis utilized by these Courts contrasts with precedential decisions of the Board of Immigration Appeals (BIA) and endorses a more expansive interpretation of the nexus requirement. Three notable cases—*Saban-Cach v. Attorney General*, *Chicas-Machado v. Garland*, and *Argueta-Hernandez v. Garland*—illustrate this shift in approach, rejecting the narrow interpretation of nexus put forth by the BIA.

These cases involve individuals targeted for forcible recruitment by gangs due to their religious or ethnic backgrounds. The Circuit Courts' rulings depart from the BIA's approach in gang recruitment scenarios, which largely limits nexus to situations where persecutors target the victim to punish them for having a specific trait. Rather, these rulings have found that a persecutor's coveting of a victim's protected characteristic is sufficient to establish that the persecution was *on account of* the protected characteristic, regardless of whether the goal was to punish the victim for possessing the characteristic. Even with the absence of animus in these scenarios, the courts note that the persecutors still targeted the victim *because* of the victim's protected characteristics. These decisions signal space for asylum seekers who have faced persecution by ethnocentric or religiocentric militant organizations to potentially establish a nexus to persecution on the basis of their religion or ethnicity. Despite the apparent lack of overt animus in situations where ethnocentric or religiocentric militant organizations limit recruitment to individuals who share the organizations' ethnic or religious identity, these organizations still target these victims *because* of their religious or ethnic identity. Furthermore, and similar to persecution motivated by animus toward the victim's religious or ethnic identity, these recruitment efforts threaten to control and chill the victim's religious or

ethnic expression. Given the nexus jurisprudence of these Circuit Courts, these efforts are clearly persecution on account of a protected class.

INTRODUCTION

Recent decisions from various federal Courts of Appeals have underscored the ongoing debate surrounding the nexus analysis and the role of animus in mixed motive asylum cases. In a departure from previous precedent set by the Board of Immigration Appeals (BIA), several Circuits have recently adopted a more expansive approach to establishing nexus, particularly in cases involving religion and ethnicity-based persecution claims. The but-for logic utilized by these Circuits has significant implications for individuals targeted by ethnocentric or religiocentric militant organizations, as it challenges the BIA's narrow interpretation of persecution on account of a protected characteristic. This analysis examines key rulings from the Third, Fourth, and Fifth Circuits, highlighting the shift in legal reasoning and its potential impact on asylum claims related to forcible recruitment efforts by such organizations.

The first section of this Note provides a short foundation on the roots of asylum law in the United States and the statutory definition of refugee provided for in the Refugee Act of 1980, which an asylum applicant must meet to be granted asylum. The next part of this Note maps the evolving agency and judicial interpretations of the statutory terms "persecution" and "on account of" to include more than simply an intent to harm. The following section contains a discussion on the struggle to create coherent standards for mixed motive cases and the enactment of the REAL ID Act's requirement that protected characteristics must be "at least one central reason" for the persecution an applicant experienced or fears. The next part traces the evolution of a rift in how the agencies and courts have interpreted "one central reason" and the BIA's eventual adoption of a narrow standard that amounts to "but-for and a bit more." The subsequent section contains an analysis on a series of recent decisions by various Circuit Courts, which highlights the emergence of a more expansive reading of the nexus requirement whereby courts utilize a but-for standard to find the absence of animus does not defeat the nexus establishment. The final section considers the implications of these decisions for individuals fleeing forceable recruitment efforts by ethnonationalist or religiocentric militant organizations.

I. BACKGROUND

A. International Refugee Law and the Beginnings of U.S. Asylum Law

Despite Thomas Paine's reveries that America would become "an asylum for mankind"[1] and the subsequent American collective self-image of itself as "a haven for the oppressed," [2] the United States first codified the concept of refugee in the mid-twentieth century.[3] In response to the vast number of Europeans left displaced in the aftermath of World War II, President Truman signed into law the Displaced Persons Act of 1948.[4] The Act offered sanctuary to up to 205,000 European "displaced persons" or "refugees" over two years.[5] Congress would later follow up this response with the 1953 Refugee Relief Act,[6] and other similarly ad hoc refugee admission legislation.[7] At this time, the United States immigration policy largely relied on an intensely restrictive national origins quota system to

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[1] THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE, AND OTHER WRITINGS 35 (Mark Philip ed., 1995) ("O! receive the fugitive, and prepare in time an asylum for mankind.").

[2] Joint Resolution to Authorize the Admission into the United States of a Limited Number of German Refugee Children, First Session on S.J. Res. 64 and H.J. Res. 168, (Statement of Robert Wagner, Senator) ("By long tradition America has been a haven for the oppressed.").

[3] U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968) [*hereinafter* Refugee Protocol].

[4] Displaced Persons, Refugees, and Orphans Act of June 25, 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219; CONG. RSCH. SERV. LIBRARY OF CONGRESS, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980). *See also,* ROGER WHITE, IMMIGRATION POLICY AND THE SHAPING OF U.S. CULTURE: BECOMING AMERICA, 70 (2018) ("In 1948, the Displaced Persons Act was passed . . . authoriz[ing] the entry of up to 200,000 Europeans who had suffered persecution at the hands of Germany's Nazi government."); ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952, 113 (1957).

[5] Displaced Persons, Refugees, and Orphans Act of June 25, 1948, Pub. L. No. 80-774, § 3, 62 Stat. 1009, 1010 (1948), *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219. The Act also incorporated the definition of a "displaced person" as provided for in "Annex I of the Constitution of the International Refugee Organization." *Id.* § 2(b). *See also* Constitution of the International Refugee Organization, opened for signature Dec. 15, 1946, Annex I, pt. 1, § B, 62 Stat. 3037, 3050 T.I.A.S. No. 1846 (entered into force in the United States Aug. 20, 1948) ("The term 'displaced person' applies to a person who . . . has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons."); DIVINE, *supra* note 4 ("Advising the American people that the United States could not ignore the sufferings of those uprooted by the war, the president outlined a plan to give displaced persons preferential treatment under the existing quotas.").

[6] The Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2(a), 67 Stat. 400 (1953), *amended by* 68 Stat. 1044 (1954), 50 U.S.C.A. Appendix, § 1971d. The Act applied to three categories of refugees: (1) "Refugee[s]" who hailed from non-communist countries, (2) "Escapee[s]," refugees who fled the Soviet Union, or other communist-controlled countries, and (3) "German expellee[s]," refugees forced to flee Eastern Europe because of their German ethnic origin. *Id.*

[7] *See, e.g.*, Azorean Refugee Act of 1958, Pub. L. No. 85-892, § 2, 72 Stat. 1712 (providing special non-quota visas for the victims of the earthquakes and volcanic eruptions on the Island of Fayal who "are out of their usual place of abode in such islands and unable to return thereto, and who are in urgent need of assistance for the essentials of life."); Fair Share Refugee Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504 (1960) (implementing legislatively endorsed parole status for refugee-escapees under the definition utilized in the 1957 amendment to the INA: "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion," Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (1957)).

dictate admission into the United States,[8] and so the Congressional Acts necessarily created avenues for non-quota visa allocations to those who met the varying definitions of "refugee." It was not until 1965 that Congress passed Immigration and Nationality Act Amendments,[9] which, for the first time, provided a permanent refugee admission quota.[10] More importantly, the amendments set aside 6 percent of the annual overall immigrant quota for refugees, termed "conditional entries."[11] The law defined these entrants in geographic and ideological terms as persons who fled and are unwilling to return to "any Communist or Communist-dominated country or area" or the Middle East because of persecution on account of race, religion, or political opinion.[12]

Similarly motivated by the displacement effects of World War II and the Soviet takeover of Eastern Europe, the international community reacted to the resulting humanitarian crisis by adopting a series of immigration policies. These policies included the United Nations Convention Relating to the Status of Refugees,[13] also known as the 1951 Convention, which applied only to persons who became refugees due to events occurring before that date, and eventually the 1967 Refugee Protocol, which extended protections to all persons who meet the Convention's definition of a refugee.[14]

Central to these protections was the principle of nonrefoulment, the obligation for States parties not to return an individual recognized as a refugee to a place where their life or freedom could be in jeopardy.[15] In 1968, the United States joined with the international community and ratified the U.N. Protocol relating to the Status of Refugees.[16] A decade later, Congress finally conformed with international law and adopted new protective

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[8] WHITE, *supra* note 4, at 71 ("The adoption of the national origins formula was a rational and logical method of numerically restricting immigration in such a manner as to best preserve the sociological and cultural balance in the population of the United States."); DIVINE, *supra* note 4, at 18 ("Instead of judging men by their character and ability, the new law selected immigration on the ground of their racial and national affiliations.").

[9] Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1956).

[10] *Id*. The Immigration and Nationality Act Amendments of 1965 also repealed the national origins quota system and shifted the emphasis away from nationality, race, and ethnic considerations instead onto family reunification and needed skills. *See* CONG. RSCH. SERV. LIBRARY OF CONGRESS, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980).

[11] Immigration and Nationality Act Amendments, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1956).

[12] *Id.* The amendments also required that persons be "unable or unwilling to return to such country or area" and or "uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode." *Id.*

[13] U.N. Convention on the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S 137 (entered into force in the United States Apr. 22, 1954) (recognizing a formalized definition of refugee and prescribed the series of protections and rights to which a refugee is entitled) [*hereinafter* 1951 Convention].

[14] Refugee Protocol, *supra* note 3, at Art. I § 2.

[15] 1951 Convention, *supra* note 13, at Art. 33, § 1 ("No Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[16] Refugee Protocol, *supra* note 3.

obligations through the enactment of the Refugee Act of 1980.[17] This landmark legislation, which abandoned prior geographic and ideological constraints for defining "refugees," largely established the contemporary U.S. asylum system.[18]

B. The Refugee Act of 1980

The United Nations Convention Relating to the Status of Refugees, with its subsequent amendment, defined a "refugee" as a person who possesses a "well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion," is outside their country of nationality, and is "unable or, owing to such fear, is unwilling to return to it."[19] The Refugee Act of 1980 embraced a similar definition of refugee,[20] defining it as: any person who is outside of the country of their nationality who is unable or unwilling to return to that country because of "persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion."[21] In addition to the adoption of this broad definition, the Act also provided for regular admission of refugees on an annual basis,[22] created a comprehensive framework for refugee admission and resettlement,[23] and provided the Attorney General with the authority to

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[17] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. *See also* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 SAN DIEGO L. REV. 9, 11 (1981) ("By adopting a universal approach to refugee admissions consistent with international standards and norms, the new law places primary emphasis on 'special humanitarian concerns.'").

[18] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[19] 1951 Convention, *supra* note 13, at Art. 1 § A(2); *see also*, Refugee Protocol, *supra* note 3, at Art. I § 2.

[20] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.; s*ee also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 15 (1983) ("The United States Refugee Act of 1980 abandons the earlier ideologically and geographically based definition of refugees in favour of that offered by the Convention and Protocol."); LAWYERS COMM. FOR HUM. RTS., THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 23 (1990) ("The 1951 Convention's definition of 'refugee' required a person to establish that he or she had a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'"); Anker & Posner, *supra* note 17, at 60 (1981) ("Both House and Senate sponsors emphasized that the purpose was to create a nondiscriminatory definition of refugee and to make United States law conform to the UN Convention.").

[21] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; s*ee also*, Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 386 (2014) (suggesting that the change from the Convention nexus language of "for reason of" to "on account of" was largely insignificant).

[22] Refugee Act of 1980, Pub. L. No. 96-212, § 207, 103 Stat. 103; *see also* The Lawyers COMM. for HUM. RTS., *supra* note 20, at 9.

[23] Refugee Act of 1980, § 101(b), Pub. L. No. 96-212, 109 Stat. 102 ("The objectives of this Act are to provide a permanent and systemic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."). *See also,* LAWYERS COMM. FOR HUM. RTS., *supra* note 20, at 1. Prior to the Refugee Act of 1980, the United States generally characterized refugees as only those fleeing from Communist countries or the Middle East. *See* Refugee Relief Act of 1953, Pub. L. 83-203, § 2(b), 67 Stat. 400, 400 (defining an "escapee" as someone fleeing from the Soviet Union or other Communist or Communist-dominated areas because of persecution or

grant asylum to aliens who met the statutory definition of refugee.[24] Importantly, and for the first time, the Act established the legal status of asylum and directed the creation of uniform procedures for aliens present in the United States or arriving at a U.S. border or port to apply for asylum.[25]

Section 208(b)(1) of the Immigration and Nationality Act, provides the Secretary of Homeland Security or the Attorney General discretion to grant asylum to individuals who apply for asylum in accordance with the procedures established by the immigration agencies.[26] The burden of establishing that an applicant satisfies the statutory definition of refugee falls on the applicant.[27] An asylum applicant must demonstrate that (1) they suffered past persecution or have a "well-founded fear" of future persecution; (2) the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion; and (3) they are unable or unwilling to return to, or avail themselves of the protection of, their country of nationality or (if stateless) last habitual residency because of this persecution or fear of persecution.[28]

C. Defining Persecution, Punitive Intent, and "Overcoming" a Protected Characteristic

Fundamental to the conception of asylum is the definition of persecution, which, undefined in the statute itself, has long been constructed through case law.[29] The BIA promulgated a definition for persecution in 1985, in the Board's decision in *Matter of Acosta*.[30] The respondent, a Salvadorian national, suffered severe violence at the hands of anti-

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fear thereof); Hart-Celler Act, Pub. L. 89-236, § 7, 79 Stat. 911, 913 (1965) (adding to the refugee definition people fleeing persecution "from any country within the general area of the Middle East"); Refugee Act of 1980, Pub. L. 96-212 § 201(a)(42), 94 Stat. 102, 102–03, 8 U.S.C. § 1101(a)(42) (eliminating geographical and ideological limitations on the definition of a refugee in place of the current definition).

[24] Refugee Act of 1980, § 208(b)(1), Pub. L. No. 96-212, 103 Stat. 102 ("[T]he alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)).").

[25] Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 103 Stat. 102 (describing the objectives of the Act to provide a permanent and systemic procedure for the intake of refugees into the United States). *See also,* John A. Scanlan, *Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, 5 IN DEFENSE OF THE ALIEN 23, 24–25 (1982). The main difference between an asylee and a refugee lies at the point with which they apply and gain status; a refugee is granted refugee status while outside of the United States. Conversely, an asylum seeker, who has met the requisite definition of a refugee, is granted asylee status *after* entering the United States or arriving at a port of entry. NOAH SCHOFIELD & AMANDA YAP, U.S. DEP'T HOMELAND SEC., REFUGEES: 2023, 1 (2024).

[26] *See* 8 U.S.C. §1158(b)(1)(A).

[27] *See* 8 U.S.C. § 1158(b)(3), 8 C.F.R. § 208.13(a); *See* INS v. Stevic, 467 U.S. 407 (1984) (clarifying that the "clear probability of persecution standard" applies to withholding of removal claims); Nagy, 11 I. & N. Dec. 888, 889 (B.I.A. 1966); Sihasale, 11 I. & N. Dec. 759, 760–62 (B.I.A. 1966).

[28] *See* 8 U.S.C § 1101(a)(42)(A).

[29] Acosta*,* 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985) ("[W]e presume that Congress, in using the term 'persecution' in the definition of a refugee under section 101(a)(42)(A) of the Act, intended to adopt the judicial and administrative construction of that term existing prior to the Refugee Act of 1980."), *abrogated in part by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987) .

[30] *Acosta,* 19 I. & N. 211.

government guerrillas following his founding of COTAXI, a cooperative organization of taxi drivers.[31] The Board, relying on pre-Refugee Act definitions of persecution, defined persecution to include "harm or suffering . . . inflicted upon an individual in order to *punish* him for possessing a belief or characteristic a persecutor sought to overcome."[32] In requiring an intent to "*punish,*" the Board implied that the applicant must demonstrate that their perpetrator's persecutorial actions were motivated by some punitive intent.[33] The Board then set out four elements for establishing a well-founded fear of persecution, which they elucidated further in *Matter of Mogharrabi*: "(1) the alien possesses a belief or characteristic a persecutor *seeks to overcome* in others by means of *punishment* of some sort; (2) the persecutor is already aware, or . . . could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the *inclination to punish* the alien."[34] Consistent with these decisions, the BIA promulgated a construction of persecution that focused on the subjective intention of the persecutor to inflict punishment upon the asylum applicant—thereby establishing punitiveness as a central inquiry for the establishment of persecution.

When faced with the unsatisfying limitations of a punitive-focused definition of persecution, the Board was forced to revisit the need for punitive intent when deciding *Matter of Kasinga*, some ten years later.[35] Fauziya Kasinga, a young female member of the Tchamba-Kunsuntu Tribe of northern Togo, sought asylum protections from the practice of female genital mutilation ("FGM") within her tribe.[36] She appealed the denial of her asylum application to the Board of Immigration Appeals,[37] and the BIA set out to determine if the practice of FGM constituted persecution for purposes of asylum.[38] One of the problematic characteristics of FGM, for purposes of meeting the BIA's prior definition of persecution, is the difficulty of establishing a punitive intent within the communities that practice it.[39] Often,

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[31] *Id.* at 216. Per the Board's findings, the anti-government guerrillas anonymously requested that COTAXI members participate in work stoppages—and retaliated after the COTAXI members refused. *Id*.

[32] *Id*. at 222 (emphasis added). The Board characterized the history of judicial construction of persecution to encompass two aspects: (1) the harm had to be inflicted on an individual to punish him for possessing a belief or characteristic that the persecutor wanted to overcome, and (2) the harm had to be inflicted by the government of a country or persons, or an organization that the government was unable or unwilling to control. *Id*.

[33] *Id.*

[34] *Mogharrabi*, 19 I. & N. Dec. at 446 (emphasis added).

[35] Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

[36] *Id.* at 357–58.

[37] *Id.* at 357.

[38] *Id*. at 358.

[39] *See* Gupta, *supra* note 21, at 394 (2014) ("Indeed, according to the attorney who litigated Kasinga's case, documentary evidence demonstrated that '[i]t was often midwives or elders who carried out the [genital mutilation] itself, which they believed was a positive act for the young woman and larger community,' and . . . the elders or midwives 'did not have an intent to punish for a Convention reason; to the contrary, "presumably most of . . . [them] believe that they are simply performing an important cultural rite that bonds the individual to society."'") (alterations in original) (second omission in original).

the practitioners who carry out FGM do not view its practice on young females as a punishment but rather as a cultural rite.[40] In ruling that FGM constitutes persecution, the Board agreed with the INS General Counsel's characterization that "the practice is a 'severe bodily invasion' that should be regarded as meeting the asylum standard even if done with 'subjectively benign intent.'"[41] Likely recognizing that the Board's definition to persecution as requiring "punitive intent" failed to provide protection to victims fearing FGM,[42] the BIA pivoted, stating that "many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution."[43] Instead, the Board focused on the perpetrator's intent to "overcome" some protected characteristic.[44] The Board explained its reliance on the "seeking to overcome" concept by stating that this "formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980."[45] The Board determined that the trait which FGM aimed to overcome was the "sexual characteristics of young women of the tribe" not previously subjected to FGM.[46]

Despite *In re Kasinga* and the BIA's purported shift away from a requirement of subjective intent to punish, a year later, the Ninth Circuit was called upon to overturn the BIA's denial of asylum to Alla Pitcherskaia. Pitcherskaia, a Russian woman, was subjected to involuntary psychiatric treatments and threats of institutionalization by militia in response to her suspected homosexuality.[47] The BIA denied Pitcherskaia's asylum claim, concluding that although she was credible, the involuntary psychiatric treatments and institutionalization did not constitute persecution because they were "intended to 'cure' her, not to punish her."[48] In remanding the case, the Ninth Circuit lamented the BIA's "erroneous definition of persecution,"[49] and the resulting conflation of punishment with

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[40] *Id.*

[41] *Kasinga*, 21 I. & N. Dec. at 366–67.

[42] *Id.* at 365.

[43] *Id.*

[44] *See id.* ("[W]e have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. . . . However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution.").

[45] *Id.*

[46] *Id.* at 366 ("FGM 'has been used to control woman's sexuality.' It also is characterized as a form of 'sexual oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'") (quoting NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 42 (Gloria Jacobs ed., 1993)). *But cf.* Lori Leonard, *"*We Did It for Pleasure Only*"*: Hearing Alternative Tales of Female Circumcision, 6 QUALITATIVE INQUIRY 212, 214, 223 (2000) ("They say female circumcision is about patriarchy. And women are not circumcised, they are mutilated. Circumcision is a way for men to control women, to make sure they are virginal, clean, pure, obedient, faithful, chaste. . . . I told them stories from Myabé—how girls were first circumcised around 1980, how they organized themselves to do it, how their parents and the chief of the land felt about it.").

[47] Pitcherskaia v. INS, 118 F.3d 641, 644 (9th Cir. 1997).

[48] *Id.* at 645.

[49] *Id.* at 648 n.6 ("This erroneous definition of persecution infected much of the Board's analysis.").

persecution.[50] The Court instead opted for an objective definition of persecution previously promulgated by the Ninth Circuit——"the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[51] The Court noted that whether "the persecutor inflicts the suffering or harm in an attempt to elicit information, . . . for his own sadistic pleasure, . . . to 'cure' his victim, or to 'save his soul' is irrelevant. Persecution by any other name remains persecution."[52] Despite the Ninth Circuit's reaffirmation of *Kasinga*'s less restrictive definition of persecution, and the shifting of the focus away from the subjective intent of the persecutor and towards the protected characteristics of the victim,[53] the Court retained, as central to the inquiry of persecution, a persecutor's desire to "get rid of" or "overcome" the protected trait. The Court devalued the subjective intent of the persecutor while not entirely disavowing the role of the persecutor's intent to rid the asylee of a particular trait. In essence, the court's definition remained only one step removed from the punitive-intent-centered definition originally put forth by the BIA in *Matter of Acosta*.[54]

D. Nexus, the REAL ID Act, and "One Central Reason"

While the concept of persecution is central to relief under the INA, it is equally necessary that any claim meet the additional elements of INA protection: that "persecution" be "on account of" one of the five enumerated grounds, "race, religion, nationality, membership in a particular social group, or political opinion."[55] The "on account of"[56] language included in the statutory definition of a "refugee"[57] has been read to require a connection between the persecutor, the persecution suffered, and membership in the protected social group.[58] This showing is also commonly referred to as "the nexus requirement."[59] While the logical linkage of the nexus rule may seem uncomplicated, in practice, courts have struggled to interpret the degree of connection necessary to establish a nexus. This is especially so in "mixed

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[50] *Id.* at 646 ("Neither the Supreme Court nor this court has construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm."); *Id.* at 647 (describing how the tests outlined in *Acosta* & *Mogharrabi,* to establish a well-founded fear of persecution, "confuse[] punishment and persecution.").

[51] *Id.* (omission in original) (quoting *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir.1997) (citing *Sagermark,* 767 F.2d at 649)).

[52] *Pitcherskaia*, 118 F.3d at 647.

[53] *Id.*

[54] Acosta, 19 I& N Dec. 211, 222–23 (B.I.A. 1985), *abrogated in part by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[55] 8 U.S.C. § 1101(a)(42)(A).

[56] Note that while the U.S. definition of refugee uses the language "on account of," the 1951 Convention uses the language "for reasons of." *Compare* 1951 Convention, *supra* note 13, *with* 8 U.S.C. § 1101(a)(42)(A).

[57] *See* 8 U.S.C. § 1101(a)(42)(A).

[58] *See* INS. v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992) (requiring evidence of the motive of the persecutor to prove that the asylum seeker was being persecuted on account of a protected ground).

[59] DAVID MARTIN & GERALD SEIPP, ASYLUM CASE LAW SOURCEBOOK § 2:2 (24th ed. 2024).

motive" cases, where an actor may be motivated by a combination of both nonprotected and protected reasons for the persecution.

In the 1992 Supreme Court case, *INS v. Elias-Zacarias*, the Court constrained an asylum applicant's ability to establish persecution on account of political opinion based on the applicant's refusal to join a guerilla organization.[60] The court held that Elias-Zacarias's fear of persecution was not "on account of . . . political opinion," because he both failed to prove that (1) his refusal to join was an expression of political opinion, and (2) the guerillas "persecute[d] him *because of* that political opinion, rather than because of his refusal to fight with them."[61] In reaching this holding, and recognizing that a persecutor's acts of harm may be influenced by a variety of motives, the Supreme Court evaluated the "on account of" language in the statute and determined that a showing of fear of persecution required *some* evidence that the persecutor was motivated by the protected trait of the victim.[62] Given the potential that the guerillas were motivated to "augment their troops[,] rather than to show their displeasure,"[63] the court determined that to establish persecution "on account of" political opinion, a refugee must show that the persecutors were motivated to harm the refugee by more than simply the refugee's resistance to their forced recruitment. In essence, the Court's decision precluded claims of asylum if the persecution inflicted by guerillas or gangs occurred only as a reaction to the applicant's refusal of the recruitment efforts. Notably, this did not preclude claims where the non-state actors had other motives, *in addition* to forceable recruitment efforts, for which to target the applicant.

Four years later, the BIA would further explicate the implications of mixed motive persecution in *Matter of S-P-*,[64] recognizing that "[p]ersecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not."[65] In *Matter of S-P-*, the Board determined that an asylum seeker who had been detained and subjected to torture by the Sri Lankan military on suspicion of aiding rebels had also effectively demonstrated that the perpetrators were partly driven because they believed the applicant to be a political opponent.[66] The Board established the standard of review for mixed motive cases is one which assesses "whether the applicant has produced evidence from which it

[60] INS. v. Elias-Zacarias, 502 U.S. 478 (1993)

[61] *Elias-Zacarias*, 502 U.S. at 482–83.

[62] *Id.* at 483 ("We do not require [direct proof]. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.").

[63] *Id.* at n.2.

[64] S-P-, 21 I. & N. Dec. 486 (B.I.A. 1996).

[65] *Id.* at 489.

[66] *Id.* at 497 ("Although there was interrogation and an attempt to gain information in each case, an additional underlying reason for the abuse was the belief that the victim held political views opposed to the government.").

is reasonable to believe that the harm was motivated [*in part*] by a protected ground."[67]

Congress acted to codify and partly modify the rulings of *I.N.S. v. Elias-Zacarias* and *Matter of S-P-* on May 11, 2005, when it passed the REAL ID Act,[68] which included an amendment to the asylum statute addressing mixed motive cases.[69] The Act provided that, for an applicant to demonstrate that they are a refugee, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least *one central reason* for persecuting the applicant."[70] Consistent with prior case law,[71] Congress acknowledged that refugees may experience persecution for multiple reasons, but emphasized as relevant the degree to which the protected ground motivated the persecutor's actions.[72] While *Matter of S-P-* held that the protected ground only needed to be a part of the persecutor's motivation, the REAL ID Act stipulated that the ground needed to be a "central" reason.[73]

II. A RIFT IN DEFINING "ONE CENTRAL REASON": THE BIA'S *BUT-FOR* & *A GOOD BIT MORE* APPROACH

Although the REAL ID Act established a "one central reason" requirement, the Act did not define "one central reason" or clarify how to determine if a reason is "central." This lack of clarity gave room for differing

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[67] *Id.* at 490, 496 ("[W]e find that the applicant has produced evidence from which it is reasonable to believe that those who harmed him were *in part* motivated by an assumption that his political views were antithetical to those of the Government." (emphasis added)).

[68] REAL ID Act of 2005, Publ. L. No. 109-12, 119 Stat. 305.

[69] *Id.* § 101(2), 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). These Amendments were in response to a string of Ninth Circuit decisions establishing that applicants in mixed motive asylum claims need to only "produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground." Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999); *see also* Briones v. INS, 175 F.3d 727 (9th Cir. 1999) (en banc) (remanding for a determination of the applicant's credibility after holding that the mixed motives presented could be sufficient grounds for asylum); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995) (finding that persecutors might have more than one motive, and "so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied."); H.R. Rep. No. 109-72, at 163 (2005) ("Ninth Circuit decisions . . . have substantially undermined a proper analysis of mixed motive cases.").

[70] 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added).

[71] *See* INS v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992); *S-P-*, 21 I. & N. Dec. at 489 ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases.").

[72] REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B). *See also* J-B-N- & S-M-, 24 I. & N. Dec. 208, 212 (B.I.A. 2007) ("During conference on the bill, this language was modified to become 'at least one central reason,' the final version of the REAL ID Act. That language thus confirms that aliens whose persecutors were motivated by more than one reason continue to be protected under section 208 of the Act if they can show a nexus to a protected ground." (footnote omitted)).

[73] REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B); *S-P-*, 21 I. & N. Dec. at 489, 496 (finding that "[p]ersecutors may have differing motives for engaging in acts of persecution" and the applicant must show that the persecutors were *in part* motivated by the protected characteristic.); *see also* H.R. Rep. No. 109-72, at 163 (2005) (specifically rejecting a series of Ninth Circuit cases which required that the protected ground have motivated the persecutor "at least in part" and arguing that it "undermined a proper analysis of mixed motive cases.").

interpretations of when a protected ground is "central" enough to a persecutor's motivation to satisfy the "persecution on account of a protected class" element of INA's protection.[74] This section traces the BIA's advancement of a series of decisions which offered an increasingly narrow interpretation of "one central reason," and the responses that both the statutory provision and the BIA's approach received from Circuit Courts.[75]

The BIA first attempted to clarify the meaning behind the "one central reason" requirement two years after the REAL ID Act, in *Matter of J-B-N- & S-M-*.[76] Unpacking this new statutory requirement, the Board considered the statutory language of "at least one central reason" against the backdrop of previous "mixed motive" case law.[77] In particular, the Board noted that the use of "*at least*" when referring to "one central reason" supported the BIA's previous determination that persecutor need not be solely motivated by the protected characteristic.[78] While concluding that the REAL ID Act represented only a partial departure from *Matter of S-P-*,[79] the BIA in *J-B-N- & S-M-* held that under the "one central reason" standard, "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. . . . [I]t cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecut[ion]."[80]

When similarly called upon to address the meaning of a "central reason" in *Parussimova v. Mukasey*, the Ninth Circuit would go on to agree with the Board's interpretation that the term "central" required that the protected ground play more than "a minor role" in the mistreatment.[81] It noted that "a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist."[82] However, the Court also noted that because there may be multiple central reasons for persecution, "an asylum applicant need not prove which reason was

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[74] *See* H.R. Rep. NO. 109–72, at 161 (2005) ("As there are no explicit evidentiary standards for granting asylum in the INA, standards . . . have evolved through the case law of the Board of Immigration Appeals (BIA) and federal courts. . . . [And] different results have been reached in similar cases, depending on the court that hears the case.").

[75] Note that many of the BIA and Circuit decisions discussed below involve applicants claiming persecution on account of "membership to a particular social group," and, more particularly, to applicants claiming persecution on account of family membership. Statutorily, there is no distinction between the mixed-motive nexus standard for a particular social group of "family membership" as opposed to any of the other protected classes.

[76] *See* J-B-N- & S-M-, 24 I. & N. Dec. 208 (B.I.A. 2007).

[77] *Id.* at 212–13.

[78] *Id.* at 213; *see S-P-*, 21 I. & N. Dec. at 489 ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. . . An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur.").

[79] *J-B-N- & S-M-*, 24 I. & N. Dec. at 214 ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.").

[80] *Id.*

[81] Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009) (quoting *J-B-N- & S-M-*, 24 I. & N. Dec. at 214).

[82] *Id.* at 741.

dominant."[83] The Board would subsequently go on to agree with this Ninth Circuit elucidation of the REAL ID mixed motive standard in the Board's decision in *Matter of N-M-*.[84]

The Fourth Circuit continued to build on the mixed motive nexus inquiry, utilizing a "but-for" standard to establish centrality, which the BIA would—in later decisions—disavow.[85] For example, when considering the death threats Maydai Hernandez-Avalos received from Mara-18 gang members after she refused to permit her twelve-year-old son to join the gang, the Fourth Circuit utilized a but-for logical stream to hold that "Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son."[86] In its analysis of the nexus requirement, the Fourth Circuit considered the critical question, "why she, and not another person, was threatened'?"[87] Under this view, if an applicant's membership to a protected group explains why the applicant, as opposed to anyone else, was targeted for persecution, then the applicant had satisfied the nexus requirement. The Fourth Circuit continued to use this framing of the centrality requirement in the various nexus cases that followed.[88]

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[83] *Id.*

[84] *N-M-*, 25 I. & N. Dec. at 531 (citing *Parussimova*, 555 F.3d at 741) (holding that in cases arising under the REAL ID Act, the "protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. . . . [A]n alien must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist.").

[85] *See* L-E-A-, 27 I. & N. Dec. 40, 46 n.3 (B.I.A. 2017) (noting the Fourth Circuit's application of the nexus inquiry departs from the BIA's version).

[86] Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) (noting the protected ground at the heart of this case was membership to the particular social group of family, and/or kindship.).

[87] *Id.*

[88] *See, e.g.*, Cruz v. Sessions, 853 F.3d 122, 130 (4th Cir. 2017), as amended (Mar. 14, 2017) ("[W]e hold that any reasonable adjudicator would have been compelled to conclude that Cantillano Cruz's membership in Martinez's nuclear family was a central reason *why she, and not another person,* repeatedly was persecuted by Avila over a two-year period." (emphasis added)); Zavaleta-Policiano v. Sessions, 873 F.3d 241, 250 (4th Cir. 2017) (holding that Zavaleta Policiano had satisfied the nexus requirement because "Zavaleta Policiano's relationship to her father is why she, rather than some other person, was targeted for extortion."); Diaz-Velasquez v. Barr, 779 F. App'x 154, 158 (4th Cir. 2019) ("We hold that the record in this case, measured against our binding precedent, compels the conclusion that family membership was 'at least one central reason' why Diaz-Velasquez, and not some other person, was targeted by MS-13, and therefore reverse the agency's contrary determination."); Salgado-Sosa v. Sessions, 882 F.3d 451, 458 (4th Cir. 2018) ("There is no meaningful distinction between whether Salgado-Sosa was threatened because of his connection to his stepfather, and whether Salgado-Sosa was threatened because MS–13 sought revenge on him for an act committed by his stepfather. However characterized, Salgado-Sosa's relationship to his stepfather (and to his family) is indisputably 'why [he], and not another person, was threatened' by MS–13." (alteration in original) (citation omitted)); Alvarez Lagos v. Barr, 927 F.3d 236, 250 (4th Cir. 2019) ("[A]s we have repeatedly emphasized, it is enough that the protected grounds be '*at least one* central reason' for the persecution — that is, one central reason, perhaps 'intertwined' with others, 'why [the applicant], and not some other person, was threatened.'" (alteration in original) (citation omitted); Perez-Morales v. Barr, 781 F. App'x 192, 196 (4th Cir. 2019) ("Rather than focusing on the persecutors' reasons for targeting the *group*, we ask whether membership in the group explains the decision to target the *applicant* instead of someone else."); Perez Vasquez v. Garland, 4 F.4th 213, 225 (4th Cir. 2021) ("The *actual, undisputed facts* in this case indicated that

In 2017, the BIA rejected the Fourth Circuit's approach in its precedential decision of *Matter of L-E-A-*,[89] where it attempted to refine the centrality requirement. When considering a family-based persecution claim, the Board noted that "the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground."[90] The Board determined that the cartel did not target the son of the shopkeeper who had refused to sell the cartel's contraband because of his family membership, but rather, the cartel was motivated by a desire to increase its profits by selling contraband in the store.[91] "Any motive to harm the respondent because he was a member of his family was, at most, incidental."[92] Several other Circuit Courts have chosen to follow the BIA's approach.[93]

Recognizing the rift between the Board's approach and that of the Fourth Circuit, in 2018, the Attorney General's office ("AG") stepped in and attempted to redress this perceived "lack of statutory guidance," first in a 2018 decision, *Matter of A-B- I*,[94] and then more explicitly in a 2021 decision *Matter of A-B- II*.[95] In *Matter of A-B- I*, Attorney General Sessions noted that a key element for establishing persecution was "an intent to target a belief or characteristic" of the victim.[96] The opinion further provided that a "criminal gang may target people . . . simply because the gang inflicts violence on those who are nearby," which would not mean the victims were "targeted 'on account of' their membership in any social group."[97]

In *Matter of A-B- II*, Acting Attorney General Rosen attempted to clarify the requirements to establishing a nexus.[98] He framed his re-review of the matter as providing guidance to "whether a protected ground must be more than a but-for cause in order to be at least 'one central reason' for persecuting an asylum applicant."[99] The Attorney General specifically

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Petitioner's familial relationship to her husband—that is, her membership in her nuclear family—was at least one central reason why the gang targeted her for extortion.").

The Seventh Circuit seemingly adopted the Fourth Circuit's but-for framing. *See* Gonzalez Ruano v. Barr, 922 F.3d 346, 356 (7th Cir. 2019) (holding that a husband's familial relationship to his wife was "the reason he, and not someone else, was targeted").

[89] *See* L-E-A ("*L-E-A- I*"), 27 I. & N. Dec. 40, (B.I.A. 2017). *L-E-A- I* was subsequently vacated by Attorney General Bar and replaced with a far more restrictive decision. L-E-A- ("*L-E-A- II*"), 27 I. & N. Dec. 581 (A.G. 2019). However, following an administrative change in 2021, Attorney General Garland vacated *L-E-A- II*, which left *L-E-A- I* as undisturbed precedent. L-E-A- ("*L-E-A- III*"), 28 I. & N. Dec. 304 (A.G. 2021).

[90] *L-E-A- I*, 27 I. & N. Dec. at 45.

[91] *Id.* at 46. The BIA noted, in a footnote, the Fourth Circuit's application of the "centrality" on these "particular social group" cases diverged from its own nexus jurisprudence. *Id.* at 46 n.3.

[92] *Id.*

[93] *See generally, e.g.*, Orellana-Recinos v. Garland, 993 F.3d 851 (10th Cir. 2021).

[94] A-B- ("*A-B- I*"), 27 I. & N. Dec. 316 (A.G. 2018).

[95] A-B- ("*A-B- II*"), 28 I. & N. Dec. 199 (A.G. 2021).

[96] *A-B- I*, 27 I. & N. Dec. at 337.

[97] *Id.* at 339.

[98] *A-B- II*, 28 I. & N. Dec. at 200 ("I am referring and reviewing this matter to provide additional guidance concerning [] recurring issues in asylum cases involving applicants who claim persecution by non-governmental actors on account of the applicant's membership in a particular social group.").

[99] *Id.*

addressed the Fourth Circuit's but-for approach, arguing that "[e]ven if the protected characteristic is only used opportunistically, the Fourth Circuit appears to believe that a causal relation is sufficient to establish nexus as a matter of law."[100] The AG went on to require more than a but-for causal link between the persecution and the social group.[101] He argued that because the United States Supreme Court has established that the term "on account of" in cases involving anti-discrimination laws is synonymous with a but-for standard,[102] and because Congress chose to add the language "at least one central reason for persecuting the applicant," this addition must have been intended to create a "more than but-for causation" requirement.[103]

Attorney General Rosen, in *Matter of A-B- II*, further expressed support for the BIA's utilization of the version of the but-for test as described in *Matter of L-E-A-*, and stated that "[t]o establish the necessary nexus, the protected ground: (1) must be a but-for cause of the wrongdoer's act; and (2) must play *more* than a minor role—in other words, it cannot be incidental or tangential to another reason for the act."[104] Attorney General Rosen went on to describe that in *Matter of L-E-A-,* the Board defined "incidental" to include situations where the "wrongdoer has no animus against the protected characteristic, and the only significance of the protected characteristic to him is as a means to an end."[105] In such instances, the protected characteristic becomes only "incidental" to the persecutor's motivation.[106] By clarifying the two-prong test from *Matter of L-E-A-* and defining "incidental" as requiring a showing of "animus" so to be more than "as a means to an end," the Board added an additional step to the but-for inquiry.[107] As such, the Attorney General's decision in *Matter of A-B- II* flatly rejected the Fourth Circuit's but-for standard in favor for one that required *a bit more*.

This language, and the emphasis on animus, is reminiscent of earlier BIA precedent, where the Board required a malignant intent to establish persecution.[108] As the Ninth Circuit extrapolated in *Pitcherskaia v. INS*, the distinction between punishment and persecution lies in a difference of vantage points—looking at the perpetrator's reasoning as opposed to looking

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[100] *Id.* at 209.

[101] *Id.* at 211.

[102] Although the Supreme Court has not ruled on the meaning of "on account of" within the INA statute, the Attorney General cites a series of Supreme Court employment discrimination cases as standing for the premise that the proper principle of causation is but-for. *Id.*; *see* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (noting that a proper principle of causation for "because" is "but-for"); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (utilizing statutory construction and, in particular, dictionary definitions of "because of" in an ADEA suit to note that "because of" is defined as "by reason of" and "on account of" and therefore they all denote but-for causation).

[103] *A-B- II*, 28 I. & N. Dec. at 211.

[104] *Id.* at 208 (emphasis added).

[105] *Id.* at 209.

[106] *Id.*

[107] *Id.*

[108] *See* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997); Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

at their result. "Punishment" implies that the perpetrator believed the victim committed some wrong, whereas "persecution" simply requires that the perpetrator has caused the victim harm.[109] As noted above, in *Kasinga*, the BIA affirmed that persecution does not require "punitive" or "malignant" intent.[110] Of course, the AG's purpose in *A-B- II* was not to define persecution, but rather to determine the significance of the REAL ID Act's inclusion of "central" within the refugee query. Regardless, the Attorney General's requirement of "animus" to find that membership in a protected group is "central" to a persecutor's motive shifts the Board's previous emphasis of a "malignant" or "punitive" intention from the "persecution defining" stage of analysis to the "on account of" stage. Using nuanced logic, the Board appears to be saying that persecution can occur even when a persecutor is not motivated by "punitive" or "malignant" feelings towards the protected class. However, to show that the protected class was one central reason for the persecution, the victim must show that the persecutor held "animus" or "malignant feelings" towards the protected characteristic.

The change in Administration following the 2020 presidential elections led to a re-consideration of this issue. Under President Biden, Attorney General Merrick Garland vacated *Matter of A-B- I* and *A-B- II*.[111] The decision instructed Immigration Judges and the BIA to follow pre-*A-B- I* precedent when adjudicating cases. In particular, the decision concluded that *Matter of A-B- II* had not been promulgated following a "thorough consideration of the issues involved."[112] Attorney General Garland decided to readdress the issues in "forthcoming rulemaking, where they can be resolved with the benefit of a full record and public comment."[113] However, since the 2020 vacation of the matter the Attorney General has not issued rules to address the issue.

More recently, in December 2023, the BIA again interpreted nexus utilizing *Matter of L-E-A-*'s two-prong analysis in *Matter of M-R-M-S.*[114] Despite the Board designating this decision as precedential, the opinion provides very little of the underlying facts, merely saying that the asylum applicants were Mexican citizens and members of a family who were forced off their land by a cartel.[115] The Immigration Judge denied the respondents' asylum claim because they failed to demonstrate a nexus between their persecution and their membership in the proposed particular social group of

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[109] *Pitcherskaia,* 118 F.3d at 647–48 ("Although we have held that unreasonably severe punishment can constitute 'persecution,' 'punishment' is neither a mandatory nor a sufficient aspect of persecution." (citation omitted)).

[110] *Kasinga*, 21 I. & N. Dec. at 365 ("[M]any of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution.").

[111] A-B- ("*A-B- III*"), 28 I. & N. Dec. 307, 307 (A.G. 2021).

[112] *Id.* at 309.

[113] *Id.*

[114] M-R-M-S-, 28 I. & N. Dec. 757, 763 (B.I.A. 2023).

[115] *Id.* at 757–58.

their family membership.[116] The judge instead reasoned that the cartel targeted the family members out of a desire to control the family's land but was not motivated by their family membership.[117]

On appeal, the BIA took a position largely reminiscent of that outlined in *Matter of A-B- II* and noted that: "To be successful in an asylum claim based on family membership, an applicant must demonstrate that the persecutor's motive for the harm is a desire to overcome the protected characteristic of the family or otherwise based on animus against the family."[118] The Board opined that family-based claims of persecution by gangs are generally rejected, as courts view the family relationship as, "at most, incidental or tangential to more commonplace goals including financial gain and furthering, or preventing interference in, a criminal enterprise."[119] Relying on the reasoning introduced in *Matter of L-E-A-*, the Board determined the family membership was "tangential" because the record did not contain evidence that the cartel harbored specific animus against the Respondent's family for reasons other than their land ownership.[120] The Board honed in on the motives behind the cartel's actions and assigned "the impetus of [the Cartel's] conduct" as being a desire to control the family's land, rather than the family itself.[121] The Board suggested that even when a victim is persecuted because of their family membership and would not have been targeted but-for their family membership, this motivation becomes tangential if the persecutor only targeted the victim to achieve a different goal. [122]

III. BUT-FOR VERSUS BUT-FOR & A GOOD BIT MORE: "INCIDENTAL" AND THE ROLE OF PERSECUTION AS REQUIRING ANIMUS OR OVERCOMING A PROTECTED CHARACTERISTIC

Recent decisions of various Circuit Courts highlight the continuation of conflicting approaches taken to the nexus analysis and the role that animus

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[116] *Id.* at 758.

[117] *Id.* at 760 It is noteworthy that this case for withholding of removal comes from the Tenth Circuit, a circuit that has largely adopted the Board's interpretation of the "one central reason" standard.

[118] *Id.*

[119] *M-R-M-S-*, 28 I. & N. Dec. at 760.

[120] *Id.* at 762–63. It cannot be ignored that the Board did not provide specifics as to what the record contained, aside from generally alluding to Cartel actions to disposes land from a family. *Id.* at 757–58. In fact, the factual and procedural history section is relatively short: "The respondents are natives and citizens of Mexico, where they lived together with the lead respondent's grandson. A criminal cartel forced them off their land because the cartel wanted the land for its own purpose. The cartel killed the lead respondent's grandson for unknown reasons, although the respondents believed it was related to the cartel's efforts to obtain their land. The cartel also forced other families off land in the same area." *Id.* at 757–58

[121] *Id.* at 763.

[122] *Id.* at 762. This language largely echoes, *Matter of A-B-II*'s definition of incidental as being when a "wrongdoer has no animus against the protected characteristic, and the only significance of the protected characteristic to him is as a means to an end." *A-B- II*, 28 I. & N. Dec. 199, 209 (2021).

plays in mixed motive cases.[123] In a recent turn of events, four Circuits tackling guerilla recruitment and religion- or ethnicity-based persecution claims have chosen to apply a broader but-for nexus standard than that promulgated by the BIA. Specifically, these Circuits have rejected the BIA's requirement that a persecutor must harbor direct "animus" or a desire to "overcome the protected characteristic," in order to establish that a persecutor's motive is more than "a means to an end" and therefore "one central reason" for the persecution.[124] The implications of these Courts' logic, particularly the rejection of an "animus" or "overcoming" requirement in the nexus inquiry, raises questions as to the potential applicability of this but-for approach in the context of forcible gang recruitment by ethnocentric or religiocentric militant organizations.[125] The following section will briefly outline and describe the importance of a series of recent decisions of the Third, Fourth, Fifth, and Eleventh Circuits. Each of these decisions utilize a but-for logic to find the applicants had established nexus between their persecution and their protected characteristic, even in cases where the persecutors did not harbor overt animus towards the applicant's protected characteristic. After that, I will discuss the potential applicability of this nexus to aid victims of forceable recruitment efforts by ethnocentric or religiocentric militant organizations in establishing the requisite nexus to their persecution.

A. Using Saban-Cach as "Bait": Indigenous-ness as More Than Incidental

On January 25, 2023, the Court of Appeals for the Third Circuit issued a ruling in *Saban-Cach v. Attorney General*.[126] Selvin Heraldo Saban-Cach, a Guatemalan of Kaqchikel Mayan Indigenous ethnicity, was persecuted at the hands of a local gang associated with the international MS-13 gang.[127] Saban-Cach was targeted for recruitment because the gang believed that they could use him—in particular—his Indigenous identity as "bait."[128] Saban-Cach testified that he, his grandmother, parents, and siblings were the only Indigenous people living in Montufar[129] and that the gang members aggressively pursued him out of a desire to take advantage of his Indigenous status.[130] Gang members harassed, beat, and insulted Saban-Cach in an

[123] *See* discussion *infra* Sections IV.A–D.

[124] *See* discussion *infra* Sections IV.A–D.

[125] Asylum claims related to gangs have been submitted by individuals who actively resist recruitment and gang-associated activities. *See* Shane Dizon & Pooja Dadhania, *Gang-Related Asylum Claims*, IMMIGR. L. SERV. 2d. (West) §10:163 (2024). Within immigration proceedings, these types of asylum applicants encounter challenges in establishing the basis for their asylum claims and establishing the nexus between their gang resistance and the persecution they have experienced or anticipate facing due to the forced recruitment efforts against them. *Id.* Additionally, they struggle to demonstrate that the government is either unwilling or unable to provide them with adequate protection. *Id.*

[126] Saban-Cach v. Att'y Gen., 58 F.4th 716, 721 (3d Cir. 2023).

[127] *Id.* at 720–22.

[128] *Id.* at 732.

[129] *Id.* at 720 n.1.

[130] *Id.* at 732.

attempt to coerce him into joining the gang.[131] The gang members warned Saban-Cach that he would continue to be beaten until he agreed to join their faction of the MS-13 gang.[132] Despite attempting to relocate within Guatemala, Saban-Cach was unable to escape the attacks from gang members.[133] He eventually fled Guatemala and entered the United States in 2015.[134] Saban-Cach also testified that his immediate family members had been subjected to assaults by gang members angered by Saban-Cach's escape.[135]

The Immigration Judge found Saban-Cach's testimony to be credible but held that he had failed to establish a likelihood of persecution and determined that even if the harm rose to the level of persecution, Saban-Cach had not established that the persecution was "on account of" a protected ground.[136] The Judge found that "while the gang may have sought the respondent's race as being useful to their agenda, the gang only harmed [him] when [he] refused to succumb to those recruitment efforts."[137] As such, the Judge determined that even though the gang viewed Saban-Cach's Indigenous status as desirable for their aims, Saban-Cach was not harmed on account of his being Indigenous but rather because he refused to join.[138] On appeal, the BIA affirmed the rulings of the Immigration Court.[139]

Following a careful review of the record, the Third Circuit disagreed with the Immigration Court and BIA's analysis, vacated the decision, and remanded the case.[140] The Circuit Court found that Saban-Cach had established membership to a particular social group as an Indigenous person in Guatemala,[141] and highlighted Saban-Cach's testimony that the gang wished to recruit him as "bait."[142] The Court reasoned that Saban-Cach had "established membership in a particularized group as evidenced from the

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[131] *Id.* at 720–21. The Third Circuit Court notes that "[t]he gang began to harass and act aggressively toward Saban-Cach, including insulting him based on his ethnicity. Gang members threw stones at him and kicked him. His father stated that '[m]any times [Saban-Cach] came home with cuts and bruises from getting beaten up by [the gang].'" *Saban-Cach*, 58 F.4th at 720. The record further provides that "Saban-Cach was physically attacked on at least four occasions, and he was threatened numerous other times." *Id.* at 728.

[132] *Id.*

[133] *See id.* at 721 ("Saban-Cach showed the Immigration Judge multiple scars from these attacks. These scars are on his right eyebrow, mid chest, right arm, and lower back.").

[134] *Id.* at 722.

[135] *Id.* ("Saban-Cach testified that, after he left Guatemala, the gang kidnapped, beat, and raped his 16-year-old sister. They held her at a house for more than a month. 'The gang members told her that since [Saban-Cach] escaped[, his] family was going to have to pay.'").

[136] *Saban-Cach*, 58 F.4th at 722.

[137] *Id.* at 723.

[138] *Id.*

[139] *Id.* It is notable that the BIA, agreed with the IJ, and found that Saban-Cach had not established a likelihood of persecution. *Id.* Hedging its analysis at this point, the Board declined to address the remaining issues, "including whether [the] proposed particular social group was cognizable and whether [Saban-Cach] demonstrated the requisite nexus between past harm and future fear and a protected ground under the Act." *Id*. at 731.

[140] *Saban-Cach*, 58 F.4th at 737.

[141] *Id.* at 731–32.

[142] *Id.* at 732.

gang's persecution of him for refusing recruitment that was attempted *because* he was of Kaqchikel Mayan indigenous ethnicity."[143] Therefore, the Court's analysis acknowledged the root cause of Saban-Cache's persecution—the gang member's desire to recruit Saban-Cach *because* he was an Indigenous young man—established a central reason for the persecution that followed when he refused to join.[144] Under the BIA's theory, Saban-Cach's indigenous status likely would have been viewed as merely "incidental" to the harm, and the gang's desire to use Saban-Cach as "bait" in his capacity as an indigenous man, demonstrated they possessed "no animus against the protected characteristic" or any desire to "overcome" this characteristic and instead appeared to view this characteristic as simply a "means to an end."[145] By rejecting this framing, the Third Circuit appeared to step away from the reasoning of *Matter of L-E-A* and the now-vacated *Matter of A-B-* to utilize a more lenient but-for standard when considering the nexus between the gang's motivation and Saban-Cach's protected class.

B. Using Chicas-Machado as a Scout: Chilling religious expression

The Fourth Circuit similarly addressed a situation where the persecutor viewed the victim's protected class as an asset or desirable trait in *Chicas-Machado v. Garland*.[146] Odalis Mireida Chicas-Machado, a citizen of El Salvador and devout evangelical, was repeatedly harassed by MS-13 gang members between 2015 and 2016.[147] In 2016, gang members attempted to recruit Chicas-Machado and threatened her with death.[148] The gang demanded that Chicas-Machado notify them of when a police car passed by "because no one would suspect she would be working with the gang based on her activity and conduct with the church."[149] Although the Immigration Judge found Chicas-Machado to be credible, the Judge determined that she had not met the nexus requirement because she failed to establish that her persecution occurred *on account of* her religion.[150]

On appeal, the BIA affirmed the Immigration Judge's opinion and found that Chicas-Machado's "evangelical Christian faith was tangential to the gang's motivation for threatening her."[151] The Board determined that the gang members saw Chicas-Machado as "an asset they could exploit to further their criminal enterprise."[152] They noted that because the gang's persecution "was not motivated to *stop or hinder* her from practicing her

[143] *Id.*
[144] *Id.*
[145] *See A-B- II*, 28 I. & N. Dec. 199, 209 (A.G. 2021); *Saban-Cach*, 58 F.4th at 732.
[146] Chicas-Machado v. Garland, 73 F.4th 261 (4th Cir. 2023).
[147] *Id.* at 263–64 (also noting that Chicas-Machado worked as secretary of the Pentecostal Church in her community).
[148] *Id.* at 264.
[149] *Id.* at 264–65.
[150] *Id.* at 264.
[151] *Id.* at 274 (Agee, J., concurring in part and dissenting in part).
[152] *Id.* at 266 (majority opinion).

religion," Chicas-Machado had not established the requisite nexus between the persecution and her religion,[153] and, as a result, her persecution was not on account of her religion.[154] The Board's determination that the gang's attempted exploitation of Chicas-Machado's religion was "tangential" because the gang harbored no animus towards her religion similarly mirrors the "means to an end" framework provided in *Matter of L-E-A* and *Matter of A-B-II*.[155]

In reversing the BIA decision, the Fourth Court maintained its tradition of a broader but-for nexus application and rejected "excessively narrow readings" of the "on account of" requirement.[156] The Court cited the but-for approach it previously outlined in *Hernandez-Avalos v. Lynch*,[157] and noted that nexus and the one central reason standard "do[] not depend on the *ultimate goal* of the persecutors or on *why* the protected ground led them to persecute an applicant,"[158] rather it requires a showing of that Chicas-Machado's religious practice is why she, and not some other person, was targeted.[159]

Additionally, the opinion identified harms resulting from the targeted forced recruitment efforts by the MS-13 gang members, even when the gang members viewed her religious expression as an asset. The Court noted that "[b]eing coerced by death threats to assist a gang because its members view her religiosity as an asset is plainly a 'serious measure[] of discrimination.'"[160] The dissenting opinion disagreed that Chicas-Machado was persecuted on account of her religion and confined religious persecution cases to those where the persecutor intended to "restrict[] or suppress[]" the victim's ability to partake in their religious activities.[161] The dissent took issue with the view that Chicas-Machado suffered religious persecution because, rather than suppressing her practice—the classic religious persecution claim—here, the gang desired to encourage Chicas-Machado's practice.[162] However, the majority recognized that even in instances where gang members viewed a protected characteristic as an asset and sought to encourage it, individuals would likely experience a chilling effect on their protected characteristics as they attempted to make themselves out to be less desirable recruits.[163] The majority noted that these chilling effects,

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[153] *Chicas-Machado,* 73 F.4th at 269.

[154] *Id.* at 264.

[155] *See id.*, at 274, 288 (Agee, J., concurring in part and dissenting in part). *See generally*, L-E-A-, 27 I. & N. Dec. 40, 45 (B.I.A. 2017); *see also A-B- II,* 28 I. & N. Dec. 191, 209 (A.G. 2021).

[156] *Chicas-Machado*, 73 F.4th at 266.

[157] Hernandez-Avalos v. Lynch*,* 784 F.3d 944, 950 (4th Cir. 2015).

[158] *Chicas-Machado*, 73 F.4th at 269.

[159] *Id.* at 267.

[160] *Id.* at 270 (second alteration in original).

[161] *Id.* at 269–70.

[162] *Id.* at 279 (Agee, J., concurring in part and dissenting in part) ("No suppression or attempted suppression of religious expression happened here. . . . [T]his case bears none of the hallmarks of a typical religious-persecution case.").

[163] *Id.* at 270 (majority opinion).

regardless of how they are brought about, are what Congress specifically sought to protect against through its various refugee protections.[164]

C. Argueta-Hernandez's relationship with God: Religiousness as a social benefit

In the same year another religion-based persecution claim was decided in the Fifth Circuit. Argueta-Hernandez, President of Evangelism at his Christian church in El Salvador, was the victim of death threats and harassment by MS-13 gang members.[165] Argueta-Hernandez testified that MS-13 gang members both attempted to recruit him to collaborate with them and to extorted him.[166] After he refused, he and his family became the target of repeated death threats and harassment by gang members.[167] Argueta-Hernandez noted that a gang leader told him "[t]his is why we are doing this to you, because you are Christian and you are good with God and that is why we looked for you."[168] After Argueta-Hernandez refused to collaborate with gang member demands, a gang hitman attempted to run his son off the road.[169] Argueta-Hernandez testified that Salvadorian officials informed him that he was targeted by MS-13 gang members "because he was a Christian," recommended that he and his family flee the country, and asked Argueta to sign a waiver of liability for the Salvadoran police should he be tortured by MS-13.[170] For a three-week span, Salvadorian officials detained Argueta-Hernandez in a safe house before sending him in a taxi to the Guatemalan border.[171]

Despite the Immigration Judge finding Argueta-Hernandez's testimony—including his claims that MS-13 targeted him for recruitment due to his religion, and the attempted murder of his son—and other corroborative evidence to be credible, the Immigration Judge denied his application for withholding of removal.[172] The Judge determined that because MS-13 gang members never explicitly stated that Argueta-Hernandez was being targeted as a result of his religion, he was not harmed as a result of his religion.[173] Instead, the Court concluded that Argueta was targeted due to "his reputation as a good person . . . in the community."[174]

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[164] *Chicas-Machado*, 73 F.4th at 270 ("[T]argeting a victim for persecution because of her religion has a chilling effect, even when the threat or persecution is not delivered in the form of an ultimatum or command.").

[165] Argueta-Hernandez v. Garland, 87 F.4th 698, 703 (5th Cir. 2023).

[166] *Id.* at 704.

[167] *Id.* at 703–04.

[168] *Id.* at 711.

[169] *Id.* at 703.

[170] *Id.* at 703–04.

[171] *Argueta-Hernandez,* 87 F.4th at 703–04.

[172] *Id.* Withholding of removal is an alternative avenue of relief, accessible to those who may be ineligible for asylum, which mandates demonstrating a *likelihood* of facing persecution grounded in one of the five protected categories. 8 CFR § 208.16(a)–(b).

[173] *Argueta-Hernandez*, 87 F.4th at 704.

[174] *Id.* (omission in original).

On initial appeal, the BIA affirmed the Immigration Judge's findings and noted that "'the gang may have had an enhanced interest in exploiting [Argueta-Hernandez] because of the privileges he enjoyed as a Christian' but that 'is insufficient to establish that [his] religion and membership in his proposed particular social groups were *central reasons* that the gang subsequently threatened to harm him.'"[175]

On further appeal, the Fifth Circuit reversed the BIA's decision and remanded the case.[176] The Fifth Circuit found that the Immigration Judge and the BIA's assertion that a persecutor must explicitly reference their victim's religion for the victim to suffer persecution was legally unsupported and, therefore, erroneous.[177] The Court further agreed with Argueta-Hernandez's argument that the BIA erred in requiring that he show that MS-13 harmed him to overcome the protected characteristic.[178]

The Fifth Circuit specifically addressed the role of animus in the nexus inquiry in a footnote of the majority opinion.[179] The BIA had asserted that even if the applicant's religion was a "*potential reason[] for the gang's enhanced interest in extorting and collaborating with the applicant*, the applicant has not provided sufficient evidence to establish that the gang harmed or will harm him in order to overcome a protected characteristic."[180] The Board opined that Argueta-Hernandez had not been prevented from preaching or exercising his religious rights.[181] The Fifth Circuit disagreed with the BIA's proposition and hypothesized that a gang could choose to extort a religious person *because* they believe that their religiousness means they have some additional social, political, or economic benefit, "[a]nd when, as here, a religious individual refuses to assist that gang because of his beliefs, the BIA and [Immigration Judge] should consider that as substantial and critical evidence supporting the petitioner's claim" of religious persecution.[182]

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[175] *Id.* (alterations in original).

[176] *Id.* at 714.

[177] *Id.* at 709 ("[T]the extent that the BIA conflates the severity of harm and nexus analyses, it 'committed a legal error by requiring that [he] prove' motive to establish persecution." (alteration in original) (quoting Eduard v. Ashcroft, 379 F.3d 182, 192 (5th Cir. 2004))).

[178] *Id.* at 709, 711.

[179] *Argueta-Hernandez*, 87 F.4th at 709 n.6 ("It is not clear whether the BIA intended to invoke a mixed-motive analysis here, but if so, the BIA should have identified how substantial evidence regarding religious persecution may be whittled to an 'enhanced interest in extorting and collaborating.' The facts in this case could suggest otherwise. For example, a gang could choose to extort an individual based on the perceived social, political, or economic benefits that a religious individual may have. And when, as here, a religious individual refuses to assist that gang because of his beliefs, the BIA and IJ should consider that as substantial and critical evidence supporting the petitioner's claim.").

[180] *Id.*

[181] *Id.* at 704.

[182] *Id.* at 709 n.6. In *Rivera v. Garland*, the Eighth Circuit endorsed the Fifth Circuit's decision in *Argueta-Hernandez* and the Fourth Circuit's nexus analysis in *Chicas-Machado*. Rivera v. Garland, 108 F.4th 600, 607 (8th Cir. 2024). There, Jose Maria Rivera, a pastor at a Christian Church in El Salvador, and his family, sought asylum after they were persecuted by gang members because Rivera's preaching had induced a gang member to quit the gang. *Id.* The Court found that even if the "ultimate 'trigger'" for

D. Azurdia-Hernandez's Christian Trustworthiness: When Positive Attributes Serve a Persecutor's Goals

The Eleventh Circuit addressed a similar religion-based claim in a non-precedential decision it issued in 2020.[183] In that case, gang members attempted to coerce Kenneth Azurdia-Hernandez and his mother to launder money for them because they were evangelical Christians, and, therefore, gang members believed they were trustworthy.[184] The Eleventh Circuit expressly rejected the Immigration Judge's determination that because the gang members "viewed their status as Evangelical Christians as a positive attribute rather than as a negative attribute," this "would not lead the cartel members to harm them in any way," and criticized the BIA's failure to consider the religious-based claim.[185]

Although the Eleventh Circuit did not decide the issue as a matter of law, it ruled that the BIA and Immigration Judge had failed to give reasoned consideration to the religion-based persecution claim and directed the BIA to reconsider the issue on remand.[186] Without deciding the issue, the Court stated:

> we cannot rule out—as a matter of law—that an asylum applicant might demonstrate religion-based persecution based on evidence that he was targeted for forced labor or some other oppressive treatment because the persecutor perceived some positive attribute (honesty, diligence, or such) associated with the persecuted person's religion that would serve the persecutor's goals.[187]

This opinion, which predates those out of the Third, Fourth, and Fifth circuits, presents a similar willingness to accept a framing of "persecution on account of a protected class" where a persecutor views a protected characteristic as an asset.

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the gang members' attack on Rivera was that an evangelized gang member wanted to leave the gang, religion could still be an "underlying central reason for the attack." *Id.* (citing Chicas-Machado v. Garland, 73 F.4th 261, 268 (4th Cir. 2023)). The Court disagreed with the BIA's narrow view of nexus and its failure to consider the casual relationship between Rivera's religion and his work to convince gang members to leave the gang. *Rivera*, 108 F.4th at 608. The Court admonished the BIA to bear in mind that "even if a protected ground was not the final 'trigger' for persecution, persecution may, at least in some circumstances, be 'on account of' religion if it is the practice of an individual's religion which leads to him being targeted in the first instance." *Id.* at 609.

[183] Azurdia-Hernandez v. U.S. Att'y Gen., 812 Fed. Appx. 935 (11th Cir. 2020).

[184] *Id.* at 937.

[185] *Id.* at 938.

[186] *Id.* at 940.

[187] *Id.* at 939.

IV. WHAT DOES THIS MEAN FOR THE RECRUITMENT EFFORTS BY ETHNOCENTRIC AND RELIGIOCENTRIC MILITANT ORGANIZATIONS?

The but-for reasoning utilized by these courts opens up an avenue of potential arguments for relief in another line of asylum cases, which to date, remain largely hindered by the Supreme Court's ruling in *INS v. Elias-Zacarias*: forcible recruitment efforts by ethnic or religious militant or guerrilla organizations. Victims of forceable recruitment efforts by ethnic or religious organizations often bring forward claims under a theory of persecution on account of political opinion.[188] The victims argue that their refusal to join these violent organizations reflects a political opinion, opposing the organizations. However, as demonstrated by the Supreme Court's opinion in *INS v. Elias-Zacarias*, this argument rarely succeeds because victims need to establish both that their refusal was, in fact, political and that the persecution occurred because of this political opinion rather than simply because of the refusal to join the group.[189] The Circuit Courts' acceptance of nexus arguments where persecutors viewed a protected characteristic as an asset raises the potential applicability of these arguments in circumstances where religious or ethnic individuals are being forcibly recruited by ethnocentric or religiocentric organizations. An analysis of the facts of several cases involving the recruitment efforts of ethnic or religious militant or guerrilla organizations is beneficial to extrapolate the confines and reach of these Circuit Courts' but-for nexus reasoning.

In 2016, the Eighth Circuit in *Ngugi v. Lynch*[190] considered a case involving Paul Ngugi, an ethnic Kikuyu who was subjected to forceable gang recruitment by the Mungiki, a violent Kikuyu sect in Kenya.[191] Ngugi petitioned for asylum based on persecution on account of religion, political opinion, and his membership to the particular social group of Kikuyus who resist recruitment by the Mungiki.[192] On appeal, the Eighth Circuit rejected these claims and cited *INS v. Elias-Zacarias* as "noting that petitioner who resisted recruitment by guerillas 'has to establish that the record . . . compels

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[188] *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157, 170 (3d Cir. 2003) ("Lukwago does not argue that the LRA persecuted him because of his race, religion or nationality, and he failed to demonstrate that the LRA's past abduction and persecution of him was on account of his political opinions."); R-, 20 I. & N. Dec. 621, 623 (B.I.A. 1992) ("As a primary matter, we find that there is no persuasive evidence in the record to demonstrate that either the Sikh militants or the police who confronted the applicant sought to punish him on account of one of the grounds enumerated in the Act."); Ngugi v. Lynch, 826 F.3d 1132, 1135–36 (8th Cir. 2016) (arguing persecution on account of political opinion, religion, and particular social group).

[189] *See* Ericka Welsh, *The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America's Join-or-Die Gang Culture*, 44 PEPP. L. REV. 1083, 1105 (2017) ("[M]any courts relied on *Elias-Zacarias* to deny political asylum to applicants who resisted gang recruitment, asserting that resistance is not a political opinion."). *See also*, INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (holding that to establish the requisite nexus for persecution on account of political opinion in forceable recruitment cases, respondents must show that: (1) their refusal to join was politically motivated and (2) that the gang or guerilla organization was politically motivated).

[190] *Ngugi*, 826 F.3d at 1132.

[191] *Id.* at 1135.

[192] *Id.*

the conclusion that he has a "well-founded fear" that the guerillas will persecute him *because of* [a protected ground], rather than because of his refusal to fight with them.'"[193] Mr. Ngugi did not present the argument—and therefore, the court did not assess—whether Mr. Ngugi had been persecuted by the Mungiki even before they punished him for refusing their recruitment effort, when they targeted him to join *because of* his Kikuyu ethnicity.[194]

In the 1992 BIA case *Matter of R-,*[195] the applicant, a Sikh man from the Punjab region of India, was subjected to forceable recruitment efforts by a group of Sikh Militants called the All-India Sikh Student Federation.[196] The applicant appealed his asylum denial and, amongst other claims, argued that the violence he suffered at the hands of the Sikh militant group amounted to persecution on account of his political opinion.[197] Relying on the reasoning of *Elias-Zacarias*, the BIA rejected his argument, noting that it is the political opinion of the victim, and not the persecutor, that is at play here, and "the mere resistance of forced recruitment is not an 'expression of political opinion hostile to the persecutor.'"[198] The Court did not consider—as the petitioner did not argue—whether the All-India Sikh Student Federation subjected the applicant to persecution even before they punished him for refusing recruitment, when they tried to force him to join because he was Sikh.[199]

Similarly, in *In re S-P-,* the applicant, an ethnic Tamil, had been kidnapped and forced to work as a welder for the Liberation Tigers of Tamil Ealam ("Tigers") at their military camp.[200] During an attack on the camp by the Sri Lankan Army, he was captured and subsequently tortured by the Army.[201] The BIA granted asylum to the applicant under a theory of imputed political opinion, premised on the torture that the applicant experienced at the hands of the Sri Lankan military.[202] While the applicant was ultimately successful in his petition, it is useful to consider the potential of another argument not raised: whether the very targeting of the applicant for kidnapping and forced labor by the Liberation Tigers of Tamil Ealam would be sufficient to establish persecution on account of ethnicity, as he was likely only targeted because he was ethnically Tamil.

Considering the ethnocentric or religiocentric motivations of these three militant groups, I pose the question: Does it matter that the militants

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[193] *Id.* at 1137 (alteration in original) (omission in original) (citing *Elias-Zacarias*, 502 U.S. at 483).
[194] *Id.* at 1138.
[195] R-, 20 I. & N. Dec. 621(B.I.A. 1992).
[196] *Id.* at 622.
[197] *Id.* at 622–23. The applicant also argued that he was persecuted on account of his political opinion and religion by local police who mistook him for a militant; the BIA was similarly unpersuaded by the arguments. *Id.* at 622.
[198] *Id.* at 623–24.
[199] *Id.* at 628.
[200] S-P-, 21 I. & N. Dec. 486, 487 (B.I.A. 1996).
[201] *Id.* at 487–88.
[202] *Id.* at 496–97.

likely only targeted the respondents *because* they were Sikh, Tamil, or Kikuyu? Rather than targeting any able-bodied man, as seen in *INS v. Elias-Zacarias*, the All-India Sikh Student Federation in *Matter of R-* clearly found the applicant to be a desirable recruit because of this shared faith.[203] The same focus on the protected characteristic of the victim can be seen in *Matter of S-P-*, where the Tamil Tigers would likely not have kidnapped the applicant had he not been Tamil,[204] and in *Ngugi v. Lynch* where the Mungiki sought out Mr. Ngugi out *because* he was Kikuyu.[205] As noted, the applicants did not raise these claims on appeal, and so this theory of nexus escaped analysis by the Courts. However, I argue that the recent Circuit Court opinions appear to provide some support for applicants in similar situations to argue—using an "asset" framing of nexus—that they were persecuted on account of their religion or ethnicity, when these ethno-nationalist militant and religio-militant organizations forcibly recruited them.

In circumstances such as these, the militant group's desire to recruit people of shared religious or ethnic background can hardly be viewed as tangential to their reasons for targeting their victims. In fact, these situations appear to be in keeping with *Matter of L-E-A-*'s idea that key to establishing persecution is "an intent to target the belief or characteristics."[206] Even in the obvious absence of animus or any facial desire to "overcome," the All-India Sikh Student Federation's and the Tigers' desire to fill their ranks with *Sikh* and *Tamil* individuals respectively is central to their cause (as is obviously demonstrated by their very names).[207] This situation is evidently the same for the Mungiki who desire to recruit ethnic Kikuyus and for similarly situated militant organizations who self-identity along ethnic or religious lines.[208] Organizations who purport an ethnic or religious superiority rationale for their actions bear an obvious preference and intent to target individuals who possess those protected characteristics for forceable recruitment, as opposed to targeting any able-bodied individual.

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[203] *R-*, 20 I. & N. Dec. at 622.

[204] *S-P-,* 21 I. & N. Dec. at 487.

[205] Ngugi v. Lynch, 826 F.3d 1132, 1135 (8th Cir. 2016)

[206] *See generally* L-E-A-*,* 27 I. & N. Dec. 40 (B.I.A. 2017).

[207] Liane Rothenberger, Kathrin Müller & Ahmed Elmezeny, *The Discursive Construction of Terrorist Group Identity*, 30 TERRORISM & POL. VIOLENCE 428, 442 (2018); IMMIGRATION AND REFUGEE BOARD OF CANADA, THE ALL-INDIA SIKH STUDENT FEDERATION (AISSF), INCLUDING ITS OBJECTIVES AND ACTIVITIES, AND ITS RELATIONSHIP WITH THE INTERNATIONAL SIKH YOUTH FEDERATION (ISYF) (APRIL 2006 – MARCH 2009) (Apr. 16, 2009), https://www.irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=452307.

[208] IMMIGRATION AND REFUGEE BOARD OF CANADA, KENYA: THE MUNGIKI GROUP, INCLUDING ORGANIZATIONAL STRUCTURE, LEADERSHIP, MEMBERSHIP, RECRUITMENT AND ACTIVITIES; THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE GROUP, INCLUDING PROTECTION OFFERED TO ITS VICTIMS (2016 – APRIL 2018) (Apr. 16, 2018), https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457455&pls=1. Consider how former militia groups in Afghanistan—primarily in heterogeneous districts—trended towards formation around ethnic identity and, as a result, "recruitment coincid[ed] with ethnicity and party affiliation." EUROPEAN ASYLUM SUPPORT OFFICE, EASO COUNTRY OF ORIGIN INFORMATION REPORT: AFGHANISTAN RECRUITMENT BY ARMED GROUPS 36 (2016). For example, Hezb-i Islami and Ettehad-i Islami were made up of largely Pashtuns, Jamiat-i Islami was comprised of Tajiks, and Jumbesh-i Melli held a base largely of Uzbeks and Turkmen. *Id.*

The degree to which a characteristic is valued to be an "asset" is particularly relevant in these circumstances. Of course, one might distinguish between the role of the "asset" when a religious or ethnic militant organization is recruiting versus when a secular, non-ethno-nationalist group is recruiting. For example, there is a distinction between a gang that recruits individuals for their protected characteristic because it is "other" and therefore valuable in its scarcity, versus an organization that instead recruits *because* the organization's goal is coalesced around this shared protected attribute. However, I argue that, at best, this is a distinction without a difference. Under the but-for reasoning of the recent Circuit Court decisions discussed, the nexus analysis and outcome fundamentally remain the same. In both circumstances, individuals have been subjected to forceable recruitment efforts *because* of their religious views or ethnic identity. The applicants would not have been targeted for recruitment in any of these situations *but for* the identification, and subsequent desiring, of these protected characteristics; if they had not been targeted for recruitment, they would not have been punished for resisting.

The perspective that a persecutor's "positive" or desiring view of a protected characteristic signifies that a victim's subsequent persecution cannot be *because* of the characteristic, appears to conflate these positive sentiments with an inability to harm. In reality, this perspective ignores the repercussions of perceived "desirability" on the victim's expression of their protected characteristic. Such repercussions include harm from the chilling effect whereby an individual is deterred from expressing their religious or ethnic identity so as to lessen their desirability. The Court in *Chicas-Machado* recognized that the gang's forceable recruitment tactics posed the threat of chilling Ms. Chicas-Machado's religious practices even absent a direct order from the gang that she stop practicing her religion.[209] When analyzing the religious persecution claim and the resulting suppression of Chicas-Machado's religious practice, the Court focused on the *effect* of the persecutor's action rather than looking simply the intent.[210]

An *effect*-focused approach to analyzing religious suppression and chilling effects appears equally applicable in instances where the persecutors and victims share the same protected characteristic. In the context of religiocentric militant organizations, a victim who recognizes the recruitment criteria of these organizations to be centered around a shared faith may likely feel pressure to suppress or dampen their religious expression to de-idealize their candidacy for recruitment. This remains true for victims of forced recruitment by an ethno-nationalist militant group; these victims may similarly feel forced to dampen their ethnic identity and

[209] Chicas-Machado v. Garland, 73 F.4th 261, 270 (4th Cir. 2023) ("[T]argeting a victim for persecution because of her religion has a chilling effect, even when the threat or persecution is not delivered in the form of an ultimatum or command.").

[210] *Id.*

be less willing to claim or express their ethnic identity out of fear of drawing the group's interest. Even in situations where ethnic identity is overtly tied to non-changeable bodily features, the chilling harm can still occur. The multi-faceted nature of ethnic identity, and particularly in expressions of ethnic identity, permits the chilling to manifest in the suppression of ethnic expressions, such as language, names, clothing, music, or food. As a result, the chilling-effect, which the Chicas-Machado's court framed as "exactly the harm from which Congress seeks to protect asylees and refugees,"[211] remains present even in the "asset"-incentivized recruitment efforts of both religiocentric or ethnonationalist militant organization.

Beyond the threat of a chilling effect that exists regardless of whether a certain protected characteristic is viewed as "positive," I further posit that it is misleading to even characterize the attitude these organizations harbor as "positive." Central to how *positive* a persecutor views a particular characteristic is the persecutor's belief that they can *control* said characteristic. In desiring to use Saban-Cache's indigenous-ness as "bait," the gang believed that they could control the expression of his identity to their benefit. When Argueta-Hernandez and Chicas-Machado were singled out in their respective communities for their religious practices, gang members sought to control their religious expression to the gang's own advantage.[212] These instances make clear that the persecutors only valued the attributes they sought to recruit to the degree to which they believed this characteristic could be controlled.

The desire to "control" and make subservient the victim's identity is not only present when non-ethnic or secular organizations want to recruit a certain characteristic, this control factor remains present regardless of whether the persecutor purportedly shares this identity with the victim or not. In circumstances of ethnocentric or religiocentric militant organizations who view a certain ethnic or religious characteristic as central to their own identity,[213] the organization's desire to recruit individuals who share this "positive" characteristic is limited by their belief that the victim's identity can be controlled to conform with how the organization *believes* their shared ethnic or religious identity should be expressed.[214] For example, a Sikh

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[211] *Id.*

[212] *Id.* at 264–65 (noting that Chicas-Machado was targeted "because no one would suspect she would be working with the gang based on her activity and conduct with the church."); Argueta-Hernandez v. Garland, 87 F.4th 698, 711 (5th Cir. 2023) (noting the gang told the petitioner that they targeted him "because you are Christian and you are good with God").

[213] Research on the identity formation of terrorist organizations note that ethno-nationalist groups, such as LTTE, "stress ethnic identity as a unifying force, which forms 'a social entity, with their own history, traditions, culture, language and traditional homeland,'" whereas religio-centric organizations utilize "a common set of beliefs (or morals)." Rothenberger, Müller & Elmezeny, *supra* note 207, at 442.

[214] Niels Terpstra & Georg Frerks, *Rebel Governance and Legitimacy: Understanding the Impact of Rebel Legitimation on Civilian Compliance with the LTTE Rule*, 19 CIVIL WARS 279, 290 (2017) ("In its struggle for a hegemonic position in the North and East[,] the LTTE assumed the authority of defining what 'Tamilness' was, and presented itself as the 'sole representative' of the Tamil nation."). *See*

individual and a Sikh militant group, though both technically identifying as "Sikh," may have fundamental disagreements about the permissibility of violence in their religion. Regardless of potential ideological differences, a militant organization may still choose to recruit the Sikh individual under the premise that they can forcibly control their victim's religious expression.[215] This idea that the persecutor can control a victim's protected characteristic is evident in the persistent use of violence in forcible recruitment situations to inspire acquiescence to the gang's will.

Given how closely tied religious or ethnic characteristics are in formulating an ethnonationalist or religious militant group's identity, when the victim is harmed after resisting recruitment efforts, the subsequent persecution is not simply premised on their refusal to join the group—as seen in *Elias-Zacarias*.[216] Here, a victim's resistance threatens the very identity of the organization as the protector of said religious or ethnic group. The rejection results in the victim being recharacterized as a "bad [insert protected class here]."[217] Through this dynamic, it becomes evidently clear that an organization's favorable view of a protected characteristic is intrinsically linked with their belief that they can exert power over it—it is viewed as an asset or positive only so long as it can be controlled. The power that the militant organization exerts is an intentional and calculated effort to force a protected characteristic into submission and subservience. Victims of this force feel pressure to dampen their ethnic or religious expression. This clearly is persecution on account of a protected class.

CONCLUSION

The recent decisions by the various Circuit Courts illuminate an evolving tension in asylum law, particularly concerning the nexus analysis and the role of animus in mixed motive cases. These decisions further highlight a departure from the restrictive standards set forth by the Board of Immigration Appeals in cases like *Matter of L-E-A-* and *Matter of M-R-M-S-* and illustrate the value of a but-for approach in analyzing whether

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Dipak K. Gupta, *Exploring Roots of Terrorism, in* ROOT CAUSES OF TERRORISM: MYTHS, REALITY AND WAYS FORWARD 16, 19 (Tore Bjørgo ed., 2005) ("As an individual succumbs to the organization, there is no room for individual ideas, individual identity and individual decision-making"); Giacomo Mantovan, *Becoming a Fearless Tiger: The Social Conditions for the Production of LTTE Fighters*, 9 CONFLICT & SOC'Y: ADVANCES IN RSCH. 37, 38 (2023) ("Existing research shows how non-state armies shape fighters' subjectivity through control over their bodies and emotions, nationalistic narratives, political rituals, and artistic forms of expression."); Shri D.R. Kaarthikeyan, *Root Causes of Terrorism? A Case Study of Tamil Insurgency and the LTTE, in* ROOT CAUSES OF TERRORISM: MYTHS, REALITY AND WAYS FORWARD 131, 132 (Tore Bjørgo ed., 2005) ("The LTTE, the most ruthless militant group, eliminated moderate Tamil political leadership as well as other militant groups such as TELO, EROS, and EPRLF and became the most dominant Tamil militant group.").

[215] *See, e.g.*, R-, 20 I. & N. Dec. 621, 622 (B.I.A. 1992) (noting the testimony of the petitioner that, after refusing to join the All-India Sikh Student Federation, he was beaten and told that he must join).

[216] *See* INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

[217] *See e.g., R-*, 20 I. & N. Dec. at 622 (claiming that the applicant was characterized as a "bad Sikh" for resisting the recruitment efforts of the All-Sikh Student Federation).

persecution is on account of a protected ground. Importantly, in their rejection of the BIA's restrictive view that a protected ground cannot be a "central reason" for persecution unless it was motivated by animus or a desire to overcome the protected trait, the Courts provide room for potential relief for victims of forceable recruitment efforts by ethnocentric or religiocentric militant organizations. Moving forward, it is important to explore further the potential for relief available under this more permissive approach by the Circuit Courts to ensure asylum protection for those who have fallen victim to persecution because of their identities.

Take a Closer Look: An Examination of the *Faragher/Ellerth* Affirmative Defense

YIQIU ZHOU

ABSTRACT

Since 1986, workplace sexual harassment has been recognized by the Supreme Court as a form of actionable discrimination under Title VII of the Civil Rights Act to be prevented for its detrimental impacts on an individual's physical and mental health. An employer could be vicariously liable for workplace sexual harassment committed by its supervisors even if no tangible employment actions are taken against the plaintiff-employee. Nonetheless, most workplace harassment claims fail in court because federal law essentially granted immunity to employers through the *Faragher/Ellerth* affirmative defense. In 1998, the Supreme Court established a two-pronged framework in two landmark cases regarding workplace harassment. Although the Supreme Court showed its intention to incentivize employers to prevent and reduce harassing behavior in the workplace by "rewarding" them with an affirmative defense, it built a "safe harbor" within the vicarious liability doctrine and provided a basis for employers to escape liabilities. After almost three decades of development, federal courts' application of *Faragher/Ellerth* defense ultimately forges a pro-employer environment in sexual harassment cases. In addition, empirical studies show neither the training programs nor the grievance procedures help to significantly prevent or reduce workplace harassment. Although over 90 percent of large employers in the United States have some form of sexual harassment training in place, it seems to have little to no impact on the overall number of harassment complaints. Knowing they are likely to prevail, the employers lack incentives to effectively implement anti-harassment policies and conduct deliverable training programs.

This article takes interest in how a jury question turned into a *de facto* matter of law in the subsequent development of the federal case law and led to the creation of a pro-employer environment in workplace sexual harassment litigation. In this article, I contend that to reach the goal that the *Ellerth/Faragher* court tried to achieve, which is incentivizing employers to reduce harassment behavior in the workplace, the affirmative defense needs to be eliminated. Evidence from both the subsequent case law in federal courts and social science studies show apparent flaws of the affirmative defense, which leads to an unfriendly environment for sexual harassment victims. With the inadequacy of many anti-harassment policies and training designs, it is time to find alternative incentives for employers in reducing workplace harassment behaviors.

ARTICLE CONTENTS

INTRODUCTION

In a House report released in April 2024, the House Intelligence Committee found that the Central Intelligence Agency ("CIA") failed to appropriately handle sexual assault and harassment within its workforce.[1] According to the interviews with the whistleblowers, not only were the reporting procedures confusing, but there was also little to no accountability or punishment for the perpetrators of the harassment.[2] In addition, the CIA had fired the victim who stepped forward and cooperated with law enforcement investigations.[3]

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[1] Katie Bo Lillis, *House Intelligence Committee Finds CIA Mishandled Sexual Assault and Harassment Claims*, CNN (Apr. 22, 2024, 11:07 AM), https://www.cnn.com/2024/04/22/politics/house-intelligence-committee-find-cia-mishandled-sexual-assault-and-harassment-claims/index.html.

[2] *Id.*

[3] *Id.*

Although explicitly prohibited under Title VII of the Civil Rights Act of 1964, workplace sexual harassment has not shown a significant decrease.[4] Over the years, scholars have pointed out that sexual harassment law has not been able to live up to its potential, particularly in the employment context.[5] In *#MeToo Has Done What the Law Could Not*, Professor Catherine MacKinnon pointed out that "[i]t is widely thought that when something is legally prohibited, it more or less stops. This may be true for exceptional acts, but it is not true for pervasive practices like sexual harassment, including rape, that are built into structural social hierarchies."[6] Unlike other actionable claims under Title VII, employers are rarely held liable for harassment behaviors that happen in the workplace, especially in hostile work environment cases, where no tangible employment action is taken.[7] Not only is it difficult for plaintiff-employees to establish a prima facie case that will meet the "severe or pervasive" standard, but employers can easily enjoy an affirmative defense that would lead them to limited, if any, liability.[8]

By creating the affirmative defense in two landmark cases, the Supreme Court had the intention to incentivize employers to prevent and reduce harassing behavior in the workplace.[9] The Court thought it would create strong motives for employers by "rewarding" them with an affirmative defense, but instead, it built a "safe harbor" within the vicarious liability doctrine and provided a basis for employers to escape liability.[10] This paper revisits the *Faragher/Ellerth* framework and argues from both doctrinal and sociological standpoints that the defense should be eliminated. Over the years, federal courts have created a pro-employer environment, resulting in a perverse incentive for employers in constructing their anti-harassment practices.[11] Without considering the context around the situation, courts tend to judge employee responses in hindsight, holding victims to a "reasonable" person standard that is unrealistic to meet.[12] This article takes interest in how a jury question developed into a question of law in federal courts over the

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[4] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC DATA HIGHLIGHT: SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES (Apr. 2022).

[5] *See generally* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2005); L. Camille Hébert, *How Sexual Harassment Failed Its Feminist Roots* 1 (Moritz Coll. L., Working Paper No. 567, 2020).

[6] Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html.

[7] Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J. L. REFORM 809, 811 (2002).

[8] *Id.* at 822–24.

[9] *See generally* Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 965–88 (2021); Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 164–67, 187 (2021).

[10] *See* discussion *infra* Part III.

[11] Hébert, *supra* note 5 at 1 ("The courts have turned that promise into a cause of action that seeks to protect the workplace form women who make claims of sexual harassment, rather than a cause of action that seeks to protect women from discriminatory workplaces.").

[12] *Id.* at 26–27.

past decades, and suggests that the elimination of the *Faragher/Ellerth* affirmative defense is a necessary first step to better achieve the principle of Title VII: to incentivize employers and employees to work together to reduce workplace harassment.[13]

Part I of this article will discuss the background of workplace sexual harassment under Title VII and the invention of the *Faragher/Ellerth* framework. Part II will address how the federal courts created a pro-employer environment in the subsequent application of the affirmative defense and essentially turned a jury question of reasonableness in both prongs of the affirmative defense into a matter of law. Part III introduces the empirical evidence to demonstrate that the reasonableness standard applied by the courts is out of touch with reality, resulting in *pro forma* anti-harassment policies and training that are incapable of reducing sexual harassment behavior in the workplace. Part IV addresses some potential alternatives that would incentivize employers to reduce workplace harassment and discuss the importance of reintroducing the right to jury in hostile work environment claims.

I. WORKPLACE SEXUAL HARASSMENT: TWO STEPS FORWARD, ONE STEP BACK

Sexual harassment is considered a form of sex discrimination under Title VII of the Civil Rights Act of 1964 and is prohibited in the workplace. But it was not always the case. Sexual harassment was not an actionable claim when the Civil Rights Act was enacted, and it was practically "invented" by Professor Catharine MacKinnon. In her 1979 book, *Sexual Harassment of Working Women*, Professor MacKinnon demonstrates that sexual harassment meets the definition of sexual discrimination under an inequality approach and, therefore, should be covered by Title VII.[14] She identified two types of harassment. The first type, "quid pro quo," includes situations like a supervisor offering an employee a raise or promotion if they meet his or her sexual demands.[15] The other type of sexual harassment, a which would come to be known as "hostile work environment," is when one person frequently offers unwanted pervasive sexual comments, requests, or advances toward another person, "mak[ing] the work environment unbearable.[16]

The next year, in 1980, the U.S. Equal Employment Opportunity Commission ("EEOC") adopted Professor MacKinnon's argument and updated its guidelines regarding sexual harassment. Under the EEOC

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[13] *Id.*

[14] *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[15] *Id.* at 37.

[16] *Id.* at 40. Professor MacKinnon originally called this form of discrimination a "condition of work," but the situation which she described would come to be known as a "hostile work environment" through cases like *Meritor*. *See id.*; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

definition, workplace sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[17] Since the guidelines were issued, federal courts have uniformly adopted the definition.[18] Six years after the guidelines were issued, in *Meritor Savings Bank v. Vinson*, the Supreme Court followed suit when, for the first time, it recognized sexual harassment as an actionable claim under Title VII.[19]

A. The "Hostile Work Environment" Under Title VII

In the 1986 landmark case, *Meritor Savings Bank v. Vinson*, the Supreme Court first recognized workplace sexual harassment as a form of sex discrimination that violates federal anti-discrimination laws.[20] It was a victory at the time for its recognition of a "hostile or abusive" environment caused by workplace sexual harassment.[21] *Meritor* marks the official recognition that both quid pro quo and hostile work environment claims are actionable under Title VII.[22] However, the Court then went on to implement a stringent standard for employees alleging sexual harassment in the workplace.[23]

First, the Court held that a hostile work environment is only actionable when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[24] This requirement indicates that the misconduct must be extremely serious for a hostile work environment to be actionable, leaving a wide range of sexually derogatory and denigrating conduct out of sanction.[25] Second, the Court found that the lower court erred in holding employers strictly liable when it was unclear whether the employer possessed knowledge of the harassment

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[17] Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2024).

[18] *See, e.g.*, Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934, 944–45 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984).

[19] *Meritor*, 477 U.S. at 66 ("Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.").

[20] *Id.*

[21] *Id.*

[22] *Id.* at 65.

[23] *Id.* at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." (citation omitted)); *see also* L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L. J. 819 (1997).

[24] *Meritor*, 477 U.S. at 67 (alteration in original).

[25] *See* Hébert, *supra* note 5, at 57 (describing how sexual harassment in the workplace can have serious repercussions even before reaching the courts' very high standard).

conduct.[26] In its *amicus curiae* brief, the EEOC contended that knowledge should not be a deciding factor when considering employer liability in a hostile work environment claim because agency principles require employers to be strictly liable for the misconduct of its supervisors.[27] Disagreeing with the EEOC on the issue of strict liability, the majority of the Court in *Meritor* indicated that "Congress' decision to define 'employer' to include any 'agent' of an employer" shows an intent to limit employer liabilities.[28] Accordingly, the *Meritor* Court rejected the EEOC and the D.C. Circuit's strict liability rule in hostile work environment claims and refused to issue a definitive ruling on employer liability.[29] Instead, the Court left an opaque instruction for lower courts, suggesting that they should look to "agency principles for guidance" going forward.[30] As a result, this instruction results in "wildly inconsistent results" in lower courts, primarily because they are constantly relying on "somewhat amorphous 'agency principles.'"[31]

Although the *Meritor* Court rejected the employer's position that a company should be shielded from liability by virtue of the "mere existence" of an anti-harassment policy and grievance procedure, the Court suggested that the employer might have a stronger argument "if its procedures were better calculated to encourage victims of harassment to come forward."[32]

B. The Faragher/Ellerth Affirmative Defense Framework

In 1998, the Supreme Court revisited the issue of employer vicarious liability and created a two-pronged affirmative defense in two landmark cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, regarding workplace harassment by supervisors.[33] In *Ellerth*, Kimberly Ellerth resigned from her job after working for Burlington Industries, alleging that she had suffered from repeated vulgar, sexualized comments and inappropriate touch without consent during her employment.[34] Ellerth knew about Burlington Industries' anti-harassment policy, but she did not

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[26] *Meritor*, 477 U.S. at 72 ("We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were 'so pervasive and so long continuing . . . that the employer must have become conscious of [them].'" (alteration in original)).

[27] *Id.* at 70 (describing the EEOC's view that "where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them").

[28] *Id.* at 72.

[29] *Id.*

[30] *Id.*

[31] Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 678 (2000).

[32] *Meritor*, 477 U.S. at 72–73.

[33] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[34] *Ellerth*, 524 U.S. at 747–48.

report her supervisor's harassment conduct through internal procedures.[35] Similarly, in *Faragher*, Beth Ann Faragher remained silent while suffering from two male supervisors' repeated inappropriate touching and offensive comments during her employment as a lifeguard for the City of Boca Raton in Florida.[36] After resigning from her job, Beth Ann Faragher brought the action against the city, asserting that her supervisors' conduct constituted discrimination and thus was in violation of Title VII of the Civil Rights Act.[37] In both cases, the employers had an anti-harassment policy, which the plaintiffs knew about; neither plaintiff utilized the internal reporting procedure and were not subject to tangible employment actions.

With these two cases, the Supreme Court created the well-known *Faragher/Ellerth* defense. The Court first reasoned that an employer may be subject to vicarious liability for a supervisor's sexual misconduct and harassment.[38] This standard of liability is grounded on two main principles: "1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment."[39] The Court somewhat clarified the strict liability confusions raised by *Meritor* by holding that employers are vicariously liable for sexual harassment committed by a supervisor.[40] When a supervisor creates a hostile work environment by committing sexual harassment, the employer is vicariously liable, regardless of whether the supervisor's conduct created a hostile work environment or resulted in a "tangible employment action . . . such as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[41]

So far, the *Ellerth/Faragher* Court's analysis of employer vicarious liability was consistent with the general tort law principle of vicarious liability. However, the Court then decided to differentiate torts committed within and outside the scope of Title VII. Outside of Title VII's scope, when a supervisor causes serious physical injury or death of the employee, courts do not insulate employers from their vicarious liability. For example, in *Anicich v. Home Depot U.S.A., Inc*, the Seventh Circuit reversed the lower court's decision to grant summary judgment for the employers and ruled that the use of supervisory authority to commit a tort outside the scope of employment could be a basis to hold the employer liable for negligent hiring, supervision, and retention.[42]

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[35] *Id.* at 748.

[36] *Faragher*, 524 U.S. at 780–82.

[37] *Id.* at 780.

[38] *Ellerth*, 524 U.S. at 755–57.

[39] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *superseded by* ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (2024).

[40] *Ellerth*, 524 U.S. at 765.

[41] *Id.* at 761.

[42] Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 654 (7th Cir. 2017).

In *Faragher*, the Court recognized the special treatment employers enjoy under Title VII, especially when the employee who commits torts or crimes is not advancing the employer's interests:

> In so doing, the courts have emphasized that harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual harassment to the classic "frolic and detour" for which an employer has no vicarious liability. These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer.[43]

Based on its interpretation of Congress' intent, the Court concluded that there was "no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment."[44] Using three examples, Court drew the line between "scope" and "frolic" on the spectrum of possible harassing conducts, stating that cases, like *Faragher*, involves an employee expressing sexual interests and in no way serving any interest of the employer, beyond the scope of employment.[45]

Ultimately, the Court established an affirmative defense scheme when a supervisor creates a hostile work environment but does not take a "tangible employment action" against the employee.[46] Employers can enjoy a defense if the following two prongs are satisfied: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[47]

The two-pronged test shows the Supreme Court's willingness to put faith in employer self-policing. By rewarding employers with an affirmative defense in harassment cases, the Court tried to create incentives for companies to prevent and reduce harassing behavior in the workplace.[48] However, the Court also provided employers with the possibility of limited

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[43] Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).
[44] *Id.* at 798.
[45] *Id.* at 799.
[46] *Id.* at 807.
[47] *Id.*
[48] *Id.* at 806. ("[A] theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.").

or no liability. Legal scholars have pointed out that the Court elevated "symbolic compliance structures" to replace otherwise meritorious sexual harassment claims, and as a result, employers "can limit its potential harassment liability not only probabilistically … but also directly, by instituting and then using symbolic compliance structures to establish a legally efficacious defense to an otherwise actionable claim."[49] These "symbolic compliance structures" were implemented in response to the ambiguity of legal mandates as a tool to establish efficacious defense, and the courts reinforced these structures when they treat them "as evidence of good faith."[50]

By adopting a modified vicarious liability standard, the *Faragher/Ellerth* Court unintentionally carved out wiggle room specifically designed for harassment claims that gives more leniency to employers and puts victims in a disadvantageous position.[51] Although it arose out of sexual harassment context, the affirmative defense was extended to other forms of harassment in practice.[52] Employees alleging racial or religious harassment are facing the hurdle of the *Faragher/Ellerth* as well.[53] If the harassment does not lead to a concrete, tangible employment action, victims of a hostile work environment must first report the harassment to the employer through its internal complaint process or else risk losing later in court.[54]

II. FLAWS OF THE AFFIRMATIVE DEFENSE: EVIDENCE FROM FEDERAL COURTS

The *Ellerth-Faragher* Court provided little to no guidance on how employers could actually avoid vicarious liability. Instead, it seems to leave the heavy-lifting work to the lower courts by stating that the "proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law"[55] but refraining from further instructions. Instead of letting the jury decide whether employers have exercised reasonable care and whether the plaintiff-

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[49] Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 172 (2001).

[50] Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1546 (1992) (discussing how organizations respond to legal changes using symbolic compliance structures).

[51] *Id.* at 1540 (discussing weak Title VII enforcement mechanisms and Supreme Court decisions that limit aggrieved employees to pursue legal channels). *See also* sources cited *supra* note 9.

[52] *See* Jones v. Delta Towing L.L.C., 512 F. Supp. 2d 479, 489–90 (E.D. La. 2007) (articulating *Faragher-Ellerth* affirmative defense to vicarious liability for workplace harassment is available in context of a hostile work environment claim grounded in racial discrimination). *See also* Garrett v. Tyco Fire Products, LP, 301 F. Supp. 3d 1099, 1106 (2018) (allowing *Faragher-Ellerth* in racial harassment case); Edrisse v. Marriott Int'l, Inc., 757 F. Supp. 2d 381, 384 (S.D.N.Y. 2010) (finding employer satisfied elements of *Faragher-Ellerth* affirmative defense to vicarious liability for supervisor's frequent mocking and harassment of a black Arab-Muslim employee). *See generally* Hébert, *supra* note 5.

[53] *Edrisse*, 757 F. Supp. 2d at 384, 387*; Garrett*, 301 F. Supp. 3d at 1121–23.

[54] Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998).

[55] *Id.* at 807.

employees have unreasonably failed to utilize the grievance procedures, most lower courts have treated this question as a matter of law.[56] In some early cases, the federal courts took the evaluation of the two-pronged test very literally and created precedents for future rulings that allow employers to get away with only minimum efforts of the anti-harassment practice. Under the circumstances where the defendant-employer files a renewed motion for judgment as a matter of law after the jury issued their verdicts, courts frequently find for the employer, despite the jury's opposite view regarding the "reasonableness" evaluation.[57] Moreover, the appellate courts might be unwilling to review the question of jury trial during the appeal,[58] resulting in the propensity of courts to treat the reasonableness question as a matter of law rather than for the jury.

In the three decades following *Faragher-Ellerth*, the federal courts created a pro-employer environment by applying a series of factors in deciding the actionability of sexual harassment claims and granted *de facto* safe harbor to employers.[59] The following sections assess how federal courts analyze both prongs of the affirmative defense and essentially provide employers with an easy escape route as long as they can show an anti-harassment compliance policy and plaintiff-employee's failure to immediately utilize employer-proved reporting channels.

A. The "Reasonable" Question

The first prong of the *Faragher-Ellerth* framework pivots on a reasonableness inquiry, yet the Supreme Court left an important question unanswered—to what extent does a company's preventative measures constitute "reasonable care" in reducing and correcting sexual harassment behavior? In its reasoning, the Court merely instructed that "the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."[60] As a result, following *Faragher-Ellerth*, the lower courts began to develop their own standards regarding the reasonableness of an employer's preventative and corrective care.[61] Although the Supreme Court did not rule on whether the existence of an anti-harassment policy is sufficient to satisfy the first prong as a matter of law,[62] federal courts routinely find companies

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[56] Grossman, *supra* note 31, at 700.

[57] Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 265 (4th Cir. 2001).

[58] *See* Gentry v. Exp. Packaging Co., 238 F.3d 842, 847 (7th Cir. 2001) ("As an appellate court, our review of the jury trial below is limited in nature.").

[59] Hébert, *supra* note 5, at 3 (discussing courts' elements approach to sexual harassment claims).

[60] *Faragher*, 524 U.S. at 807.

[61] *See* David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461 (2009).

[62] *Faragher*, 524 U.S. at 778. ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a

have exercised reasonable care as long as employers provide a facially valid anti-harassment policy.[63] In the post-*Ellerth/Faragher* era, the precedent gradually started to build about the different sets of facts that had been so found.

In one of the earliest cases following the *Ellerth/Faragher* decision, *Fierro v. Saks Fifth Ave.*, the Southern District of New York interpreted the first prong of the affirmative defense at face value, holding that Saks' anti-harassment policy was an undisputed fact and therefore passed the first prong of the *Ellerth/Faragher* defense.[64] The fact that Saks has an existing antiharassment policy was undisputed, but the court ignored *Faragher* Court's instruction that the promulgation of such policy is not necessarily "reasonable" a matter of law, and failed to assess whether the policy is "suitable to the employment circumstances"[65] before granting summary judgment for the defendant-employer.[66]

In many cases that set precedents for later rulings, courts have indicated that the mere *dissemination* of anti-harassment policy is sufficient to constitute a company's reasonable care in preventing and correcting sexual harassment.[67] In *Barrett v. Applied Radiant Energy Corp.*, the Fourth Circuit noted that the "[d]istribution of anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting sexual harassment."[68] This standard could not be rebutted unless the plaintiff is able to demonstrate that the anti-harassment policy was adopted in bad faith, defective, or dysfunctional.[69] The Fourth Circuit interpreted *Faragher*'s holding as a validation for all anti-harassment policies adopted in good faith.[70] Ruling as a matter of law, the Fourth Circuit held that if a policy was not adopted in bad faith or otherwise defective or dysfunctional, the existence of such a policy militated strongly in favor of the "reasonable care" to prevent harassment.[71] Such a reviewing standard was not laid out nor approved by the *Faragher* court, but an invention by the court while refusing to evaluate whether the policy was suitable to the circumstances. The Fourth Circuit drew the "reasonable" line at anything that is not adopted in bad faith, defective, or dysfunctional at first glance.

Similarly, in *Shaw v. AutoZone*, the Seventh Circuit held that when the employee was provided a handbook that included a sexual harassment policy

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stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

[63] Grossman, *supra* note 31, at 688. *See, e.g.*, Ritchie v. Stamler Corp., No. 98-5750, 2000 WL 84461, at *3 (6th Cir. Jan. 12, 2000); Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999).

[64] Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 491–92 (S.D.N.Y. 1998).

[65] *Faragher*, 524 U.S. at 807.

[66] *See Fierro*, 13 F. Supp. 2d at 491–92.

[67] *See generally* Walsh, *supra* note 61.

[68] Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001).

[69] *Id.*

[70] *Id.*

[71] *Id.*

and signed a form acknowledging the receipt of the policy, the employer satisfied the "reasonable care" prong of *Faragher-Ellerth* defense.[72] Under some circumstances, a written policy is not necessarily required for employers to satisfy the first prong. In a 2010 case, the District Court for the Northern District of Illinois treated the parties' supplemental briefs as cross-motions for summary judgment and held that a *verbal* sexual harassment policy alone could satisfy the first prong of the *Faragher-Ellerth* defense, and therefore denied employee's motion for summary judgment to rule as a matter of law.[73] The employer never had a written policy against sex harassment, and the general manager's knowledge of a sex harassment policy was "common sense."[74] The employer had no knowledge or intention to implement a written sexual harassment policy, but the court nonetheless found it could be deemed as exercising reasonable care because "such a policy is not necessary in every instance as a matter of law to satisfy the first prong of *Ellerth/Faragher* defense."[75]

Some courts applied a heightened scrutiny when examining the first prong of the *Faragher-Ellerth* defense. In *Clark v. UPS*, the Sixth Circuit held that for the employer-defendant to satisfy the first prong, the court must "[look] behind the face of a policy to determine whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior."[76] The court then identified the requirements of a reasonably effective policy, that such policy should "(1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy."[77] Even in one of the most heightened scrutiny standards, the court showed an enormous faith in harassment training and employee education. However, it failed to assess whether the policy had been successfully implemented.

In some cases, courts have refused to apply the first prong when the harassment was a single incident, even when the incident itself was severe or pervasive.[78] Instead of evaluating the employer's response to harassment conduct, some courts suggested that a single incident does not create a hostile work environment, and employers should not be liable for a

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[72] Shaw v. AutoZone, Inc., 180 F.3d 806, 812–13 (7th Cir. 1999).

[73] Turner v. Saloon, Ltd., 715 F. Supp. 2d 830, 836 (N.D. Ill. 2010) (while referring to the deposition record, the court did not specify what constitutes a verbal policy).

[74] *Id.*

[75] *Id.*

[76] Clark v. United Parcel Serv., Inc., 400 F.3d 341, 349 (6th Cir. 2005).

[77] *Id.* at 349–50 (citations omitted).

[78] *See* David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1295–96 (2001); *see also* Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (suggesting that single incident harassment may no longer be actionable because of the difficulties that employers would experience in avoiding liability).

standalone harassment conduct because the difficulties to avoid vicarious liability.

Accordingly, the disparate ruling on "reasonableness" in different circuits showed the factual intensity of the first prong. Given the circumstances around a sexual harassment claim, it should be very difficult for a judge to rule, as a matter of law, on the establishment of a hostile work environment, the severity or pervasiveness of the conduct, the adequacy of preventative or corrective measures by the employer, and the effectiveness of their implementation. Instead of leaving these determinations to the jury, federal courts kept modifying the *Faragher-Ellerth* defense and approached the first prong as a question of law.

B. The "Unreasonable" Question

Compared to how much leniency was given to employers regarding the first prong of the *Faragher-Ellerth* affirmative defense, federal courts' treatment towards employees in evaluating the second prong of the defense was incomprehensibly harsh. If a victim delays or fails to report through the employer-approved procedures, there is a high likelihood that federal courts are going to dismiss their claims based on the "unreasonable" prong as a matter of law. In many cases, courts reversed jury verdicts around on the key issue of reasonableness. For example, in *Barrett*, the jury originally issued a verdict for the plaintiff-employee, finding that she had not unreasonably failed to report harassment, but the district judge overturned the verdict in a post-trial opinion, granting the defendant-employer's motion for judgment as a matter of law.[79]

Based on the lower courts' interpretation and application of the defense, a plaintiff-employee is often found to be "unreasonable" if there is a failure to report *immediately* or if they report promptly but failed to go through the exact, designated channel employers provide. Yet scholars have found that "only 15% of those who reported did so in what courts consider a timely manner."[80] In *When Rules are Made to be Broken*, Professor Eigen, Professor Sherwyn, and Nicholas Menillo examined the circuit court opinions and concluded that the federal court judges often fail to thoroughly consider the circumstances around the case and dutifully apply the second prong of the affirmative defense as the *Ellerth/Faragher* directed, let alone find for plaintiff-employees.[81] Out of the 213 cases they studied, in only one case, *Moore v. Sam's Club*, the Southern District of New York applied the

[79] Barrett v. Applied Radiant Energy Corp., 70 F. Supp. 2d 644, 645–46 (W.D. Va. 1999); *see also* Lissau v. S. Food Serv., Inc., 159 F.3d. 177, 182 (4th Cir. 1998) (remanding for renewed motion for summary judgment for the defendant).

[80] Matthew D. Venuti, Comment, *Modernizing the Workplace: The Third Circuit Puts the* Faragher-Ellerth *Affirmative Defense in Context*, 64 Vill. L. Rev. 535, 537 (2019).

[81] Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. UNIV. L. REV. 109, 164–65 (2015).

affirmative defense and found for the employee.[82] Specifically, the court held that the defendant-employer failed to raise the affirmative defense because the employer conceded that the employee had "took full advantage of the preventive and corrective opportunities provided."[83]

Another rare pro-employee opinion in the post-*Ellerth/Faragher* era, *Greene v. Dalton*, pointed out that the reasonable question regarding the timing to response in a hostile work environment claim should be resolved by a jury, not through summary judgment.[84] In *Greene*, a former Navy employee suffered from an eleven-day pattern of sexual harassment by her immediate supervisor, including vulgar languages, sexual advances, and a sexual assault incident.[85] After a month of the last incident, the plaintiff reported the situation.[86] The appellate court rejected the Navy's argument that the plaintiff unreasonably failed to utilize the reporting procedure and struck down the Navy's attempt to obtain a full summary judgment.[87] Rather, the court explained that the purpose of the affirmative defense was "not intended to punish the plaintiff merely for being dilatory."[88] The appellate court held that the complete liability avoidance would require the Navy to fulfill a higher burden of proof, where "as a matter of law, a reasonable person in [the plaintiff's] place would have come forward early enough to prevent [the supervisor's] harassment from becoming severe or pervasive."[89] Failing to meet this burden, the Navy was not entitled to summary judgment.[90] As a result, the court decided that it is the jury's job to evaluate whether the plaintiff acted reasonably in the given circumstances.[91]

In the majority of cases where the victims failed to report promptly, things did not turn out well for the employees. In *Shaw*, the Seventh Circuit found that plaintiff's fear of reporting her supervisor's harassment conduct was unreasonable.[92] The court found that the employee has duty to utilize the company's complaint procedure despite experiencing *subjective* fear.[93] In finding such fear is an "inevitable unpleasantness" that is insufficient to justify non-reporting, the court stated: "[W]e conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."[94] Similarly, in *Hetreed v. Allstate Ins. Co.*,

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[82] *Id.* at 165–66.
[83] Moore v. Sam's Club, 55 F. Supp. 2d 177, 193 (S.D.N.Y. 1999) (internal quotation marks omitted).
[84] Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999).
[85] *Id.* at 673.
[86] *Id.*
[87] *Id.* at 675.
[88] *Id.* at 674.
[89] *Id.* at 675 (internal quotation marks omitted).
[90] *Greene*, 164 F.3d at 675.
[91] *Id.*
[92] *See* Shaw v. AutoZone, 180 F.3d 806, 812–13 (7th Cir. 1999).
[93] *Id.* at 813.
[94] *Id.*

the Seventh Circuit found the plaintiff-employee's non-reporting due to fear of retaliation unreasonable.[95] The plaintiff suffered from her supervisor's harassment for over four years, and she reported through the internal system after the supervisor-harasser retired because of fear of retaliation.[96] The court indicated that such fear was "an unfounded suspicion," and the response was unsympathetically straightforward, "if it does occur, [it] can be penalized."[97] The court believed that if the bare possibility of retaliation were enough to explain an employee's non- or delayed- reporting, then the *Ellerth/Faragher* defense "would be a dead letter."[98] However, the *Ellerth/Faragher* court never addressed how a victim's fear of retaliation would impact the timing or manner of reporting. Without considering that a jury might be the best fit to decide whether a person had a legitimate fear of retaliation under the totality of circumstances, the Seventh Circuit found it was just a bare possibility, and therefore, the plaintiff's delayed reporting was unreasonable as a matter of law.

In the Tenth Circuit, non-reporting or delayed reporting due to fear of retaliation is also deemed "unreasonable" as a matter of law. For example, in *Pinkerton v. Colorado Department of Transportation*, the Tenth Circuit stressed that under the objective of Title VII, the victim-employee has a duty to promptly report to prevent workplace harassment.[99] Therefore, the "generalized fear of retaliation" would not explain the delay in reporting harassment conduct.[100] In *Pinkerton*, the employee worked as an administrative assistant for the Colorado Department of Transportation ("CDOT") and was suffered from "inappropriate, sexually oriented remarks" during her employment.[101] Her immediate supervisor vulgarly asked her about her breast size, whether she had sexual urges, and if she masturbated.[102] After enduring these comments for two and a half months, the plaintiff reported these conduct through CDOT's internal reporting procedure and filed a written complaint.[103] Although she stated that the delay was because of fear of retaliation, the Tenth Circuit nonetheless found that it was "unexplained" and thus "unreasonable."[104] The court stressed that the plaintiff should have taken the opportunity to report sooner, knowing the CDOT's anti-harassment policy.[105] The dissenting opinion by Judge Ebel, however, called out the inappropriateness of the majority in assessing the standard for summary judgment.[106] The dissent pointed out that even if

[95] Hetreed v. Allstate Ins. Co., 6 F. App'x 397, 399 (7th Cir. 2001).
[96] *Id.* at 398.
[97] *Id.* at 399.
[98] *Id.*
[99] Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1063 (10th Cir. 2009).
[100] *Id.*
[101] *Id.* at 1057.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1064.
[105] *Pinkerton*, 563 F.3d at 1063.
[106] *Id.* at 1067 (Ebel, J., dissenting).

CDOT is able to satisfy the first prong of the *Ellerth/Faragher* defense, there is still a genuine issue of fact as to the second prong.[107] An employee's response to harassment, according to Judge Ebel, whether it is delayed reporting or failure to file a report, "must be determined by reference to many factors," such as the efficacy of the reporting mechanism implemented by the employer.[108] In addition, an employee's own effort to stop harassment behaviors should not be overlooked.[109] The first vulgar comments started in December 2002 and continued into early January. Ms. Pinkerton's contact with CDOT's internal rights administrator was on February 19, 2003, and the official filing of a formal written complaint was on February 24, 2003.[110] Since a single harassment incident may not be sufficient to establish a hostile work environment, a jury could find that Ms. Pinkerton's reporting reasonable, making the summary judgment inappropriate.[111]

Under some circumstances, courts look for a "credible threat" when plaintiff-employees assert a subjective fear that prevents them from immediate reporting.[112] In *Shields v. Fed. Express Customer Info. Servs.*, the Court of Appeals for the Sixth Circuit held that a reasonable jury would interpret a threat towards employment as "credible threats of retaliation to keep [the plaintiffs] quiet."[113] Agreeing with the Second Circuit's rationale in *Gorzynski v. JetBlue Airways Corp.*,[114] the Six Circuit refused to grant summary judgment for the employer and found that genuine issues of material fact exist in both prongs of the Faragher/Ellerth defense. In *Gorzynski*, the Second Circuit rejected a "brittle reading of the Faragher/Ellerth defense" and held that an employer is not, as a matter of law, entitled to the defense "simply because an employer's sexual harassment policy provides that the plaintiff could have complained to other persons as well as the alleged harasser."[115] Similarly, the Sixth Circuit specified that not only the delayed or non-reporting should be considered based on the facts and circumstances, but an employee is allowed to avoid harassment reporting through the internal procedure if a "credible threat of retaliation" can be demonstrated.[116] The Court found that a jury could interpret a supervisor's threatening comment in response to employees'

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[107] *Id.*

[108] *Id.* at 1068.

[109] *Id.* at 1067.

[110] *Id.* at 1068.

[111] *Pinkerton*, 563 F.3d at 1069.

[112] *See* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (concluding that plaintiff's failure to report harassment for several months was not based on a "credible fear" that her complaint would fall on deaf ears or that she would suffer an adverse employment action as a result of her decision to file a complaint). *See also* Venuti, *supra* note 80, at 537. *See generally* Hébert, *supra* note 5, at 7; Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671 (2021).

[113] Shields v. Fed. Express Customer Info. Servs. Inc., 499 F. App'x 473, 483 (6th Cir. 2012).

[114] Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 96 (2d Cir. 2010).

[115] *Id.* at 104–05.

[116] *Shields*, 499 F. App'x at 482 (citing Thornton v. Fed. Express Corp., 530 F.3d 451, 457 (6th Cir. 2008)).

intention of reporting as a credible threat of retaliation, therefore reversed lower court's summary judgment on the issue.

To the contrary, the Eleventh Circuit refused to find the existence of a "credible fear" even when the harasser pulled out a gun while alone with the victim.[117] The court held that because the harasser did not express threats while showing the gun, the plaintiff-employee merely had an "unsupported subjective fear."[118] Since the supervisor did not indicate that her job was in jeopardy or threatened her with physical harm, a "subjective fear" that "may exist in every case" cannot excuse the employee's delayed reporting.[119] As a result, the Eleven Circuit affirmed that, as a matter of law, even a victim's intimidation caused by the gun could not excuse her from delaying reporting.[120]

Moreover, in evaluating the second prong, courts seem to review the manners of reporting rigidly. Compared to how federal courts evaluate the first prong of the *Ellerth/Faragher* defense, they seem unwilling to provide as much leeway to the employees as they give to the employers. The Eleventh Circuit emphasized the principle that "[o]ne of the primary obligations that the employee has under [the *Faragher-Ellerth* rules] is to take full advantage of the employer's preventative measures."[121] However, the preventative measures are often limited to employers' official reporting procedures.[122] For example, in *DeCesare v. National Railroad Passenger Corp.*, the court found that reporting harassment conduct to a union representative rather than the company's designated personnel defeated the plaintiff's claim. [123] Since the union representative did not take further actions upon knowing the harassment conduct, the court deemed that the employer was not notified until Ms. DeCesare's formal filing of harassment allegations.[124] Eventually, Plaintiff was too scared to return to work and was declared disabled by her doctors because of the stressed caused by the

[117] Venuti, *supra* note 80, at 555; Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1291 n.17 (2003) ("We have no quarrel with that claim, but we are unwilling to say that her subsequent failure to report Mykytiuk, when she was out of his presence, was reasonable due to her subjective fear that Mykytiuk might physically harm her. Indeed, the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff-employee could escape her corresponding obligation to report sexually harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser.").

[118] *Walton*, 347 F.3d at 1291 n.17.

[119] *Id.*

[120] *Id.*

[121] Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1306–07 (11th Cir. 2007).

[122] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1285; Elizabeth Potter, *When Women's Silence Is Reasonable: Reforming the* Faragher/Ellerth *Defense in the #MeToo Era*, 85 BROOK. L. REV. 603 (2020); Jessica K. Fink, *Backdating #MeToo*, 45 CARDOZO L. REV. 899 (2024).

[123] *See* DeCesare v. Nat'l R.R. Passenger Corp., No. CNA 98–3851, 1999 WL 330258, at *5 (E.D. Pa. 1999).

[124] *Id.*

harassment conduct, but the court nonetheless faulted Plaintiff for not filing the report sooner.[125]

As a result, employees who suffer from harassment and try to get help from anyone or anything other than the designated reporting personnel or complaint mechanism will likely be viewed as "unreasonable" and thus found to have failed to take full advantage of the anti-harassment policy.[126] For example, in *Madray v. Publix Supermarkets, Inc.*, the store employees reported the store supervisor's misconduct of improper touching and kissing behavior to three different mid-level managers before filing a formal complaint, and one of the managers testified that he actually witnessed the misconduct.[127] The court concluded that because the plaintiffs did not *adequately* report using formal complaint procedures in Publix's sexual harassment policy, complaining to anyone other than the person designated in the company's anti-harassment policy does not satisfy the reasonable compliant requirement.[128] Even though the plaintiff-employees filed an official complaint four days after their complaint to the other managers, they unreasonably delayed in reporting and failed to take full advantage of the preventative and corrective opportunities.[129] By concluding that the plaintiffs did not reasonably avail themselves of the reporting grievance, the court essentially implicitly faulted the victims themselves for "facilitating" a hostile work environment.[130] The courts often require a plaintiff-employee to provide adequate notice to the employer regarding workplace harassment, while employers' merely promulgating an anti-harassment policy is considered sufficient.[131]

Overall, federal courts often fail to consider any psychological impacts of sexual harassment and the contexts around victims' timing and manner of reporting, thus being unable to achieve Title VII's objective to deter and avoid harm. Instead of letting the jury decide the reasonableness of both *Ellerth/Faragher* defense prongs, federal courts have been trying to draw bright-line rules when evaluating factually-intense questions. Over time, courts have restricted the manners for victims to report harassment conduct and driven the law further away from the initial goal of Title VII.

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[125] *Id.* ("Plaintiff has failed to take reasonable means of providing notice to Defendant. Simply informing her Union representative was not enough in this case. It wasn't until she actually filed a grievance that any action was taken. This Court believes that her filing a grievance served as an appropriate means of notifying Defendant, and this is supported by Nesci's subsequent investigation. However, while filing the grievance was appropriate, Plaintiff should have taken such action much earlier.")

[126] *Id.*

[127] Madray v. Publix Super Mkts., Inc., 30 F. Supp. 2d 1371, 1374 (S.D. Fla. 1998).

[128] *Id.* at 1376.

[129] *Id.*

[130] *Id.*

[131] Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) ("When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem.").

III. FLAWS OF THE AFFIRMATIVE DEFENSE: EVIDENCE FROM EMPIRICAL STUDIES

The perspective of the *Ellerth-Faragher* Court was that employers would take steps in a more rigorous manner to reduce workplace sexual harassment. Since the majority deemed harassment to be "outside the scope of the employment" and "misuse of the supervisory authority" under the traditional principle of agency law, it refused to overturn *Meritor's* finding that employers should not be "automatically" liable.[132] Furthermore, the Court envisioned the "temptation to litigate would be hard to resist" unless enacting an affirmative defense to counter such risk and "implement [Title VII] sensibly."[133] The Court believed that both plaintiffs and defendants would be poorly served because it would be hard to tell the difference between the affirmative and "merely implicit uses of power" when considering a supervisor's harassment conduct.[134] Therefore, in order to avoid such temptation, the Court held that an affirmative defense for employers needed to be implemented.[135] In addition, it hoped to create incentives for employers by rewarding those who take steps to prevent harassment in the workplace.[136] However, empirical studies have shown that the current anti-harassment practice has failed to achieve the *Ellerth-Faragher* Court's goal of reducing harassment behavior.[137] Rather, it deviated from the original purpose and became a tool for employers to dodge legal liability.

A. The Inadequacy of Current Anti-Harassment Approaches

As discussed earlier, the treatment the employers receive in the application of the *Faragher-Ellerth* defense shows that the existence of anti-harassment policies and training is often deemed sufficient proof of reasonable care in preventing and reducing workplace harassment.[138] Yet empirical studies provide evidence to the contrary. An EEOC report concluded that most workplace anti-harassment training over the last 30 years has failed as a preventative tool and the traditional forms of training focus on avoiding legal liability rather than reducing workplace

[132] Faragher v. Boca Raton, 524 U.S.774, 804 (1998).
[133] *Id.* at 805.
[134] *Id.*
[135] *Id.* at 780.
[136] *Id.* at 803.
[137] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1294 ("Unfortunately, a standard that provides an incentive for employers to devise a subtle system that satisfies the courts but discourages complaints, does not, we believe, effectively lead to the ultimate goal of eliminating sexual harassment in the workplace."). *See also*, Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 494, 496 (2018).
[138] See discussion *supra* Section II.A.

harassment.[139] In a 2018 study, Professor Elizabeth Tippett analyzed the content of 74 different sexual harassment training curricula and found that most harassment training is outdated—they center around the content developed in the 1980s and 1990s, which focus on the complexity of the sexual harassment law and how to avoid litigation.[140] In addition, most training only puts emphasis on advising victims to invoke an institutional response rather than providing realistic options to help individuals suffering from harassment.[141] The early-stage anti-harassment training included advice and instructions for harassment victims to protect their own legal interests, but researchers found that these instructions disappeared in later training materials.[142] It seems that "[employers] assume that an institutional response is always preferred over other options, which may be true from a liability reduction standpoint."[143] Different from other areas of law, where scholars believe that employers would be self-motivated to adapt quickly to new information and adjust their practices in reducing litigation risk, there has not been much evolution in the content of anti-harassment training.[144] Professor Tippett pointed out that workplace harassment training is operating "like software updates—where the existing substrate is patched and new features are added—but the original code remains intact."[145] This observation might be counterintuitive at first glance because the public's view on both sexuality and harassment have evolved in the past few decades, but it shows employers' confidence—that they are fully aware that there is no necessity to provide a more engaging and meaningful education; that they are sitting comfortably in the legal "safe harbor" as long as they adopt a *pro forma* policy.

The limited studies available suggest that, contrary to what the *Faragher-Ellerth* court envisioned, the training and procedures "may be managerial snake oil."[146] Rather than incentivizing employers to prevent harassment, the affirmative defense incentivizes employers to put in only the bare minimum of preventative efforts.[147] Moreover, the rule might even perversely discourage employers from making complaint procedures easier

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[139] *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/
report.cfm (gathering examples where the company "looked the other way" for years when a valuable employee was the harasser).

[140] Tippett, *supra* note 137, at 485.

[141] *Id.* at 486.

[142] *Id.*

[143] *Id.* at 519.

[144] *Id.* at n.149 (discussing Richard Posner's theory that firms will adapt quickly and adjust their practice in response to risk environment).

[145] *Id.* at 510.

[146] Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT'L ACAD. SCIS. 12255, 12257 (2019).

[147] Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 469 (2002) ("[T]he courts are granting employers summary judgment on the affirmative defense based upon evidence of minimal policies with questionable effectiveness.").

in order for them to raise the possibility of satisfying the second prong of the affirmative defense.[148]

Though research has shown that traditional training can be not only unhelpful but even counterproductive, workplace anti-harassment training continuously carries out outdated content, confusing reporting procedures, and mundane formality. In Professor Frank Dobbin and Professor Alexandra Kalev's study, using advanced statistical models to isolate the effects of harassment training programs, they found that these programs negatively affect the representation of women in management and create a backlash.[149] The data analysis shows that although sexual harassment training for employees can improve knowledge about harassment, it can emphasize gender stereotypes and eventually lead to a reduction in female managers. The mandatory training that focuses on forbidden behaviors and ignores the power dynamics reinforces gender stereotypes and signals that male employees are the problem.[150] Empirical studies have pointed out that such training could lead to more victim-blaming and failed to reform potential harassers.[151]

In some cases, harassment-prevention training could even increase the likelihood of harassment in male employees who are inclined to harass women.[152] The study shows that men who receive high scores on "the Likelihood to Sexually Harass Scale" often shift "toward greater acceptance of sexual harassment" after training programs.[153] In addition, experimental data shows that routinely presented, poorly designed workplace training could discourage male employees from working with women out of fear of harassment charges,[154] although past research has shown there is an extremely low possibility of false accusations in sexual harassment reporting.[155] Even when sexual harassment training is effective at increasing employees' awareness and knowledge about harassment, empirical data has shown that the training does not successfully change employee behaviors.[156] Ultimately, employees who suffer from workplace sexual harassment would become the ones who bear all the cost of ineffective harassment training—

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[148] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1304.

[149] Dobbin & Kalev, *supra* note 146, at 12258. *See also* Justine Tinkler, Skylar Gremillion & Kira Arthurs, *Perceptions of Legitimacy: The Sex of the Legal Messenger and Reactions to Sexual Harassment Training*, 40 L. & SOC. INQUIRY 152, 153 (2015).

[150] Dobbin & Kalev, *supra* note 146, at 12258.

[151] *Id.*

[152] Lori A. Robb & Dennis Doverspike, *Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training*, 88 PSYCH. REP. 85, 85 (2001).

[153] *Id.* at 87.

[154] Tinkler, Gremillion & Arthurs, *supra* note 149.

[155] David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1319 (2010).

[156] Vicki J. Magley, Louise F. Fitzgerald, Jan Salisbury, Fritz Drasgow & Michael J. Zickar, *Changing Sexual Harassment Within Organizations via Training Interventions: Suggestions and Empirical Data*, in THE FULFILLING WORKPLACE: THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH, 225, 227, 229–230, 241 (Ronald J. Burke & Cary L. Cooper eds., 2013).

they pay with their career growth, their physical and mental well-being, and their opportunities to prevail in court.[157]

B. Why Employees Do Not Report

As to the second prong of the *Ellerth/Faragher* affirmative defense, empirical studies show that the majority of the victims do not act how federal court judges expect in their reasonable person standard. A 2016 EEOC report found that up to 85% of women had experienced sexual harassment in the workplace, depending on whether harassment behavior was defined as more than one action or a specific action.[158] Conducted by the EEOC Select Task Force on the Study of Workplace Harassment, the report found that many victims don't report harassment—in fact, "[t]he least common response of either men or women to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint."[159] Based on the data, approximately 30% of victims report harassment at all, and only as many as 13% of employees who suffered from harassment filed a formal complaint.[160] The most common response is different forms of avoidance, such as downplaying the situation and attempting to endure or ignore it.[161]

In fact, the failure of reporting is a result of complicated reasons—fear of both social and professional retaliation, distrust of the grievance procedure, lack of bystander reporting training, or disbelieving that the employers will take disciplinary actions against the harassers, and natural psychological responses to the harassment such as shame, self-blame, and denial.[162] The EEOC acknowledged such social and psychological complications and suggested that employees' failure to report harassment is understandable in such a highly traumatic yet delicate situation. In its Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors,[163] the EEOC points out that failure to immediately report after the first or even several harassment behaviors should not be deemed as unreasonable: "[a]n employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. . . . An employee might reasonably ignore a small number of incidents, hoping that the

[157] *Id.*
[158] *See* Feldblum & Lipnic, *supra* note 139.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* ("Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.").
[163] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *superseded by* ENFORCEMENT GUIDANCE ON HARASSMENT IN THE Workplace (2024).

harassment will stop without resort to the complaint process."[164] Moreover, the guideline stressed that an employee who suffer from harassment behavior might hesitate to turn the workplace to a "battleground" and try stopping the harassment behavior on their own before filing a formal complaint.[165]

In addition, studies have shown that employees do not make the reporting decision lightly. The culture of an organization also significantly affects employees' response to harassment training.[166] Employees are more likely to have a cynical belief towards the training and grievance procedure and are less likely to report harassment when their workplace has a gender-homogenous and high-stressed organizational climate where harassment behaviors are more tolerated.[167]

Overall, the empirical studies have demonstrated that the current anti-harassment practice, including training program and internal grievance procedures, has failed to effectively deter harassers from misconduct. In addition, they have dissuaded victims from reporting and deviated from the original goal of avoiding harm under Title VII that the *Ellerth-Faragher* Court was hoping to achieve.

IV. COMPLEX PROBLEMS CAN HAVE SIMPLE SOLUTIONS

While the assumption that the *Ellerth-Faragher* Court relied on has been largely defeated by the subsequent case law and judicial interpretation of the affirmative defense, it is not too late to explore alternative options. The following sections discusses some potential solutions that would incentivize employers to effectively prevent and respond to sexual harassment behavior in the workplace.

A. Statutory Elimination of the Faragher/Ellerth Defense

Despite some concerns about over-monitoring and arbitrarily discharging the accused employee under a strict liability regime,[168] the elimination of the *Faragher/Ellerth* defense is a necessary step towards a

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[164] Feldblum & Lipnic, *supra* note 139.

[165] *Id.*

[166] Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 466 (2020).

[167] Louise F. Fitzgerald, Fritz Drasgow, Charles L. Hulin, Michele J. Gelfand & Vicki J. Magley, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCH. 578, 584 (1997).

[168] *See* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 456–57 (1997) ("Subjecting employers to strict liability when they have clearly attempted to eradicate workplace harassment and taken remedial measures once notified of specific instances of supervisor harassment may deter them from even attempting to prevent or remedy the harassment.").

more effective legal rule for combating workplace harassment.[169] As the New York legislature did in reforming the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), Congress should act to eliminate the *Faragher/Ellerth* defense and hold employer strictly liable in hostile work environment claims.[170]

Section 8-107(13) of the NYCHRL specified that employers are held strictly liable for acts of their supervisor-employees but "can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken."[171] In *Zakrzewska v. New School*, a diversity suit in 2008, the Second Circuit certified the New York Court of Appeals to answer the question of whether the affirmative defense applies under the NYCHRL.[172] The Court of Appeals concluded that the *Faragher/Ellerth* defense is not available under the NYCHRL.[173] The Court of Appeals took legislative intent into consideration and held that "the plain language of the NYCHRL precludes the *Faragher/Ellerth* defense," asserting that to hold otherwise would contradict the specific intention of Section 8-107(13) of the NYCHRL.[174]

Similarly, a new provision added to NYSHRL in 2019 clarified that an employer's liability would not depend on effective reporting by the victims. The provision specifically provides that "[t]he fact that [an] individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable."[175] Although the courts have not yet come to a determination of whether the new NYSHRL provision effectively eliminated the *Faragher/Ellerth* defense the same way as the NYCHRL does,[176] this amendment has shown the determination of the legislature to hold employers to a heightened standard in hostile work environment claims.

From a law and economics standpoint, holding employers strictly liable will also signal litigation uncertainty for employers and thus incentivize

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[169] Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989) ("The most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable.").

[170] N.Y. Exec. Law § 296 (Consol. 2025); *see also* Phillips & Associates, *New York Legislature Passes Bill Eliminating* Faragher/Ellerth *Defense in State Law Harassment Cases*, PHILLIPS & ASSOCS. BLOG (Aug. 2, 2019), https://www.newyorkcitydiscriminationlawyer.com/blog/2019/august/new-york-legislature-passes-bill-eliminating-far/.

[171] N.Y. COMP. CODES R. & REGS. tit. 13, § 8-107 (2006).

[172] Zakrzewska v. New School, 928 N.E.2d 1035, 1036 (N.Y. 2010).

[173] *Id.*

[174] *Id.* at 1039.

[175] N.Y. COMP. CODES R. & REGS. tit. 13, § 8-107 (2006).

[176] Green v. N.Y.C. Transit Auth., No. 15-cv-8204, 2020 WL 5632743, at *9–10 (S.D.N.Y. Sept. 21, 2020).

them to put more effort into reducing harassing behavior.[177] With the current protection of the affirmative defense, employers have an overall chance of 70%–89% or greater in prevailing at pretrial, summary judgment dispositions.[178] This phenomenon provides yet further evidence to support the economic argument "that there are not strong enough incentives to push companies to eliminate or mitigate the risk of workplace sexual harassment."[179] With a lack of regulation, society can only rely on social movements like *#MeToo* to put companies in the "court of social opinion" and spur corporate change.[180] When companies calculate the cost and benefit and decide that the risk of their current practice would eventually affect its reputational and shareholder value, they are more motivated to revamp their anti-harassment practices.[181] The most compelling example is the recent trend in expanding uncompensated termination provisions to include sex-based misconduct in CEO contracts.[182] In the wake of the *#MeToo* movement, corporate boards started to endure public scrutiny on workplace culture, especially when it involves sexual misconduct by high-level executives.[183] This effort includes expanding the definitions of "cause" in CEO contracts that permit uncompensated termination in situations involving harassment, discrimination, or violations of company policy.[184] Prior to #MeToo, the CEO contracts were fairly narrow in defining the situations that would allow terminations without severance package—and shockingly enough, sex-based misconduct is often not part of the traditional language.[185] In many cases, CEOs and high-level executives who are directly involved in sex-based misconduct could comfortably exist with severance packages and the protection of confidential settlements.[186]

Thus, by increasing the uncertainty in the litigation process, a statutory elimination of the *Faragher/Ellerth* defense has the potential to motivate

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[177] *See* Kaushik Basu, *Sexual Harassment in the Workplace: An Economic Analysis with Implications for Worker Rights and Labor Standards Policy* 8 (Mass. Inst. of Tech. Dep't of Econ., Working Paper No. 02-11, 2002).

[178] *See* Eigen, Sherwyn & Menillo, *supra* note 81, at 145 (citing Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARV. L. & POL'Y REV. 103, 109–10 (2009)).

[179] *Companies Have Little Incentive to Fight Workplace Sexual Harassment, Vanderbilt Economist Explain*, VANDERBILT RESEARCH NEWS (Mar. 1, 2018, 4:51 PM), https://news.vanderbilt.edu/2018/03/01/companies-have-little-incentive-to-fight-workplace-sexual-harassment-vanderbilt-economist-explains/; *see also* Joni Hersch, *Gender Gaps in Families, Health Care, and Industry: Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV. 630, 634 (2011).

[180] *Companies Have Little Incentive to Fight Workplace Sexual Harassment, Vanderbilt Economist Explain*, *supra* note 179.

[181] *Id.*

[182] Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 IND. L.J. 125, 134–35 (2022).

[183] *Id.* at 160.

[184] *Id.* at 130 n.8 (discussing how Google gave a $90 million exit package to Android-creator Andy Rubin after alleged sexual misconduct).

[185] *Id.* at 130–31.

[186] *Id.*

employers to do more than the bare minimum in reducing harassment behaviors and, therefore, significantly improve the employees' work environment. Although some might argue that the statutory foundation for harassment claims under Title VII is quite lean,[187] Congress is still the best hope in fundamentally improving employee's situation in workplace harassment.

B. A Middle Ground: Avoidable Consequence Doctrine

While employer strict liability might be the ultimate cure, it will take some time to achieve in the foreseeable future. Furthermore, it is anticipated that there will be strong pushbacks from corporations. California state law manages to find a middle ground that holds employers strictly liable for *all* acts of its supervisors while allowing a new defense to harassment claims.[188] Under California's Fair Employment and Housing Act ("FEHA"), employers are not allowed to raise the *Faragher/Ellerth* defense; instead, they can assert a defense under the avoidable consequences doctrine.[189] The defense has three elements: "(1) the employer took reasonable steps to prevent and correct workplace harassment, (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."[190]

In *State Department of Health Services v. Superior Court*, the California Supreme Court explained that different from the *Faragher/Ellerth* defense, the avoidable consequences doctrine only enables employers to limit *damages*, not all liabilities.[191] Deriving from common tort law, the avoidable consequences doctrine established that "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure."[192] In judging the injured party's effort to avoid harm, the court assessed the employee's mitigation conduct "in light of the situation existing at the time and not with the benefit of hindsight,"[193] which was consistent with principle of the avoidable consequences doctrine. The doctrine does not require the injured party to take efforts that are impractical or disproportional, and the reasonableness of the injured party's efforts is evaluated based on the

[187] Hébert, *supra* note 5, at 42 (suggested that sexual harassment law is essentially court-made law, not by Congress).
[188] CAL. GOV'T CODE §12940(k) (West 2023).
[189] *Id.* at §12940(j)(1).
[190] State Dept. of Health Serv. v. Superior Court, 79 P.3d 556, 565 (Cal. 2003).
[191] *Id.* at 564.
[192] *Id.*
[193] *Id.*

situation of the injury.[194] The court stressed that the holding of *Department of Health Services* indicated a different practice from many federal courts in applying the *Faragher/Ellerth* defense: "[T]he holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms."[195] The court explained that the lack of report may be a consequence of employer's lack of an adequate antiharassment policy or procedures, insufficient communication or employee education, and pointed out that "the employee may reasonably fear reprisal by the harassing supervisor or other employees."[196] The opinion also recognized the victim's natural feelings, such as embarrassment or shame, as sufficient excuses for delayed reporting.[197]

By replacing the *Faragher/Ellerth* defense with the avoidable consequences doctrine, employers are no longer able to escape liability entirely in workplace sexual harassment claims. Instead, an employer that has exercised reasonable care in providing trainings and reporting channels remains strictly liable for harm a victim-employee could not have avoided through reasonable care. On the other hand, this doctrine also gives rise to the duty to mitigate damages, which is consistent with the principle of Title VII. The employer would not be liable for any damages caused by harm that the victim-employee could have avoided at the time of injury. However, even if the employee's actions will not be judged "as high as the standard required in other areas of law" under the avoidable consequences doctrine, the particular level of reasonableness remains unclear. The question of reasonableness will be evaluated based on each individual situation, and it is still unclear whether the courts would let it remain a jury question or turn it into a matter of law.

C. Back into the Hands of the Jury

In the three decades following *Faragher/Ellerth*, the majority of courts have deviated from the initial intention of the affirmative defense by holding that certain *pro forma* policies constitute reasonable care as a matter of law. In the wake of the *#MeToo* movement, some courts have started to realize that social expectations have parted ways with sexual harassment law.[198] For both the first and second prong of the *Faragher/Ellerth* defense, the general public has a different standard of "reasonableness" from the

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[194] Green v. Smith261 Cal. App. 392, 396–97 (Cal. Ct. App. 1968) ("The doctrine does not require the injured party to take measures which are unreasonable or impractical . . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . It is sufficient if he acts reasonably and with due diligence, in good faith.").

[195] *State Dept. of Health Serv.*, 79 P.3d at 565.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 560; *see also* Fink, *supra* note 122, at 933.

courts.[199] While employers were frequently shielded from strict liability by adopting a *pro forma* "zero-tolerance" policy in harassment claims, there is a higher social expectation for employer discipline action of the wrongdoers.[200] Meanwhile, with the development of psychological research, social understandings and expectations regarding a "reasonable" person's response to harassment have evolved as well.[201] As research suggests, there has been an increased recognition among the public regarding how workplace culture, fear of retaliation, and bystander reporting may impact how victims respond to workplace harassment.[202] While the majority of the courts have not kept up with the changing normative expectations, some courts have started to consider the context around the reporting situations rather than accepting the mere existence of an employer's anti-harassment policy to be "compelling proof" as a matter of law.[203]

For example, in *Minarsky v. Susquehanna County*, the Third Circuit vacated summary judgment after finding that a jury should decide whether the policy in place was effective and whether the victim of workplace sexual harassment unreasonably failed to report the misconduct because of her fear of retaliation and losing her job.[204] The plaintiff endured years of sexual harassment by her supervisor and never reported through the county's official anti-harassment reporting process.[205] After the plaintiff filed a claim against her employer, the district court granted summary judgment in favor of the county and found that both prongs of the *Faragher/Ellerth* defense were satisfied.[206] So far, the case was just another example of the courts' mechanical application of the affirmative defense framework. On appeal, the Third Circuit reversed the district court's analysis of the *Faragher/Ellerth* test. Deviating from the previous case law, the Third Circuit shed new light on the affirmative defense framework; the opinion held that "reasonableness," as the "cornerstone of the [*Faragher/Ellerth*] analysis," should be left for a jury to decide.[207] The Third Circuit clarified that although a plaintiff's failure to report persistent harassment behavior is often found unreasonable as a matter of law, it is not "*per se* unreasonable" since "[w]orkplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the

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[199] Fink, *supra* note 122, at 918.

[200] *Id.* at 916 ("With the exposure of Harvey Weinstein and others, members of the public quickly came to comprehend not only the number of women who for years had been targeted by this type of behavior but also the power dynamics that likely prevented many of them from coming forward. . . . [T]he public gained a rapid education regarding the psychological trauma that often accompanies harassment, and regarding the credible fears harbored by many victims that they would face retaliation if they came forward." (footnote omitted)).

[201] *Id.*

[202] Venuti, *supra* note 80, at 536, 566.

[203] Venuti, *supra* note 80, at 536, 546–47.

[204] Minarsky v. Susquehanna Cnty., 895 F.3d 303, 314 (3d Cir. 2018).

[205] *Id.*

[206] *Id.* at 309.

[207] *Id.* at 311.

jury." [208] In one of the footnotes, the *Minarsky* court specifically acknowledged that the #MeToo movement has shown why sexual harassment is underreported: victims "anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment."[209]

The Third Circuit took an approach that has not been widely adopted by other circuits within the frame of the *Faragher/Ellerth* defense: putting factual-based questions back into the hands of the jury. Although significantly deviating from the long-established precedent of other circuits, the *Minarsky* court acknowledged the limitation of judges in determining "reasonableness" and showed its willingness to consider social context and psychological effects. While it is still early to conclude whether more circuits will follow the lead of the *Minarsky* court, the uncertainty of a jury trial might also incentivize employers to be more diligent in reducing workplace harassment. If more plaintiff-employees survive motions for summary judgment, employers will be motivated to improve their anti-harassment practices as society redefines the "reasonable person" standard in harassment reporting.

D. Government Enforcement Actions as Signals for Change

One of the most criticized issues of sexual harassment law is it fails to fundamentally change the culture of a company. [210] Unlike workplace fatalities and job injuries, sexual harassment does not receive the same level of regulations as those that are recognized by the Occupational Safety and Health Administration ("OSHA").[211] Under OSHA, companies could face hefty fines if they fail to meet the standard for workplace safety.[212] Although sexual harassment ranks as one of the working conditions people are most concerned about, companies do not pay much for failing to provide a workplace safe from harassment.[213]

The EEOC may hold the key to incentivizing employers to change workplace culture by utilizing consent decrees. As a court-enforced settlement, a consent decree can be an effective legal tool between the defendant and the EEOC that spells out an improvement plan for policy implementation, education and training, revamped reporting procedure, and the role of an EEOC monitor in overseeing and supervising the employer for a period of time to ensure successful completion of the provisions outlined

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[208] *Id.* at 314.
[209] *Id.* at 314 n.12.
[210] *See* Susan Bisom-Rapp, *The Role of Law and Myth in Creating a Workplace That "Looks Like America."* 43 BERKELEY J. EMP. & LAB. L. 251, 292 (2022).
[211] Hersch, *supra* note 179, at 630.
[212] *Id*.
[213] *Id*. at 633.

in the decree.[214] In other areas of law, consent decrees have been used by the Department of Justice ("DOJ") as an organizational reform tool, such as police reform,[215] violations of voting law,[216] and sexual harassment violations under the Fair Housing Act.[217] In a consent decree, government agencies could specify all the actions and training the employers must implement to raise awareness and facilitate a harassment-free work environment. For example, "[p]articularly regarding Title VII consent decrees, the EEOC has several components . . . the scope of the decree, injunctive relief, monetary relief, anti-discrimination policy and dissemination, mandated EEOC Title VII training, semi/annual reporting requirements to the EEOC, and other miscellaneous actions."[218]

In 2003, the EEOC entered a 2.5-year consent decree with Dial Corporations with appointed monitors to effectuate the decree.[219] Within the first year of the decree, the monitors have reported that "Dial had successfully rewritten its previous policy regarding harassment, revised its complaint procedures, and had taken steps to improve supervisory accountability."[220] They also reported that the improved sexual harassment training program at Dial had implemented exceeded the requirements of the decree.[221] Reflecting on the success in rebuilding workplace culture, the monitor found that the majority of the employees "attributed the improvements to the [EEOC] litigation."[222]

Similarly, in 2022, a U.S. District Court in California approved and entered a three-year consent decree between the EEOC and Activision Blizzard, Inc., a videogame entertainment company.[223] Aside from $18 million in monetary relief and significant injunctive relief, the consent decree laid out detailed provisions that focused on building an effective anti-harassment compliance program and creating a retaliation-free, inclusive

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[214] *Understanding Consent Decrees from Equal Employment Opportunity Commission and EEOC Title VII Training*, COMPLIANCE TRAINING GRP. (Oct. 27, 2021), https://compliancetrainninggroup.com/2021/10/27/eeoc-title-vii-training/.

[215] *See* U.S. DEP'T OF JUST., POLICE REFORM AND ACCOUNTABILITY ACCOMPLISHMENTS; U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (2023); United States v. Baltimore Police Dep't, 249 F. Supp. 3d 816, 820 (D. Md. 2017).

[216] *See e.g.*, United States v. Union Cnty., No. 2:23-cv-02531, at *5 (D.N.J. June 12, 2023); United States v. New Jersey, No. 3:21-cv-14618, at *1 (D.N.J. Sept. 2, 2021).

[217] *See* United States v. Pfeiffer, No. 20-cv-1974, at *2, *7. (D. Minn. Oct. 24, 2021) (specifies that the defendants must also undergo education and training on the FHA, with specific emphasis on discrimination on the basis of sex and sexual harassment.).

[218] *Understanding Consent Decrees from Equal Employment Opportunity Commission and EEOC Title VII Training*, *supra* note 214.

[219] U.S. EQUAL EMP. OPPORTUNITY COMM'N, MONITORS REPORT CONSENT DECREE IN SEXUAL HARASSMENT CASE IS WORKING AT DIAL (May 26, 2004), https://www.eeoc.gov/newsroom/monitors-report-consent-decree-sexual-harassment-case-working-dial; EEOC v. Dial Corp., No. 99-C-3356, at *2, *3, *12 (N.D. Ill. May 9, 2003).

[220] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 219.

[221] *Id.*

[222] *Id.*

[223] EEOC v. Activision Blizzard, Inc., No. 2:21-CV-07682, (C.D. Cal. Mar. 29, 2022).

culture under the monitorship of the EEOC.[224] An equal employment opportunity ("EEO") consultant would oversee all company policies, reporting and grievance procedures, and review content and effectiveness of all trainings during the three-year period.[225] Since all subsidiaries of the Activision Blizzard would be subject to the consent decree, the terms would be implemented in locations across the country.[226] The EEOC reviewed it as an opportunity for the industry to examine their workplace anti-harassment and anti-retaliation practice.[227]

While consent decrees and monitorship may bring remarkable results in reforming employer anti-harassment practices, consent decrees often are the results of a systematic, long-term pattern of workplace sexual harassment. In the case of Dial Corporation, the consent decree was entered after 11 years of a systematic problem of tolerating a sex-based hostile work environment.[228] In addition, there was evidence of multiple former employees that suffered from harassment.[229] More importantly, the district judge denied Dial's motion for summary judgment, finding genuine issues of material fact remained as to multiple issues of the claim, such as the "severe or pervasive conduct" question,[230] Dial's negligence issue in whether it had taken steps "to address the [harassment] problem on a company-wide basis,"[231] and whether Dial satisfied the *Ellerth/Faragher* affirmative defense.[232]

Overall, by utilizing enforcement tools such as consent decrees, government agencies play an important role in signaling their commitment to helping create a harassment-free environment for employees. Knowing that their anti-harassment and anti-retaliation practices could be subject to

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[224] *Id.* at *4, *5, *8.

[225] *Id.* at *14, *15.

[226] *Id.* at *4.

[227] U.S. EQUAL EMP. OPPORTUNITY COMM'N, COURT APPROVES EEOC'S $18 MILLION SETTLEMENT WITH ACTIVISION BLIZZARD (Mar. 30, 2022) ("We recognize Activision Blizzard for agreeing to a substantial injunctive relief that reflects its commitment to being a change agent in an industry that struggles with harassment in the workplace. We encourage others in the industry to examine their practices to ensure a workplace free of harassment and retaliation. The EEOC remains vigilant to remedy issues of harassment and discrimination wherever we find them").

[228] EEOC v. Dial Corp., No. 99-C-3356, at *3 (N.D. Ill. 2003) ("On May 20, 1999, EEOC initiated this action by filing its Complaint against Dial. EEOC's Complaint alleged that Dial violated Title VII of the Civil Rights Act of 1964, as amended, including, but not limited to, amendments authorized by the Civil Rights Act of 1991, 42 U.S.C. §2000e et seq. ('Title VII'), by engaging in a pattern or practice of sexual harassment and sex-based harassment against a class of current and former female employees since at least July, 1988.").

[229] EEOC v. Dial Corp., No. 99-C-3356, at *2 (N.D. Ill. May 9, 2003).

[230] EEOC v. Dial Corp., 156 F. Supp. 2d 926, 953 ("After reviewing the evidence before me, I find that genuine issues of material fact remain as to whether Dial maintained a policy of tolerating co-worker harassment.").

[231] *Id.* at 954–55.

[232] *Id.* at 956. ("After reviewing the evidence, I find that genuine issues of material fact remain as to the issue of whether Dial is shielded from liability by the *Ellerth/Faragher* affirmative defense. As noted above, the first element of this defense requires the employer to demonstrate that it has exercised reasonable care to prevent and correct promptly any sexually harassing behavior. . . . I am not persuaded that Dial's efforts to prevent harassment on a plant-wide basis were reasonable as a matter of law.").

monitorship, employers will have a stronger incentive to examine their workplace culture and create effective procedures to prevent harassment behaviors.

CONCLUSION

The persistent workplace harassment problems and waves of social movements prove that the need to provide employers with the right incentives to create a harassment-free workplace is still urgent.

After nearly three decades of development, both empirical studies and the post-*Ellerth/Faragher* federal case law provide strong evidence that the *Faragher/Ellerth* defense has failed to achieve its original goal: to encourage employers and employees to work together in reducing harassment. Moreover, the lower court's treatment of both prongs as matters of law rather than jury questions has created substantial legal hurdles for victim-employees seeking relief for their injury. Courts often overlook the actual effectiveness of employers' anti-harassment practices and, critically, fail to consider the totality of circumstances around employee reporting. As a result, the current regime allows employers to comfortably sit in a legal "safe harbor" by creating a *pro forma* anti-harassment policy with an inconvenient reporting channel.

Ultimately, it would be beneficial for the Supreme Court to revisit the feasibility of the *Faragher-Ellerth* defense to better achieve goal of Title VII. If the Court refuses to re-evaluate the defense, Congress should move toward a statutory solution. Such a solution should not only be consistent with the legal principle of anti-discrimination and tort law, but it should also incentivize employers to design anti-harassment practices around harm-deterrence rather than liability-avoidance.