# COLUMBIA LAW REVIEW




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### ESSAY

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## ABSTRACTS

### ARTICLES



*Across the economy, monopolists of all kinds are engaged in "conditional dealing." This is the practice of unilaterally offering benefits and penalties, or bribes and threats, to induce trading partners to refrain from competing against the monopolist or from dealing with its rivals. Pharma giants offer discounts conditioned on "loyalty," agricultural monopolists impose "exit penalties" for switching to rivals, and social networks offer interoperability for apps only so long as they don't compete.*

*Economic scholarship shows that conditional dealing can inflict serious harms, but the law has not caught up. In particular, harmful conditioning goes undeterred because it falls into the gaps between the categories of our fragmented monopolization law. Courts have repeatedly tried to squeeze conditioning into ill-fitting categories, rejected claims on the basis of economically irrelevant criteria, and sometimes thrown up their hands altogether. The result: shambolic doctrine, tolerance of harmful behavior, and the collapse of enforcement efforts.*

*Conditional dealing should be recognized as a new category of monopolizing conduct. To that end, this Article provides a new analytical framework: a definition of conditioning, as well as standards for gauging its exclusionary impact, contribution to power, and procompetitive justifications. It explains why a host of criteria often applied by courts—from price-cost and "coercion" tests to quantitative foreclosure screens—should be jettisoned. And it sketches two further ideas with broader implications for antitrust: a framework of "quick look monopolization" for nakedly harmful conditioning and a reinterpretation of the "attempted monopoly maintenance" offense to tackle knowing misconduct in complex markets.*



*Are refusals to provide services for same-sex weddings anti-gay discrimination? The answer, the Supreme Court seems to say, is "no." Last Term in* 303 Creative LLC v. Elenis*, the Court held that the Constitution's Free Speech Clause granted a web designer the right to*

*processes, counseling, and other assistance that strengthen fathers' active membership in the family. But men facing economic precarity are unlikely to be married and thus need not go to court when a romantic relationship ends. Accordingly, these men do not benefit from this transformation in custody rules and processes, and they are unlikely to access the supportive services. The child support system makes things worse by imposing unrealistic orders on low-income fathers that alienate men from their families. And the family regulation system, also known as the child welfare system, treats these fathers as incompetent caregivers or, even worse, as threats.*

*Family law may relegate men in crisis to the periphery of family life, but it can also help bring them back. The goal is not to restore men's patriarchal authority but rather to extend the model of cooperative parenting to more families. To this end, this Essay proposes far-reaching reforms to custody rules and processes, child support, and family regulation. In each of these problematic areas of family law, the proposed reforms give families greater autonomy in shaping agreements about family relationships, support to make these bargains workable, and opportunities for men to be active fathers.*

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# ARTICLES

## MONOPOLIZING BY CONDITIONING

*Daniel Francis**

*Across the economy, monopolists of all kinds are engaged in "conditional dealing." This is the practice of unilaterally offering benefits and penalties, or bribes and threats, to induce trading partners to refrain from competing against the monopolist or from dealing with its rivals. Pharma giants offer discounts conditioned on "loyalty," agricultural monopolists impose "exit penalties" for switching to rivals, and social networks offer interoperability for apps only so long as they don't compete.*

*Economic scholarship shows that conditional dealing can inflict serious harms, but the law has not caught up. In particular, harmful conditioning goes undeterred because it falls into the gaps between the categories of our fragmented monopolization law. Courts have repeatedly tried to squeeze conditioning into ill-fitting categories, rejected claims on the basis of economically irrelevant criteria, and sometimes thrown up their hands altogether. The result: shambolic doctrine, tolerance of harmful behavior, and the collapse of enforcement efforts.*

*Conditional dealing should be recognized as a new category of monopolizing conduct. To that end, this Article provides a new analytical framework: a definition of conditioning, as well as standards for gauging its exclusionary impact, contribution to power, and procompetitive justifications. It explains why a host of criteria often applied by courts—from price-cost and "coercion" tests to quantitative foreclosure screens—should be jettisoned. And it sketches two further ideas with broader implications for antitrust: a framework of "quick look monopolization" for nakedly harmful conditioning and a reinterpretation of the "attempted monopoly maintenance" offense to tackle knowing misconduct in complex markets.*

* Assistant Professor of Law, NYU School of Law. Disclosure: While serving at the FTC (2018–2021), I participated in some of the matters described below. This Article relies only on public materials. My research is funded only by New York University. My wife is an antitrust attorney in private practice. Thanks to Geoffrey Green, Erik Hovenkamp, Emma Kaufman, Dave Lawrence, Doug Melamed, Jon Sallet, Steve Salop, Carl Shapiro, and Danny Sokol for helpful comments, to Kaitlyn Ezell and Sam Yu for excellent research assistance, and to Noah McCarthy and the *Columbia Law Review* team for superb editing help.

## INTRODUCTION

What could be more flagrantly anticompetitive than bribing or threatening a business to deter it from becoming, or from dealing with, a competitor? Surely, one might think, any self-respecting antitrust system would come down very hard on a monopolist that tried anything of the kind.

But the practice is rife. Enforcers have sued digital platforms for offering an array of valuable benefits—from search preferencing to interoperability—to encourage their trading partners to steer clear of rivals and rivalry.[1] Agritech giants pay distributors to reject cheaper crop protection chemicals that would reduce farmers' costs.[2] And pharmaceutical monopolists wield enormous rebates to induce customers to refuse cheaper generic alternatives that patients would value.[3]

And when enforcers do challenge such practices—typically under the prohibition on "monopolization" in Section 2 of the Sherman Act[4]—courts often seem barely interested. For example, the D.C. Circuit has effectively shrugged at an allegation that a dominant social network leveraged valuable interoperability to deter other apps from developing competing functions,[5] while the Ninth Circuit showed little interest in allegations that a processor-chip monopolist used a patent license as a

1. See infra section I.A.1. "Search preferencing" means more favorable treatment in search results (e.g., higher ranking, or display in a featured box or sidebar); "interoperability" means interconnection between compatible products and services. These have featured in allegations against Amazon and Meta (Facebook) respectively. See infra notes 28–33, 58–61 and accompanying text.

2. See infra section I.A.2 (discussing an FTC suit alleging anticompetitive "loyalty discounting" by two agritech companies).

3. See infra section I.A.3 (describing how pharmaceutical companies use rebates to keep certain drugs off approved formularies).

4. See Sherman Act of 1890, 15 U.S.C. § 2 (2018) ("Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .").

5. See New York v. Meta Platforms, Inc., 66 F.4th 288, 305–06 (D.C. Cir. 2023) (applying refusal to deal law and rejecting plaintiff's theory of harm).

vehicle to surcharge customers' dealings with rivals.[6] So what's going on? What's the point, one might ask, of having a monopolization statute if it doesn't catch this kind of thing?

It turns out that antitrust does a staggeringly bad job at handling practices of this kind. These are all examples of *conditional dealing*: a monopolist treating other market participants more favorably when they refrain from (or limit) competition against the monopolist, or refrain from (or limit) dealing with its rivals. In a paradigmatic conditional dealing case, there is no actual agreement or commitment that the counterparty won't compete or won't deal with rivals. Instead, there is just an explicit or implied policy, unilaterally applied by the monopolist, that punishes competition and rewards "loyalty." The inducement may be naked (e.g., cash payments or penalties) or it may involve differentiated terms of trade with the monopolist (e.g., granting or withholding access to a product or service, or offering better or worse prices, to encourage "loyalty").

Conditional dealing falls into a troubling gap in antitrust doctrine. On the one hand, antitrust has fairly clear rules for *agreements* involving monopolists, including deals with rivals to avoid competition ("market allocation" agreements),[7] and deals requiring trading partners to cut off rivals ("exclusivity" agreements).[8] These rules provide for fairly close scrutiny. Agreements of the first kind are usually per se illegal;[9] agreements of the second kind are analyzed to determine whether rivals are being harmfully and unjustifiably foreclosed.[10]

On the other hand, antitrust also has fairly clear rules for unilateral choices about pricing and supply. These rules, by contrast, are highly permissive, amounting to virtual immunity. Thus, above-cost pricing is usually per se legal, even if customers complain that a monopolist's prices are too high or competitors complain they are too low.[11] And businesses can generally refuse to deal with their rivals at will.[12] In theory, it's possible

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6. See Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 997–1003 (9th Cir. 2020) (holding that the FTC's "'anticompetitive surcharge' theory fails to state a cogent theory of anticompetitive harm").

7. See Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49–50 (1990) (describing a market allocation agreement as "unlawful on its face").

8. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (holding that a substantial foreclosure standard applied to the analysis of an exclusive agreement).

9. See, e.g., *Palmer*, 498 U.S. at 49–50.

10. See, e.g., *Tampa Elec.*, 365 U.S. at 327.

11. See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 449–53 (2009) (rejecting a "price-squeeze" theory of antitrust liability); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993) (holding that liability for predatory pricing claims requires a showing of below-cost pricing).

12. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise

for a refusal to deal to violate the antitrust laws,[13] but the eye of that needle is so slender that no plaintiff has squeezed through it in decades.[14]

Conditional dealing falls right between these two categories. It seems to present all the dangers of classically harmful agreements, regardless of whether an actual agreement exists, and regardless of how the threats and bribes are labeled, paid, or extracted. But it also seems to implicate all the liberty concerns that attend unilateral pricing and supply choices. After all, if there is no general antitrust duty to deal with the world, it seems to follow that a monopolist can choose to sell only to noncompetitors, or to sell to them on more favorable terms. That position even has some everyday intuitive appeal: Why should a business have to sell to its own rivals, or to businesses that choose to partner with its rivals?

Conditioning ruthlessly exposes a deep problem with the monopolization offense: its discomfort with practices that do not fall into its clean, shoebox-like categories (like exclusivity or tying) and that force courts to rely on monopolization's elusive and uncertain first principles.[15] It's all very well to say, as courts often do, that monopolization law asks whether conduct is "anticompetitive" or "predatory" rather than "competition on the merits," but that kind of sloganeering is virtually no help in the real world.[16]

So courts—and some commentators—tend to try to jam conditioning into an existing shoebox, often one that is subject to heavily pro-defendant rules. For example, when a coalition of states alleged that the Facebook personal social network dangled valuable interoperability to deter app developers from developing competing functions, the D.C. Circuit analyzed that practice as a simple refusal to deal: a practice that, as noted above, is virtually per se legal.[17] And when the FTC alleged that Qualcomm, a leading chip supplier, used patent licenses as a vehicle to tax

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his own independent discretion as to parties with whom he will deal.'" (second alteration in original) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).

13. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601–11 (1985) (imposing liability for the termination of a cooperative venture with a smaller rival).

14. See Erik Hovenkamp, The Antitrust Duty to Deal in the Age of Big Tech, 131 Yale L.J. 1483, 1490 n.26 (2022) [hereinafter Hovenkamp, Big Tech] (noting that no plaintiff has won a refusal case since 2004).

15. See, e.g., Thomas A. Lambert, Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach, 92 N.C. L. Rev. 1175, 1177 (2014) (noting that the "problem with Section 2" is that "nobody knows what it means"); see also Daniel Francis, Making Sense of Monopolization, 84 Antitrust L.J. 779, 784 (2022) [hereinafter Francis, Making Sense of Monopolization] ("[T]he core idea of 'monopolization' remains maddeningly elusive.").

16. See Daniel Francis, Antitrust Without Competition, 74 Duke L.J. 353, 358 (2024), [hereinafter Francis, Competition] (criticizing the use of an "unliquidated competition criterion"); Herbert Hovenkamp, The Slogans and Goals of Antitrust Law, 25 N.Y.U. Legis. & Pub. Pol'y 705, 745–51 (2023) ("[A]n antitrust concern articulated as a 'protection of the competitive process' does not give us much help unless we have some background substance to tell us what intelligent competition policy is.").

17. See New York v. Meta Platforms, Inc., 66 F.4th 288, 305–06 (D.C. Cir. 2023).

customers' dealings with its rivals, the Ninth Circuit analyzed the claim as a complaint primarily about excessive royalty rates, and automatic legality followed.[18] In still other cases, courts have been persuaded to apply an array of tests—"coercion," below-cost pricing, the "predominance" of price, duration and terminability, and so on[19]—that have little or nothing to do with the underlying dangers, notwithstanding the rich economic literature protesting that these considerations are beside the point.

This economic literature leaves no doubt that conditioning can enable a monopolist to do just what the Sherman Act abhors: inflict welfare harms by excluding rivals in ways that contribute to monopoly power and are not justified by offsetting benefits.[20] But antitrust's ability to respond to harmful conditioning is being hobbled by the structure of monopolization doctrine: specifically, its heavy reliance on analytical categories that were designed to respond to other, rather different, practices.[21] In other words, this is a problem that the law has created for itself. Economists seem perfectly clear-eyed about the effects and dangers of conditional dealing.[22]

Monopolization's failure to reckon with conditioning is holding back efforts to deal with some of the most pressing concerns on the antitrust agenda. This includes, for example, concerns about platform monopolists proffering a benefit (like interoperability or better search rankings) to induce their trading partners to disfavor rivals;[23] agricultural monopolists using conditional discounts and "exit penalties" to prevent rivals from getting a foothold;[24] and pharmaceutical monopolists using rebates to keep lower-cost competitors down or out in markets for life-saving treatment.[25] In these and other areas, monopoly conditioning may threaten worse harms than just higher prices.

* * *

This Article argues that we should meet conditional dealing on its own terms by recognizing a new category of monopolizing conduct. *Anticompetitive conditioning* or *conditional dealing* is the application by a monopolist of conditions that punish others for competing with it (horizontal conditioning) or for trading with its rivals (vertical conditioning).

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18. See Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1000–03 (9th Cir. 2020).
19. See infra section II.A.
20. See infra section I.B.
21. See infra section II.A.
22. See infra section I.B.
23. See infra section I.A.1.
24. See infra section I.A.2.
25. See infra section I.A.3.

This Article unfolds in three parts. Part I presents the problem: conditional dealing by monopolists. It surveys the uses and dangers of this practice in a selection of critical tech, agriculture, and healthcare markets, then synthesizes the rich body of economic scholarship on conditioning and its effects.

Part II sets out the Article's primary contribution: a new analytical framework for courts and others analyzing conditioning under Section 2 of the Sherman Act. This includes a test for identifying conditional dealing (the "hold-constant" test) and a doctrinal framework for assessing its legality. This involves assessments of whether a condition has an exclusionary incidence on rivals (i.e., whether a horizontal condition significantly impairs the incentives of one or more rivals to meet demand, or whether a vertical condition significantly impairs the ability of one or more rivals to do so by substantially foreclosing their access to inputs, distribution, customers, or complements); whether the exclusion is reasonably capable of contributing significantly to monopoly power; and whether the practice is justified by offsetting welfare benefits.

This Part also explains why many factors often emphasized by courts and others—from price-cost measures and coercion tests to doctrines of de facto exclusivity—should have no place in this analysis. And, using conditional dealing as a vehicle to explore some broader questions of principle, this Part proposes some more general course corrections for antitrust: a modest regrounding of the concept of substantial foreclosure; a clarification that free riding in an antitrust case is, without more, a neutral fact, not a trump card for a defendant; and the long-overdue recognition that an unconditional refusal to deal is per se lawful, notwithstanding the agonizing refusal of courts to say this out loud. Part II also points out some landmarks in antitrust's precedential canon that are best understood as conditioning cases.

Part III sketches two further ideas to reinforce monopolization's frontier. The first idea is what might be called *quick look monopolization*. It draws on a doctrine developed under Section 1 of the Sherman Act that, in clear cases, a plaintiff may establish a prima facie case by reference to the basic nature and context of the agreement without having to piece together evidence of actual effects or impacts.[26] This approach has never been applied in monopolization law, but it *should* be, because its logic applies equally in that setting. It provides a principled way to sharpen monopolization doctrine in a small subset of clear cases, including conditioning cases lacking plausible justifications.

The second idea is a reinterpretation of the offense of *attempted monopoly maintenance*. Conventional accounts present the attempt offense as a sort of mini-monopolization: that is, a ban on conduct by a near-

26. See Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999) (noting that certain agreements may be found anticompetitive without elaborate analysis of the market so long as the "great likelihood of anticompetitive effects can easily be ascertained").

monopolist that has provably resulted in actual exclusion and actual contribution to power. But the offense also bears a second, neglected reading: a prohibition of conduct by an actual monopolist that is intended to cause welfare harms by suppressing rival ability and incentive to compete and which is dangerously likely to have led to that outcome—regardless of whether it really did have that effect. It provides a principled way to deter intentional misconduct, even in our most complex and dynamic markets.

Ultimately, this Article's central claim is a simple and intuitive one. A monopolist's use of an explicit or implicit condition to punish trading partners for competing, or for dealing with competitors, is a distinct form of antitrust wrongdoing, not an edge-case example of a more familiar practice like tying or predatory pricing. Just like other familiar kinds of violations, conditioning presents clear, well-understood risks of consumer harm, and it can be scrutinized by courts without unreasonable intrusion on the freedom of businesses to run their affairs. When a monopolist uses such a practice to exclude rivals and augment its monopoly, courts should demand evidence of justification—and should impose liability if it is not forthcoming. Such claims should not be shrugged off for failure to fit neatly into a handful of doctrinal boxes that were crafted with very different practices in mind.

It is time to close antitrust's conditioning loophole.

## I. THE MONOPOLIST'S BARGAIN

This Part aims to show that anticompetitive conditioning—the unilateral imposition by a monopolist of threats or bribes to deter trading partners from competing (horizontal conditioning) or from dealing with competitors (vertical conditioning)—is a serious problem. That is: It is happening in important sectors, and it may cause real harm.

### A. *Conditioning in Practice*

Some of the most prominent concerns on today's competition policy agenda turn out to be worries about conditional dealing. This Article will put the spotlight on three critical sectors: tech, agriculture, and pharmaceuticals.[27]

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27. These have been repeatedly identified as priority areas for antitrust enforcement. See, e.g., D. Bruce Hoffman, Dir., FTC Bureau of Competition, Antitrust in the Digital Economy: A Snapshot of FTC Issues, Remarks at Global Competition Review Live (May 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf [https://perma.cc/H5TF-5ZHT] (tech); Michael Kades, Deputy Assistant Att'y Gen., DOJ, Keynote Address at the ABA Antitrust Fall Forum (Nov. 22, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-keynote-address-aba-antitrust [https://perma.cc/8MNS-EJD8] (agriculture); Rebecca Kelly Slaughter, Comm'r, FTC, Keynote Remarks at the FTC/DOJ Pharmaceutical Task Force Workshop (June 14, 2022),

1. *Tech*

a. *Amazon: E-Commerce Merchant Policy.* — The FTC's blockbuster 2023 monopolization case against Amazon is complex, but has three theories at its core.[28] The first of these alleges that Amazon treats merchants worse on its platform when those merchants sell their products through other channels at lower prices.[29] The second alleges that Amazon harms competition by tying its Prime distribution to fulfillment services.[30] The third alleges that Amazon set and changed its prices in various ways to punish rivals for lowering them and to encourage rivals to raise them.[31]

The first of these theories is a conditioning story. The policy allegedly discourages merchants from dealing with other platforms on terms that allow better prices.[32] When such lower prices are detected, Amazon allegedly denies offending products access to the promotional high-visibility "Buy Box" and then applies a range of other unfavorable treatments—including "demoting them in search results," "hiding their prices on the Search Results Page," and "excluding them from Sponsored Products advertisements"—causing their sales to "tank."[33] Or, to put it another way, Amazon makes favorable treatment of merchants conditional on those merchants preventing rival platforms from setting lower retail prices.

The policy resembles what is sometimes called a most-favored-nation (MFN) agreement. In general, an MFN agreement requires one party to treat the other at least as favorably as it treats any of its other trading partners.[34] This can be procompetitive, including because it ensures that low prices and high-quality outputs are shared with the MFN beneficiary and because it can give the beneficiary confidence that investments will not expose it to opportunism and holdup.[35] And it can also be anticompetitive, including because it deters the bound party from

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https://www.ftc.gov/system/files/ftc_gov/pdf/Keynote-Remarks-Pharma-Workshop.pdf [https://perma.cc/24R3-E84K] (pharma).

28. See Amended Complaint ¶¶ 259–434, Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash. filed Mar. 14, 2024) [hereinafter FTC Amazon Amended Complaint].

29. See id. ¶¶ 16, 271–287.

30. See id. ¶¶ 27–32.

31. See id. ¶¶ 327–339 (describing Amazon's "first-party anti-discounting" strategy); id. ¶¶ 418–434 (describing a "Project Nessie" program to encourage rivals to raise price).

32. Id. ¶¶ 16, 271–875.

33. Id. ¶¶ 277–87.

34. The antitrust analysis of MFN agreements is complex, and few cases have been litigated to verdict. See generally Jonathan B. Baker & Judith A. Chevalier, The Competitive Consequences of Most-Favored-Nation Provisions, Antitrust, Spring 2013, at 20 (discussing MFN analysis); Steven C. Salop & Fiona Scott Morton, Developing an Administrable MFN Enforcement Policy, Antitrust, Spring 2013, at 15 (same).

35. See Baker & Chevalier, supra note 34, at 20–22.

discounting to the beneficiary's rivals.[36] But the FTC's case alleges no actual agreement to accord MFN treatment nor a commitment by most merchants to do so. Instead, unilateral conditions do the work by punishing favorable dealings with Amazon's rivals.[37] The result may be just the same: that rival platforms, which could provide price and quality competition for Amazon, are excluded, and consumers harmed as a result.

b. *Google: Search Distribution Foreclosure*. — The 2020 antitrust lawsuit filed by the Justice Department and a coalition of states against Google challenged the alleged foreclosure of distribution for internet search—that is, cutting off rivals' paths to market—through a series of practices, including exclusivity and default agreements.[38] A district court recently imposed liability as a result;[39] Google has stated that it will appeal.[40]

Some of the practices at issue involve conditional dealing. For example, Google's agreement with Verizon allowed Verizon to choose to preload other general search engines, in addition to Google, onto its devices, but "it had to accept [a] much-lower . . . revenue share on those models" to do so.[41] Verizon concluded that doing so "would result in a $1.4 billion loss in revenue."[42] Google's agreement with AT&T was "very similar" to the Verizon deal.[43] And T-Mobile's agreement provided for a "bounty per device" to induce exclusivity: "If T-Mobile [did] not configure a device on an exclusive basis, it [was] entitled to no bounty at all."[44] Google's agreement with Motorola required preinstallation of Google as a default general search engine and provided for "additional monthly payments" if Google was the exclusive default on all search access points on a device.[45] In each of these cases there was no obligation to deal exclusively, but doing so meant a greater reward. In other words: vertical conditioning.

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36. See, e.g., United States v. Apple, Inc., 791 F.3d 290, 305 (2d Cir. 2015) (holding that Amazon's MFN clauses contributed to competitive harm by deterring bound parties from offering favorable terms to the beneficiary's rivals).

37. In fact, the FTC alleges that a "price parity" commitment was formerly required but is no longer, after it attracted attention from enforcers. FTC Amazon Amended Complaint, supra note 28, ¶¶ 274–276.

38. See United States v. Google LLC, Nos. 20-cv-3010 (APM) & 20-cv-3715 (APM), 2024 WL 3647498, at *50–65 (D.D.C. Aug. 5, 2024).

39. Id. at *125 ("Plaintiffs have established that Google is liable under Section 2 of the Sherman Act . . . .").

40. David Shepardson & Mike Scarcella, Google Has an Illegal Monopoly on Search, US Judge Finds, Reuters (Aug. 6, 2024), https://www.reuters.com/legal/us-judge-rules-google-broke-antitrust-law-search-case-2024-08-05/ [https://perma.cc/CMN9-LFGT] ("Alphabet said it plans to appeal [the] ruling.").

41. *Google*, 2024 WL 3647498, at *61.

42. Id.

43. Id. at *62.

44. Id.

45. Id. at *63.

A second theme of the Google search case points to horizontal conditioning. Google has reportedly paid Apple billions of dollars each year for the status of exclusive default search provider on iOS devices.[46] This amounts, of course, to traditional vertical exclusivity of a kind well known to antitrust. But there is some basis to think that Apple is also a potential competitor to Google: that is, they are in a horizontal relationship too. Apple, some commentators have suggested, is distinctively well situated to create and commercialize a rival search engine.[47] As a result, Google has been willing to pay over the odds for search distribution to incentivize Apple to stay out of the search market.[48]

This implies a horizontal conditioning story. Google, that story goes, may have been paying Apple extra compensation for search distribution services on the implicit condition that Apple stays out of the upstream search market. And the result may be that consumers have been deprived of the benefits, including quality and innovation benefits, that Apple's entry into search could bring. The district court highlighted evidence that Apple understood that entering search would jeopardize a very significant amount of revenue from Google.[49]

c. *Google: Play Store "Project Hug".* — In Epic Games's recent jury-trial victory over Google,[50] Epic alleged, among other things, horizontal conditioning aimed at the market for Android app stores.[51] The alleged purpose of such conditioning was to protect Google's own app store, the Play Store, from competition.[52]

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46. Id. at *51 ("In 2022, Google's revenue share payment to Apple was an estimated $20 billion . . . .").

47. See Steven C. Salop, Potential Competition and Antitrust Analysis, Roundtable on the Concept of Potential Competition 25, DAF/COMP/WD(2021)37 (June 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)37/en/pdf [https://perma.cc/NM32-PSJY] ("Apple was a potential entrant into search or a potential entrant sponsor.").

48. See, e.g., Nico Grant, Inside Google's Plan to Stop Apple From Getting Serious About Search, N.Y. Times (Oct. 26, 2023), https://www.nytimes.com/2023/10/26/technology/google-apple-search-spotlight.html (on file with the *Columbia Law Review*); David Pierce, Google Reportedly Pays $18 Billion a Year to Be Apple's Default Search Engine, The Verge (Oct. 26, 2023), https://www.theverge.com/2023/10/26/23933206/google-apple-search-deal-safari-18-billion [https://perma.cc/8JDS-JHQG] ("[Google's] money not only gives Google prime placement on Apple devices but it also has historically kept Apple from building its own search engine.").

49. *Google*, 2024 WL 3647498, at *52 (noting that Apple expected that it would forgo many billions of dollars in Google revenue if it launched its own search engine).

50. See Jaspreet Singh & Harshita Mary Varghese, Google's Court Loss to Epic Games May Cost Billions but Final Outcome Years Away, Reuters (Dec. 13, 2023), https://www.reuters.com/legal/googles-court-loss-epic-games-may-cost-billions-final-outcome-years-away-2023-12-12/ [https://perma.cc/JRM8-KP6W].

51. Second Amended Complaint ¶¶ 128, 198–205, Epic Games, Inc. v. Google LLC, No. 3:20-CV-05671-JD (N.D. Cal. filed Nov. 17, 2022).

52. Id. ¶ 128.

The allegations related to a policy initially known as Project Hug and subsequently renamed the Games Velocity Program. This was an alleged policy of providing special benefits to developers that might be able and willing to enter the market for app stores so long as they stayed out.[53] For example, when Activision Blizzard indicated some intention to develop its own Android app store, Google allegedly agreed to pay Activision roughly $360 million over three years, contingent on various MFN-like restrictions that would have made it more difficult for Activision to launch a commercially viable app store.[54] Epic alleged that, while there was no agreement not to enter, Google thus "understood that its agreement . . . effectively ensured that [Activision] would abandon its plans."[55]

Similarly, Epic alleged that, when Riot Games indicated the same intention, Google entered into a similar deal—with a payment of around $30 million—and similar obligations that were "understood and intended [to ensure] that Riot, like [Activision], would not launch a competing Android app store."[56]

These claims could be read to imply an underlying policy of offering benefits to possible app store entrants on implicit condition that they stay out of that market. In other words: horizontal conditioning.

d. *Facebook: Platform Policies.* — The FTC's 2020 lawsuit against Facebook (now Meta) challenged three practices: Facebook's acquisition of Instagram, Facebook's acquisition of WhatsApp, and Facebook's use of certain "platform policies."[57] A large group of states, led by New York, filed a parallel complaint.[58]

The platform-policies theory was an anticompetitive conditioning claim. The allegation was, in essence, that Facebook agreed to provide valuable interoperability to app developers so long as their apps did not develop competing social network functionalities and did not interoperate in various ways with rival social networks.[59] The FTC explicitly alleged that "the public announcement and enforcement of the policies changed the incentives of software developers, deterring them from developing features and functionalities that would present a competitive threat to Facebook, or from working with other platforms that compete with

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53. Id.

54. Id. ¶ 199.

55. Id. ¶ 200.

56. Id. ¶ 201.

57. Complaint ¶¶ 68–168, Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (No. 1:20-cv-03590-CRC) [hereinafter 2022 Facebook Complaint]; First Amended Complaint ¶¶ 77–228, *Facebook*, 581 F. Supp. 3d 34 (No. 1:20-cv-03590-CRC).

58. Complaint at 5 n.1, New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20-cv-03589-JEB), 2020 WL 7348667.

59. See Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 9–11 (D.D.C. 2021); New York v. Facebook, Inc., 549 F. Supp. 3d at 18–20.

Facebook."[60] The first dimension of this policy (denying, in various ways, interoperability for apps that replicated Facebook's functionalities) was an alleged horizontal condition; the second (denying, in various ways, interoperability for apps that connected to or promoted rivals) was an alleged vertical condition.

As we shall see below, the court flatly rejected this claim. And in an appeal of the states' case, the D.C. Circuit held that, while the alleged vertical conditioning should be analyzed under exclusive dealing law, the alleged horizontal conditioning was a simple refusal to deal and lawful as a result.[61]

e. *Qualcomm: No License, No Chips.* — The FTC's 2017 monopolization case against Qualcomm had many facets, including challenges to refusals-to-deal and to traditional exclusivity.[62] But the central pillar of the case—the challenge to Qualcomm's "no license, no chips" policy[63]—was, at heart, a challenge to anticompetitive conditioning. The following is one way of understanding the complex case that was alleged by the FTC.

The FTC alleged that Qualcomm was a monopolist supplier of processor chips to device original equipment manufacturers (OEMs) like Apple and Samsung, as well as a holder of a portfolio of patents practiced by its own chips and those of rivals.[64] It operated a policy of declining to supply its chips to OEMs that had not obtained a license to Qualcomm's patents: thus, "no license, no chips."[65] The license required OEMs to pay Qualcomm a sizable royalty on all devices, including devices using rivals' chips instead of Qualcomm's.[66]

The FTC alleged that the commitment to make the payments was extracted by withholding, or threatening to withhold, chip supplies—not access to IP—and that the royalty payments included, in addition to value for Qualcomm's IP, a harmful surcharge or tax on purchases from chip competitors.[67]

This sounds a lot like a complaint about excessive pricing—a complaint that U.S. antitrust does not recognize.[68] So, to see the vertical conditioning dynamics that may have been in play, imagine a series of three hypotheticals. First, imagine that a chip monopolist had required its chip customers to pay—as a condition of being allowed to buy chips—a

60. 2022 Facebook Complaint, supra note 57, ¶ 137.

61. See New York v. Meta Platforms, Inc., 66 F.4th 288, 304–06 (D.C. Cir. 2023); see also infra section II.A.1.

62. Federal Trade Commission's Complaint for Equitable Relief ¶¶ 107–130, Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 5:17-cv-00220), 2017 WL 242848.

63. Id. ¶¶ 61–106.

64. Id. ¶ 2.

65. Id. ¶ 61.

66. Id. ¶¶ 61–63.

67. Id. ¶ 87.

68. See infra section II.A.2.

naked penalty every time the customer bought a chip from a rival. Plainly, such an obligation would not be a strict exclusivity agreement, but it would punish and deter dealings with rivals, like a tax. This is obviously a vertical condition.

Second, now imagine that the same chip monopolist required its chip customers to pay the very same penalty when buying *any* chip: its own or a rival's. This makes the penalty "nondiscriminatory" in form. But this does not change a thing. The chip monopolist will rationally lower its own nominal price by the amount of the penalty to avoid raising its effective price unprofitably.[69] So the "nondiscriminatory" surcharge is economically identical to a discriminatory one.

Finally, imagine that instead of simply charging a naked penalty, the chip monopolist also conferred some patent rights and called the total payment a "royalty." For example, instead of a naked $X surcharge, suppose that the chip monopolist threw in a patent license of value $Y and charged $X+Y for a patent license, labeling the whole sum a "patent royalty."[70]

The third hypothetical is economically identical to the first: both involve vertical conditioning. The FTC's case can be understood as an allegation that the third hypothetical captures what was going on, and that as a result rival chip suppliers were being excluded to the detriment of customers and consumers. As we shall see, the FTC won at trial but lost on appeal: The Ninth Circuit analyzed this part of the case primarily as a complaint about excessive royalties rather than vertical conditioning.[71]

2. *Agriculture*

a. *Crop Protection: Loyalty Discounts.* — Crop protection chemicals—like insecticides and fungicides—are a critical input in agricultural supply chains.[72] Like drugs, such chemicals come in branded varieties, typically protected by patents at launch, and generic versions that enter after the patent expires.[73]

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69. The effective economic price of the monopolist's chip is equal to the nominal price plus the surcharge. And the profit-maximizing effective price of that chip is unchanged from the first hypothetical, so the chip monopolist wants to keep its effective price unchanged. Thus, it reduces its nominal chip price.

70. See Petition of the FTC for Rehearing En Banc at 14–15, Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (presenting a version of this account).

71. See infra section II.A.2.

72. See SNS Insider, Crop Protection Chemicals Market to Hit USD 75.72 Billion by 2030 Due to Rising Global Population and Food Demand Coupled With Advancements in Agricultural Technology, Yahoo Fin. (Nov. 27, 2023), https://finance.yahoo.com/news/crop-protection-chemicals-market-hit-140000061.html [https://perma.cc/WCT5-REET]; see also Julius J. Menn, Current Trends and New Directions in Crop Protection, 18 Am. J. Indus. Med. 499, 499–500 (1990) ("[C]rop protection chemicals are and will continue to be . . . the major element in protecting food and fiber crops . . . .").

73. See Jett McFalls, Young-Jae Yi, Ming-Han Li, Scott Senseman & Beverly Storey, Tex. A&M Transp. Inst., Evaluation of Generic and Branded Herbicides: Technical Report 1

In a complaint filed in September 2022, the FTC has alleged that two agritech giants, Syngenta and Corteva,[74] are using anticompetitive vertical conditions to extend pesticide monopolies long after patent expiration.[75] Specifically, the FTC alleges that the suppliers achieve this through loyalty discounting: offering lower prices to distributors that buy 85% or more of their needs from the monopolists, and higher prices to disloyal businesses that do not.[76] These programs allegedly apply to "substantially all leading distributors,"[77] and collectively foreclose "a substantial share" of each relevant market to generic competitors.[78] They are not alleged to reduce prices below cost.[79] This practice involves no commitment not to deal with rivals, but punishes and deters doing so. In other words, it is vertical conditioning.

The FTC alleges that the rebates are complex, uncertain, and delayed, to "make it less likely that a distributor will lower its prices in anticipation of [a rebate]."[80] So they increase distributor profits, rather than lowering customer prices. As a result, the FTC alleges, distributors have "declined to buy more than minimal amounts" of generic products.[81] "Multiple generic manufacturers" have declined to enter; others have exited.[82] The result: higher prices.[83]

The crop protection companies moved to dismiss the complaint, protesting the "remarkable proposition that reducing prices—without more—is anticompetitive."[84] Among other things, they argued that prices, and alleged schemes in which price is the predominant mechanism, are not unlawful unless they are below cost.[85] The district court declined to dismiss the case but indicated that if pricing—rather than other "coercive"

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(2015) (discussing herbicide formulation's patent process, lifespan, and profitability compared to generics).

74. See Press Release, FTC, FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers (Sept. 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate [https://perma.cc/4U8D-CJCM] (referring to Syngenta and Corteva as "two of the largest pesticide manufacturers operating in the United States").

75. See First Amended Complaint ¶¶ 59–202, Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Dec. 23, 2022).

76. Id. ¶¶ 64–72 (Syngenta); id. ¶¶ 73–76 (Corteva).

77. Id. ¶ 84.

78. Id. ¶ 171.

79. Id. ¶ 176.

80. Id. ¶¶ 85, 175.

81. Id. ¶¶ 177–178.

82. Id. ¶¶ 182–183.

83. Id. ¶¶ 190–202.

84. Memorandum of Law in Support of Syngenta's Motion to Dismiss the Amended Complaint at 1, *Syngenta*, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Jan. 13, 2023).

85. Id. at 3, 15; Memorandum in Support of Defendant Corteva, Inc.'s Motion to Dismiss at 18–19, Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Jan. 13, 2023).

practices—turned out to be the "predominant" method of exclusion, the court would apply the principle that above-cost prices are per se legal.[86]

b. *Koch Foods: Chicken Grower Exit Penalties.* — The Justice Department has recently alleged that, from 2014 onward, Koch Foods (a leading poultry processor) has imposed an "exit penalty" in its agreements with chicken growers.[87] This was a requirement that growers make a cash payment to Koch—large enough to equal or exceed a grower's annual take-home pay after expenses—in order to switch to a rival within a period of ten or fifteen years after contracting with Koch.[88] The complaint alleges that Koch "actively enforces" these requirements, with the result that "[s]ome farmers returned to Koch rather than face litigation, while others declined to pursue a switch because the exit penalty would be too onerous."[89] The complaint further alleges that "Koch's highly visible efforts to collect its exit penalties have deterred farmers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families."[90] In other words, the agreements do not forbid switching to a rival but they deter and punish it. Koch elected to settle, agreeing not to enforce existing provisions and to stop imposing new ones.[91]

3. *Pharmaceuticals.* — Many pharmaceutical manufacturers offer rebates against the list price of their drugs, contingent upon favoring their drugs over those of rivals.[92] Sometimes these are offered to payors such as private insurers or Medicare,[93] but increasingly they are negotiated with pharmacy benefit managers (PBMs).[94]

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86. Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP, 2024 WL 149552, at *14–19 (M.D.N.C. Jan. 12, 2024).

87. Complaint ¶ 5, United States v. Koch Foods Inc., No. 1:23-cv-15813 (N.D. Ill. filed Nov. 9, 2023).

88. Id.

89. Id. ¶ 44.

90. Id. ¶ 49.

91. Press Release, DOJ, Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods From Imposing Unfair and Anticompetitive Termination Penalties in Contracts With Chicken Growers (Nov. 9, 2023), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing [https://perma.cc/C5EC-V9UP].

92. Press Release, FTC, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman that Block Cheaper Drugs (June 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes [https://perma.cc/X7LD-LAJF] ("[Pharmaceutical] rebates are often conditioned on the drug staying in a preferred position on the formulary.").

93. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 400 (3d Cir. 2016) (involving rebates paid by manufacturers to hospitals' group purchasing organizations).

94. See Nitzan Arad, Elizabeth Staton, Marianne Hamilton Lopez, Samson Goriola, Aparna Higgins, Mark McClellan & Barak Richman, Duke Univ. Margolis Ctr. for Health Pol'y, Realizing the Benefits of Biosimilars: Overcoming Rebate Walls 5 (2022), https://healthpolicy.duke.edu/sites/default/files/2022-03/Biosimilars%20-

PBMs are intermediaries between payors and drug companies.[95] They maintain formularies of drugs with tiers of preference that affect how providers prescribe the drugs.[96] For example, a formulary might provide that, for a particular indication (i.e., use case), Drug A is covered if prescribed first, with Drugs B and C covered only if Drug A has first been tried unsuccessfully. Or it might provide that Drug A is covered without prior authorization, and that Drugs B and C are covered only with such authorization. So a rebate granted to a PBM might be conditioned, for example, on meeting a purchase-share threshold,[97] or on keeping rivals off the formulary or consigned to lower tiers.[98]

Of course, rebating can be a form of desirable price discounting.[99] And a PBM or other buyer may be able to force manufacturers to lower drug prices by announcing that it will deal exclusively with one supplier.[100] But many commentators have raised concerns about harms from excluding rivals.[101] The core worry is that a buyer that would otherwise deal with both an incumbent and a rival will be deterred from doing so by the prospect of losing rebates, with the result that market or monopoly power is maintained and consumers pay more for drugs.[102]

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%20Overcoming%20Rebate%20Walls.pdf [https://perma.cc/59UG-L7E9] (noting that rebates are paid to both PBMs and health plans).

95. See Minority Staff of the U.S. Sen. Comm. on Fin., 115th Cong., A Tangled Web: An Examination of the Drug Supply and Payment Chains 26–35 (2018), https://www.finance.senate.gov/imo/media/doc/A%20Tangled%20Web.pdf [https://perma.cc/Q47U-43QJ] [hereinafter Senate Minority Report] (describing the role of PBMs in the healthcare supply and payment chains).

96. See In re EpiPen, 44 F.4th 959, 966–67 (10th Cir. 2022) (describing formularies and their relationship to PBMs).

97. See Joanna Shepherd, Pharmacy Benefit Managers, Rebates, and Drug Prices: Conflicts of Interest in the Market for Prescription Drugs, 38 Yale L. & Pol'y Rev. 360, 366–67 (2019) (noting share incentives).

98. See FTC, Report on Rebate Walls 2 (2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-report-rebate-walls/federal_trade_commission_report_on_rebate_walls_.pdf [https://perma.cc/TX9T-YMQN].

99. See Senate Minority Report, supra note 95, at 27; Fiona Scott Morton & Lysle T. Boller, Enabling Competition in Pharmaceutical Markets 21 (Hutchins Ctr. Working Paper No. 30, 2017), https://www.brookings.edu/wp-content/uploads/2017/05/wp30_scottmorton_competitioninpharma1.pdf [https://perma.cc/9VBG-VVWQ].

100. See, e.g., *In re EpiPen*, 44 F.4th at 967 (describing how announced exclusivity can lead to a bidding war and lower prices); Scott Morton & Boller, supra note 99, at 19 (same).

101. See FTC, Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products 1 (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf [https://perma.cc/WU47-75FS] [hereinafter FTC, Policy Statement].

102. As this Article was going to print, the FTC filed a complaint challenging a variety of PBM practices, including certain exclusionary rebates, as unfair methods of competition and unfair acts or practices. See Complaint ¶¶ 99–118, Caremark Rx, LLC, FTC File No. 221 0114, No. 9437 (F.T.C. Sept. 20, 2024), https://www.ftc.gov/system/files/ftc_gov/

There are several reasons why a buyer might want to deal with a rival drug supplier as well as an incumbent but be unable to switch entirely away from the incumbent. The incumbent's drug may be suitable for more indications than the rival's.[103] Manufacturers may offer rebates covering multiple drugs such that access to a discount on *any* drug is premised on meeting conditions for *all* drugs, leaving unintegrated rivals unable to match the terms.[104] Or downstream actors, like providers, may have some preference for the original drug.[105] And if the buyer cannot entirely switch to the rival, the prospect of losing the rebate may ensure it does not deal with the rival at all.

Many rebate dollars seem to be passed on in the form of lower prices.[106] But others are not. Rebates are often calculated and paid at the end of an accounting period, and so PBMs may be more likely to treat them as a lump sum and retain them as profits, rather than as a cost savings to be passed on as lower prices.[107] They are also typically confidential, so downstream payors often cannot tell how much the PBM is being paid.[108] Particularly in such cases, PBMs may choose drugs with a higher rebate over rivals' that are cheaper for payors.[109] And some allege that "PBMs designate payments from manufacturers and pharmacies as fees rather than rebates to prevent these funds from being passed on to plan sponsors."[110] Accordingly, there may be reasons to fear rebating's rise.[111]

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pdf/d9437_caremark_rx_zinc_health_services_et_al_part_3_complaint_corrected_public.pdf [https://perma.cc/4RPR-8PSD].

103. See Arad et al., supra note 94, at 8–9.

104. See The Role of Pharmacy Benefit Managers in Prescription Drug Markets Part II: Not What the Doctor Ordered: Hearing Before the H. Comm. on Oversight and Accountability, 118th Cong. 23 (2023) (statement of Rena M. Conti, Associate Professor, Questrom School of Business) [hereinafter Conti Testimony] (describing the PBM rebate strategy).

105. See, e.g., Arad et al., supra note 94, at 11.

106. See, e.g., Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions, 118th Cong. 13 (2023) (statement of Adam Kautzner, President, Express Scripts) ("In total, Express Scripts passes 95% of rebates it receives to health plan clients and their customers.").

107. See FTC, Policy Statement, supra note 101, at 1.

108. See Senate Minority Report, supra note 95, at 26; Darius Lakdawalla & Meng Li, JAMA Network Open, Association of Drug Rebates and Competition With Out-of-Pocket Coinsurance in Medicare Part D, 2014 to 2018, at 2 (2021).

109. See Conti Testimony, supra note 104, at 18; Senate Minority Report, supra note 95, at 27.

110. Senate Minority Report, supra note 95, at 29.

111. See Lakdawalla & Li, supra note 108, at 7 (noting sharp increases in prices and rebates).

4. *Summary.* — The foregoing examples can be presented systematically:

| Example | Type of Alleged Conditioning | Deterred Activity | Benefit / Penalty |
|---|---|---|---|
| **Amazon E-Commerce** | Vertical | Allowing lower prices through other channels | More prominent / less prominent distribution |
| **Google Search (Network and Device Partners)** | Vertical | Preinstalling other search engines | More revenue share / less (or no) revenue share |
| **Google Search (Apple)** | Horizontal | Entering search market | Larger payment / smaller (or no) payment |
| **Google Project Hug** | Horizontal | Entering app store market | Cash payment / no cash payment |
| **Facebook Platform Policies (No Replication)** | Horizontal | Replicating core functionalities | Interoperability / no interoperability |
| **Facebook Platform Policies (No Promotion)** | Vertical | Promoting rival personal social networks | Interoperability / no interoperability |
| **Qualcomm No License, No Chips** | Vertical | Buying rivals' chips | No surcharge payment / surcharge payment |
| **Crop Protection Loyalty Discounts** | Vertical | Buying rivals' chemicals | Lower prices / higher prices |
| **Chicken Grower Exit Penalties** | Vertical | Switching to a rival | No exit fee / exit fee |
| **Pharmaceutical Rebate Walls** | Vertical | Favorable treatment of rivals (share / tier) | High rebate / low or no rebate |

## B. *Conditioning in Theory*

Conditional dealing has been subject to extensive economic analysis, including much important recent work. The full picture is intricate, but the bottom line is simple: Conditional dealing, like many forms of

monopolization, may result in either harm or benefit. And it is hard to be sure which effect predominates in the wild.[112]

1. *Theories of Harm*

a. *Horizontal Conditioning*. — Horizontal conditioning—inducing actual or potential rivals to refrain from or limit rivalry—threatens all the harms of traditional market allocation. When a monopolist pays off a business that would otherwise have become a rival, the result is the continuation of the monopoly instead of the competition that would have resulted, with all the usual harms: higher prices, lower output, and so on.[113]

A deal of this kind is often rational for the participants because the producer profits of monopoly generally exceed the combined producer profits of duopoly (or oligopoly, or competition), such that both the incumbent and the potential entrants can do better splitting monopoly profits than by competing.[114] The lower the profits that a potential entrant expects from entry—perhaps because competition will drive prices down very close to costs, or because the entrant doubts its ability to enter successfully—the more likely that entrant may be to take the deal instead. Consumers bear the harms.

Of course, this share-the-spoils theory will not always be plausible. If fully effective competitive entry is inevitable, a monopolist may have little to gain by paying off individual rivals. There is no point in paying a ransom to protect a monopoly that will surely be lost anyway.[115] And if the entrant believes that it can outcompete the monopolist on the merits—perhaps because it has lower costs or a better product—then it may prefer to take a shot at getting its own monopoly profits, rather than accepting a share of the incumbent's.[116]

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112. See Bogdan Genchev & Julie Holland Mortimer, Empirical Evidence on Conditional Pricing Practices: A Review, 81 Antitrust L.J. 343, 354 (2017) (noting the challenges of empirical work on this issue).

113. See, e.g., Daniel Francis & Christopher Jon Sprigman, Antitrust: Principles, Cases, and Materials 46–49 (2d ed. 2024) (outlining the harms of monopoly).

114. See, e.g., Steven C. Salop, The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test, 81 Antitrust L.J. 371, 379 (2017) [hereinafter Salop, Paradigm] (noting the monopolist's "bidding advantage[]").

115. As a result, share-the-spoils stories commonly center on entrants that are distinctively well situated to enter, and therefore distinctively threatening to incumbents. The most celebrated example is probably the case of "first filer" generic pharmaceutical manufacturers, whose unique advantage is conferred by the Hatch–Waxman regulatory framework, leading to the notorious "pay-for-delay" practice in which first-filers are co-opted by branded-drug incumbents through large "reverse settlements." See C. Scott Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, 81 N.Y.U. L. Rev. 1553, 1562–78 (2006) (describing the "pay-for-delay dilemma").

116. As Einer Elhauge notes, "[L]ong-term prospects of at least remaining in the market, *if not besting the incumbent*, are normally what motivates entry and persuades capital markets to fund it." Einer Elhauge, Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—And the Implications for Defining Costs and Market Power, 112 Yale L.J. 681, 773 (2003) (emphasis added). Of course, entrants are not always the best judge of their

But in many plausible cases a monopolist may believe that it can protect its own position—at least for some time—by paying off an important rival or subset of rivals. And those rivals may also believe that they can do better by taking the payoff and focusing elsewhere than by squaring up for the fight. In such cases a horizontal conditioning practice may emerge and may result in all the familiar harms of antitrust wrongdoing: higher prices, lower quality, reduced output, and less innovation.

b. *Vertical Conditioning*. — Vertical conditioning—inducing trading partners to refrain from or limit dealing with rivals—presents a slightly more complicated story. As Professor Steve Salop and others have demonstrated, a conditioning practice that incentivizes trading partners to refrain from dealing with rivals (either completely or to some extent) can raise the rivals' costs of inputs, distribution, customers, or complements and thereby reduce the extent to which they can exert pressure on the monopolist, resulting in welfare harms.[117] This is by now a classic antitrust concern.[118]

But vertical conditioning is not quite the same as paradigm exclusivity. The latter usually involves a binding commitment from trading partners not to deal with rivals.[119] By contrast, conditioning involves the application of a policy that merely incentivizes loyalty but does not involve a

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own prospects. See Avishalom Tor, The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy, 101 Mich. L. Rev. 482, 508 (2002) ("[E]ntrants may not only overestimate the profitability of successful entry, but also underestimate the investments and the time necessary for the venture to become viable.").

117. See, e.g., Salop, Paradigm, supra note 114, at 372; Willard K. Tom, David A. Balto & Neil W. Averitt, Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing, 67 Antitrust L.J. 615, 627 (2000).

118. See, e.g., Fiona M. Scott Morton, Contracts that Reference Rivals, Antitrust, Summer 2013, at 72, 72–73 (identifying various ways in which vertical agreements referencing rivals may inflict harm); see also Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209, 223–49 (1986) (describing in detail the possible effects of a vertical exclusionary agreement).

119. See Richard M. Steuer, Exclusive Dealing in Distribution, 69 Cornell L. Rev. 101, 102 (1983) ("'Exclusive dealing,' as defined in the legal literature, is a restriction that a supplier imposes on a customer, forbidding the customer from purchasing some category of products from any other supplier."). When there is an option of breaching the commitment and paying a penalty of some kind—such as damages—the economics of paradigm exclusivity may look more like those of vertical conditioning. See Patrick DeGraba, Patrick Greenlee & Daniel P. O'Brien, Conditional Pricing Practices—A Short Primer 10 (2017), https://www.ftc.gov/system/files/documents/reports/conditional-pricing-practices-short-primer/conditional_pricing_practices_-_a_short_primer_-_sept_2017.pdf [https://perma.cc/S3TZ-3PQL] ("Under a liquidated damages provision, a buyer essentially faces a 'disloyalty tax' if it switches too many of its purchases to an entrant.").

commitment to it. The trading partner constantly faces a choice about whether to become disloyal and incur the penalty.[120]

Traditional exclusivity theories must engage with a well-known Chicago School challenge: A monopolist's trading partner is unlikely to accept an exclusivity obligation that makes its own situation worse unless it is compensated with either lower prices reflecting resulting efficiencies or equivalent benefits.[121] This challenge is not always apposite in conditioning cases, many of which do not involve anyone "accepting" or agreeing to anything, by contrast with a paradigm exclusivity case in which a partner affirmatively commits to loyalty. But the challenge reminds us that any plausible theory of harm must explain why the relevant actors would behave as the theory suggests.

Happily, the economic literature has paid extensive attention to explaining why and how anticompetitive conditions (or similar practices) can plausibly generate harm of a kind that antitrust might care about. Several explanatory theories have emerged.

Out-of-Market Leverage Theories

In an important category of cases, the monopolist uses some out-of-market leverage—that is, a trading partner's desire to achieve or avoid some out-of-market outcome that the monopolist can cause or prevent—to encourage trading partners to abjure or restrict dealings with rivals. This might be very simple: a cash bribe, say, or a threat to burn down a factory. Or it might involve a second market in ways that resemble tying or bundling: for example, by offering access to a separate desired product (tying-like), or a better price for it (bundling-like). In what we are calling a conditioning case, unlike true tying or bundling, what is induced is (at least some) abstention from dealing with rivals, not additional dealing with the monopolist.[122]

Leverage of this kind can contribute to monopoly or market power in a market of concern by making rival output less attractive, even if the rival

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120. See Benjamin Klein & Andres V. Lerner, Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts, 80 Antitrust L.J. 631, 669 (2016) [hereinafter Klein & Lerner, Price-Cost Tests] (describing price-incentive mechanisms); see also Enrique Ide, Juan-Pablo Montero & Nicolás Figueroa, Discounts as a Barrier to Entry, 106 Am. Econ. Rev. 1849, 1852–53 (2016) (arguing that this ex post exclusion story requires some kind of ex ante lock-in, particularly in the form of a commitment to make an unconditional transfer in exchange for generous treatment in a subsequent period).

121. Robert Bork, for one, articulated this objection:

> A seller who wants exclusivity must give the buyer something for it. If he gives a lower price, the reason must be that the seller expects the arrangement to create efficiencies that justify the lower price. . . . [T]here is every reason to believe that exclusive . . . contracts have no purpose or effect other than the creation of efficiency.

Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 308–09 (1978).

122. This distinction is sometimes elided by courts (and others!), leading to misclassification. See infra section II.C.

output is higher quality or lower cost.[123] In extreme cases there may be no above-cost price that a rival could offer that would win the business of a rational trading partner subject to the monopolist's condition.[124]

In-Market Leverage Theories

A second category involves "in-market" leverage across segments of demand for a single product or service. In the classic version, at least some trading partners have some amount of demand that is noncontestable (or less contestable)—meaning that there are no substitutes (or a strong preference) for the monopolist's output—and also some additional demand that is (more) contestable, meaning that the monopolist's output is preferred less or not at all in that segment of demand. The preference may arise from a variety of factors, including product differentiation, regulatory requirements, goodwill or trading-partner risk aversion, preferences of end customers, switching and transaction costs, and so on.[125] For example, a trading partner with an overall demand of 100 units per week might strongly prefer the monopolist's output for 20 of those units but have little or no such preference for the remainder of its demand.

The rest of the story resembles out-of-market leverage. The monopolist might refuse to supply in the first segment unless the trading partner refrains from dealing with rivals in the second segment;[126] or it may offer better terms in the first segment for doing so.[127] And, just as with out-of-market leverage, there may be no above-cost price that a rival could offer for the contestable share such that the trading partner would

123. See Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harv. L. Rev. 397, 403–20 (2009) [hereinafter Elhauge, Death of Single Monopoly Profit] ("Tying by a firm with tying market power typically does increase monopoly profits even when the tie has no efficiencies."); Barry Nalebuff, Exclusionary Bundling, 50 Antitrust Bull. 321, 321 (2005) (noting that bundling-like strategies can prevent even efficient rivals from competing).

124. See Daniel A. Crane, Mixed Bundling, Profit Sacrifice, and Consumer Welfare, 55 Emory L.J. 423, 443–44 (2006) [hereinafter Crane, Mixed Bundling] (demonstrating this effect).

125. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 401 (3d Cir. 2016) (noting that a "unique cardiology indication" provided "incontestable demand"); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997) (acknowledging the role of "proven product and strong reputation"); Roger D. Blair & Thomas Knight, Bundled Discounts, Loyalty Discounts and Antitrust Policy, 16 Rutgers Bus. L. Rev. 123, 145 (2020) (noting product differentiation and downstream customer demand as constraints on the effect of loyalty schemes); Michael A. Salinger, All-Units Discounts by a Dominant Producer Threatened by Partial Entry, 81 Antitrust L.J. 507, 531 n.71 (2017) (alluding to FDA approvals as a determinant of contestability).

126. See Salinger, supra note 125, at 533.

127. See Blair & Knight, supra note 125, at 145 (discussing discounts that operate in this way).

rationally deal with the rival at all.[128] Many variations on this simple story are possible: A prominent one involves granting retroactive loyalty rebates on sales already made, which are by definition noncontestable.[129]

Simple accounts may treat demand contestability as exogenously determined, with competitive concern limited to the competitive segment. This is certainly a convenient modeling assumption. But contestability is more often endogenous: relative preference for the monopolist may wane as entrants build goodwill, network effects, know-how, and so on. Thus, a contestable segment may serve as an entry ramp into a noncontestable segment.[130]

Incumbent-Entrant Coordination Theories

Another set of theories, explored in the writings of Professors Einer Elhauge and Michael Salinger, shows that vertical conditioning may help to facilitate coordination between an incumbent and an entrant. Elhauge, for example, focuses on cases in which the reward for loyalty is a guaranteed margin of preference over terms offered to disloyal trading partners.[131] This approximates what is sometimes called "MFN-plus" treatment.[132] He points out that, just like other MFN practices, this makes it more costly for the bound party to discount to disloyal trading partners, as loyal beneficiaries must get even better terms.[133] This in turn reduces rivals' incentives to compete on price.[134]

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128. See Klein & Lerner, Price-Cost Tests, supra note 120, at 639 (noting that rivals may face an implicit below-cost price); Janusz A. Ordover & Greg Shaffer, Exclusionary Discounts, 31 Int'l J. Indus. Org. 569, 570 (2013) (making an equivalent point).

129. See Blair & Knight, supra note 125, at 143–44 (providing a worked example of a retroactive discount that excludes equally efficient rivals); see also Am. President Lines, LLC v. Matson, Inc., 633 F. Supp. 3d 209, 219 (D.D.C. 2022) (describing an allegation of exclusionary "first dollar" discounting); Church & Dwight Co., Inc. v. Mayer Lab'ys, Inc., 868 F. Supp. 2d 876, 905 (N.D. Cal. 2012) (noting the argument that a discontinuous rebate schedule can create "golden handcuffs" for buyers).

130. See Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 Colum. L. Rev. 515, 530–31 (1985) (emphasizing the importance, in leverage analysis, of long-run dynamic effects, including impact on reputation and strategic positioning).

131. See Einer Elhauge, How Loyalty Discounts Can Perversely Discourage Discounting, 5 J. Competition L. & Econ. 189, 193 (2009) [hereinafter Elhauge, Loyalty Discounts]. As Professor Daniel Crane notes, these may be uncommon. Daniel A. Crane, Bargaining Over Loyalty, 92 Tex. L. Rev. 253, 285–86 (2013) [hereinafter Crane, Loyalty].

132. See Thomas A. Lambert, Have Elhauge and Wickelgren Undermined the Rule of Per Se Legality for Above-Cost Loyalty Discounts?, Truth on the Market (Sept. 12, 2012), https://truthonthemarket.com/2012/09/12/have-elhauge-and-wickelgren-undermined-the-rule-of-per-se-legality-for-above-cost-loyalty-discounts/ [https://perma.cc/8MUX-8KF3] ("The loyalty discounts that [Elhauge] model[s] really just look like souped-up 'Most Favored Nations' clauses . . . .").

133. See Elhauge, Loyalty Discounts, supra note 131, at 193; see also Einer Elhauge & Abraham L. Wickelgren, Robust Exclusion and Market Division Through Loyalty Discounts, Int'l J. Indus. Org., Nov. 2015, at 111, 112.

134. See Elhauge, Loyalty Discounts, supra note 131, at 213.

And Salinger has pointed out that when an incumbent engages in share-based discounting to its customers, a rival's incentives may be affected in interesting ways. The rival can try to contest share outside the zone marked out for it by the threshold but may prefer to sit instead within the threshold and enjoy higher prices if further entry will be limited.[135] For example, if an incumbent monopolist's discount is contingent on its customers allocating 60% of their purchases to the monopolist, a rival might *either* compete aggressively for all purchases *or* simply take the highest possible price for the remaining 40%.

Collective Action Theories

Another category of theories posits that harm may result from a collective action problem. In the traditional telling, an incumbent's trading partners commit to exclusivity because: (1) the incumbent indicates that it will give better treatment to those that commit to exclusivity than to those that do not, (2) no trading partner believes that it alone can provide enough scale to sustain an entrant, and (3) no trading partner believes that any other trading partner will do so either, for the same reason.[136] This story depends on, among other things, scale barriers to entry,[137] and it may be thwarted by a strong trading partner that can solve the collective action problem.[138] But an incumbent that can discriminate may be able to buy off such strong partners.[139]

Although vertical conditioning need not necessarily involve an affirmative commitment of the kind that this account traditionally contemplates, it can. For example, when a monopolist invites trading partners to agree to pay a fee (or similar) for dealing with rivals in the future, their willingness to agree may be explicable by reference to a collective-action account of this kind.

And collective-action analysis may even help to explain the success of conditioning practices involving no traditional commitments. For example, if a monopolist will charge a higher price to disloyal customers for some period of time in the event that they deal with a rival, trading partners may be unwilling to deal with the rival because they fear that the rival will not sustain competitive scale. This would leave those trading

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135. See Salinger, supra note 125, at 511.

136. See Eric B. Rasmusen, J. Mark Ramseyer & John S. Wiley Jr., Naked Exclusion, 81 Am. Econ. Rev. 1137, 1137–38 (1991) (modeling this effect).

137. See id. at 1143.

138. See Louis Kaplow & Carl Shapiro, Antitrust, *in* Handbook of Law and Economics 1047, 1206 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (noting that "one or a few large buyers may find it profitable to support entry").

139. See Ilya R. Segal & Michael D. Whinston, Naked Exclusion: Comment, 90 Am. Econ. Rev. 296, 307 (2000) (noting that the possibility of discrimination makes exclusion possible even if trading partners can coordinate); see also Robert Innes & Richard J. Sexton, Strategic Buyers and Exclusionary Contracts, 84 Am. Econ. Rev. 566, 576 (1994) ("[T]he next buyer only needs to be given a payoff that is as high as could be obtained if all buyers *except* [the first] reject their [initial exclusivity] contracts.").

partners stuck with "disloyal" terms from the monopolist for the relevant period, while their competitors enjoy better treatment. In effect, the monopolist creates a commitment mechanism through its conduct.

Rent-Sharing and Pass-Through Theories

When a monopolist's trading partners are not end-consumers, they may become stakeholders in the monopolist's power. In particular, when competition among trading partners is intense, their margins may be competed away, leaving them with little or nothing to gain from increased competition against the monopolist.[140] Any cost savings from competition will simply be passed on to their own customers, not retained as profit.[141] But those same trading partners may have something to gain from continued monopoly if the monopolist will share some of the rents with them.[142] End-consumers end up bearing the costs.[143]

The thinner trading partners' own margins, the lower the compensation they may accept to forgo the benefits of competition and help protect the monopoly.[144] "In effect, the service that [they can be paid to] provide is the exclusion of a potential entrant."[145] This generally requires, among other things, that the trading partners are critical to entry, that entry would result in increased competition rather than a mere change of monopolist, and that the trading partners would not enjoy equivalent rents after entry.[146]

There are many ways for a monopolist to share rents with trading partners. These include side payments,[147] rebates,[148] "bonuses" or "fees,"[149] and the use of price-maintenance or exclusive territories to insulate trading partners from competition with one another.[150] Or a price-discriminating monopolist might price high to disloyal customers while pricing low to those customers' competitors, to "compete away most of the

140. Ide et al., supra note 120, at 1864 (modeling this claim).

141. Id.

142. See DeGraba et al., supra note 119, at 11 ("The supplier distributes a portion of the rents back to the retailers in the form of a lump sum payment in exchange for retailers' exclusivity to the supplier.").

143. See id.

144. See Joseph Farrell, Deconstructing Chicago on Exclusive Dealing, 50 Antitrust Bull. 465, 477 (2005) (arguing that increased pass-through to intermediate buyers facilitates anticompetitive exclusion).

145. John Asker & Heski Bar-Isaac, Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals, 104 Am. Econ. Rev. 672, 681 (2014).

146. See id. at 682.

147. See John Simpson & Abraham L. Wickelgren, Naked Exclusion, Efficient Breach, and Downstream Competition, 97 Am. Econ. Rev. 1305, 1306, 1318 (2007).

148. See Ordover & Shaffer, supra note 128, at 569.

149. See Steuer, supra note 119, at 129.

150. See Asker & Bar-Isaac, supra note 145, at 680.

benefits of using the rival's input" and thus punish trading partners for dealing with the monopolist's rival.[151]

And, just as a set of trading partners can become stakeholders in the monopolist's incumbency, the monopolist in turn can become a stakeholder in protecting those trading partners from competition. Each new player in that market makes exclusion harder for the monopolist, so the monopolist may have an incentive to help the trading partners resist entry and expansion at their own level of the supply chain.[152] The result can be a cozy implicit bargain between a monopolist and a set of important trading partners.

Predation Theories

A final set of theories posits that the harm will arise through a two-step process that corresponds to standard predatory pricing.[153] In the first step, the monopolist offers prices that rivals cannot profitably match to trading partners that decline to deal with rivals.[154] Rivals run out of money and exit, and given entry barriers, the monopolist is left with more power than it started with.[155]

This is a variation on a common price predation story, with the tweak that the prices are conditional. The core mechanism of harm here often owes more to the price than the condition, though the condition may result in rivals making even fewer sales than they would with unconditional pricing.[156]

2. *Theories of Benefit.* — Conditional dealing may also result in welfare benefits. These may flow either from the behavior induced by the condition, or from the inducement itself.

Of course, the existence of some benefits does not imply that a practice is beneficial *overall*, nor that the harmful effects are necessary to achieve the benefits. In fact, every form of monopolization, however flagrant, generates some benefits. For example, if a monopolist manufacturer blows up all its rivals with dynamite, that conduct will at least save downstream retailers the transaction costs of dealing with the rivals, give the retailers strong incentives to promote the distribution of the

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151. Patrick DeGraba, Naked Exclusion by a Dominant Input Supplier: Exclusive Contracting and Loyalty Discounts, 31 Int'l J. Indus. Org. 516, 517 (2013).

152. See Asker & Bar-Isaac, supra note 145, at 682–83; Elizabeth Granitz & Benjamin Klein, Monopolization by "Raising Rivals' Costs": The Standard Oil Case, 39 J.L. & Econ. 1, 9–10 (1996) (discussing Rockefeller's use of these tactics in 1871–1872).

153. On the economics of predation, see Janusz A. Ordover & Robert D. Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 Yale L.J. 8, 9–10 (1981).

154. Id.

155. Id.

156. See Salop, Paradigm, supra note 114, at 372 (noting that a challenge to conditional pricing under a predation theory "would attack the 'level' of the prices" rather than the condition).

monopolist's product, and allow the manufacturer to invest in the retailers without fear of free riding. There is, thus, always a bright side.[157]

a. *Benefits of Induced Behavior.* — Sometimes benefits may result from the fact that one or more trading partners are induced not to compete or deal with competitors.

Two cautionary notes at the outset. First, many prominent benefit theories have been developed in the context of paradigm exclusivity, in which the trading partner makes an affirmative promise to deal only with the monopolist.[158] But in conditioning cases there is usually no such commitment, just an incentive effect.[159] This may preclude or undermine traditional benefit claims that are premised on high confidence that the trading partner will in fact remain loyal.[160]

Second, some courts and commentators have confused the benefits of exclusivity with the benefits of commitments made to a bound party in return for exclusivity, including commitments relating to supply, pricing, and so on.[161] But nothing about a promise not to deal with a monopolist's rivals requires any particular package of corresponding duties for the monopolist.

*Facilitating investments that would not otherwise take place because of free-riding effects.* A monopolist may be deterred from making certain investments if some of the resulting benefits will accrue to rivals.[162] Some of this effect flows from externalization: The monopolist will invest less than it would if it internalized all the payoff. Another part of the effect flows from the fact that an investment may improve the ability or incentive

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157. See Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," and Consumer Harm, 70 Antitrust L.J. 311, 353 (2002) [hereinafter Jacobson, Consumer Harm] (discussing the potential efficiencies of exclusive dealing contracts); Tom et al., supra note 117, at 617 (same).

158. See Tom et al., supra note 117, at 616–19 (summarizing orthodox analysis of exclusivity agreements).

159. Id. at 621–22 (noting the "emerging issue in antitrust litigation and counseling" of practices short of traditional exclusivity that resemble it in some respects, including partial commitments and arrangements that incentivize exclusivity without requiring it).

160. See Fiona M. Scott Morton & Zachary Abrahamson, A Unifying Analytical Framework for Loyalty Rebates, 81 Antitrust L.J. 777, 801 (2017) (observing that in some cases loyalty discounts have not spurred complementary investment). But see Steuer, supra note 119, at 127 (noting that the possibility of breach can soften the effect of a commitment).

161. For example, the Supreme Court has stated that, for a buyer, an exclusive deal "may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306 (1949) (footnote omitted). None of these effects flows from exclusivity as such: Instead, they may flow from particular promises that a supplier may or may not offer in exchange for an exclusivity commitment.

162. See Scott Morton & Abrahamson, supra note 160, at 801 ("[A] manufacturer might train workers at an intermediary to repair a product only if the intermediary sells a high enough share from that manufacturer to limit free-riding."); Steuer, supra note 119, at 127.

of one or more rivals to compete against the monopolist, cannibalizing its profits. Reducing free riding may increase the monopolist's socially valuable investment.[163]

*Facilitating investments that would otherwise be deterred by fear of opportunism.* When a monopolist makes relationship-specific investments, it may become vulnerable to holdup or opportunistic threats by its trading partner.[164] This risk may deter the monopolist from making the investments in the first place.[165] Practices that deter the partner from credibly threatening to go elsewhere may reduce the threat, and thus encourage the monopolist to invest.[166]

*Allocating risk of fluctuations in demand.* Some investments may not be rational unless the monopolist has confidence in the level of future demand for its output.[167] Inducing exclusivity may contribute to such confidence, and thus make the investments rational.[168] Exclusivity may also offer a way to allocate the risk of fluctuating demand to the most efficient bearer of that risk.[169]

*Aligning incentives and encouraging investment.* A trading partner that deals with the monopolist and its rivals may have little incentive to promote any particular brand.[170] An exclusive relationship may give the

163. See Jacobson, Consumer Harm, supra note 157, at 360 (arguing that leaks of confidential information disincentivize future investments); Steuer, supra note 119, at 130–31 (discussing the free riding which ensues when sellers are forced to share confidential information with their buyers, putting trade secrets at risk of exposure).

164. See Ittai Paldor, Antitrust Law's Harm to Competition: A New Understanding of Exclusivity, 69 Buff. L. Rev. 1095, 1120 (2021) ("If the party required to make these relationship-specific investments is not guaranteed a certain amount of sales for a predetermined price, the investments may be abandoned.").

165. Id.

166. See DeGraba et al., supra note 119, at 4–5 ("Exclusive contracts . . . can promote efficiency by improving incentives for parties to make beneficial investment when holdup or free-riding might otherwise occur."); Paldor, supra note 164, at 1122. Note that in both free-riding stories, the benefit arises from the social value of the additional increment of investment that is contingent on protection against free riding. What we are calling here "opportunistic threats" may overlap heavily with what we might otherwise call "desirable price competition against the monopolist."

167. Paldor, supra note 164, at 1120 & n.88 (noting that some relationship-specific investment is contingent on a guaranteed minimum sales volume).

168. See Crane, Loyalty, supra note 131, at 261 (arguing that exclusivity can help guarantee a minimum sales volume despite uncertain demand); Paldor, supra note 164, at 1120 & n.88 (same).

169. See Crane, Loyalty, supra note 131, at 260–61; Herbert Hovenkamp, The Federal Trade Commission and the Sherman Act, 62 Fla. L. Rev. 871, 889 (2010) (describing risk-management benefits of loyalty discounts).

170. See Jacobson, Consumer Harm, supra note 157, at 357–58 (noting that a distributor authorized to deal with several brands is "subject to conflicting interests and less likely to promote" any one as effectively).

trading partner an incentive to support the monopolist's product, resulting in extra distribution efforts.[171]

b. *Benefits of Inducements.* — Conditioning cases often involve benefit claims that relate not to the induced behavior of the counterparty (e.g., the fact that the counterparty will not compete or deal with rivals) but to the inducements offered to obtain that behavior, when evidence indicates that those inducements could or would not reasonably be offered absent the challenged practice.[172]

*Discounts are good.* All else equal, true price reductions toward the competitive price tend to increase output and welfare.[173] (All else may not be equal, though: The mere fact that two different prices are involved does *not* mean that either or both are less than they would be absent the condition.[174]) In particular, a trading partner may decide to deal exclusively in order to extract lower prices from the monopolist and its competitors.[175]

*Price discrimination and price competition for contestable demand.* In some cases, exchanging better terms for loyalty may allow the monopolist to offer to make additional sales above the monopoly output level.[176] This in turn may allow the monopolist to be a price competitor for contestable demand at a price below the market-wide monopoly price.[177] In such cases, the monopolist is effectively price-discriminating among segments of the same customer's demand, charging a lower price on more elastic demand. This may make a larger contribution to welfare when rivals are few or weak.[178]

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171. See Genchev & Mortimer, supra note 112, at 352; Jacobson, Consumer Harm, supra note 157, at 357; David E. Mills, Inducing Downstream Selling Effort With Market Share Discounts, 17 Int'l J. Econ. Bus. 129, 133–36, 140 (2010) (showing that loyalty discounts reduce the cost of induced selling efforts).

172. See supra section I.A.1.c (discussing Google's Project Hug benefits to potential competitors, perhaps rational only in light of the benefits' anticompetitive effects).

173. See Blair & Knight, supra note 125, at 123 (noting that discounts are generally procompetitive and welfare-enhancing); Ordover & Shaffer, supra note 128, at 569 (same).

174. See Elhauge, Loyalty Discounts, supra note 131, at 216 ("There is no sound economic reason to conflate real discounts from but-for levels with price differences conditioned on compliance with exclusionary terms."); see also Elhauge, Death of Single Monopoly Profit, supra note 123, at 450 ("The most important thing to get straight about bundled discounts is that they need not reflect true discounts at all.").

175. See Salinger, supra note 125, at 535 n.82.

176. U.S., Roundtable on Fidelity Rebates 5, DAF/COMP/WD(2016)20 (June 7, 2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1606fidelity_rebates-us.pdf [https://perma.cc/W79K-9RX5].

177. See Salinger, supra note 125, at 523 ("[P]urchasers in the competitive segment get much lower prices while consumers in the monopolized segment get the same price.").

178. For this reason, most illustrations of the salience of this effect focus on two-firm cases. See, e.g., id. at 520, 523 (modeling this with a monopolist and a single entrant); see also Sean Durkin, The Competitive Effects of Loyalty Discounts in a Model of Competition Implied by the Discount Attribution Test, 81 Antitrust L.J. 475, 490–91 (2017).

*Volume-like discounts for trading partners of various sizes.* Volume discounts are a common and often beneficial means of competing on price,[179] and they may proxy the increased efficiencies of trading at scale.[180] But because different trading partners may have different abilities to accommodate scale, suppliers may turn to share discounts instead as a purportedly fairer alternative.[181] And to the extent that such discounts constitute true price reductions or help to achieve real scale efficiencies, they too may result in genuine benefits.[182]

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Conditional dealing, then, appears to be taking place in some of the most important sectors of our economy, from our largest digital platforms to markets for necessaries like food and medicine. And an array of economic scholarship has articulated a variety of ways in which such practices might enable monopolists to exclude rivals and harm consumers—just the kinds of things with which antitrust is traditionally concerned. Unfortunately, as Part II will explore, the law of monopolization is lagging far behind.

## II. CONDITIONING AS MONOPOLIZATION

This Part argues that it is time to admit a new category to monopolization's library of forms, alongside tying, bundling, predatory pricing, and so on. Conditional dealing is the offering, by a monopolist, of conditional terms to trading partners that provide for disfavored treatment if they compete—either at all or to a particular extent—with the monopolist (horizontal conditioning) or if they trade—again, at all or to a particular extent—with the monopolist's rivals (vertical conditioning). Or, to put it the other way around, terms that provide that trading partners will receive favored treatment if they abandon or limit competition against the monopolist or dealings with its rivals.

The following discussion will focus only on Section 2 of the Sherman Act,[183] leaving other avenues of challenge to conditional dealing—including Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the FTC Act—for another day.[184]

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179. See Dennis W. Carlton & Michael Waldman, Safe Harbors for Quantity Discounts and Bundling, 15 Geo. Mason L. Rev. 1231, 1233 (2008) (discussing volume discounts' ubiquity and relationship with efficiencies).

180. Id.

181. See Tom et al., supra note 117, at 629 (noting the argument that share discounts "allow[] smaller customers to buy on more equal terms").

182. Id. (mentioning the potential benefits of market-share discounts).

183. See 15 U.S.C. § 2 (2018).

184. For example, some courts are willing to infer an agreement, sufficient to trigger the application of Section 1, 15 U.S.C. § 1, from so-called threat-and-accession interactions.

### A. *A Failure of Shoeboxes*

Section 2 of the Sherman Act, 15 U.S.C. § 2, establishes the monopolization offense. This governs businesses that hold or attain monopoly power: a high bar, connoting significant freedom from competition.[185] It prohibits creating or extending such power through conduct variously labeled "exclusionary," "anticompetitive," "predatory," or "not competition on the merits."[186]

As this overload of eyebrow-wiggling labels might suggest, there is considerable uncertainty about what general principles, if any, govern the monopolization offense.[187] The core difficulty is that vigorous competition—the behavior that antitrust is supposed to value and require—involves prospering at the expense of rivals, capturing their market share, and perhaps forcing them out of the market.[188] And success leads to monopoly. So courts have struggled to give an account of monopolization that does not punish desirable conduct.[189]

In practice, courts usually dodge this first-principles question—sometimes genuflecting to it in a paragraph or two of empty cant[190]—and rely instead on a taxonomy of neat, shoebox-like categories of behavior, each with a corresponding micro-rule of legality. Thus, we have fairly specific rules for predatory pricing, tying, bundling, and so on.[191] Predatory pricing, for example, constitutes monopolization if it involves a

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See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526 (5th Cir. 2022) (endorsing such an inference in principle).

185. For illustration, a market share of around 60–70% is suggestive of monopoly power, although share alone is not dispositive. See, e.g., Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 n.5 (9th Cir. 2022); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945); see also Francis & Sprigman, supra note 113, at 338 (discussing the relationship between share and monopoly power).

186. See Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("[T]he possession of monopoly power [is not] unlawful unless it is accompanied by an element of anticompetitive *conduct*."); United States v. Grinnell Corp., 384 U.S. 563, 570–71, 576 (1966) (condemning monopoly achieved through "exclusionary practices").

187. See supra note 15 and accompanying text.

188. See Frank H. Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 972 (1986) ("Competitive and exclusionary conduct look alike.").

189. See Francis, Making Sense of Monopolization, supra note 15, at 784–91 (surveying considerable judicial and scholarly disagreement).

190. Courts often purport to rely on a thick, normative, and undefined concept of "competition" for this purpose, usually with unhelpful results. See Francis, Competition, supra note 16, at 433–34.

191. See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 994 F.3d 1166, 1173 (10th Cir. 2021) (explaining that there are "specific rules for common forms of alleged misconduct" (citing Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013))).

monopolist (1) charging below-cost prices that (2) create a dangerous probability of recouping its losses through enhanced monopoly power.[192]

The result is that monopolization law effectively thinks in these shoeboxes: Plaintiffs either fit into a recognized category or they lose. Courts are often reluctant to impose monopolization liability[193] and hardly ever do so without plenty of reassurance that they are coloring well inside the lines.[194] "General principles" Section 2 claims are seldom tried, and less often successful.[195]

This spells trouble for conditioning claims, because most such practices simply do not fit into any of the shoeboxes recognized in existing monopolization law. In many cases, courts often try to jam them in anyway, with unappetizing results.[196] But in other cases, courts explicitly recognize that conditioning theories do *not* fit into these categories and throw up their hands in ways that very clearly expose the costs of a shoebox-based system of micro-rules: particularly a system that does not include conditioning.

In one recent case, for example, a district court considered an allegation that an incumbent competitor offered shipping slots to a rival on favorable terms so long as the rival withdrew from the upstream market for ships—that is, a horizontal condition.[197] The court confessed that it "struggle[d] to cabin" this allegation, and "[w]ithout additional briefing on how the proposal should be treated under the antitrust laws . . . the Court hesitate[d] to opine further on how the allegation fit[] with [the plaintiff's] claims."[198]

Likewise, in another recent case, confronted with a vertical condition exerting what was labeled "in-market leverage" in Part I, an appellate court confessed similar confusion:

> [The plaintiff] describes a phenomenon where an entrenched firm might be able to offer hard-to-match discounts to the non-entrenched share by offering loyalty discounts conditioned on sales exceeding the entrenched demand. But [the plaintiff] does not provide us any legal standard by which to evaluate [the defendant]'s alleged leveraging of entrenched share, making it

192. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

193. See, e.g., Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170 (10th Cir. 2023) ("We exercise caution when evaluating what qualifies as exclusionary conduct under [Section 2 of] the Sherman Act.").

194. See Francis, Competition, supra note 16, at 428 (arguing that a fear of false-positive liability has led to underenforcement of antitrust laws, particularly in cases that fall outside familiar categories).

195. See id.

196. See infra note 201 and accompanying text.

197. See Am. President Lines, LLC v. Matson, Inc., 633 F. Supp. 3d 209, 219 (D.D.C. 2022).

198. Id. at 230–31.

> impossible for us to determine whether there is a material issue of fact.[199]

So the court "refrain[ed] from deciding this issue independently."[200]

The point is a simple one. By falling in the wrong box or none at all, conditioning cases routinely fail for reasons that have little or nothing to do with the economic concerns surveyed above, leaving the law of conditional dealing—to the extent that we have such a thing—an unedifying mess.[201] And, as the following will show, no existing member of monopolization's family of shoeboxes is well placed to accommodate conditional dealing.

1. *Refusal to Deal.* — Some conditional practices involve granting or cutting off access to a product or service to induce trading partners not to compete or not to work with rivals. In such cases courts have sometimes applied the law of refusal to deal. This framework usually governs claims that a monopolist is denying a rival access to some kind of supply, hindering the rival's competitive effectiveness.[202]

Courts treat such claims with extreme skepticism. Indeed, antitrust generally starts from the proposition that every business has an affirmative right to pick its own customers.[203] The Supreme Court articulated this point soon after the Sherman Act was passed.[204] The Court's 1919 *Colgate* decision is still routinely cited for "the long recognized right of [a] trader

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199. In re EpiPen, 44 F.4th 959, 1001–02 (10th Cir. 2022) (footnote omitted).

200. Id. at 1004.

201. See Su Sun, Editor's Note: Assessing Conditional Pricing, 81 Antitrust L.J. 337, 337 (2017) (noting that there is "no consensus" on the analytical framework applicable to conditional pricing). Even when plaintiffs win in cases involving a conditioning theory, the reasoning is seldom convincing. In *Chase Manufacturing*, for example, the Tenth Circuit correctly upheld a theory of harm in a case in which a monopolist threatened trading partners with termination if they dealt with a rival (i.e., vertical conditioning). Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170–77 (10th Cir. 2023). But the reasoning was lamentable. The court held that there was evidence of illegality because: (1) the defendant held "significant market power"; (2) "distributors did not flock to [the rival product], despite its 20-to-25% lower price and superior quality"; (3) there was evidence of "coercive behavior"; and (4) the defendant had "not explained how its conduct fostered competition." Id. at 1171–72. But evidence of market power goes to whether we are dealing with a monopolist, not whether the conduct was unlawful; the fact that distributors did not switch to a rival does not itself imply that the monopolist's conduct was improper; coercion is an empty test for the reasons explained above, see infra section II.B.2.b; and before we can require a defendant to show justifications, we need a prima facie case. So *Chase Manufacturing*'s outcome was correct, but the reasoning was not.

202. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) ("Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 [of the Sherman Act]."); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–11 (1985) (finding a Section 2 violation for a refusal to deal).

203. See Hovenkamp, Big Tech, supra note 14, at 1487 ("[T]he default rule is that a firm can lawfully refuse to deal with rivals . . . .").

204. See United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 320 (1897) (outlining a private business's right to charge what they wish and deal with whom they wish).

or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And . . . [to] announce in advance the circumstances under which he will refuse to sell."[205]

In principle, this right is a qualified one. Monopolization liability is available at least in theory for a narrow category of refusals, given the Court's 1985 holding in *Aspen Skiing* that it was unlawful for a monopolist ski resort to pull out of cooperation with a smaller rival without adequate "justification."[206] But the seminal modern Section 2 case, 2004's *Trinko*, went out of its way to marginalize *Aspen Skiing* ("at or near the outer boundary" of the law[207]) and held that even a monopolist with a statutory duty to deal could not be liable in antitrust for refusing to do so.[208] The Court emphasized the hazards of dragging courts into the supervision of forced selling, fearful of the resulting need to regulate prices, terms, and performance.[209] No one seems to have won a refusal to deal case since.[210] A separate essential facilities doctrine is recognized in theory by lower courts but seems to be similarly imaginary in modern practice.[211]

Most modern readings of *Aspen Skiing*—channeling *Trinko*'s spirit—confine it to cases in which a monopolist terminates a previous, profitable course of dealing for purely anticompetitive reasons.[212] But it is not obvious why it should be worse to cut off a rival than not to deal with it in the first place (particularly given that this rule seems likely to dissuade monopolists from selling to rivals in the first place, for fear that they may

205. United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (quoting *Trans-Mo. Freight*, 166 U.S. at 320). The fuller quotation is more qualified, reading: "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right . . . ." Id. (emphasis added). But the thrust of the opinion, and the status of the principle, is unmistakable.

206. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–11 (1985); see also Otter Tail Power Co. v. United States, 410 U.S. 366, 377–82 (1973) (imposing liability for a refusal to deal).

207. *Trinko*, 540 U.S. at 409.

208. Id.

209. Id. at 414–15.

210. See Hovenkamp, Big Tech, supra note 14, at 1490 n.26.

211. See Brett Frischmann & Spencer Weber Waller, Revitalizing Essential Facilities, 75 Antitrust L.J. 1, 8–9 (2008) (noting that "[t]he [essential facilities] doctrine has been subject to increasing scholarly criticism" and that "[t]he *Trinko* decision in 2004 represents [its] near extinction . . . in the Supreme Court").

212. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013); Covad Commc'n Co. v. Bell Atl. Corp., 398 F.3d 666, 673–76 (D.C. Cir. 2005). But see Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 461 n.13 (7th Cir. 2020) (alluding to the possibility of "a broader approach, in which harm 'wholly disproportionate' to [a] valid business justification can . . . support a refusal-to-deal-claim" (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 772c2 (4th ed. 2015))); Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 19, New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023) (No. 21-7078), 2022 WL 266802 ("There is . . . no rigid test for analyzing refusals to deal under Section 2.").

become locked in by antitrust), nor is it clear what should count as a good reason.[213] At least one appellate court has held that a desire to exclude rivals from one's own property is a good enough reason to justify a refusal.[214] It's not obvious why that's wrong in a legal system that does not generally force persons to share their property; and if it's right, it's not clear what refusal would ever fail that test.

Multiple courts have analyzed conditioning through the rather dim and narrow lens of refusal to deal law.[215] For example, when the FTC and a coalition of states alleged that Facebook (now Meta) violated Section 2 by offering valuable interoperability services to apps only on condition that the apps neither developed competing functionalities (i.e., horizontal conditioning) nor promoted in certain ways those that did (i.e., vertical conditioning), the district court and the D.C. Circuit analyzed the horizontal conditioning as a refusal to deal.

In the district court, Judge James Boasberg held that it was "clear off the bat" that:

> Facebook's adoption of a policy of not offering API access to competitors did not, standing alone, violate Section 2. . . . [A] monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated . . . by a desire 'to limit entry' by new firms or impede the growth of existing ones.[216]

From this it followed that "a firm's merely announcing its choice not to deal with competitors . . . cannot violate Section 2."[217] This may have deterred some from competing, but "Facebook had no antitrust duty to avoid creating that deterrent."[218] Such a policy was "plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing."[219]

Crucially, Judge Boasberg held that illegality could only flow from actual refusals, not from a conditional policy. "[T]he mere act of announcing or maintaining a general no-dealing-with-competitors *policy*

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213. See Michael Jacobs, Introduction: Hail or Farewell? The *Aspen* Case 20 Years Later, 73 Antitrust L.J. 59, 65–67 (2005) (questioning *Aspen*'s reasoning).

214. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997) ("[A] monopolist's 'desire to exclude others from its [protected] work is a presumptively valid business justification . . . .'" (second alteration in original) (quoting Data Gen. v. Grumman Sys. Support, 36 F.3d 1147, 1187 (1st Cir. 1994))).

215. See, e.g., Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440 (1910); *Viamedia*, 951 F.3d at 462–63; Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 227 F. 46, 48–49 (2d Cir. 1915); Whitwell v. Cont'l Tobacco Co., 125 F. 454, 461–63 (8th Cir. 1903).

216. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 27 (D.D.C. 2021) (quoting Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)).

217. Id.

218. Id.

219. Id. at 28.

cannot, in and of itself, violate Section 2; rather, the analysis must focus on particular *acts*" of refusal.[220]

On appeal in the states' case, the D.C. Circuit specifically upheld the choice of the refusal to deal lens for analysis of the horizontal conditioning allegation.[221] Stating that interoperability with Facebook's platform was "a privilege, and one highly sought,"[222] the court reiterated core refusal to deal principles: "To consider Facebook's policy as a violation of § 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors. That theory . . . runs into problems under [*Trinko*]," and if sharing were required, "courts would have to manage corporations' business affairs, a role for which the judiciary is ill suited."[223]

But on closer examination this lens is a very poor fit for conditioning. A refusal claim involves alleged harm from not getting access to some output, while a conditioning claim involves alleged harm from the affirmative creation of a condition that affects incentives, even if no trading partner is ever cut off.[224] In fact, if the condition works as feared, the threat will induce compliance, and no one will have to be "punished."

Moreover, the remedial problem that dominates refusal law and was emphasized in *Trinko*[225]—namely, the challenge of setting prices and terms and then policing compliance with them—is entirely absent in the conditional-dealing context. To remedy a refusal, a court must require dealing, set detailed terms, and monitor behavior;[226] to remedy a condition, the court need only forbid the condition, leaving the parties and the court otherwise free to get on with their lives. Thus, the D.C. Circuit's suggestion that barring a condition amounts to "manag[ing] corporations' business affairs"[227] is hard to understand—and hard to

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220. Id. at 28–29; see also Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 27 (D.D.C. 2021) (making the same point in connection with Section 13(b) of the FTC Act).

221. The appellate court indicated that exclusive dealing law should apply to the vertical conditioning. New York v. Meta Platforms, Inc., 66 F.4th 288, 304–05 (D.C. Cir. 2023).

222. Id. at 302.

223. Id. at 305.

224. A recent DOJ Antitrust Division brief expressed this point clearly:

> Unlike unilateral refusals to deal, which can harm competition by withholding valuable access from rivals (leaving them weakened and less competitive), plaintiffs allege *conditions that harm competition by inducing app developers to change their behavior* by limiting or discouraging them from dealing with [the defendant]'s rivals or by deterring them from becoming rivals to [the defendant] themselves.

Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, supra note 212, at 15 (emphasis added).

225. See Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 414–15 (2004).

226. Id.

227. New York v. Meta Platforms, Inc., 66 F.4th at 305.

reconcile with the fact that antitrust courts tell businesses not to engage in particular practices all the time.[228]

Indeed, conditioning no more constitutes an antitrust refusal to deal than does, say, tying or exclusivity. In a tying case, a defendant refuses to sell A unless the customer also buys B. This may involve a literal refusal to deal in A, but courts have not for that reason thought it appropriate to invoke the "long recognized"[229] right to choose one's own customers to defeat tying allegations. Quite the contrary, the antitrust laws have long been haunted by the idea that tying is or may be per se illegal.[230] Likewise, the whole antitrust law of exclusivity would be impossible to explain or justify if the "greater" freedom to refuse to deal included the blanket "lesser" freedom to sell only to exclusive partners.

In sum, conditional dealing and refusal to deal are different behaviors, involving different theories of harm, and inviting different remedies.

2. *Pricing*. — Some conditioning practices involve pricing. In the classic version, lower prices are charged to trading partners if they do not compete against the monopolist (or if they limit the extent to which they do), or if they do not trade with the monopolist's rivals (or, again, if they limit the extent to which they do).[231]

Courts have sometimes analyzed such practices under the law of predatory pricing. This is the antitrust rule against charging unsustainably low prices to drive rivals out of a market protected by entry barriers, creating a dangerous probability of recoupment through enhanced monopoly power.[232] The Supreme Court has insisted that there can be no liability in such cases unless the price was below the monopolist's own costs,[233] and courts are skeptical of recoupment theories.[234] Ultimate liability is very rare.[235]

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228. See Edward Cavanagh, Antitrust Remedies Revisited, 84 Or. L. Rev. 147, 188–89 (2005) ("Conduct remedies are the most frequently invoked by the courts in monopolization cases.").

229. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

230. See, e.g., Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 498–99 (1969) (indicating that a tie with market power in the tying product is per se illegal); see also Francis & Sprigman, supra note 113, at 316–18 (reviewing the status of the per se rule).

231. See Tom et al., supra note 117, at 615 (noting the rise of "market-share discounts" rewarding partial exclusivity).

232. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (laying out this test).

233. See id.

234. See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 121 n.17 (1986) ("[T]he obstacles to the successful execution of a strategy of [price] predation are manifold . . . ."); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[P]redatory pricing schemes are rarely tried, and even more rarely successful.").

235. See Derek W. Moore & Joshua D. Wright, Conditional Discounts and the Law of Exclusive Dealing, 22 Geo. Mason L. Rev. 1205, 1244 (2015) (noting plaintiffs' poor track record under the *Brooke Group* test).

Courts treat predation claims with a deep skepticism similar to that seen in refusal to deal cases. Like those cases, the antitrust law of pricing seems to implicate an affirmative liberty with deep roots. In passing the Sherman Act, for example, Congressman David Culberson of Texas—a prominent supporter of the legislation—proclaimed: "I am inclined to think that the Standard Oil Company can sell its product at just such prices as it pleases . . . ."[236] The courts have repeatedly agreed.[237]

Some courts have applied predation law, including the immunity that it extends to above-cost prices, in conditioning cases. The Third Circuit has held that "when pricing predominates over other means of exclusivity, the price-cost test applies," meaning per se legality unless prices are below cost.[238] Other courts have expressed similar views.[239]

In other cases, courts have interpreted conditioning claims as complaints about excessive prices, which do not constitute a basis for antitrust liability.[240] For example, in rejecting the FTC's challenge to Qualcomm's "no license, no chips" policy—a policy that, the FTC alleged, surcharged dealings with rivals through an inflated "royalty" payment[241]—the Ninth Circuit held that, if a surcharge is designated a patent royalty, a challenge to the surcharge "sounds in patent law, not antitrust law."[242]

But the law of predation is a poor fit for conditional dealing. In a predation case, the objection is to the defendant's use of a deeper pocket to drive rivals out, with the plaintiff asking the court to examine a price (which every business cannot help but set) to see whether it is too low (though antitrust usually values low prices[243]). By contrast, most of the

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236. 21 Cong. Rec. 4090 (1890) (statement of Rep. Culberson).

237. See, e.g., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447–48 (2009) (emphasizing the freedom of businesses to refuse to deal); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004) (same); Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 916 (7th Cir. 2020) (same); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (same).

238. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 409 (3d Cir. 2016); see also ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 274 n.11 (3d Cir. 2012) (holding that "the price-cost test applies to market-share or volume rebates").

239. See, e.g., Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1061 (8th Cir. 2000) (discussing the strong presumption of legality applicable to discounts that remain above a firm's average variable cost); Valassis Commc'ns, Inc. v. News Corp., No. 17-cv-7378, 2019 WL 802093, at *10 (S.D.N.Y. Feb. 21, 2019) (holding that when a pricing practice is lawful under the price-cost test, it may not be aggregated with other practices in a "monopoly broth"); see also Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 257 F.3d 256, 266–69 (2d Cir. 2001) (applying plaintiff's own theory, which involved pricing below cost).

240. See, e.g., *Trinko*, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

241. See supra section I.A.1.e (discussing the suit in depth).

242. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 999 (9th Cir. 2020).

243. See Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) (describing "competition's basic goals" as "lower prices, better products, and more efficient production methods").

conditional dealing theories reviewed in Part I have nothing to do with deep pockets or unmatchable prices. Nor do those theories concern behavior that a defendant cannot reasonably avoid.

As Salop has underscored, the concern in a conditional pricing case is with the condition, not the price.[244] It makes no difference whether an inducement to reject rivals is a better price, a side payment, or a threatening stick of dynamite.[245] Accordingly, a host of writers have emphasized that price-cost tests are of little to no help in screening for competitive harms from conditioning.[246] For example, in a rent-sharing case, a monopolist shares the rents from exclusion with intermediate buyers in exchange for their help keeping rivals out.[247] This can be done through side payments that leave the buyers just a bit better off under monopoly than they would be under competition.[248] No price need come close to the monopolist's costs, or anyone else's, for harm to result.

Neither does scrutiny of conditional pricing implicate liberties of any very high order. Even the Clayton Act legislators did not seem to see any contradiction between respecting the right to set a price, on the one hand, and prohibiting commodity deals involving a condition of exclusivity, on the other.[249]

Finally, there is a broader point of both principle and practice at issue here. Immunizing any practice involving above-cost pricing would turn every price term into a sheltered channel through which a monopolist can launder all kinds of side payments or penalties, with immunity for the broader scheme. This would swallow a big chunk of antitrust. For example, instead of using an exclusive agreement, a monopolist might charge preclusively high prices to counterparties if they deal with rivals. Instead of tying, the monopolist might charge a preclusively high price for the tying product alone. And so on.

Ultimately, it does not seem rational to treat compensation for market allocation, or for abjuring competitors, differently just because it is paid through manipulation of a price term rather than in a manila envelope. Monopolists of all kinds with colorable services to offer, or colorable IP

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244. See Salop, Paradigm, supra note 114, at 372.

245. See infra section II.B.2.c (considering the economics of exclusion).

246. See, e.g., Giacomo Calzolari & Vincenzo Denicolò, Loyalty Discounts and Price-Cost Tests, Int'l J. Indus. Org., Dec. 2020, 102589, at 1, 13 ("[T]he application of price-cost tests to loyalty discount cases is problematic."); Elhauge, Loyalty Discounts, supra note 131, at 216 (stating that arguments for a price-cost test "miss the point"); Moore & Wright, supra note 235, at 1217 (arguing that a below-cost price "is neither necessary nor sufficient to establish competitive harm"); Salop, Paradigm, supra note 114, at 372 (arguing that the "proper focus" of analysis in conditional-pricing cases is foreclosure, not costs).

247. See supra notes 140–152 and accompanying text.

248. See supra notes 140–152 and accompanying text.

249. See Clayton Act of 1914, 15 U.S.C. § 14 (2018) (prohibiting sale on condition of exclusivity); 51 Cong. Rec. 9256 (1914) (statement of Rep. Graham) ("It is a natural right of a man to fix prices for the commodities which he has to sell.").

rights to license, would have free rein to violate core antitrust rules. Antitrust's relentless focus on economic substance over form commands a different result.[250]

3. *Tying*. — Some conditioning practices involve granting or withholding access to a product or service to deter trading partners from competing or dealing with competitors. For example, a monopolist might refuse to sell in market A to any business that competes against it in market B. The resemblance to traditional tying—in which the monopolist refuses to supply a "tying" product unless customers also buy a "tied" one—has led some courts and commentators to favor the use of tying law in such cases.[251]

Whether brought under Sections 1 or 2, a tying claim generally requires, among other things, market power in the tying market; the existence of "separate" products; strict conditioning ("forcing"); foreclosure of a substantial volume of commerce; and a "harm to competition" in the market of competitive concern, which under Section 2 means harm through contribution to monopoly.[252]

Courts sometimes apply these criteria to vertical conditions—sometimes under the label of "negative tying."[253] For example, in *Data General* the First Circuit considered an allegation that an incumbent computer manufacturer had unlawfully excluded an independent aftermarket service provider (ISP) by refusing to license its diagnostic software to ISPs or their clients.[254] The court indicated that, if the incumbent had indeed entered into an "arrangement[] conditioning the sale of one product on an agreement *not* to purchase a second product from [ISPs]"—forcing customers to buy service from the incumbent or to maintain their own computers—this could constitute an illegal "negative

250. See, e.g., Am. Needle, Inc. v. NFL, 560 U.S. 183, 191 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."); Fed. Trade Comm'n v. AbbVie Inc., 976 F.3d 327, 356 (3d Cir. 2020) (discussing the predominance of economic realities over forms in antitrust); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 470 (7th Cir. 2020) (same); In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 550 (1st Cir. 2016) (same).

251. See infra notes 253–258 and accompanying text.

252. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481–83 (1992) (laying out the elements of a tying claim); United States v. Microsoft Corp. 253 F.3d 34, 65–66, 85 (D.C. Cir. 2001) (same, and discussing the anticompetitive effects of a tie); In re Google Digital Advert. Antitrust Litig., 627 F. Supp. 3d 346, 402 (S.D.N.Y. 2022) (same). This Article does not address the prospect of per se Section 1 liability.

253. See, e.g., Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016) ("A negative tie 'occur[s] when the customer promises not to take the tied product from the defendant's competitor . . . .'" (first alteration in original) (quoting Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 n.23 (9th Cir. 2008))); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994) (discussing negative ties in the Section 1 context), abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

254. See *Data Gen.*, 36 F.3d at 1154.

tie."[255] But the court rejected that tying claim. There was scant evidence that such a condition actually existed,[256] and—"[m]ore importantly"—"virtually no evidence that any [customer] ha[d] *unwillingly* chosen to maintain its own computers" rather than deal with the ISPs, so the "allegation of a negative tie . . . fail[ed] in the absence of proof that [the incumbent] coerced consumers to accept such an arrangement."[257] A number of other cases and commenters have likewise assimilated conditional dealing practices to tying.[258]

But conditioning cases do not easily fit under the tying microscope. First, only a small subset of conditions can be plausibly captured by tying law. Tying law generally requires an absolute refusal to supply a tying product unless a separate tied product is purchased too.[259] This seems to rule out all horizontal conditioning cases (those in which the trigger for adverse treatment is becoming a rival rather than dealing with rivals); all vertical conditioning cases in which the inducement is better terms, rather than product access; and all single-product practices, even those involving in-market leverage.[260]

Second, tying analysis is not aimed at the right issue. Paradigm tying uses product access to "force a customer to buy another product it likely wouldn't have bought,"[261] whereas vertical conditioning uses it to punish dealing with rivals. The first kind of condition is satisfied when a customer buys something from the monopolist; the second is satisfied when the customer refrains from buying something from someone else. There is some directional similarity between these effects—if X buys from Y, X has less demand for the output of Y's rivals—but they are distinct.

Moreover, the set of tying practices and the set of vertical conditioning practices have dissimilar characteristics: In short, the first set is generally less troubling than the second. Paradigm tying includes the many—overwhelmingly benign—cases in which a defendant unconditionally combines products for technological or cost reasons, like adding a

255. Id. at 1178. The court did not separately consider a Section 2 tying theory.

256. Id. at 1181.

257. Id.

258. See, e.g., Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272 (6th Cir. 2015) (discussing differential pricing as a tying claim under Section 1); Scott Morton & Abrahamson, supra note 160, at 832 (arguing that tying law provides the best frame for evaluating loyalty discounts).

259. See Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–18 (1984) ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product . . . ."), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

260. See supra section I.B.1.b.

261. Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1179–80 (10th Cir. 2023) (citing Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1039 (10th Cir. 2017)); see also *Jefferson Par.*, 466 U.S. at 10–12.

function to software or selling a car with tires on.[262] Vertical conditioning does not include these ubiquitous product-integration cases. And the effect of an incentive to refrain from or limit dealings with rivals—the hallmark of a vertical condition—is obviously more likely to be harmful than an obligation to buy some additional output from the monopolist. After all, it's one thing if a defendant prefers not to go to the trouble of selling cars and tires separately, but quite another to induce customers not to buy tires from rivals when the first set wears out or if they want an upgrade. The second practice seems much less likely to have anything to do with efficiency and much more likely to result in harm.[263]

Finally, tying doctrine imposes irrelevant obligations of pleading and proof on plaintiffs. Because tying law aims to prevent power in one (tying) market from being used to generate power in a second (tied) market, courts impose a variety of criteria—market power in the tying product market, a "separate products" test, and a requirement of "forcing"—that have nothing to do with theories of harm from conditioning.[264] In a vertical conditioning case, access to the tying-like product is just a side payment in tacit exchange for some exclusivity in the market of competitive concern. It could just as well be cash, or a low or negative price for a competitive product, or a lifetime supply of pizza. Thus, vertical conditioning can inflict harm (1) even if the defendant has no market power in the first market (access need only be valuable: some differentiation short of antitrust market power will do that); (2) even if the two products fail the separate products test; and (3) even if there is no coercion because the trading partners are willing.[265] Tying law misses all this, and it promises a slew of false negatives as a result.

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262. See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 1717 (5th ed. Supp. 2024) [hereinafter Areeda & Hovenkamp, Antitrust Law] (describing how ties can bring about cost savings and product improvements).

263. The central point is that, in the first category of practices, the defendant's own operations are directly at issue. There may be significant cost savings from integration or bundled supply, and significant costs to disaggregation. Imagine, for example, telling a consumer-electronics retailer that it must also allow customers to buy individual components like circuit boards and diodes as well as finished equipment; telling a supermarket that it must allow customers to buy eggs or slices of bread individually, or just a splash of milk rather than a whole pint; telling a bookseller that it must allow customers to buy individual chapters rather than whole books; or telling a software manufacturer that it must allow consumers to buy some, but not all, of the features of an application. As these examples illustrate, there will often—perhaps almost always—be good, cost-related reasons why a supplier might choose not to disaggregate products and services beyond a certain point and why we might be reluctant to try to make them do so. Conversely, a defendant is much less likely, across the run of all cases, to have good reasons to try to prevent a customer from dealing at all with a rival. The potential harms from doing so are obvious, and the potential justifications are much more likely to reflect special circumstances.

264. See supra note 252 and accompanying text.

265. See supra section I.B.1.b (outlining theories of harm in vertical conditioning cases).

4. *Bundling.* — Some conditions involve offering a lower price for one product or service as an inducement to stay loyal in another market.[266] The resemblance to bundling—in which a monopolist in one market may acquire power in a second market by offering a discount that unintegrated competitors can't match[267]—has led some analysts to apply bundling law to such practices.[268]

The law of bundling is the subject of a circuit split. The majority rule, from the Ninth Circuit's *PeaceHealth* decision, condemns bundles only when the discount is large enough that, if allocated to the competitive product, it would reduce price below the defendant's own costs,[269] for reasons familiar from the predation discussion.[270] The minority rule, from the Third Circuit's decision in *LePage's*, is not quite so demanding, nor so clear.[271] It rejects the price-cost test, but it is not quite clear what rule it prescribes.[272] Some commentators have recommended a price-cost-based approach to evaluate conditioning cases of various kinds.[273]

But there are some evident problems with the use of bundling law here. First, of course, bundling doctrine in the traditional sense could apply only to a small sliver of vertical cases: those involving a price reduction on one product for loyalty in another market. The Third Circuit has explicitly refused, for example, to apply bundling law to a case of in-market leverage.[274]

Second, just as with tying law, bundling law is really aimed at a different practice with a different, and usually lower, risk profile. True bundling involves the very common practice of offering a discount for the purchase of a bundle of goods; this need not penalize or preclude dealings with rivals in the market of concern.[275] Conditioning, by contrast, makes a discount contingent on refraining from dealing with rivals. Across the set of all cases, this seems much more likely to be harmful and much less likely

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266. See, e.g., Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 892 (9th Cir. 2008) (describing a condition wherein a healthcare provider offered discounts on tertiary services to insurers so long as they were made the sole preferred provider for primary, secondary, and tertiary services).

267. See Nalebuff, supra note 123, at 322–24 (describing bundling).

268. See, e.g., Benjamin Klein & Andres V. Lerner, The Law and Economics of Bundled Pricing: *Lepage's*, *PeaceHealth*, and the Evolving Antitrust Standard, 53 Antitrust Bull. 555, 579–85 (2008) (evaluating the law applicable to bundled discount contracts).

269. *PeaceHealth*, 515 F.3d at 906.

270. See supra section II.A.2.

271. LePage's Inc. v. 3M, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc).

272. See Salinger, supra note 125, at 508 ("A common criticism of *LePage's* was that it did not provide clear guidance to companies . . . .").

273. See, e.g., Klein & Lerner, Price-Cost Tests, supra note 120, at 639 (proposing a price-cost based test, involving allocation of discounts to contestable sales, for single-product loyalty-discount cases).

274. See Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) ("[W]e are aware of no court that has credited this novel theory [of single-product bundling].").

275. See supra note 262 and accompanying text.

to be efficient.[276] Among other things, scope economies often arise when products are supplied together, making a bundled discount efficient, but a discount conditioned on loyalty is less likely to proxy for selling efficiencies than one conditioned on the nature and quantity of product supplied.

Third, neither of the leading legal standards seems an appealing metric for conditioning cases. No one, alas, has a clue what the *LePage's* standard is.[277] And the *PeaceHealth* price-cost test, even with discount attribution, is not a convincing proxy for any of the theories of competitive concern described above. Commentators have overwhelmingly recognized that significant harm can result from conditioning without below-cost pricing, allocated or not.[278]

Finally, bundling law is not aimed at the concerns that conditioning raises. Like tying, it is primarily a response to the concern that monopoly power in one market will be used to exclude unintegrated rivals in the market of concern.[279] But the economic concern with conditioning turns on neither the existence of monopoly power in the first market nor the proposition that the rivals are strictly unintegrated. In a conditioning case, the discount is just a side payment for exclusivity. The competitive concern is that demand will be affected, in a way we are willing to label a distortion, by a cross-market subsidy.[280] It makes no economic difference at all whether the discount, subsidy, or side payment is funded by a monopoly price margin in another market, an annuity from Aunt Ethel, or general revenue. And rivals that are weakly integrated in the first market are just as vulnerable to exclusion as those that are not. The bundling analogy does not land.

5. *Exclusivity.* — Vertical conditioning centrally involves inducing trading partners not to deal with rivals. As such, it invites the application of the law of exclusivity (or exclusive dealing), which under Section 2 typically involves a monopolist extracting a commitment from trading partners not to deal with rivals.[281]

Exclusivity doctrine centrally asks whether an exclusive relationship generates harmful substantial foreclosure of rivals and, if so, whether its

276. An equivalent observation was made and developed above in connection with tying. See supra note 263 and accompanying text.

277. See, e.g., Daniel L. Rubinfeld, 3M's Bundled Rebates: An Economic Perspective, 72 U. Chi. L. Rev. 243, 264 (2005) ("The [*LePage's*] decision . . . lacks a clear, coherent economic rationale and leaves unclear when package pricing . . . will or should be condemned under the antitrust laws.").

278. See supra note 246.

279. See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1186–87 (9th Cir. 2016) (declining to apply the *PeaceHealth* test because the affected rival was integrated).

280. See infra section II.B.2.c.

281. See supra section I.A (collecting examples).

harms are offset by benefits.[282] The foreclosure standard is notoriously vague—Professor Daniel Crane has called it "banal and nonpredictive"[283]—but it is often identified with the denial of access to a high quantitative share of whatever is being purportedly foreclosed: inputs, distribution, customers, or complements.[284] Courts often require a plaintiff to show foreclosure of a share around 40–50% in Section 1 cases and a modest but undefined amount less under Section 2.[285]

Some courts have analyzed vertical conditional dealing through this lens, sometimes using the term "de facto exclusivity" to reflect the extension of the paradigm beyond strictly exclusive agreements.[286] For example, in a brief discussion, the D.C. Circuit indicated that the vertical conditioning dimensions of Facebook's platform policies should be analyzed under exclusive dealing law.[287] That claim failed, the court held, for two reasons. First, because the alleged obligation not to develop competing functions was limited to individual apps that connected with Facebook and did not restrict the ability to create other apps for other social networks (i.e., the policy required only partial, not complete, forbearance from competition). And second, because the states had failed to allege how Facebook's rivals had been foreclosed, including "the importance of cross-network apps to [rivals], what fraction of developers were discouraged, or whether network-bridging apps were the 'most efficient channels' for Facebook's competitors to acquire users."[288] Other

282. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 331–34 (1961) (holding that the rival's opportunities in the market must have been "significantly limited").

283. Crane, Loyalty, supra note 131, at 274.

284. See, e.g., *Tampa Elec.*, 365 U.S. at 328 (customers); McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 837–38 (11th Cir. 2015) (distribution).

285. See, e.g., OJ Com., LLC v. KidKraft, Inc., 34 F.4th 1232, 1247 (11th Cir. 2022) (describing the plaintiff's burden to prove foreclosure of a substantial share); *McWane*, 783 F.3d at 835 (noting that "foreclosure is usually no longer sufficient by itself"); United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

286. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282 (3d Cir. 2012) (discussing "de facto partial exclusive dealing" (emphasis omitted)); LePage's Inc. v. 3M, 324 F.3d 141, 157–59 (3d Cir. 2003) (applying exclusivity analysis to a vertical condition); Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1250 (D. Utah 1999) (holding that the "practical effect" of exclusivity is sufficient to trigger the application of exclusive dealing law).

287. See New York v. Meta Platforms, Inc., 66 F.4th 288, 304 (D.C. Cir. 2023); see also supra section I.A.1.d (discussing this litigation in more detail).

288. New York v. Meta Platforms, Inc., 66 F.4th at 304 (quoting United States v. Microsoft Corp., 253 F.3d at 70).

courts have also applied the law of exclusivity to conditioning,[289] and some writers have favored doing so.[290]

To be sure, exclusivity presents the closest fit with vertical conditioning among all monopolization's categories, and the framework offered here will draw on it.[291] But simply slotting conditioning cases into existing exclusivity law will not suffice—even aside from the fact that it obviously cannot cover horizontal conditioning. (Horizontal conditioning, of course, involves inducement not to compete with the monopolist, not inducement not to trade with its rivals, and so lacks any resemblance to paradigm exclusivity.)

First, many courts have held that exclusivity law simply does not cover conditioning, and that it is limited instead to cases involving an affirmative exclusive commitment,[292] perhaps of literally all the bound party's business.[293] The Ninth Circuit has explicitly held that share-based conditional discounts "are not exclusive dealing arrangements, de facto or actual, unless they 'prevent[] the buyer from purchasing a given good from any other vendor.'"[294] Even the Justice Department, obtaining relief in a 2011 monopolization matter involving large discounts in exchange for exclusivity, went out of its way to suggest an important role for price-cost tests—hallmarks of pricing analysis, not exclusivity analysis—in that

289. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 529 (5th Cir. 2022) ("[C]onditional refusals to deal are functionally equivalent to exclusive-dealing arrangements."); *OJ Com.*, 34 F.4th at 1247 (finding that precedent treats conditional refusals to deal and exclusive dealings "as synonymous"); Fed. Trade Comm'n v. Surescripts, LLC, 424 F. Supp. 3d 92, 100–04 (D.D.C. 2020) (evaluating exclusive contracts under the substantial foreclosure standard).

290. See, e.g., Tom et al., supra note 117, at 615 (arguing that "market-share discounts structured to produce total or partial exclusivity should be judged according to the same economic principles that govern exclusive dealing"); see also Blair & Knight, supra note 125, at 131 (applying *Brooke Group*'s test to conditioning); Moore & Wright, supra note 235, at 1217 (advocating for a foreclosure test).

291. See infra section II.B (describing proposed framework).

292. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 265 (3d Cir. 2012) (holding that certain agreements "were not true requirements contracts because they did not expressly require the [trading partners] to purchase a specified percentage of their needs from [the monopolist]"); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062–63 (8th Cir. 2000) ("Brunswick's discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount . . . ."); Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 69 F. Supp. 2d 571, 575 (S.D.N.Y. 1999) ("The incentive agreements are not exclusive dealing agreements by their terms, and do not require anyone to buy or sell any British Airways tickets, but merely provide larger commissions or discounts if the targets are met.").

293. See Tom et al., supra note 117, at 633 ("Some cases suggest that agreements must require a very high level of exclusivity, perhaps even 100 percent, before they can be considered 'exclusive dealing contracts.'").

294. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1003–04 (9th Cir. 2020) (alteration in original) (quoting Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996–97 (9th Cir. 2010)).

case.[295] But nothing in the theories of harm described in Part I is limited to cases involving strict commitments to exclusivity.

Second, exclusivity cases, doctrine, and scholarship are saturated with criteria that are unrelated to conditioning harms. These include, for example: the duration and terminability of the agreements, whether "coercion" is present, the level of market concentration, whether exclusivity is "common" or "normal," and so on.[296] Thus, for example, the Tenth Circuit recently dismissed a conditioning case based on loyalty rebates because "exclusive rebate agreements were a normal competitive tool in the . . . market, [the defendant's] exclusive rebate agreements were short and easily terminable, and [the defendant] did not coerce any [trading partners]."[297] Likewise, in denying the motion to dismiss in the FTC's "crop protection chemicals" case against Syngenta and Corteva,[298] the court indicated that it was applying exclusivity law only because the plaintiff had plausibly alleged "coercive" conduct beyond pricing, like threats to cut off supply.[299]

But none of these criteria are important measures of, or useful proxies for, competitive harm in a conditioning case, given the economics of harm surveyed in Part I. In fact, they are virtually irrelevant—and certainly not necessary for harm. The creation of an incentive for loyalty does not depend on the duration or terminability, or even the existence, of any underlying agreement. What matters is whether dealing with rivals will be punished by the monopolist. A concentrated market is no more necessary here than in any other monopolization case. Whether a practice is in some sense "common" is obviously immaterial to whether its use by a monopolist in a particular case has resulted in harm. And coercion is beside the point: None of our theories of harm require an unhappy or locked-in trading partner, or that the punishment for disloyalty take any particular form (e.g., a supply cutoff).

It is not even particularly clear how the quantitative foreclosure screen emphasized by many courts in exclusivity cases should be applied to conditional dealing practices. (For example, if a monopolist grants, or just offers, a 0.5% discount to all trading partners in exchange for exclusivity, is that 100% foreclosure, 0.5%, or something else?) In practice, courts do not seem willing to treat even significant impairments as generating substantial foreclosure in the exclusivity sense. In one recent case, the Fifth Circuit considered allegations that a monopolist had used a $50 million

295. Competitive Impact Statement at 14, United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. 2011), 2011 WL 13054949.

296. See, e.g., *ZF Meritor*, 696 F.3d at 284 (coercion and market concentration); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163–64 (9th Cir. 1997) (market concentration); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) (duration of contracts).

297. In re EpiPen, 44 F.4th 959, 990 (10th Cir. 2022).

298. See supra section I.A.2.a.

299. See supra note 86 and accompanying text.

conditional "donation" to get a key trading partner to cut off a "laundry list of efficiency-enhancing, cooperative . . . projects" with a rival.[300] Remarkably, the Court held that "those allegations have nothing to do with [the rival] getting shut out of any market at all. So they're irrelevant for foreclosure purposes."[301]

And the accumulated law of justification in exclusivity cases is a poor fit with conditioning. The use of an exclusive dealing framework implicates a good deal of received learning about traditional justifications, including protection against free riding, security of demand, and so forth.[302] But that received learning—and resulting judicial willingness to credit such claims—is seldom fully applicable to a conditioning case, in which there is no commitment, just an incentive effect.[303]

Finally, analytical recourse to the question of whether some particular practice is or is not a de facto exclusivity agreement trades on an underlying binary idea that some agreements are equivalent to full exclusivity while others are equivalent to none. There does not seem to be any reason to do this, nor any particularly obvious place to draw a line that would make sense across the great variety of real markets and cases.[304]

So, while there is a strong family resemblance between vertical conditioning and traditional exclusivity, exclusivity doctrine has developed in countless ways that leave it an unpromising tool for accurately gauging the harms of conditioning—horizontal and vertical alike.

### B. *A Doctrinal Framework*

Part I demonstrated that a monopolist can use a condition to inflict welfare harms through the exclusion of rivals: just the kind of thing that monopolization law is supposed to prevent. And now we have also seen that the shoebox-bound structure of Section 2 doctrine is impeding antitrust's ability to protect against this threat. Conditioning cases are falling outside monopolization's boxes altogether or being squeezed into inapposite categories.

This Article's core claim is that conditioning deserves an analytical category of its own within monopolization doctrine, with a corresponding micro-rule of legality. That is, we can define "conditioning" with sufficient clarity and then extrapolate from existing law and theory to determine

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300. BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 530 (5th Cir. 2022).

301. Id.

302. See, e.g., Paldor, supra note 164, at 1119–27 (summarizing the traditional benefits of exclusive dealing).

303. See supra section I.B.2.

304. See Moore & Wright, supra note 235, at 1237 ("In truth, it would be impossible for a court or policymakers to identify ex ante a market-share threshold above which a market-share discount is tantamount to exclusive dealing.").

what does, and what does not, need to be proved to establish liability in a conditioning case.

As a foundation for this exercise, this Article will assume—for reasons grounded in monopolization's basic structure and history, and set forth at length elsewhere[305]—that any monopolization case requires a plaintiff to plead and prove, in addition to monopoly power, an affirmative case implementing three basic requirements: (1) *exclusion*, meaning material impairment of the ability or incentive of one or more rivals to meet demand, sufficient to result in (2) *contribution to monopoly power*, meaning that it is reasonably capable of making a significant contribution to such power, through (3) *unprivileged means*, meaning that the conduct is not within a recognized safe harbor. A defendant may rebut this case by showing (4) *justification*, meaning that the challenged practice is on balance beneficial by reason of benefits that could not reasonably be obtained with less harm.[306]

The challenge, then, is how to apply these tests to horizontal and vertical conditioning, consistent with first principles and existing doctrine.

1. *Defining a Condition: The Hold-Constant Test.* — Step zero in this framework requires a definition of a condition. This test should: (1) capture practices raising the concerns surveyed in Part I; (2) avoid unnecessary overlap with existing categories; (3) not pick up routine sale or purchase interactions; and (4) be reasonably straightforward to apply.

To that end, this Article offers a definitional test—the "hold-constant" test—as a predicate for the application of the conditioning framework. It is as follows:

A condition is a policy or practice implemented by a monopolist that provides for less favorable treatment of a market participant by reason of becoming a rival or dealing with a rival either at all or to some extent (or, equivalently, *more* favorable treatment for *not* doing so), otherwise holding constant the market participant's dealings with the monopolist.

In other words, if the practice involves treating the market participant worse by reason of its competing with the monopolist or dealing with a competitor of the monopolist (either at all or to some extent), assuming that nothing else changes about its interactions with the monopolist, then we have a conditional-dealing practice and should apply the framework given here.

This test captures the practices implicating the harms surveyed in Part I, including the relatively straightforward collusion-like dynamics of horizontal conditioning as well as the various concerns presented by vertical conditioning.[307] It includes naked threats and bribes, as well as the

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305. See Francis, Making Sense of Monopolization, supra note 15, at 791–824 (presenting an account of the history, theory, and doctrine of monopolization).

306. Id. at 804–20 (doctrinal framework).

307. See supra section I.B.

array of out-of-market and in-market inducements surveyed in Part I.[308] It includes what Professor Fiona Scott Morton calls "contracts that reference rivals,"[309] as well as unilateral-policy equivalents (which we might call "policies that reference rivals"), and the horizontal cousins we might call "contracts and policies that reference *rivalry*."

It also has a clear core that minimizes overlap with existing categories. We can briefly illustrate the boundaries. If the complaint is that the monopolist won't sell (at all or on desired terms), that's a refusal to deal claim; if the complaint is that the monopolist is incentivizing others not to compete, or not to deal with its rivals, by offering to sell so long as they play along, it's a conditioning claim. If the complaint is that the monopolist won't give access to (or a discount on) product A except to those who buy product B as well, that's a tying (or bundling) claim; if it's that the monopolist won't give access to or a discount on product A except to those who do not compete with it or deal with its competitors, that's a conditioning claim. And if the monopolist has extracted a commitment to exclusivity from trading partners, that's an exclusivity claim; if the monopolist has just incentivized its trading partners to stay loyal through incentive effects, that's a conditioning claim.

There will be some fuzz on the borderlines, as there always is. But this is no more a problem here than it is anywhere else. A plaintiff may plead any or all implicated theories.[310] In such cases the existence of the conditioning frame will help to make sure that such claims are not improvidently dismissed for failure to exhibit some unnecessary fact (e.g., lack of coercion or an underlying long-term agreement leading to dismissal of an exclusivity theory[311]).

The hold-constant proviso at the end of the definition ("otherwise holding constant the market participant's dealings with the monopolist") excludes from the definition cases in which the monopolist is paying for something other than abstention from competition or from dealing with rivals. If a benefit is conditional on extra investment, confidentiality, commitment of resources, and so on, it is not a condition in the sense with which we are concerned. To count as a condition, the threat or benefit must be contingent on rivalry or dealings with rivals *all else equal*.[312]

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308. See supra section I.B.1.

309. See Scott Morton, supra note 118, at 72, 77 (discussing contracts for which the "terms . . . depend on information from a different buyer-seller relationship involving at least one of the same parties").

310. See, e.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020) ("[A] dominant firm's conduct may be susceptible to more than one court-defined category of anticompetitive conduct.").

311. See supra section II.A.5.

312. For the avoidance of doubt, this analysis has nothing to do with the magnitude or salience or impact of the threat or benefit. This is not a coercion test. At this stage of the analysis, we are just trying to make sure that a condition exists.

The proviso also excludes from our definition cases in which what the trading partner is supplying is particularly scarce: space on a billboard, the one unit that the trading partner makes per year, etc. Simply buying that output is not vertical conditioning on this definition because there is no punishment for selling to rivals (or inducement for not doing so), all else equal. Instead, the underlying practicalities mean that, at least to some extent, selling to the monopolist means not selling to rivals, and that is not a condition on our telling. But if the trading partner would be punished for expanding its output or otherwise engaging in additional dealing with rivals—say, for adding a second billboard and selling that space to a rival or increasing output to start selling to rivals—then we have conditioning.

The word "otherwise" in the proviso does important work and carries meaning that may not be immediately obvious. It brings into the definition of a condition policies that require a transaction with the monopolist whenever a transaction occurs with a rival.[313] For example, rather than fining a customer $5 every time it competes or deals with a rival, a monopolist could just require its customer to buy a copper penny from the monopolist for $5.01 each time the customer worked with a rival. This can be understood as an anti-evasion feature of the rule, as just about any condition could be reframed into this form. It may take some analytical work to figure out whether a payment is in economic substance a punishment for competing or dealing with a rival, and not a genuine price for a product or service. It is for the plaintiff to prove that an actual condition exists, as part of its general burden to establish a violation.[314]

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313. This might not be obvious. Recall that the point of the proviso is to exclude from our definition a condition that is triggered by something other than refraining from competing or dealing with rivals. For example, if a monopolist agrees to pay a bonus to trading partners that provide a valuable service to the monopolist, that is not what we are calling a condition: It rewards the service, not the harmful behaviors we are worried about. But, as the text explains, the existence of this proviso opens up a line for abuse or evasion. Rather than extracting a penalty for competing or dealing with competitors, a monopolist could simply require that, whenever dealing with a competitor, a trading partner must first purchase a product or service from the monopolist at an artificially inflated price—a disguised penalty. (This is one way of understanding *Qualcomm*. See supra section I.A.1.e.) Likewise, rather than offering a bonus for not competing or for not dealing with competitors, the monopolist could simply offer a product or service on artificially favorable terms to trading partners that do not compete or deal with rivals—a disguised bonus. (This is one way of understanding the Google–Apple theory of harm described in Part I.) The word "otherwise" ensures that, to the extent that an aspect of the dealing between monopolist and trading partner is itself triggered by competing or dealing with a competitor, that change in dealing does not trigger the proviso and thus cannot serve as an escape hatch for a creative monopolist.

314. See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1181 (1st Cir. 1994) (granting summary judgment for defendant in a tying claim because plaintiff had failed to show actual conditioning).

Anything the market participant might value or disvalue can serve as an inducement: making or demanding a payment,[315] giving more or less favorable terms of trade in any market,[316] providing access to a separate product,[317] handing out free refrigerators[318]—anything at all. There is no exemption for "reasonable" penalties. In particular, a conditional penalty that is calibrated to reflect the opportunity cost of competition against the monopolist (in the spirit of the so-called efficient component pricing rule) is a condition on this definition.[319]

"Policy or practice" should also be understood broadly. Any explicit or implicit conditional offer, trading practice, or statement of intention will do, whether publicly declared, privately communicated, or reasonably inferable from conduct.[320] As a rule of thumb, if the monopolist's conduct caused others to reasonably apprehend that they would be treated more favorably if they refrained from competition or working with rivals, a condition of the relevant kind exists. Happily, close cases are the ones least likely to matter. Threats are of limited salience if the targets can't be sure whether they're being threatened! So a court can err on the side of requiring clarity before concluding that a condition exists.

Share-based discounts, for example, or other benefits that reward a trading partner for maintaining a particular share of dealings with the monopolist (e.g., low prices on condition that more than 80% or 90% of all purchases are from the monopolist), are paradigm examples of a vertical condition. That's because the trading partner can incur disfavored treatment by conducting additional dealings with rivals, holding constant the volume of purchases from the monopolist. Because the trading partner

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315. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526 (5th Cir. 2022) (evaluating a $50 million "donation[]" premised on cutting off a rival); Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1004 n.24 (9th Cir. 2020) ("[T]he requirement that Apple forfeit or reimburse Qualcomm millions of dollars in incentive funds was a strong deterrent to termination [of dealings with rivals].").

316. See, e.g., Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 995 (9th Cir. 2010) (rewarding higher purchase shares with lower prices).

317. See, e.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 435 (7th Cir. 2020) (making access to "interconnect" services contingent on refraining from dealing with "advertising representation" rivals).

318. See Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1257–58 (5th Cir. 1988) ("Champion . . . [offered] distributors promotional gifts, ranging from jackets to refrigerators, if they removed competing spark plugs from their shelves.").

319. See Nicholas Economides & Lawrence J. White, Access and Interconnection Pricing: How Efficient Is the "Efficient Component Pricing Rule"?, 40 Antitrust Bull. 557, 575 (1995) (warning that in "real-world settings policy makers should be wary of blind devotion to the [rule]").

320. See, e.g., *Viamedia*, 951 F.3d at 435 (concerning explicit threats); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282–83 (3d Cir. 2012) ("[D]espite the fact that Eaton did not actually terminate the agreements on the rare occasion when an OEM failed to meet its target, the OEMs believed that it might."); CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 76 (2d Cir. 1999) (considering an "unwritten exclusive dealing policy").

is punished for dealing with rivals, even if nothing else changes about the trading relationship, it's a condition.

By contrast, volume discounts, which reward a higher volume of dealings with the monopolist through lower prices (e.g., low prices on condition that you buy at least 1000 units from the monopolist in a twelve-month period),[321] are not conditions under this test, because the inducement responds to changes in dealings with the monopolist, not dealings with rivals.

It follows from this that monopolists may be able to engage in a work-around, using carefully calibrated volume discounts (based on quantity, not share) to approximate the effects of a true anticompetitive condition.[322] But this is not a reason for despair. Excluding rivals accurately with a volume discount requires accurate and timely insight into the present and expected future needs of a critical mass of trading partners, which may be difficult or impossible to obtain.[323] Moreover, the set of all volume discounts is more benign than the set of all vertical conditioning practices and contains many discounts that are welfare maximizing. Volume discounts are often good proxies for seller economies, and they often directly incentivize additional output.[324] And they preserve room for a trading partner to overbuy to sponsor the monopolist's competitors without losing the discount. Finally, and for all these reasons, simple volume discounts have been repeatedly endorsed by courts.[325] So there is no failure of principle in leaving this road open.

2. *Exclusion.* — The first question in a Section 2 case is exclusion: whether the challenged practice has impaired (or will impair) the ability or incentive of at least one rival to meet demand.[326] Many practices that

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321. See supra notes 179–180 and accompanying text.

322. See Scott Morton & Abrahamson, supra note 160, at 782–83 (pointing out that volume rebates "impose no explicit restraint on trade" but can be structured to have almost the same effects as loyalty rebates).

323. For example, to incentivize a buyer to completely refrain from dealing with a rival through a simple volume discount, a monopolist seller must be able to predict the amount of the individual buyer's total demand over the contract period. Set it too low and the buyer will be able to obtain the discount and still trade profitably with a rival; set it too high and the discount will be of reduced effectiveness because a buyer will have to overbuy to obtain it. Getting this right may be challenging at the best of times, and given changing market conditions, uncertainty about the future, multiple (maybe very many) buyers, information asymmetries, and other real-world conditions, it will often be impractical.

324. See, e.g., Carlton & Waldman, supra note 179, at 1233 (noting volume discounts' ubiquity and relationship with efficiencies).

325. See, e.g., LePage's Inc. v. 3M, 324 F.3d 141, 154 (3d Cir. 2003) (finding that volume discounts "are concededly legal and often reflect cost savings").

326. See Francis, Making Sense of Monopolization, supra note 15, at 804–06 (discussing exclusion).

exclude rivals are valuable and lawful,[327] but conduct that does not exclude cannot violate Section 2.[328]

a. *Horizontal: Allocation Without Agreement.* — In a case of horizontal conditioning, exclusion is likely to be found in the impairment of an actual or potential rival's incentive to compete: The prospect of receiving disfavored treatment effectively deters the firm from competing. A plaintiff must plead and prove that the condition had a significant—that is, more than trivial—deterrent effect of this kind.[329]

This means that a horizontal conditioning case requires proof that one or more trading partners to which the monopolist applied the condition faced a genuine choice about whether to become or remain a competitor of the monopolist—either at all or in some respect—and that the offered threat or bribe was significant enough to materially deter them from, or limit them in, doing so.[330] So if the trading partner did not reasonably have such a choice—for example, because it was irreversibly committed one way or the other—then there can be no exclusion.[331] Nor is there exclusion if the condition's effect was too trivial to affect that choice.[332]

b. *Vertical: Understanding Substantial Foreclosure.* — In a vertical conditioning case, the condition changes the incentives of trading

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327. See Jacobson, Consumer Harm, supra note 157, at 352 (arguing that exclusive dealing arrangements that raise rivals' costs may be "a beneficial consequence of competition").

328. See Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 466–67 (D.C. Cir. 2008) (holding that, because the plaintiff failed to establish that the challenged conduct had actually excluded a rival, defendant had not monopolized); see also NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998) (conceding harm to consumers from increased telephone service rates, but finding no violation when the harm "flowed not so much from a less competitive market . . . as from the exercise of market power that [was] *lawfully* in the hands of [the] monopolist").

329. In principle, a horizontal condition could harmfully impair rival ability, rather than incentive, to compete; likewise, a vertical condition could harmfully impair rival incentive, rather than ability. There is no problem of principle with such cases, although they are likely to be special cases. (For example, a case in which a defendant monopolist degraded the quality of inputs or distribution that would be used by the customer to compete against it seems to fall into this category.) But the central stories of harm are likely to be those presented in the text. Moreover, assuming profit maximization, the ultimate difference between an effect on ability and one on incentive is not particularly clear.

330. This may overlap with invited or actual collusion. See Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 445 (7th Cir. 2020) ("Comcast . . . returned to Viamedia with a series of offers that would have required Viamedia to 'assign' 100% of its customers' [business] to Comcast in exchange for a one-time 'finder's fee.' That was essentially an offer to pay Viamedia to exit the marketplace.").

331. See, e.g., Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1176–89 (9th Cir. 2016) (noting allegations that, among other things, defendant afforded worse service to rivals than non-rivals, with no suggestion any entity could move between categories, and finding no liability).

332. This follows from the baseline obligation to show exclusionary impact. See supra note 328.

partners. By inducing trading partners to restrict the access of actual or potential rivals of the monopolist to inputs, distribution, customers, or complements, the monopolist impairs the ability of its rivals to compete.[333]

This is a familiar foreclosure concern. It depends, first, on a showing that the condition affected the behavior of trading partners. If it did not, there can be no exclusion: for example, because they would never have dealt with the rival in the first place or because they did so anyway.[334] When determining whether a condition has actually affected the behavior of trading partners, it may be instructive to see how those trading partners made choices that were not subject to the condition (e.g., purchases beyond a loyalty threshold).[335]

And it depends, second, on a showing that actual and potential rivals were significantly—that is, more than trivially—hindered in their ability to compete against the monopolist.[336] Thus there is no exclusion if, for example, close substitutes are readily available,[337] or if the relevant inputs, distribution, customers, or complements are competitively unimportant.[338] The existence of theoretical substitutes, however, is not enough.[339] Rival

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333. See supra section I.B.1.b.

334. See Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1258 (5th Cir. 1988) (finding no evidence of an exclusive dealing contract's actual impact on trading partner behavior).

335. See, e.g., Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1045 (8th Cir. 2000) (emphasizing that "[s]everal boat builders chose to take a higher percentage of their engines from [the monopolist] than necessary to qualify for its largest market share discount"). This exercise should be conducted with some caution. For example, if a monopolist conditions a benefit (such as low prices) on purchasing 90% of requirements from the monopolist, a trading partner might rationally choose to go further and buy 100% of its needs from the monopolist because, given the requirement to hit the 90% threshold, the costs of dealing with another supplier for the remaining 10% of needs exceed the benefits of doing so. Under such circumstances, the trading partner's decision to buy above the threshold does not suggest that the condition has no effect.

336. See, e.g., McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 837 (11th Cir. 2015) (foreclosure requires that "opportunities for other traders to enter into or remain in [the] market [are] significantly limited" (alterations in original) (internal quotation marks omitted) (quoting United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001))).

337. See, e.g., CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 80–81 (2d Cir. 1999) (rejecting the argument that a monopolist's conduct amounts to exclusion when competitors had many alternatives to the lost distribution); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997) (same).

338. See Tom et al., supra note 117, at 632 (noting that when cost impacts are not significant, antitrust concerns are unlikely).

339. See ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 287 (3d Cir. 2012) (finding an agreement exclusionary despite a right of termination because the right was contingent on the existence of a lower-price substitute and no manufacturer could meet that threshold).

impairment, not rival exit, is the test,[340] despite occasional judicial suggestions to the contrary.[341]

Many courts have required evidence of coercion in conditioning cases.[342] But coercion is irrelevant: Its presence does not imply exclusion nor does its absence imply no exclusion. It is not even obvious what such a test could mean (every business wants better terms) or why it should imply overall harm (as noted above, some harmful exclusion actively benefits trading partners[343]). Both the economics of harm and monopolization doctrine turn on whether the monopolist is excluding rivals by changing trading partners' behavior, and neither turns on whether the trading partners felt good about it or were in some sense free to do otherwise.[344] It is hard to understand, for example, the Fifth Circuit's disregard of a $50 million inducement, paid by a monopolist to a key trading partner to cut off a rival, partly on the ground that the trading partner was not in enough of a budget crisis to create some necessary quantum of coercion.[345]

Nor do the dynamics of harm have anything to do with the duration or terminability of any underlying agreement—again, contrary to the views

340. See, e.g., Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1175 (10th Cir. 2023) ("[W]hat matters is not whether [the monopolist] succeeded in totally excluding [its rival] from the . . . market but whether [the monopolist's] actions substantially foreclosed [the rival] from the market and impeded [the rival's] market growth."); *McWane*, 783 F.3d at 838 ("[T]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." (internal quotation marks omitted) (quoting United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005))); see also United States v. Microsoft Corp., 253 F.3d at 64 ("[A]lthough Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones."). In a deeper sense, this point is a cousin of the insight that antitrust does not protect individual competitors as such. See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). Welfare harms are the touchstone, and those may or may not involve actual competitor exit.

341. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1001–02 (9th Cir. 2020) (suggesting that, because other market participants still had access to the market, there could be no antitrust liability for contractual conditions); Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 257 F.3d 256, 269 (2d Cir. 2001) (finding that business practices which have persisted for years without precluding rivals' market participation are presumptively legal).

342. See, e.g., In re EpiPen, 44 F.4th 959, 996 (10th Cir. 2022) (refusing to impose liability when the plaintiff failed to prove coercion); Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016) (same); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010) (same); see also Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000) (refusing to impose liability and emphasizing, among other things, that trading partners "were free to walk away from the discounts at any time, and they in fact switched to [rivals] at various points when [they] offered superior discounts").

343. See supra section I.B.1.b.

344. See Francis, Competition, supra note 16, at 408–10 (discussing the role of coercion in antitrust theory and doctrine).

345. BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526–28 (5th Cir. 2022).

of some courts.[346] All the concerns surveyed in Part I can exist without an underlying agreement, much less one that is long in duration and hard to get out of. What matters is whether the monopolist is creating the relevant incentive effect, not whether it is doing so through a contract.[347]

This measure of exclusion corresponds to the best reading of what antitrust often calls "substantial foreclosure." But that term is used inconsistently, and often confusingly.[348] "Substantial foreclosure" in monopolization law means, or should mean: restriction of access to inputs, distribution, customers, or complements that generates a nontrivial competitive impairment of the affected rivals, consistent with the court's formulation of the concept as a test of whether "the opportunities for other traders to enter into or remain in [the relevant] market [are] significantly limited."[349]

To be sure, some loose judicial talk has created a puzzle here about the role of quantitative analysis. The Court in *Tampa Electric* seems to have identified the foreclosure test with a quantitative "substantial share" test of some kind.[350] Lower courts ran with that ball, inferring that this share-based measure was a separate, and quantitative, criterion for liability—and

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346. See, e.g., *In re EpiPen*, 44 F.4th at 988 (arguing that "short, easily terminable exclusive agreements" are not concerning because competitors can wait such agreements out or induce their termination); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012) ("[M]odern antitrust law generally requires . . . contracts of sufficient duration to prevent meaningful competition by rivals [before finding unlawful exclusivity] . . . ."); *Allied Orthopedic*, 592 F.3d at 996–98 (stating that easily terminable contracts have little potential to foreclose competition); CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 81 (2d Cir. 1999) (same); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163–64 (9th Cir. 1997) (same).

347. This has been widely recognized. See, e.g., Elhauge, Loyalty Discounts, supra note 131, at 219 ("[E]ven when loyalty discount agreements require no buyer commitment at all, they can raise prices greatly above but-for levels."); Steuer, supra note 119, at 133 (arguing that even exclusive dealing contracts of short duration can have anticompetitive effects); Tom et al., supra note 117, at 624–25 (same).

348. See supra note 283 and accompanying text.

349. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961); see also McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 840 (11th Cir. 2015) (finding substantial foreclosure despite the fact that the victim "was not completely excluded from the . . . market" and "was able to enter and grow"). See generally Joshua D. Wright & Alexander Krzepicki, Rethinking Foreclosure Analysis in Antitrust Law: From *Standard Stations* to *Google*, Concurrentialiste (Dec. 17, 2020), https://www.networklawreview.org/wright-krzepicki-foreclosure/ [https://perma.cc/MNQ3-8CEK] (providing a thoughtful discussion of the foreclosure concept).

350. 365 U.S. at 327 ("[E]ven though a contract is found to be an exclusive-dealing arrangement, *it does not violate the section unless* the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." (emphasis added)); see also Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949) (holding that the harm-to-competition test under Section 3 of the Clayton Act "is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected").

raised its height over time.[351] As noted above, courts today often require, as necessary but not sufficient for liability, foreclosure of 40–50% of available inputs, etc., under Section 1 and something less under Section 2.[352]

This is an analytical mistake. Share-based proof and other methods of proof are *alternative* ways of proving exclusion, not cumulative requirements. To see why, it is helpful to recognize the foreclosure share requirement as one of antitrust's small family of structural presumptions. Others in this family include: the inference from concentration that a merger is harmful;[353] the inference from merged-firm share that a merger is harmful;[354] the inference of market power from share;[355] and the inference of monopoly power from share.[356]

These structural presumptions all work in the same way. They offer an evidentiary shortcut for a plaintiff, grounded in market share, as an alternative to direct proof of underlying economic harm or power. Each can be rebutted by evidence undermining the force of the inference.[357]

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351. Jacobson, Consumer Harm, supra note 157, at 325 (noting that "the threshold of illegality for foreclosure" has "moved higher and higher").

352. See supra note 285 and accompanying text.

353. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963) (articulating the presumption of merger illegality from structural evidence); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) (presenting the modern formulation of that presumption); DOJ & FTC, Merger Guidelines § 2.1 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/X3YL-XJ32] (describing the agencies' analytical approach to the structural presumption in merger law).

354. See *Phila. Nat'l Bank*, 374 U.S. at 363–64; United States v. Anthem, Inc., 236 F. Supp. 3d 171, 207 (D.D.C.), aff'd, 855 F.3d 345 (D.C. Cir. 2017) (laying out the contemporary formulation of this presumption); DOJ & FTC, supra note 353, § 2.1. The wisdom and economic logic of this presumption are uncertain. See Daniel Francis, Comments on the 2023 Draft Merger Guidelines 18–19 (Sept. 12, 2023), https://ssrn.com/abstract=4569469, [https://perma.cc/7LME-F6TT] (arguing that the presumption has no economic basis). But see Fed. Trade Comm'n v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER, 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (discussing reasons to question the presumption, but nonetheless applying it).

355. See Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984) (holding a hospital's 30% market share insufficient for "the kind of market power that justifies condemnation of tying"), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) (holding that a business with 30% market share presumptively does not hold market power); Hardy v. City Optical Inc., 39 F.3d 765, 767 (7th Cir. 1994) (describing a 30% market share as the minimum for inferring market power in tying cases).

356. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (finding an 80% market share sufficient to survive summary judgment on the issue of monopoly power); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (holding that 87% market share "leaves no doubt" of monopoly power if the underlying market is valid); Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 n.5 (9th Cir. 2022) (holding that a 65% market share is sufficient to create a presumption of monopoly power).

357. See, e.g., United States v. Gen. Dynamics Corp., 415 U.S. 486, 506 (1974) (finding evidence rebutting the presumption of market power); *Baker Hughes*, 908 F.2d at 982–83

And none of them preclude other, more direct, proof of the claimed effect when the structural presumption is not satisfied or cannot sensibly be applied.[358]

Here, the claimed effect for which foreclosure share is a proxy is the impairment of rival ability to compete through the imposition of a significant cost increase (or some equivalent). And the structural move is the inference of meaningful impairment from the share of inputs, etc., denied to the affected rival, on the basis that the rival will likely be confined to fewer, higher-priced, or lower-quality inputs. Needless to say, structural analysis like this is more useful when output in the market is more homogeneous. In the presence of real differentiation, the utility of counting heads and treating them alike declines rapidly. In differentiated markets, in principle, harm can result from restriction or denial of access to shares of inputs, etc., significantly below the usual share thresholds, if what remains available to the rival is relevantly worse.[359]

As a result, it is vital to preserve the independence of the qualitative path to proof of exclusion, regardless of whether quantitative thresholds are met. A plaintiff must always be permitted to try to show that a practice has actually hindered rivals by raising costs of access to some input, etc., regardless of the share foreclosed.[360] Several commentators have made this point forcefully.[361]

*Tampa Electric* itself comfortably bears this reading. The Court in that case evidently regarded the qualitative and quantitative tests as

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(describing the burden-shifting framework applicable to the presumption of anticompetitive effects, allowing for rebuttal); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 128 (2d Cir. 1981) (finding that market share is relevant but not dispositive for determining market power); United States v. AT&T Co., 552 F. Supp. 131, 171–72 (D.D.C. 1982) (finding no monopoly power despite a large market share because of countervailing evidence).

358. See, e.g., PLS.com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 838 (9th Cir. 2022) (confirming viability of direct proof of anticompetitive effects under Section 1); United States v. Microsoft Corp., 253 F.3d 34, 56–58 (D.C. Cir. 2001) (en banc) (confirming possibility of proving monopoly power by direct evidence); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (same); Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892, 925–41 (N.D. Cal. 2023) (analyzing potential merger for potential-competition concerns without the use of the merger structural presumption).

359. See United States v. Microsoft Corp., 253 F.3d at 64 ("[A]lthough Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones.").

360. See Elhauge, Loyalty Discounts, supra note 131, at 218 (supporting a share test "where direct evidence of rival efficiency impairment is not present").

361. See, e.g., Jacobson, Consumer Harm, supra note 157, at 362–63 (arguing that "if price, output, quality, choice, or innovation have been harmed, the lack of percentage foreclosure is no defense"); Steuer, supra note 119, at 116–124 (arguing that quantitative "measures alone are no longer an adequate measure of foreclosure" (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Beltone Elec. Corp., 100 F.T.C. 66 (1982))).

coterminous.[362] One way of understanding the Court's meaning is that foreclosure must be enough to have a significant effect on rivals, and whatever foreclosure results in a competitively significant burden on rivals is, ipso facto, a sufficiently "substantial share."

c. *Conditioning and the Economics of Exclusion.* — There is an important objection to consider at this point. Surely, the objection goes, some conditions really involve discounts or other benefits rather than harms. So why label such practices "exclusionary" when we do not treat regular discounting the same way, and when the practice may be net beneficial?[363]

The answer turns on both the specificity and the generality of the exclusion concept in monopolization theory. Exclusion is specific, in that it is one small part of the inquiry into the antitrust legality of a practice. Exclusion analysis is just an effort to figure out whether the practice has the necessary impact on the ability or incentive of rivals to meet demand in the market of competitive concern.[364] At this stage of the analysis, a court is not yet concerned with whether that impact is significant enough to make a real contribution to monopoly power, or whether the practice is net beneficial, or whether the behavior is of a kind that should be immunized from antitrust scrutiny. And for the purposes of this analysis, nothing turns on whether the practice is "really" a threat or a bribe, a penalty or a discount. This will matter at the justification stage: for example, when a defendant argues that a condition is a means of expanding output and promoting welfare, like a simple discount.

In many familiar monopolization theories, the basic exclusion concern is that demand is being affected by an exogenous force: exogenous in that it has nothing to do with the cost or quality of the competitive product. In a tying case, for example, the inducement is the prospect of access to another (tying) product that is more valuable than its competitors; in bundling cases, it is a discount on other products; in a price-predation case, it is a subsidy from a deep pocket.[365]

In each of these cases, the economic effect in the market of competitive concern is the same regardless of the origin of the force. The exclusion is the fact that the force drives demand toward the product of competitive concern and away from rivals, for reasons that are unrelated to their respective production cost or quality.[366] The same effect would be

362. *Tampa Elec.*, 365 U.S. at 327–29 (mingling discussion of quantitative and qualitative standards).

363. See section I.B for a discussion of the potential benefits and harms of exclusionary conduct.

364. See Francis, Making Sense of Monopolization, supra note 15, at 804–06 (proposing exclusion as a "definitional element of monopolization law").

365. See supra section II.A.

366. Note the pliability of the idea of exogeneity. There is a normative idea in the background that it is in some sense improper to use one product to boost demand for another: that "pure" competition is market-specific, and that we define a "distortion" as a demand effect unrelated to the single-market cost and quality of output. But it is not very

generated by any subsidy: from an annuity, an ice cream business, or a mutual fund. Whether the underlying effect is labeled "conditioning," "leverage," "foreclosure," or "predation," and whether the practice is overall welfare-beneficial or welfare-harmful, the effect on demand in the market of concern works the same way.[367]

And this brings us to the generality of exclusion. Exclusionary effects, in this narrow antitrust-economics sense, are tremendously common.[368] This includes effects of practices that do not significantly contribute to monopoly, practices that are privileged, and practices that are net beneficial.[369] Among other things, exclusion is certainly not limited to cases in which the source of the inducement is itself market or monopoly power. Greater monopoly power must be the result, but such power need not be the means: A business can commit monopolization by fraud on the Patent Office,[370] sham litigation,[371] business torts,[372] and misrepresentation,[373] none of which involve use of monopoly. Nor does exclusion require that prices be below anyone's costs. The common thread is that demand is affected by forces unrelated to the cost or quality of the product of competitive concern or of its substitutes.

So why is it appropriate to have a special monopolization framework for tying when we do not have one for, say, simple subsidies from general revenue, if both are exclusionary in the same way? The key difference is probably that the policy case for intervention is vastly, vastly better for tying than for cross-subsidization. Subsidies from general revenue are

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clear why this should be so, and in evaluating procompetitive benefits we routinely take the opposite view. See, e.g., Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (noting that procompetitive effects can include "greater product interoperability"); Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008) (procompetitive benefits include "facilitating economies of scale in the market for complementary goods"). Systems competition often takes place in parallel with component competition: When and why should we insist on competition among components rather than among ties, bundles, and deep pockets? The best explanation is probably simple: Sometimes we think we can improve welfare by doing so. But there is plenty of proximate-cause-style policy work being done by the neutral-sounding idea of exogeneity. See Mark A. Geistfeld, Proximate Cause Untangled, 80 Md. L. Rev. 420, 424–49 (2021) (explaining the policy considerations underlying proximate cause).

367. For versions of this point, see, e.g., Crane, Mixed Bundling, supra note 124, at 447; Klein & Lerner, Price-Cost Tests, supra note 120, at 666.

368. See supra notes 179, 275 and accompanying text.

369. See supra sections I.B.2, II.A.1.

370. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177–78 (1965) (confirming that antitrust liability may be imposed for fraud on the Patent Office).

371. See Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 56–61 (1993) (discussing antitrust petitioning immunity and the "sham" exception to it).

372. See Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783–88 (6th Cir. 2002) (affirming a finding of monopolization resulting from tortious conduct).

373. See Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys, 850 F.2d 904, 915–17 (2d Cir. 1988) (discussing monopolization claims "based on misleading advertising").

ubiquitous, difficult and costly to detect and measure, almost certainly benign or beneficial most of the time, impossible to micromanage without doing much more harm than good, and within a zone of conduct (unilateral unconditional pricing) that implicates long-recognized freedoms from antitrust supervision.[374] By contrast, tying practices are less common, more easily detected, more likely to be harmful, less plausibly regarded as privileged or immune from scrutiny within our antitrust tradition, and more tractable to judicial intervention than cross-subsidization.[375] So, for these and other reasons, one can sensibly think that antitrust intervention at the point of a tie can do more good than harm, while simultaneously thinking the reverse about cross-subsidization.

And that brings us back to conditioning. From the perspective of this policy choice, conditioning looks just like tying. It involves an avoidable practice that raises obvious grounds for concern; it is reasonably easy to tell when it is happening; it may give rise to either harms or benefits, and we have a pretty good handle on what these might be; and we can reasonably think that—just as with tying—intervention in provably harmful cases could result in real social good, and that a rule to that effect probably will not do much harm. So antitrust scrutiny seems a wiser, safer bet than antitrust immunity.

3. *Contribution to Monopoly and Equally Efficient Rivals.* — Exclusion of rivals cannot amount to monopolization unless, among other things, it is sufficiently likely to increase or entrench monopoly power.[376] This corresponds to the long-standing requirement that the conduct must be "reasonably" capable of making a significant contribution to power.[377] This contribution turns both on the magnitude of the exclusionary impact on affected rivals and on the magnitude of the constraint exerted by those rivals on the monopolist.[378]

This causal test is a bit more plaintiff-friendly than the default civil litigation balance-of-probabilities standard, and it certainly does not require quantification of effects on price, output, or anything else.[379]

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374. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1077 (10th Cir. 2013) (disclaiming any interest in scrutinizing profits and margins business line by business line).

375. See supra section II.A.3.

376. See, In re EpiPen, 44 F.4th 959, 986 (10th Cir. 2022) (noting that liability requires that the challenged conduct would contribute to the defendant's power over price or output); Jacobson, Consumer Harm, supra note 157, at 347–48 (noting that monopolization liability requires contribution to monopoly power).

377. See, e.g., McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 833 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc); C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1247 n.7 (5th Cir. 1985).

378. See, e.g., *McWane*, 783 F.3d at 838–40 (assessing both the direct impact of challenged conduct on the injured rival and the ultimate consequences for the defendant's pricing power).

379. See Francis, Making Sense of Monopolization, supra note 15, at 807–11 (discussing the requisite degree of "contribution to monopoly").

Emphasizing "the need for courts to infer 'causation' from the fact that a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power,'" the D.C. Circuit has underscored that "[t]o require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."[380]

Nevertheless, the test is an important and meaningful screen. It weeds out cases in which the exclusion did not really impair rivals' ability to compete, or in which the impacted rivals are minnows with no prospect of impairing the monopolist's power.[381]

This formulation implies that monopolization liability might be imposed in cases involving practices that might not exclude an equally efficient rival. Some courts and commentators have suggested that antitrust liability ought to be off the table in such cases, lest antitrust end up shielding weak rivals from market discipline.[382]

To be sure, it is easy to see the appeal of a test that requires a plaintiff to prove that the challenged practice would impair an equally efficient rival as a precondition for monopolization liability.[383] After all, one way of paraphrasing our core concern in a monopolization case is to ask whether, if a cheaper or better alternative came along, it would be able to flourish. An antitrust law that helps less efficient rivals stay in the market looks a lot like corporate welfare for weak businesses.

But on a closer look the equally efficient yardstick becomes less interesting. For one thing, real monopolists generally do not have symmetrical rivals. If they did, they would probably not be monopolists in the first place.[384] Equal efficiency often cannot be gained without similar

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380. United States v. Microsoft Corp., 253 F.3d at 79 (first and second alterations in original) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651c, at 78 (1st ed. 1996)).

381. See Krattenmaker & Salop, supra note 118, at 243–45 (explaining that "even if excluded rivals' costs increase significantly, the purchaser of an exclusionary right still may not gain power over price").

382. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) ("[N]othing in the record indicates that an equally efficient competitor was unable to compete with Sanofi."); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 270 (6th Cir. 2015) ("Kodak's differential pricing was unlawful only if it might have forced a more efficient competitor out of business.").

383. See Richard A. Posner, Antitrust Law 193–97 (2d ed. 2001) (proposing such a standard); Daniel A. Crane & Graciela Miralles, Toward a Unified Theory of Exclusionary Vertical Restraints, 84 S. Cal. L. Rev. 605, 639 (2011) (same).

384. Monopoly power generally requires preeminence of a kind that can be inferred from roughly 70% of a defined market protected by entry barriers. See supra note 356 (collecting cases). So actual symmetrical rivals are almost certainly not already present. And if other businesses could readily enter at similar levels of efficiency, monopoly power is generally excluded. See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)

scale, or at least the kind of scale that would preclude the defendant from holding monopoly power. And "efficiency" in the fullest sense reflects many things beyond productive technology, including factors like know-how and goodwill that develop over time.[385] So the equally efficient rival paradigm supposes a world that has little to do with the one found in a real Section 2 case.

But the core problem is that a practice can inflict serious harms, in all the ways that antitrust cares about, even if all affected rivals are less efficient than the monopolist. Weaker rivals and imperfect substitutes often make significant contributions to social welfare by constraining monopolists.[386] They may be close competitors in a differentiated market, or they may simply be the only rivals around. And, given that today's less efficient competitor may be tomorrow's equally efficient one, practices can also inflict harm by ensuring that no rival attains equal efficiency.[387] Courts have recognized as much. In *Microsoft*, most famously, the targets—Netscape Navigator, Sun's Java, and the businesses that might use them to compete with Windows—were not even rivals yet, let alone equally efficient ones.[388]

The equally efficient rival test also proves far too much. A fully symmetrical rival can always match the monopolist's practice blow-for-blow and will therefore never be excluded.[389] And if the idea is to hypothesize some kinds of symmetry, like identical productive technology, but not others, like integration into multiple markets or deep pockets, it is not at all clear how one ought to pick the symmetries or why one would think that this arbitrary thought exercise tells us anything interesting.[390] If antitrust objects to excluding a rival that simply "does not sell as many

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(finding that market power requires that "new rivals are barred from entering"). So potential symmetrical rivals are probably not present either, if monopoly exists.

385. See Kaplow, supra note 130, at 530, 538 (discussing long-run dynamic effects on competition).

386. See Steven C. Salop, Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard, 73 Antitrust L.J. 311, 328–29 (2006); see also In re EpiPen, 44 F.4th 959, 970–71 (10th Cir. 2022) (describing the reduction in the price of certain drugs following the entry of an admittedly weaker competitor). Indeed, as the *Cellophane* fallacy illustrates, a profit-maximizing monopolist that has succeeded in excluding or acquiring its near competitors may be constrained only by imperfect or distant substitutes. See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 399–404 (1956) (noting that the dominant cellophane manufacturer had priced itself into competition with products of a very different nature).

387. See A. Douglas Melamed, Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles? 73 Antitrust L.J. 375, 388 (2008) (noting that "a rival that is less efficient today might become equally or more efficient" in time).

388. See United States v. Microsoft Corp., 84 F. Supp. 2d 9, 28–30, 51 (D.D.C. 1999) (outlining the relevant findings of fact and imposing liability).

389. See Calzolari & Denicolò, supra note 246, at 4 (modeling this dynamic).

390. See Salop, Paradigm, supra note 114, at 393 (criticizing the equally efficient competitor standard).

products as the [monopolist]"[391]—the central premise of bundling doctrine—it is not obvious why it should not also be willing to object, in appropriate cases, to excluding a rival that simply has yet to lower its costs down to the monopolist's level.

So there is not much of a reason to care about whether a challenged practice would succeed in winning business from an imaginary rival imbued with an arbitrary and incomplete set of symmetries. Real harms are the concern.

4. *Privilege and the Price-Cost Test.* — Some unilateral practices are per se legal. This includes, for example, at least some refusals to deal,[392] above-cost unconditional pricing,[393] mere product improvements,[394] market entry or exit,[395] and so on.

Courts have struggled mightily with the question of whether and when conditioning is protected by this privilege or immunity. As we have already seen, some courts have reasoned that, because a monopolist is generally free to price and refuse to deal as it likes, it may exercise those freedoms by disfavoring rivals through conditioning.[396]

These courts have misunderstood the nature of the privilege. To the extent that unconditional refusals and unconditional above-cost prices are per se legal, it is not because they do not ever exclude rivals or create welfare harms.[397] Instead, it is because in unconditional form they are common, generally (though not always) benign, and unsuited to judicialization.[398] (And because they have long been treated that way.[399]) Subjecting unconditional refusals and above-cost unconditional pricing to antitrust scrutiny would impose huge costs, bring little real value, and drown the courts in abjectly valueless litigation.

But not one word of that can be said of conditioning, whether it involves supply cutoffs, prices, both, or neither. Unconditional refusals or

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391. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 909 (9th Cir. 2008).

392. See supra section II.A.1.

393. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasizing the legality of monopoly pricing).

394. See, e.g., Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 999–1000 (9th Cir. 2010) ("[P]roduct improvement by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result.").

395. See, e.g., In re Asacol Antitrust Litig., 233 F. Supp. 3d 247, 268 (D. Mass. 2017) (holding that neither product introduction nor product withdrawal violate Section 2).

396. See, e.g., New York v. Meta Platforms, Inc., 66 F.4th 288, 305 (D.C. Cir. 2023) ("To consider Facebook's policy [forbidding developers from using its platform to create competitors] as a violation of § 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors.").

397. See Harold Demsetz, The Intensity and Dimensionality of Competition, *in* The Economics of the Business Firm: Seven Critical Commentaries 137, 166 (1995) (noting that the exclusionary effect of pricing has nothing to do with a "cost-based standard").

398. See Francis, Making Sense of Monopolization, supra note 15, at 811–14 (explaining and defending this view of the privilege under Section 2).

399. See supra notes 204–205, 236–237 and accompanying text.

unconditional pricing are ubiquitous and effectively mandatory for every business: No one can deal with everyone, and virtually everyone has to set prices. By contrast, conditioning involves an affirmative choice to go out of one's way to set up a scheme involving categories that specifically deter trading partners from competing or dealing with competitors.[400] This is no more ubiquitous or unavoidable than resorting to tying or exclusivity. There is no injustice in expecting a monopolist to be on notice that there is antitrust risk in setting up a conditional tariff that punishes and deters competition or dealing with competitors.[401] In fact, what minimally counseled monopolist wouldn't appreciate that antitrust risk from the get-go?

Moreover, unlike routine pricing and trading decisions, conditions are at least as likely to result in harm as tying or exclusivity: In fact, as noted above, they seem more likely to result in harm than tying, and less likely to generate benefits than paradigm exclusivity.[402] And, as already noted, a host of traditional forms of monopolization could readily be reformulated into conditional dealing practices if the latter were systematically accorded lenient treatment.[403]

So monopolization's privilege does not cover conditioning, ever. The immunity accorded to many simple refusals, and to unconditional above-cost pricing, has no application to conditional practices. There is more to be gained in this area, and less to be feared, from careful intervention than from immunity of the kind accorded unconditional above-cost pricing.[404]

5. *Justification and the Role of Free Riding*. — Once a plaintiff shows that a monopolist has engaged in conditioning that has excluded rivals and augmented monopoly power, the defendant has the opportunity to show that the practice is beneficial overall.[405] This is the stage of the analysis at which, for example, a defendant monopolist may argue that the condition allows it to charge lower overall prices, make valuable investments, and so on, compared to the likely counterfactual.[406]

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400. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1076 (10th Cir. 2013) (explaining that refusal to deal law "doesn't seek to displace doctrines that address a monopolist's more direct interference with rivals").

401. See Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 275 (6th Cir. 2015) ("In setting prices, it is important for companies to have clear guidelines." (citing Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 453 (2009))).

402. See supra notes 263, 302–303 and accompanying text (describing tying and exclusivity justifications, respectively).

403. See supra sections II.A.1–.2.

404. See Moore & Wright, supra note 235, at 1219–20 (rejecting the price-cost approach in foreclosure cases); see also Pulse Network, L.L.C. v. Visa, Inc., 30 F.4th 480, 493 (5th Cir. 2022) (finding no immunity when the plaintiff "isn't challenging [the defendant's practice] because it imposes low or below-cost pricing," but rather "argues that [the practice] abuses [the defendant's] market power, specifically by imposing supra-competitive prices . . . in a way that excludes competitors from the market").

405. See cases cited supra note 357.

406. See supra section I.B.2.

The normal rules apply to this assessment. It is not enough to show some positive directional effect or a good subjective purpose: All monopolization generates some benefits,[407] and antitrust is concerned with effects, not subjective intentions.[408] Nor is it enough to show merely that the challenged practice drives some business to the monopolist rather than rivals, or increases profits, as *all* monopolization does.[409] What is needed is a showing that the benefits of the practice tend to outweigh its harms.[410] This analysis is also subject to the normal rule that a benefit only counts if there is no reasonable less restrictive way to attain it.[411] For example, a defendant cannot proffer the metering of demand in order to maximize output as a procompetitive justification if it is reasonably possible to meter demand in less harmful ways.

Some cautionary and limiting principles may be worth bearing in mind. First, as noted in Part I, conditioning is not identical to paradigm exclusivity: Among other things, there is usually no strict commitment to exclusivity in a conditioning case. This tends to limit the force of benefit claims that depend on a high degree of confidence that the monopolist's trading partner will not, in fact, compete or deal with competitors.[412]

Second, given the prominence of free-riding arguments in defenses of exclusivity and similar practices,[413] it may be worth underscoring that it is not enough to prove that a condition reduces free riding.[414] The elimination of free riding as such is a neutral fact. Indeed, free riding is central to many basic competitive processes, including imitation.[415] At the highest level of generality, for example, almost every business makes some contribution to the ability of its trading partners to cover their fixed costs,

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407. See supra note 157 and accompanying text.

408. See McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 840 (11th Cir. 2015) (clarifying the role of intent). But see infra section III.B (discussing attempted monopolization, including the relevance of intent to that offense).

409. See Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 38 (D.C. Cir. 2005) ("A restraint cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product . . . .").

410. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (noting that the defendant's low prices were "not irrelevant" but "not dispositive").

411. See C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law, 116 Colum. L. Rev. 927, 937 (2016) (describing the standard less-restrictive-alternative analysis).

412. See supra section I.B.2.

413. See Benjamin Klein & Andres V. Lerner, The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty, 74 Antitrust L.J. 473 *passim* (2007) [hereinafter Klein & Lerner, Expanded Economics].

414. Not all third-party benefits are unpriced. When the monopolist's investment makes a trading partner's services more valuable to the monopolist's rivals, the trading partner may be able to exclude the rivals from the benefits (and thus charge for the benefit), and the monopolist may be able to charge the trading partner in turn. Such cases involve no free ride.

415. The maker of each "better mousetrap" is generally free riding on the effort of the first mousetrap maker. As Milton Handler once put it, "The right to compete means the right to imitate." Milton Handler, Unfair Competition, 21 Iowa L. Rev. 175, 189 (1936).

and to that extent subsidizes its own rivals.[416] There is not much reason to think that overall welfare would be higher if this was brought to an end.[417] The relevant benefit for justification purposes is the social value of the quantum of additional investment that is causally contingent on protection against free riding.

The free-riding door also swings both ways. Classic treatments of free riding and exclusivity suggest that, when an exclusive arrangement is justified as a response to free riding, the social harm from foreclosing rivals must be balanced against the social value of additional incremental investment that the monopolist would only undertake with exclusivity.[418] But in such cases there is sometimes an additional harm from exclusivity that does not always get much attention: the social harm from the loss of free riding that would occur—albeit on a smaller quantum of investment—absent exclusivity. In other words, in the counterfactual world in which exclusivity was prohibited or not used, there would be a social gain from the free ride in the form of the externalized benefit itself (if any), which would be lost as a result of the exclusivity (or other practice). This should be included in any assessment of welfare harms from the relevant conduct.

### C. *Conditioning in the Antitrust Canon*

Recognizing conditioning as a monopolization shoebox of its own has a secondary benefit: It helps us spot conditioning at work in some classic or canonical cases, in which it may have been mislabeled or not squarely analyzed at all. This section will briefly highlight a couple warhorse precedents that turn out, on examination, to have involved conditioning all along.

First and perhaps most obviously, *Lorain Journal*[419] is a crystal-clear example of vertical conditioning, not an example of paradigm exclusivity. That case involved an incumbent monopolist newspaper that declined to accept advertising from any advertiser that also traded with a new-entrant radio station.[420] "Numerous [local] advertisers wished to supplement their local newspaper advertising with local radio advertising," the Court explained, "but could not afford to discontinue their newspaper advertising in order to use the radio."[421] It is not at all clear that these facts would survive the predilection of some modern courts to ask in paradigm

416. See Steuer, supra note 119, at 129 (explaining the mutual benefits of free riding).

417. For one thing, in such a world it is not at all clear how any supplier would cover its fixed costs—at least without costly and controversial cost accounting, and perhaps at all.

418. See Klein & Lerner, Expanded Economics, supra note 413, at 480 (explaining this account).

419. Lorain J. Co. v. United States, 342 U.S. 143 (1951).

420. Id. at 148–49.

421. Id. at 153.

exclusivity cases about long-term commitments, terminability, and so on.[422] But as a vertical conditioning case it is perfectly, archetypally clear.

Likewise, the leading appellate case on bundled discounts—*PeaceHealth* from the Ninth Circuit,[423] which is currently winning a circuit-split war against *LePage's* from the Third[424]—turns out on close examination to be a conditioning case, not a mere bundling case at all. Paradigm bundling involves offering a discount on a purchase of a bundle of separate products.[425] Indeed, the *PeaceHealth* court said as much.[426] But the conduct of the defendant hospital system in *PeaceHealth* went much further: The discount was conditional not just upon purchase of a package of services but also upon exclusivity. Specifically, the plaintiff alleged that the defendant hospital "offered insurers discounts of 35% to 40% on tertiary services *if the insurers made PeaceHealth their sole preferred provider for* all *services*."[427]

This appears to have involved a conditional-dealing policy rather than paradigm exclusivity. During negotiations with a Blue Cross Blue Shield affiliate, for example, the defendant hospital system quoted two prices: a discounted, loyal price if the insurer refrained from adding a rival hospital—that is, the plaintiff—as a preferred provider, and a higher, disloyal price if the insurer chose to do so.[428] Another insurer added the plaintiff as a preferred provider, alongside the defendant, and the defendant promptly increased its prices to that insurer as a result.[429] In sum, while the case does not appear to have involved actual commitments to exclusivity, "[t]he evidence showed that insurers who made PeaceHealth their exclusive preferred provider across all services . . . paid lower [prices] than insurers who purchased . . . at least some . . . services from [the plaintiff]."[430]

Now, whatever one's view about how antitrust should treat a pure bundled discount,[431] it seems perfectly clear that inducing customers to

422. See supra section II.A.5.

423. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008).

424. LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc); see also Simon & Simon, PC v. Align Tech., Inc., No. CV 19-506 (LPS), 2020 WL 1975139, at *8 (D. Del. Apr. 24, 2020) ("The *LePage's* standard for bundled discounts has not been adopted by any other Circuit, and it has not been expanded in the Third Circuit.").

425. See Francis & Sprigman, supra note 113, at 401–10.

426. *PeaceHealth*, 515 F.3d at 894 ("A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually.").

427. Id. at 892 (emphasis added).

428. Id. at 892–93.

429. Id. at 893.

430. Id.

431. See supra section II.A.4 (describing the circuit split in bundling law).

abjure one's rivals by offering a conditional discount is a different, and more dangerous, creature than simple bundle pricing.[432]

It is hard to make this point more clearly than the Ninth Circuit did in *PeaceHealth* itself when it commented, in support of its analysis, that "[b]undled discounts are pervasive, and examples abound. Season tickets, fast food value meals, all-in-one home theater systems—all are bundled discounts."[433] Those are indeed all pure bundled discounts. But the New York Yankees do not make season-ticket discounts conditional on fans staying away from the Mets. Nor, for that matter, do McDonald's or Sony impose similar conditions on consumers that want to get a Happy Meal or 10% off a matched set of speakers. It is only by ignoring this critical distinction that the Ninth Circuit was able to treat *PeaceHealth* as a "case in which a plaintiff challenges low prices as exclusionary conduct," rather than a case involving a monopolist inducing exclusivity through a conditional discount[434]—and only by doing so could it purport to rely on "the endemic nature of bundled discounts in many spheres of normal economic activity."[435] What the *PeaceHealth* court lacked was an analytical and doctrinal frame for recognizing the distinctive threat to competition presented when defendants monopolize by conditioning.

Finally, a conditioning practice can be spotted lurking in the complex facts of *Microsoft*.[436] In that case, Microsoft, an incumbent operating system monopolist, used a variety of practices to exclude two incipient products that threatened to undermine its Windows monopoly: Netscape's Navigator internet browser and Sun's Java technologies.[437] One of these practices concerned Intel, which had begun cooperation with Sun and Netscape on a "cross-platform [Java Virtual Machine]," which would operate across multiple operating systems and therefore make it easier for developers to produce software that was compatible with rivals to Windows.[438]

So Microsoft presented Intel with a threat. If Intel was going to work with Sun and Netscape on the Java project, Microsoft would work with one of Intel's key rivals in the processor-chip market, AMD, to support a rival processor technology.[439] It was a simple eye-for-an-eye threat: If you support our competitors in one market, we'll support your competitor in another market. Microsoft CEO Bill Gates made it clear: "If Intel has a real problem with us supporting this then they will have to stop supporting Java

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432. See supra section II.A.4 (describing differences between paradigm bundling and vertical conditioning).

433. *PeaceHealth*, 515 F.3d at 894.

434. Id. at 901.

435. Id. at 903.

436. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

437. Id. at 51–54.

438. Id. at 77.

439. Id.

Multimedia the way they are. I would gladly give up supporting this if they would back off from their work on [Java]."[440] Intel promptly capitulated.[441]

This allegation is dealt with in a brief, ride-along element of the *Microsoft* opinion, and the court labeled the practice "exclusionary" without much analysis or discussion.[442] But it is a clear example of vertical conditioning: a conditional punishment imposed by a monopolist for dealing with the monopolist's competitor. Moreover, it neatly illustrates that the punishment in a conditioning case need not have anything to do with the terms of dealing between the monopolist and the trading partner but can involve anything else that matters to the trading partner: in this case, a threat to support the trading partner's key competitor. Vertical conditioning analysis thus offers a fully adequate rationale and analytical framework to justify and explain the D.C. Circuit's treatment of the threat to Intel.

### D. *Special Cases*

Some applications of this framework are worth special attention, either because of their policy significance or because they involve some intricacy.

1. *Tech Monopoly and the Adjacency Threat.* — There may be value—for agencies and courts alike—in keeping a particular eye on horizontal conditioning by digital monopolists aimed at what one might call "adjacent" threats.[443]

In many cases, a monopolist's closest substitutes are its most important competitive threats. But in markets with very strong network effects—that is, when products become more valuable to users as the number of other users, or intensity of their activity, increases[444]—an incumbent firm may be least concerned about very close substitutes.[445] Those are precisely the firms that will find it hardest to gain scale in the face of the network effects, even if they have a superior product.[446]

In such cases, a particularly important source of competition may be the threat of entry from businesses that are complementary to the incumbent.[447] The incumbent's scale makes it easier, not harder, for a

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440. Id. (internal quotation marks omitted).

441. Id.

442. Id. at 78.

443. See Francis, Making Sense of Monopolization, supra note 15, at 826 (making this point briefly).

444. See Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, J. Econ. Persps., Spring 1994, at 93, 94 (describing network effects); Catherine Tucker, Network Effects and Market Power: What Have We Learned in the Last Decade?, Antitrust, Spring 2018, at 72, 72 (same).

445. See Francis, Making Sense of Monopolization, supra note 15, at 826 (providing digital markets as an example of this).

446. Id.

447. Id.

complement to achieve scale in its own right.[448] Having done so, a software competitor may be able to push out new functions to existing users, migrating into increasingly close competition with the incumbent—at competitive scale and counting a chunk of the incumbent's users among its own.

This adjacency threat may be illustrated by recent developments in tech competition. For example, when Twitter (now X), the dominant microblogging site, experienced a rocky period in 2023, a new app from an adjacent social competitor—Meta's Threads—picked up more than 100 million users in five days.[449] Likewise, some of the practices described in Part I could be understood as responses to an adjacency threat. For example, the allegations relating to Google's Project Hug may imply that Google's app store faces important threats from established (complementary) game and app developers with large overlapping user bases that can roll out app stores at scale to their users, arriving in the app store market with critical user mass.[450] Similar stories could be told of Google's payments to Apple[451] and Facebook's policies.[452]

None of this implies that digital markets merit a separate legal standard or that any particular practice is harmful. But it spotlights the value of protecting adjacency competition and the urgency of clarifying the law of conditioning.

2. *Contracts Taxing Rivals*. — In some cases, a monopolist may enter an agreement with a trading partner that penalizes deals with rivals by taxing or surcharging such deals.

This is a form of vertical conditioning. It satisfies the hold-constant test because dealing with a rival, holding constant dealings with the monopolist itself, triggers disfavor.[453] And it may result in all the harms described in Part I.[454] A classic example is *Caldera*, which involved an

448. Id.

449. See Jon Brodkin, Most of the 100 Million People Who Signed Up for Threads Stopped Using It, Ars Technica (July 28, 2023), https://arstechnica.com/tech-policy/2023/07/zuck-says-threads-doing-better-than-expected-despite-losing-over-half-of-users/ [https://perma.cc/GBR4-3ZGD]; Emma Roth, Threads Is Struggling to Retain Users—But It Could Still Catch Up to X, The Verge (Sept. 26, 2023), https://www.theverge.com/2023/9/26/23890592/threads-meta-monthly-users-data-x-twitter [https://perma.cc/WU2F-RUT3]. As these articles emphasize, being able to enter at scale is no guarantee that you can keep your users engaged.

450. See supra section I.A.1.c.

451. See supra section I.A.1.b.

452. See supra section I.A.1.d.

453. The proviso in our definition ensures the forced-purchase cases count as "conditions." See supra section II.B.1.

454. See Carl Shapiro & Keith Waehrer, Using and Misusing Microeconomics: *Federal Trade Commission v. Qualcomm*, *in* Antitrust Economics at a Time of Upheaval: Recent Competition Policy Cases on Two Continents 294, 297–307 (John E. Kwoka, Jr., Tommaso M. Valletti & Lawrence J. White eds., 2023) (providing an economic analysis of harm in the Qualcomm "no license, no chips" case); Joseph Farrell, Janis K. Pappalardo & Howard

allegation that Microsoft licensed its MS-DOS operating system to computer OEMs on condition that they paid a royalty to Microsoft "on every machine the OEM shipped regardless of whether the machine contained [MS-DOS] or another operating system" such that "an OEM who chose to install [a rival product] would pay two royalties on the same machine."[455] The court held that such a practice deterred dealing with rivals and on that basis could violate Section 2.[456] Other examples can be found in the practices of some of antitrust's most famous defendants.[457]

A practice of this kind may be exclusionary even if the "tax" is nondiscriminatory, such that it applies to all purchases by the trading partner, including those from the monopolist. A rational monopolist will not want to charge an effective price above the profit-maximizing level so will adjust its nominal price to eliminate any effect of the tax.[458] Rivals cannot do the same.

Because there is no economic difference between an obligation to pay a $10 fine and an obligation to buy a copper penny from the monopolist for $10.01, cases of this kind may require a court to penetrate labels and grapple with economic substance.

Unhappily, this is what the Ninth Circuit declined to do in *Qualcomm*. In that case, as noted above, the FTC alleged that payments labeled "patent royalties"—payable by Qualcomm's customer-licensees on each device they manufactured—included a surcharge that taxed chip rivals.[459] The Ninth Circuit correctly recognized that all-unit royalties, payable whether the OEM used a Qualcomm chip or a rival's chip, could have an exclusionary effect, citing *Caldera*.[460] But it held that Qualcomm's case was different because, in effect, there were *some* real patent rights in play. "When Qualcomm licenses its [standard essential patents (SEPs)] to an OEM, *those patent licenses have value* . . . regardless of whether the OEM uses Qualcomm's modem chips or chips manufactured and sold by one of Qualcomm's rivals."[461] And the Court noted that "unlike *Caldera* . . . here

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Shelanski, Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior, 37 Rev. Indus. Org. 263, 267–68 (2010) (discussing a "tax-rivals'-sales" theory of harm).

455. Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1249–50 (D. Utah 1999).

456. Id. at 1251.

457. See, e.g., United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) (discussing a "factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors"); Hans B. Thorelli, The Federal Antitrust Policy 93 (1955) (discussing Standard Oil's practice of taxing railroads' deals with rivals); Granitz & Klein, supra note 152, at 9–10 (same).

458. See supra notes 69–70 and accompanying text.

459. See supra section I.A.1.e.

460. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1000 (9th Cir. 2020) (citing *Caldera*, 87 F. Supp. 2d at 1249–51).

461. Id. (emphasis added).

OEMs do not pay twice for SEP licenses when they use non-Qualcomm modem chips."[462]

But the existence of some genuine patent rights worth paying for does not preclude the simultaneous presence in the royalty of a significant tax. There is no economic difference between a naked $5 fee and a $10 royalty for patent rights worth $5. And it does not matter whether chip rivals charged for SEP licenses: The allegation was that the surcharge inflated their chip prices.

Part of the point here is that this aspect of *Qualcomm* was not in substance a "patent antitrust" issue at all. The rich complexities of the interaction between IP and antitrust policy[463] are almost entirely irrelevant. Assuming the truth of the alleged facts—as we are concerned here purely with the general principle, not with *Qualcomm* as such—the crux is simply that the economic effect, or legality, of a condition has nothing to do with whether it happens to be located in a patent license.

Antitrust litigator and writer Jon Jacobson has offered three thoughtful objections to the antitrust scrutiny of practices involving the taxing of rivals: First, such practices reduce rivals' revenues rather than raising their costs; second, merely raising rivals' costs in this way is "competition in action," not an antitrust violation; and, third, the implicit theory of concern lacks a limiting principle, as "there needs to be some objective metric to determine how much is too much for antitrust purposes."[464]

But these objections do not quite kill. First, the concern in cases of this kind is not merely that the practice reduces rivals' revenues but that it forecloses their access to trading partners in ways that do raise their costs and which, moreover, result in the kind of welfare harms with which antitrust is routinely concerned.[465] Second, labels like "competition in action" or even "anticompetitive" probably do not shed much analytical light of their own.[466] Practices of this kind can harm consumer welfare by excluding competitors, and there does not seem to be much reason to exempt them from scrutiny. Third, the limiting principle here is the same as any other Section 2 case: Excluding rivals by unprivileged means that sufficiently contribute to monopoly power and are not justified by offsetting benefits is unlawful.[467] No more is needed.

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462. Id.

463. See generally Francis & Sprigman, supra note 113, at 587–656 (detailing the intersection of IP and antitrust).

464. Jonathan M. Jacobson, The Tax Theory in Conditional Pricing Analysis, CPI Antitrust Chron., Sept. 2019, at 2, 4.

465. See supra section I.B.

466. See Francis, Competition, supra note 16, at 356 (arguing that the purported "competition" concept is too indeterminate to be of analytical use).

467. See supra section II.B.

3. *Self-Preferencing.* — Self-preferencing in its pure form involves favoring one's own integrated division unconditionally and disfavoring third parties' unconditionally. No conditional offer is made to anyone, and no one can move between the favored and disfavored categories.[468] As a result, it does not constitute conditioning under this Article's definition. Of course, cases outside this pure core may very well involve conditioning. For example, if favorable treatment is extended not only to one's own division but also to third parties that refrain from competing or from dealing with rivals, it is a conditioning case. The fact that the monopolist's own division is also favored changes nothing.

4. *Unconditional Refusals to Deal.* — Implicit in the foregoing is the proposition that unconditional refusals to deal, like unconditional above-cost prices, should be per se legal. This principle is largely observed in practice by courts and enforcers today,[469] but it is worth saying out loud. These practices are generally benign, extremely common, and unsuitable to judicialization: They are thus per se legal.[470]

It follows that *Aspen Skiing* should be overruled.[471] *Aspen Skiing*, of course, was not a conditioning case. The injured competitor ski resort in that case was not facing any choice about whether to compete with the defendant ski resort—the mountains in question being immobile—and the plaintiff was not being induced to refrain from competition by reason of a conditional threat or bribe. Instead, a competitor was directly complaining about the consequences of an already-executed and unconditional decision to stop cooperating with it.[472]

Courts and scholars have had forty years to try to find a sensible rule within *Aspen Skiing*, and no one seems to have solved the riddle. There is no good reason to treat termination of a deal more harshly than an up-front refusal,[473] nor much reason to care whether a defendant is sacrificing short-run profits,[474] nor much value in parsing the "legitimacy" of various

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468. For example, suppose that a general search engine is treating its wholly owned shopping platform more favorably than it treats competing third-party shopping sites (perhaps through more prominent link placement). Suppose further that the third-party shopping sites are not threatening to launch competing general search engines, nor are they being punished for dealing with other search engines. Instead, they are simply being treated worse. This constitutes "pure" self-preferencing, as the shopping sites are not being incentivized to behave loyally through a condition.

469. See supra section II.A.1 (discussing courts' skepticism of refusal to deal claims).

470. See supra section II.B.4.

471. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

472. Id. at 607–08 ("Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated.").

473. See Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986) (declining to impose liability for a monopolist's "withdrawal" of a "helping hand").

474. Many practices that cause welfare harm and fit into long-recognized categories of illegal conduct are profitable in both the long run and the short run, while plenty of desirable practices involve short-run sacrifice, including R&D. Kaplow & Shapiro, supra note 138, at 1192–93. The real value of the profit-sacrifice test—which is more valuable as it

subjective flavors of the profit-maximization motive. Doubtless these and other problems drive the near-zero liability rate in refusal cases[475] by inducing courts to find for defendants: It surely can't be that monopolists are selling to all comers at prices, and on terms, that they like.

The surrender of an imaginary cause of action is not much of a loss for plaintiffs. *Aspen Skiing* is not doing any useful work for plaintiffs or anyone else,[476] and the pretense to the contrary is a pure cost in the antitrust system. Better to acknowledge what everyone already knows: An absolute refusal to supply, to a particular entity or at all, is not illegal. Firms need not "lend . . . rivals a helping hand,"[477] license to them,[478] or design products to help them out.[479]

Note that we are dealing here only with *mere* refusals. If the monopolist has made false statements, prior representations or promises, and so on that have contributed to harm, immunity is much less plausible.[480] And if the refusal includes an offer to sell if the victim ceases to be a rival, then of course it is an example of horizontal conditioning of the kind discussed above.[481] As Professor Carl Shapiro testified almost two decades ago before the Antitrust Modernization Commission, there is no contradiction here: One can simultaneously accept that "vertical unconditional refusals to deal [should] never trigger antitrust liability" while also embracing the need for careful effect-based scrutiny of conditional refusals.[482]

Moreover, giving up *Aspen Skiing* does not mean throwing out everything plausibly regarded as a refusal to deal. Some appealing cases—

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embraces more long-term effects—is that it highlights a highly suspect subset of practices. See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, Cheap Exclusion, 72 Antitrust L.J. 975, 979–81 (2005) (noting that such practices are appealing targets for enforcement action). They may be particularly clear examples of monopolization, but they do not necessarily reflect either its outer bounds or its ideal type.

475. See supra section II.A.1.

476. See Hovenkamp, Big Tech, supra note 14, at 1490 n.26 ("No plaintiff has won a [refusal to deal] case since *Trinko*.").

477. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013).

478. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 993–95 (9th Cir. 2020) (finding no obligation to license at the component level).

479. See Simon & Simon, PC v. Align Tech., Inc., No. 19-506 (LPS), 2020 WL 1975139, at *7 (D. Del. Apr. 24, 2020) (holding that a defendant does not violate Section 2 merely because it designs its product in a manner that hinders rivals).

480. See, e.g., Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("Deception in a consensus-driven private standard-setting environment harms the competitive process . . . .").

481. See Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, supra note 212, at 17–18 ("[A] wholly unconditional refusal to deal on any terms cannot be reframed as a conditional refusal.").

482. Carl Shapiro, Professor, Univ. of Cal., Berkeley, Testimony Before the Antitrust Modernization Commission: Exclusionary Conduct 13 (Sept. 29, 2005), https://faculty.haas.berkeley.edu/shapiro/amcexclusion.pdf [https://perma.cc/JWP8-347B].

including the recent *Viamedia* litigation and the landmark *Terminal Railroad*—are really consummated vertical merger cases. In *Viamedia*, the challenged foreclosure arose from Comcast's acquisition of control over vital Interconnects needed by its ad rivals;[483] in *Terminal Railroad*, the problem was the acquisition by a group of railroads of all the bridges across a river.[484] These were bad mergers crying out for good remedies, not for contortions in conduct law.[485]

## III. REINFORCING MONOPOLIZATION DOCTRINE

This Article's core claim has been that conditioning should be recognized as an independent form of actual monopolization. This very brief final Part offers two more tools with a role to play in fighting anticompetitive conditioning. They are, respectively: quick look monopolization and attempted monopoly maintenance.

### A. *Quick Look Monopolization*

For a long time, the law of anticompetitive agreements under Section 1 of the Sherman Act[486] has made room for "quick look" analysis, also called "intermediate scrutiny" or the "inherently suspect" standard.[487] The core idea is that a plaintiff may establish a prima facie case by reference to the basic nature and context of an agreement, without having to laboriously piece together evidence of actual market impacts.[488] For this purpose it is enough to show that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."[489] If a plaintiff can do so, the burden flips to the defendant to show that things are more complicated, or that there are redeeming benefits.[490]

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483. See Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 443 (7th Cir. 2020).

484. See United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 391–94 (1912).

485. The rule of per se immunity described in the text is limited to cases of nondiscriminatory refusals. Many discriminatory refusals, by contrast, will likely take the form of policies that make the availability of a product or service conditional upon refraining from competition with the monopolist. In such cases, per se immunity is inappropriate.

486. 15 U.S.C. § 1 (2018).

487. See Francis & Sprigman, supra note 113, at 193–201, 260–70. Quick look analysis has not always found a warm reception in lower courts. See Edward D. Cavanagh, Whatever Happened to Quick Look?, 26 U. Mia. Bus. L. Rev. 39, 64 (2017) (explaining that in recent years "lower courts have been quite reluctant to invoke quick look in private antitrust litigation").

488. See Francis & Sprigman, supra note 113, at 193–94.

489. Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

490. See Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

Broadly speaking, this has been applied to cases: (1) in which the apparent benefits are facially far outweighed by the apparent harms,[491] (2) in which the link between benefits and harms is so attenuated that the harms could not be plausibly necessary to obtain the benefits,[492] and (3) in which there seems to be no serious justification but the practice is so novel that per se condemnation is inappropriate.[493] This approach has not been applied under Section 2,[494] perhaps because its contours are so murky or because the fear of chilling procompetitive conduct casts such a long shadow in monopolization law.[495]

But the case for a quick look framework under Section 2 is identical to that under Section 1. If harms are obvious and conduct is facially unrelated to procompetitive benefits, and if no privilege is implicated, the same commonsense inference can and should be drawn for the same reasons. In conditioning cases that fill this category—cases of "naked conditioning"—a court should presume the illegality of the condition and flip the burden, without requiring detailed proof of exclusionary impact or contribution to monopoly. It is then for the defendant to rebut the presumption by showing that the practice is justified or less harmful than it looks. This is most likely to apply in cases of horizontal conditioning, but there is no reason to preclude it in any sufficiently clear cases of vertical conditioning.

This may sound unduly aggressive. It is not. It is really just an endorsement of commonsense inferences in clear cases—and neither common sense nor clear cases are unique to Section 1. Sometimes, after all, the threat of harm is "so blatant that a detailed review of the surrounding marketplace would be unnecessary."[496] In such cases, a defendant can fairly be invited to explain itself—under Section 1 *or* 2.

The zone of special scrutiny this Article proposes is bounded in some very important ways. First, monopolists are rare: a small subset of businesses in the economy, with which competition may be most socially

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491. See, e.g., id. at 38 (pointing out that the launch of a new joint-product SUV by car manufacturers would not justify collusion on price and advertising across all models of car).

492. See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 98–113 (1984) (condemning a restraint that, while in some sense related to the legitimate joint activity of a football league, was not reasonably necessary for that desirable activity).

493. See, e.g., Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 457–61 (1986) ("[W]e have been slow to . . . extend *per se* analysis to restraints . . . where the economic impact of certain practice is not immediately obvious.").

494. See Thomas Brown, Katherine Robison & Ian Simmons, Joint Ventures and the Sherman Act: The Problem Revealed by *American Needle* and How Best to Address It, CPI Antitrust J., Mar. 2010, at 1, 9 ("[S]o far as we are aware there are no 'quick look' monopolization cases . . . .").

495. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 990–91 (9th Cir. 2020) (emphasizing chilling concerns "*especially* in technology markets").

496. Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.), 739 F.3d 262, 274–75 (6th Cir. 2014) (citing Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–70 (1999)).

precious.[497] Second, at least as applied to naked conditioning in particular, we are dealing with practices that cry out for justification. After all, horizontal conditioning is perilously close to market allocation, while vertical conditioning presents all the dangers of paradigm exclusivity while being much less likely to elicit exclusivity's traditional benefits.[498] Third, and perhaps most importantly, naked conditioning is rare (among other things, it is a small subset of all conditioning practices) and it is obviously dangerous. In any case in which the condition is linked to some plausibly beneficial joint investment or venture—no doubt the majority of conditions—quick look will simply not apply. After all, competitor collaborations, too, are also often procompetitive, but courts seem to be able to tell the flagrantly bad ones, suitable for quick look review, from the rest, all without the sky falling on our heads.[499] There is no reason not to do the same thing in the same way, in the same small set of the most facially troubling cases, under Section 2.

This approach resonates with a thoughtful strand of scholarship condemning "cheap exclusion": that is, harmful conduct with no substantial procompetitive benefits.[500] It is also a gentle riff on the "no economic sense" and similar tests endorsed by some.[501] If the only plausible reading of a practice is a harmful one, it is fair to place the first burden of explanation on the defendant.[502]

### B. *Attempted Monopoly Maintenance*

Section 2 of the Sherman Act prohibits not just monopolization but also attempts and conspiracies to monopolize.[503] The Supreme Court has explained that the attempt offense requires "predatory or anticompetitive conduct," a "specific intent to monopolize," and a "dangerous

497. The special salience of monopolists in our antitrust system is reflected in the existence of Section 2 itself: a specific statute dedicated to the scrutiny of acquisition and maintenance of monopoly.

498. See supra section I.B.

499. See DOJ & FTC, Antitrust Guidelines for Collaborations Among Competitors 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/L39S-K5D6] (noting that collaborations are "often" procompetitive).

500. See supra note 474 and accompanying text. In a thoughtful contribution in a similar vein, Professor Jon Baker has proposed that a "truncated" rule of reason might be employed to analyze certain exclusionary practices. See Jonathan B. Baker, Exclusion as a Core Competition Concern, 78 Antitrust L.J. 527, 548–56 (2013).

501. See Gregory J. Werden, The "No Economic Sense" Test for Exclusionary Conduct, 31 J. Corp. L. 293, 293 n.4 (2006) (describing DOJ's support for the test).

502. See Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1077 (10th Cir. 2013) ("The point of the profit sacrifice test is to isolate conduct that has *no* possible efficiency justification.").

503. 15 U.S.C. § 2 (2018).

probability" of successful monopolization.[504] Both monopoly acquisition and monopoly maintenance can be unlawfully attempted.[505]

Most modern accounts of the attempt offense present it as actual monopolization in miniature. On this view, a defendant is guilty if it engaged in successful actual exclusion of rivals, giving it a position dangerously close to monopoly.[506] This flows mainly from courts' practice of assessing dangerous probability of success mainly by reference to the defendant's market share: If it is at or above monopoly levels, the defendant has actually monopolized, but if it is somewhat less, then it has only attempted to monopolize.[507] On this account, the attempt offense is simply a modified version of actual monopolization, with a lower market-power test and an additional requirement of intent.[508]

But this is an awfully odd way to conceptualize an attempt offense. Most attempt offenses—even criminal ones[509]—do not require actual infliction of some lesser quantum of harm. The offense of attempted

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504. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 459 (1993).

505. See, e.g., Lorain J. Co. v. United States, 342 U.S. 143, 154 (1951); Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170 (10th Cir. 2023); New York v. Meta Platforms, Inc., 66 F.4th 288, 302 (D.C. Cir. 2023); In re EpiPen, 44 F.4th 959, 981 (10th Cir. 2022); Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 315 (4th Cir. 2007). But see LePage's Inc. v. 3M, 277 F.3d 365, 385–88 (3d Cir. 2002) (doubting the existence of an attempted monopoly maintenance offense), opinion vacated on reh'g en banc, 324 F.3d 141, 169 (3d Cir. 2003) (pointedly expressing no view).

506. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 529 (5th Cir. 2022) ("Attempted monopolization . . . is similar [to actual monopolization] but allows for liability even if the monopoly never came to fruition."); M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 (4th Cir. 1992) ("An attempt to monopolize employs 'methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" (quoting Am. Tobacco Co. v. United States 328 U.S. 781, 785 (1946))).

507. See, e.g., *Spectrum Sports*, 506 U.S. at 459 ("[D]emonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."); Trone Health Servs., Inc. v. Express Scripts Holding Co., 974 F.3d 845, 857 (8th Cir. 2020) ("Dangerous probability of success is examined by reference to the offender's share of the relevant market." (internal quotation marks omitted) (quoting HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 550 (8th Cir. 2007))); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 (10th Cir. 1989) ("The likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market." (citing Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161 (10th Cir. 1986))).

508. See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 994 F.3d 1166, 1172 (10th Cir. 2021) (holding there is sufficient overlap between monopolization and attempt to evaluate the claims together); Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd., 989 F.3d 1224, 1241 n.9 (11th Cir. 2021) (explaining that the only difference between the two offenses is attempt's specific intent requirement).

509. Attempted monopolization is a crime too. See Press Release, DOJ, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization [https://perma.cc/386A-G687].

murder, for example, does not generally require proof of injuries that come "dangerously close" to fatal or indeed any actual injury at all.[510] Instead, the law's general approach to attempt offenses suggests that attempted murder has been committed if the defendant shoots at the victim and misses; if the defendant tries to poison a victim even though the substance turns out to have lost its efficacy; if the defendant hires a "hitman" that turns out to be an undercover cop; and so on.[511] These are all cases in which the defendant intentionally did everything necessary to commit the offense—expecting and believing that facts necessary to the commission of the offense did or would exist—but in which those facts turned out not to exist, so the full offense was not committed.

Standard accounts of the attempt offense support a finding of guilt in these cases.[512] That approach helps to prevent and deter dangerous conduct, punish culpable persons, reflect the social harms caused by attempted wrongs, ensure similarity of treatment among similarly culpable persons, and so on.[513]

But, oddly, the standard framing of attempted monopolization seems to miss these cases. The gap includes the set of cases in which an actual monopolist intentionally sets out to maintain its monopoly by excluding rivals, through means that are generally capable of doing so, but in which the conduct does not seem to have provably contributed to the result. For example, suppose that a monopolist targeted one or more businesses with exclusionary conduct (acquisition, blowing-up-with-dynamite, conditioning, whatever you like) for the sole reason that it believed that the targets were on track to become important rivals and that doing so would enable it to keep prices high and quality low. And suppose that it cannot now be known or proved—after the dynamite has been used—whether the targets were in fact on that track.

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510. See, e.g., People v. Sanders, 522 N.E.2d 715, 723 (Ill. 1988) (explaining that injury is not an element of the attempted murder offense); Harrison v. State, 855 A.2d 1220, 1238 (Md. 2004) (same); People v. Fernandez, 673 N.E.2d 910, 914 (N.Y. 1996) (same); Swenson v. State, 654 S.W.3d 144, 154 n.15 (Tex. App. 2022) (same).

511. See Gideon Yaffe, Criminal Attempts, 124 Yale L.J. 92, 101, 120–21 (2014) (noting that "attempts are often harmless," and discussing the rule, followed in some states, that hiring a hitman is attempted murder).

512. See id. at 102.

513. See Lawrence C. Becker, Criminal Attempt and the Theory of the Law of Crimes, 3 Phil. & Pub. Affs. 262, 270–71, 276 (1974) (noting criminal law's focus on social harms including those "produced by intentional, malicious conduct which is aimed at doing . . . physical or financial damage to persons or property" and arguing that, including for reasons of equal treatment, "attempts [should be] seen as presumptively equal in social harm to successes"); Mark E. Rozkowski & Ralph Brubaker, Attempted Monopolization: Reuniting a Doctrine Divorced From Its Criminal Law Roots and the Policy of the Sherman Act, 73 Marq. L. Rev. 355, 381 (1990) (listing prevention, punishment, equality of treatment, and deterrence as the objectives of attempt liability); Yaffe, supra note 511, at 102 ("[I]f a form of conduct is legitimately criminalized, then so are attempts to engage in that form of conduct." (emphasis omitted)).

This monopolist should be liable for attempted monopoly maintenance, subject to whatever defenses might ordinarily apply (including an assessment of welfare benefits).[514] As noted above, from the perspective of general attempt law, this seems to be a pretty easy case. The monopolist has done all the actions necessary to complete an offense, including actions of a kind that would ordinarily be expected to conduce to the commission of the offense—not just taken a substantial step—with the specific intent to perform that offense.[515] Multiple courts have emphasized that the legality of an attempt should be examined at the time of the relevant act, not with the benefit of hindsight about how things actually unfolded.[516]

Section 2 law should respect the basic principle that the factual impossibility of the full offense—for example, because the target was not really on track to be a successful competitor—is no defense to attempt liability.[517] As one court has already put it in a Section 2 case: "The mere failure to succeed, or the impossibility of success, does not negative an attempt."[518] This even goes, the Fifth Circuit has held, if the offense was never possible. "If a defendant had the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no

514. For some broadly supportive contributions, see, e.g., Am. Acad. Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1320 (7th Cir. 1991) ("Firms found guilty of attempting to monopolize are typically, and in predatory pricing cases must always be, monopolists."); In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 701 (E.D. Pa. 2007) ("I find that defendants may be liable for attempted monopolization even if defendants possessed a monopoly . . . ."); John E. Lopatka & William H. Page, An Offer Netscape Couldn't Refuse?: The Antitrust Implications of Microsoft's Proposal, 44 Antitrust Bull. 679, 706–10 (1999) (making a cautious case for the attempted monopolization offense, apparently including cases involving actual monopolists). The Areeda & Hovenkamp treatise appears somewhat skeptical of attempt liability in cases in which a monopolist threatens with uncertain effect. See Areeda & Hovenkamp, Antitrust Law, supra note 262, § 806a ("[E]xclusionary conduct by a monopolist within its own market, whether successful or not, is best treated as an aspect of the full monopolization offense."); id. § 806b (indicating that "unimplemented threats" should generally be "ignore[d]" unless the threat actually deterred entry, in which case it should be analyzed as actual monopolization).

515. See, United States v. Taylor, 142 S. Ct. 2015, 2020 (2022) (noting that attempt requires specific intent and at least a substantial step taken toward completion); United States v. Fortner, 943 F.3d 1007, 1010 (6th Cir. 2019) (same); United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007) (same).

516. See, e.g., Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 695 n.20 (10th Cir. 1989) ("The capacity of the defendant to monopolize must be evaluated at the commencement of the . . . scheme."); United States v. Am. Airlines, Inc., 743 F.2d 1114, 1118–19 (5th Cir. 1984) ("When evaluating the element of dangerous probability of success, we do not rely on hindsight . . . .").

517. See, e.g., United States v. Reed, 75 F.4th 396, 402–03 (4th Cir. 2023); United States v. Chavez, 29 F.4th 1223, 1227–28 (10th Cir. 2022); United States v. Carter, 15 F.4th 26, 36–37 (1st Cir. 2021); United States v. Burke, 431 F.3d 883, 886 (5th Cir. 2005); see also State v. Logan, 656 P.2d 777, 778 (Kan. 1983) ("Our research has not revealed an instance where an American court has ever recognized factual impossibility as a defense to an attempt charge.").

518. Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 461 (W.D. Pa. 1968).

defense that the plan proved to be impossible to execute."[519] Section 2 should take this principle seriously too, subject to all the usual Section 2 law regarding the expected procompetitive benefits of the challenged conduct.

Accepting this possibility does not require uprooting existing liability theories. Courts should continue to recognize that a dangerous probability of success can be shown, as modern cases agree, through actual but incomplete acts of exclusion that have provably resulted in a lower level of market power. But they should also recognize that attempt liability can be shown by proof of completed conduct by an actual monopolist that is of the right kind to exclude rivals, notwithstanding uncertainty about whether it actually did so.

There remains the usual tricky question of what should count as the necessary intent, given that all businesses try and hope to succeed at rivals' expense.[520] That question is not specific to this reformulation of the attempt offense and deserves full treatment elsewhere. But, consistent with the observations above regarding the purpose and function of the monopolization offense,[521] it would seem sensible to require something like subjective intent to perform the relevant acts combined with subjective intent or belief that overall welfare harm (e.g., increased or maintained prices) will result from unprivileged exclusion of rivals. It is enough to intend and expect that the practice will, on net, harm consumers or other trading partners by enabling the defendant to avoid price decreases, quality improvements, or innovation investments that would otherwise be rational, without intending or expecting sufficient welfare benefits to offset the harm.

Only a small subset of practices, including conditional-dealing policies, present attempted-maintenance concerns of this kind. But that subset contains intentional wrongdoing of a particularly pernicious kind. When a monopolist acts in a manner that is subjectively intended to cause welfare harms through the exclusion of rivals, or through unprivileged means of the right general kind to constitute monopolization, liability is appropriate. That includes, among other things, horizontal or vertical conditions imposed by a monopolist for the purpose of suppressing competitive threats, and that are plausibly capable of having that effect, but that are not redeemed by expected benefits. Society can get along fine without whatever conduct might be deterred by a rule like that.

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519. *Am. Airlines*, 743 F.2d at 1119.

520. See Edward H. Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 373, 394 (1974) (noting the "fundamental difficulty" that "a specific intent to acquire monopoly power may often be entirely legitimate").

521. See supra section II.B.3.

## CONCLUSION

Conditional dealing has fallen through the cracks in monopolization law for long enough. Courts have tried to jam such practices into ill-fitting categories and applied tests and measures with little or nothing to do with the real competitive concerns. The result has been indifference to coherent theories and cogent evidence of harm. In vain have economists and others protested the poor fit between doctrine and reality.

The result has been a proliferation of facially troubling conditions, in critical markets from tech to agriculture to healthcare. The terrible disarray in judicial treatment of such practices—overwhelmingly in favor of defendants—is at best no deterrent and at worst an outright invitation to engage in harmful behavior.

This Article has argued that a clean solution can be inferred from existing monopolization law and theory. Anticompetitive conditioning, in both its horizontal and vertical manifestations, is an independent form of exclusionary conduct. It raises many of the same concerns as exclusivity, tying, bundling, and predation but also exhibits meaningful differences from each, meriting a framework of its own. When conditional dealing is challenged, a court should first ask whether a monopolist has in fact implemented a horizontal or vertical condition that satisfies the hold-constant test. If so, the court should evaluate exclusion, contribution to monopoly, and justification under the framework presented above. This entails rejecting the efforts of previous courts to accommodate conditioning through doctrines of "de facto partial exclusive dealing," "negative tying," and similar contortions. It also entails setting aside inapposite tests like coercion, duration, quantitative screens, and price-cost standards.

Two more specialized tools may also have a role to play in the most troubling cases. The quick look device, imported from the law of Section 1, may help to streamline the analysis of particularly flagrant practices. And the neglected offense of attempted monopoly maintenance may play a valuable role in capturing intentionally harmful conduct in complex, dynamic markets.

All the foregoing boils down to a simple proposition. When a monopolist specifically induces its trading partners to refrain from competition or from trading with rivals, and when that inducement materially impairs rivalry to such an extent that it threatens to significantly shore up monopoly power, a defendant must prove that the practice is nevertheless beneficial overall.

It is hard to believe that that is not already—and uncontroversially—the law.

# DISCRIMINATION DENIALS: ARE SAME-SEX WEDDING SERVICE REFUSALS DISCRIMINATORY?

*Craig Konnoth**

*Are refusals to provide services for same-sex weddings anti-gay discrimination? The answer, the Supreme Court seems to say, is "no." Last Term in* 303 Creative LLC v. Elenis*, the Court held that the Constitution's Free Speech Clause granted a web designer the right to refuse same-sex wedding services. In so doing, the Court also appeared to opine that the refusal involved no anti-gay discrimination.*

*Scholarship has yet to explore the stakes of these denials regarding the existence of discrimination. The claim—if accepted—makes it harder for states to argue that compelling equality interests justify infringing on refusers' putative speech rights. Further, if state courts agree that anti-marriage discrimination is not anti-gay discrimination, then public accommodations will be free to deny a whole swath of marriage-related services to gay people. Beyond its doctrinal implications, any claim that no discrimination has occurred harms LGBTQ+ groups by diminishing and dismissing the burdens gay people face.*

*This Article examines the validity of these discrimination denials. Historically, they turned on the distinction between "conduct" and "status." That is, litigants claimed that discrimination against gay conduct (like same-sex marriage) was not discrimination against gay people. As that distinction has proved unviable, the Court has moved away from the status–conduct binary toward a new distinction between access and content. Thus, as long as there is access to a resource, there is no discrimination—after all, a store cannot be forced to stock content that appeals to all groups. The Article explains why this new justification for discrimination denials also fails.*

* Professor of Law, University of Virginia School of Law, Greenwall Foundation Faculty Scholar, Affiliated Faculty, Center for Health Humanities and Ethics, University of Virginia. My thanks to Craig Benson, Mary Anne Case, Katie Eyer, Leslie Francis, Debbie Hellman, Mark Satta, Michael Stein, Kurt Crispin Steinhouse, the University of Virginia Kohler Seminar, a student seminar at University of Chicago Law School, and faculty workshops at the University of Virginia, the University of Maryland and the University of Connecticut Schools of Law, and especially to Jessica Clarke for helpful comments and discussions, to Kiera Goddu and Ian Roberson for research help, to Leslie Ashbrook and Dan Radthorne for citation assistance, and to Billi Jo Morningstar for proofing.

## INTRODUCTION

The clash between free speech and minority interests, specifically those of gay people,[1] has reached fever pitch. For decades, the Court has

1. The cases this Article examines primarily involve refusals directed at gay people, and thus, usually refers to the affected group as such. That is not to say that other members of the LGBTQ+ community will not be affected, or indeed, other minorities. For example, President Donald Trump's Administration justified its ban on certain transgender individuals serving in the military by arguing that its policy "draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition) . . . and not transgender status." Appellants' Opening Brief at 23, Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019) (No. 18-35347), 2018 WL 2981765. The Ninth Circuit held that there was discrimination against transgender people and so did "not address whether it constitutes discrimination against transgender persons on the . . . ground that gender dysphoria and transition are closely correlated with being transgender." *Karnoski*, 926 F.3d at 1201 n.18 (citing Supreme Court precedent, discussed infra, that rejected the status–conduct distinction). See generally Kenji Yoshino, Covering, 111 Yale L.J. 769 (2002) [hereinafter Yoshino, Covering] (discussing cases involving race and sex in which courts accepted

played referee in this fight. In 1995, the Court unanimously held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (GLIB) that the Free Speech Clause granted the Boston St. Patrick's Day Parade organizers the right to exclude a gay and lesbian group in violation of state antidiscrimination law.[2] In 2000, in *Boy Scouts of America v. Dale*, a bare majority of the Court similarly held that the Boy Scouts could expel an openly gay scoutmaster.[3] In the 2010 case of *Christian Legal Society v. Martinez*, another bare majority of the Court pulled back, holding on narrow grounds that California could prohibit a Christian law student group at a public school from excluding gay and lesbian students.[4]

The last few years have seen an intensification of this battle. In 2017, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Colorado baker refused to bake a cake for a same-sex wedding.[5] Members of the Court sparred with each other in anticipation of a subsequent showdown; the case was ultimately resolved on narrow grounds but produced three concurrences and a dissent.[6] The showdown arrived last Term in *303 Creative LLC v. Elenis*, another Colorado case.[7] There, a majority of the Court held that graphic designer Lori Smith could refuse to build websites for same-sex weddings.[8]

The reasoning in these cases generally proceeds in two steps. When approving service refusals, the Court first identifies and magnifies the refuser's expressive interest.[9] It then goes on to diminish the interests of the gay people experiencing the refusal, holding that gay people do not experience discrimination.[10] This reasoning packs a one-two punch—the refusers have a speech interest in their message, and the gay person lacks a countervailing equality interest as (according to the Court's majority in these cases) no discrimination has occurred.

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arguments that the discrimination at issue targeted certain characteristics of individuals, rather than a protected status).

2. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 581 (1995).

3. Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

4. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672, 698 (2010).

5. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

6. Id. at 1732 (grounding the Court's analysis in the facts of the adjudication at issue and noting that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts"); see also Leslie Kendrick & Micah Schwartzman, The Etiquette of Animus, 132 Harv. L. Rev. 133, 134 (2018) ("But in *Masterpiece*, the Supreme Court avoided the main conflict between LGBT equality and religious liberty.").

7. 143 S. Ct. 2298 (2023).

8. Id. at 2312–13.

9. See infra notes 14–20 (discussing the Court's excavation of the speech rights in this line of cases); infra section III.B (discussing in detail how the Court minimizes the interests of the same-sex couples by claiming no discrimination has occurred).

10. See, e.g., *303 Creative*, 143 S. Ct. at 2316–18 (arguing that Ms. Smith is only refusing to create designs celebrating same-sex marriage message, not refusing to serve LGBTQ+ customers at all).

Take *303 Creative*, for example. There, the Court claimed, first, that Smith's service denial was expressive.[11] Second, it claimed there was no discrimination, a claim that this Article calls "discrimination denial." In other words, the Court suggested, gay people had no equality interest to weigh against Smith's speech interests. Smith's objection, the Court emphasized, is not to gay people, but (in this case) to same-sex *weddings*.[12] Thus, it noted, "the parties agree that Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites' do not violate her beliefs."[13]

Both the Court and commentators dwell in greater detail on the refuser's speech right, interrogating whether the claimed interest constitutes speech,[14] the nature of the speech if any,[15] its importance, and whether the speech

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11. Id. at 2316 ("Ms. Smith does not seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple." (emphasis omitted)).

12. Id. at 2339 (Sotomayor, J., dissenting).

13. Id. at 2317 (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045). One might deny that the Court claims there is discrimination. This Article discusses and rejects that possibility infra note 205.

14. In *303 Creative*, it was fairly apparent to the Court that speech was involved. "[T]he wedding websites Ms. Smith seeks to create qualify as 'pure speech' under this Court's precedents." Id. at 2312 (citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021)). In other cases, however, the Court has justified at greater length its finding that the conduct at issue involved protected expression. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("The use of . . . artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage [that is, a wedding cake,] clearly communicates a message . . . ."); Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–50 (2000) ("[T]he scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values . . . . [A]n association that seeks to transmit such a system of values engages in expressive activity."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995) ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."). For academic commentary, see Steven J. Heyman, A Struggle for Recognition: The Controversy Over Religious Liberty, Civil Rights, and Same-Sex Marriage, 14 First Amend. L. Rev. 1, 88 (2015) ("[A]n enterprise that offers to serve the public becomes part of the social realm of commerce. Such an enterprise properly can be regarded as a place of public accommodation with a duty to serve everyone."); Amy J. Sepinwall, Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations, 53 Conn. L. Rev. 1, 53 (2021) ("[T]here is in fact no conflict between equality and refusing service to those who seek a vendor's products for hateful ends. Those ends are themselves equality-undermining, so, if anything, vendors vindicate equality when they refuse to contribute to them."); Elizabeth Sepper, Free Speech and the "Unique Evils" of Public Accommodations Discrimination, 2020 U. Chi. Legal F. 273, 275 ("Because of social expectations of service, a business communicates little, if anything, when it provides a good or service to any particular customer. The wedding vendor signals no approval of the person or the use of the goods by its service.").

15. The Court in *303 Creative* emphasized that speech remains protected even if "offer[ed] . . . for pay" through a corporation. 143 S. Ct. at 2316. Others appear to disagree that speech rights lose some vitality in public accommodations contexts. See, e.g., Sepper supra note 14, at 292. In *Hurley* and *Dale*, similarly, the Court engaged in significant analysis

is the client's or the vendor's.[16] Less frequently foregrounded in today's academic commentary is the second set of rights—the antidiscrimination interests of the gay people experiencing service refusals,[17] and, in particular, the Court's claim that these refusals do not constitute discrimination.[18]

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to explain how conduct and association implicate expressive principles. See Dale Carpenter, Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach, 85 Minn. L. Rev. 1515, 1519–20 (2001) (noting that reviewing the history of suppression of expressive associations is instructive for analyzing the *Dale* case); Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 811 (2001) (noting in critiquing *Dale* that expressive association "protects organizations like the NAACP from being banned or persecuted because state actors do not like their First Amendment activity . . . [and also] protects an individual from being punished or harassed for being a member of an organization like the NAACP"); see also Jonathan Turley, The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence Over Free Speech, 83 Md. L. Rev. 145, 148 (2023) (examining the issue within the compelled-speech framework).

16. See *303 Creative*, 143 S. Ct. at 2313 ("We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech." (citing *303 Creative*, 6 F.4th at 1181 & n.5)); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment) ("Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward."). But see Elane Photography, LLC v. Willock, 309 P.3d 53, 68–70 (N.M. 2013) (noting that because the speech in question was offered for hire, it may not be attributable to the vendor); Craig Konnoth, How the Supreme Court's LGBT Cases Fractured the First Amendment, Bloomberg L. (July 6, 2023), https://news.bloomberglaw.com/ip-law/how-the-supreme-courts-lgbt-cases-fractured-the-first-amendment (on file with the *Columbia Law Review*) (arguing that anti-gay speech receives greater protection under the current Court's jurisprudence than pro-gay speech).

17. There was plenty of such commentary in the aftermath of *Hurley* and *Dale*. See infra section I.A. But more recent cases have not attracted similar analysis, perhaps because, first, the Court did not explicitly indicate the role its discrimination denial played in its analysis, which may make it easier to overlook the matter. See infra note 155 and accompanying text. Second, the Court also diminished the rights at stake. See infra section II.B.2. Scholars might follow the Court's lead in focusing on the expressive interests it indicates are important. Third, given that *Masterpiece Cakeshop* was not decided on free speech grounds, and no gay people were actually denied services in *303 Creative*, the harm might seem attenuated. See infra note 173 and accompanying text. Fourth, because of the structure of constitutional analysis, the same-sex partners in *Masterpiece Cakeshop* "present to the Court not as rights-bearers but merely as the beneficiaries of a state 'interest' in nondiscrimination against gay people"; it is the refusers who claim the right and who therefore might appear more important to constitutional scholars. Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 72 (2018). Finally, the expressive claims described in the preceding footnotes might appear more novel than discrimination denial, which may be a holdover from the *Hurley* and *Dale* era.

18. The commentary that does exist—a blog post, an online-only forum piece, and a case comment—thus offers no new analysis of the Court's denial of discrimination. In his blog post, Dale Carpenter examines First Amendment doctrine and tallies the products that gay people might lose access to (a limited list according to him) but does not consider whether this loss of access constitutes discrimination. See Dale Carpenter, How to Read *303 Creative v. Elenis*, Reason: Volokh Conspiracy (July 3, 2023), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/M2A8-RCNL] [hereinafter Carpenter, How to Read *303 Creative*]. David Cole's online essay similarly focuses on First Amendment doctrine and is content to "take the Court at its word,"

And yet, denying the existence of discrimination carries both doctrinal and political significance.[19] Doctrinally, the question of whether

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accepting its denial that discrimination occurs if a vendor refuses to make certain products as long as they do not exclude individuals based on their characteristics. David D. Cole, "We Do No Such Thing": *303 Creative v. Elenis* and the Future of First Amendment Challenges to Public Accommodations Laws, 133 Yale L.J. Forum 499, 501, 502–03 (2024), https://www.yalelawjournal.org/pdf/ColeYLJForumEssay_hgfr3cxy.pdf [https://perma.cc/3ZL7-X29A]. Cole only criticizes the Court on the facts—he argues that the *303 Creative* petitioner *did* seek to exclude people based on their characteristics. Id. (noting that the "business sought a court order allowing it to turn away all gay couples seeking a wedding website, regardless of content").

Professor Kenji Yoshino's case comment offers the only contemporary scholarship that critiques the Court's characterization of when discrimination occurs. But Yoshino refers to the old status–conduct distinction; much of the rest of his discussion focuses on the *weight* of the harms gay people will experience, both material and dignitary. See Kenji Yoshino, Rights of First Refusal, 137 Harv. L. Rev. 244, 277 (2023) [hereinafter Yoshino, Rights]. In any case, Yoshino's consideration of the harms to gay people does not occupy the majority of his comment: His focus is on the Court's overall reasoning and centers on the refusal right rather than the nondiscrimination interest. Nonetheless, his discussion of the claim is the most prominent in the legal literature thus far.

One last distinction bears noting: Both John Corvino and Mark Satta argued in the wake of *Masterpiece Cakeshop* that the Court cannot allow discrimination based on how a customer might *use* a product, but that a shopkeeper might refuse to make a certain kind of product or a product that takes a certain form. John Corvino, "The Kind of Cake, Not the Kind of Customer": *Masterpiece*, Sexual-Orientation Discrimination, and the Metaphysics of Cakes, Phil. Topics, Fall 2018, at 1, 6–7 (arguing for a distinction between design-based refusals and user-based refusals); Mark Satta, Why You Can't Sell Your Cake and Control It Too: Distinguishing Use From Design in *Masterpiece Cakeshop v. Colorado*, Harv. C.R.-C.L. L. Rev. Amicus Blog (July 10, 2019), https://journals.law.harvard.edu/crcl/why-you-cant-sell-your-cake-and-control-it-too-distinguishing-use-from-design-in-masterpiece-cakeshop-v-colorado/ [https://perma.cc/NJ4E-4C3P] ("While the bakers in the other . . . cases were seeking only to have a say over which items they make, the baker in *Masterpiece* was seeking to control how his customers use the products he makes, and by extension, which messages the *customers* go on to create . . . ."). On their account, two cakes that have the identical form but that are sold for use in a same- and different-sex wedding respectively, are the "same" cake. That is, the identity of the cake is determined by its form, not its function. It is unclear whether that is the case, however. Consider, for example, birth control pills. The identity of the item is less its form, and more what it does. Cf. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127–28 (9th Cir. 2009) (finding against pharmacists arguing that law compelling them to dispense birth control violated their free exercise rights). With a wedding cake, the use of the cake again defines the item—as the term *wedding* cake indicates. This Article does not seek to fully critique the distinction (for example, one could argue that in the case of a pill, "form" should be defined by chemical composition rather than use, such that an off-label use should not brook objection) but simply to acknowledge it as a contribution to the literature.

19. It bears noting that the Court has made similar moves in other cases. For example, in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), the Court held that Title VII could prohibit certain kinds of sexually harassing speech "without so much as a word about free speech doctrine." Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark, 1994 Sup. Ct. Rev. 1, 20. In some ways, that Court took the inverse approach—focusing on antidiscrimination interests and ignoring speech interests. But unlike in that case, the Court explicitly denies the antidiscrimination interest at stake here.

there is discrimination can determine whether LGBTQ+ individuals' interests outweigh any expressive interests of refusers—if there is no discrimination, then gay people can hardly argue against the refusers' expressive rights.[20] The question can even delimit the reach of antidiscrimination statutes—if anti-*marriage* discrimination is not anti-*gay* discrimination, then no antidiscrimination statute has been violated.[21] And rhetorically, denying the existence of discrimination enables prioritizing refusers' interests while erasing those of gay people. Thus, exam-ining the Court's claim that no discrimination has occurred is the focus of this Article.[22]

While the Court does not always explicitly articulate its reasoning, two grounds best justify the discrimination denial: First, denying service based on the *conduct* of individuals does not constitute discrimination against their *status*. Scholars read the Court's cases from the late 1990s and early 2000s as relying on this status–conduct (also known as the act–identity) distinction.[23] In *Hurley*, *Dale*, and *Christian Legal Society*, refusers argued that gay people engaged in objectionable conduct. For example, the gay

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20. See infra section II.B.

21. See infra section II.A.

22. There are situations in which someone might, as the Court puts it, send a "message" without discriminating based on "status." See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2319 (2023). But those situations do not involve the actual denial of a service. For example, a seller might post a sign stating that they disapprove of marriage equality but *do* provide same-sex marriage-related services because the law demands it. A tougher case might involve a situation in which a shop posts a sign that says "gay people are unwelcome," but gay people also never seek a service from that store (and thus, never experience a denial). One might argue in these cases that while a message has been sent, no discrimination has actually occurred. But those situations are different. The cases at issue here *do* involve a denial of service. Indeed, the message is understood to inhere in the denial of service.

To be sure, sending a message of discrimination can still constitute discrimination. Language theory holds that statements have both a descriptive and performative aspect. Giving a promise, for example, does not simply describe an action; it constitutes the act of promising. See J.L. Austin, How to Do Things With Words 50–52 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) ("We must consider the total situation in which the utterance is issued . . . if we are to see the parallel between statements and performative utterances . . . . [T]he total speech act in the total speech situation is emerging from logic piecemeal . . . thus we are assimilating the supposed constative utterance to the performative."). A public accommodation is "open to the public." *303 Creative*, 143 S. Ct. at 2325, 2336–38 (Sotomayor, J., dissenting). Stating that it is closed to a certain segment of the public is a performative act that discriminates against that group of the public. This Article does not defend that view in detail.

23. See, e.g., Yoshino, Rights, supra note 18, at 251–52 (discussing the status–conduct distinction in the context of "Don't Ask, Don't Tell"). The original formulation by Michel Foucault refers to the identity–act distinction. See Michel Foucault, The History of Sexuality: An Introduction 43 (Robert Hurley trans., Pantheon Books 1978) (1976) ("Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.").

and lesbian group in *Hurley* sought to carry a banner,[24] and in *Christian Legal Society*, the excluded gay and lesbian students purportedly engaged in unsanctioned sexual activity.[25] But, the refusers argued, they objected to that *conduct*, not to gay *people* themselves. Gay people who did not engage in prohibited conduct would be permitted access.[26]

Some of today's litigants seek to revive such arguments. They have similarly argued that their objection is to providing services for same-sex *marriage*, not to gay *people*.[27] Yet, relying on now decades-old literature and jurisprudence, most of today's lower courts have roundly (and rightly) rejected the status–conduct binary.[28] Status does not exist in a vacuum but is constituted through conduct—including coming out, engaging in intimate conduct, marching in pride parades, and choosing whether to love and to whom to express that love.

Today's Court—primarily through Justice Neil Gorsuch, the author of *303 Creative*—also claims that service refusals are not discriminatory.[29] But rather than relying on the status–conduct distinction, his opinion inaugurates a new distinction between access and content. On this account, plaintiffs' stores offer a certain set of content—cakes or websites for different-sex weddings, or more generic items like cookies or brownies. They are willing to give gay people *access* to all this content. But they are not willing to alter the content they offer—they are not willing to make cakes for same-sex weddings, for example. And as long as the protected group is given access to any of the seller's content (whatever it is), there is no discrimination.

Although Justice Gorsuch presents his reasoning as original, similar distinctions have been made in other areas of antidiscrimination law. In disability discrimination law, defendants have invoked the access–content distinction in the courts of appeals.[30] To draw one example from these cases, a bookstore that does not carry books in Braille does not necessarily discriminate against blind people—that is, as long as blind people are allowed *access* to the books the store chooses to stock.[31] The fact that the

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24. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995); see also infra notes 71–75 and accompanying text.

25. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 702 (2010); see also infra notes 92–95 and accompanying text.

26. See infra notes 65–68 and accompanying text.

27. See infra notes 90–91, 117–118.

28. See infra notes 95–97and accompanying text.

29. See Yoshino, Rights, supra note 18, at 251 ("For the majority, this refusal is not status-based discrimination as Smith does not change the terms associated with the goods she offers based on the identity of the buyer.").

30. See infra section I.B.1.

31. Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) ("The common sense of the [ADA] is that the content of the goods or services offered by a . . . public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons."). For

books the store stocks is of less use to members of a certain group is not relevant as long as that group is given equal access.

Both the status–conduct and access–content distinctions help justify the claim that the service denial is not discriminatory. They allow the Court to unlink the service denial from the protected *status* of the individual. Instead, these distinctions allow the Court to anchor the service denial to specific *conduct* (marriage) or to the nature of the product (services for different-sex couples). In this way, the Court can claim that the service denial does not discriminate against gay status.

Part I explores the status–conduct and access–content distinctions. Part II explores the implications of denying the existence of discrimination in general,[32] and of the access–content justification in particular. On one level, the Court does not simply hold that service refusers' First Amendment interests trump gay people's interests against discrimination. Rather, the Court feels the need to minimize gay people's interests to justify the service denial. Observers might take some comfort in the fact that the Court does not give the refusers an automatic win, with no regard to gay people's interests. But the story is more complex.

At the outset, the claim that the service denials are not discriminatory can present real doctrinal problems for litigants. First, if a service denial sometimes constitutes fully protected expression, a state must show at least that it advances a compelling interest in requiring services for same-sex weddings. In these cases, states argue that their application of the public accommodation laws serve the compelling interest of protecting gay people from discrimination.[33] Future courts may rely on the *303 Creative* Court's claim that under federal law, no discrimination against gay people has occurred, in which case the compelling interest disappears altogether.[34] Second, *303 Creative*'s definition of what counts as discrimination could affect how other courts interpret antidiscrimination statutes. Other courts could hold (and have held) that objections to same-sex marriage do not count as discrimination, limiting protections for gay rights.[35]

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commentary, see Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement 71 (2009) [hereinafter Bagenstos, Law and Contradictions].

32. That is, using both the identity–act and access–content justifications.

33. See State Public Accommodation Laws, Nat'l Conf. State Legislatures (June 25, 2021), https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws [https://perma.cc/2V8B-NHRY] (noting that only "[f]ive states—Alabama, Georgia, Mississippi, North Carolina and Texas—do not have a public accommodation law for nondisabled individuals").

34. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2316–18 (2023) (arguing that Ms. Smith only refuses to provide a wedding website to same-sex couples but does not necessarily refuse to serve same-sex couples entirely). Note that the denial of discrimination does not control the Court's analysis, so it is dicta. See id.

35. See, e.g., Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 896–97 (Ariz. 2019) ("The enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference. But here, the City

Beyond doctrine, the shift from the status–conduct binary to the access–content binary has stakes for both religious and LGBTQ+ identity. First, a close reading of Justice Gorsuch's *Masterpiece Cakeshop* concurrence suggests that the departure from the status–conduct distinction seeks to enable claims of religious discrimination.[36] If such cases become more prominent in the Court's docket, a sharp distinction between status and conduct could undermine arguments that the burdens on certain religious *conduct* constitute discrimination against religious *people*. Avoiding the status–conduct binary helps evade that problem.

Second, the access–content distinction shifts focus from the individuals involved to the services at issue, avoiding consideration of identity categories. This risks reifying a market-oriented view of the harm involved: The injury gay couples face is a supply-chain one—limited availability of certain goods—rather than a dignitary, identity-based one.[37]

At base, the claim that no discrimination has occurred denies the lived reality of gay people. Civil rights claims have historically depended on the building of consciousness among groups about the existence of oppression.[38] If the Court openly weighed the rights of First Amendment claimants against those of gay people and came out in favor of the former, it would be forced to reckon with the burdens that its ruling imposes on gay people. The Court's approach instead refuses to recognize gay individuals as having the agency, autonomy, and understanding to appreciate when they have experienced discrimination.[39] Thus it is essential to address the court's claim that discrimination has not occurred.

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effectively cuts off Plaintiffs' right to express their beliefs about same-sex marriage by telling them what they can and cannot say."); Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47] ("The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.").

36. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); see also infra notes 139–142 and accompanying text.

37. But see Hila Keren, Beyond Discrimination: Market Humiliation and Private Law, 95 U. Colo. L. Rev. 87, 172 (2024) ("Market humiliation is a corrosive relational process . . . [in which] providers of market resources . . . use their powers to reject or mistreat other market users due to their identities. They humiliate users and harm their market citizenship by depriving them of dignified participation in the marketplace.").

38. See, e.g., Donald G. Nieman, From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction, 17 Cardozo L. Rev. 2115, 2117 (1995) ("Equally dramatic, and no less significant, was the change in consciousness that occurred among African-Americans, paralleling the constitutional revolution and helping to give it life."); Peter H. Schuck, Public Law Litigation and Social Reform, 102 Yale L.J. 1763, 1775 (1992) (reviewing Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992) and Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991)) ("*Brown*'s . . . contribution was to put civil rights on the liberal political agenda, force white politicians to respond, raise public consciousness of racial injustice, and inspire civil rights organizations and the black community to take to the streets . . . .").

39. This form of dignitary harm constitutes epistemic injury. See infra notes 209–215 and accompanying text.

Discrimination denial claims rely on status—conduct and access—conduct justifications. Decades-old literature already dismantles the status–conduct justification. The access–content justification, however, has not received similar critical treatment. Indeed, the disability literature which has historically reckoned with the access–content distinction appears to have given up grappling with the distinction on analytical terms.[40]

Part III offers two arguments to show that in cases like *303 Creative*, targeting content constitutes discrimination. First, certain items—yarmulkes, crosses, and other items—are identified strongly with specific groups of people: Jewish people, Christians, and so on. Targeting items infused with group identity can exhibit animus against those groups. Second, defining content in terms of a group as the Court appears to do (for example, distinguishing between same–sex and different–sex wedding cakes) to justify discrimination against that group is also illegitimate. In that way, this Article argues, the access–content distinction in these cases ultimately fails as an analytical matter.

Ultimately, the Court seeks to quarantine Smith's message from any claim of discrimination, making her putative expression a get-out-of-jail-free card. If there is no discrimination, there are no competing values that the Court must weigh—First Amendment values dictate the conclusion. But denials of service can have a serious and significant effect on gay people, limiting their access not only to wedding vendors but also to public accommodations that provide basic necessities like food and healthcare.[41] There should be no confusion: Same-sex wedding service refusals are

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40. That is, the literature argues that the statute and regulations are better read to prohibit the distinction; it does not suggest that the distinction does not make analytic sense on its own terms. See, e.g., Sharona Hoffman, AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance, 23 Cardozo L. Rev. 1332–33, nn.108–109 (2002) (citing cases in which circuit courts found that the ADA does not require protection against discriminatory content, only access to the content provided).

41. See Brief of Amici Curiae Colorado Organizations & Individuals in Support of Respondents at 3, 15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5152969. Reciting those consequences here would be duplicative and unoriginal, so this Article does not do so, but they remain significant. There remains dispute as to how significant the burden on individuals will be. Carpenter argues that the Court's decision only applies to products that are customized and expressive, which is a rare combination; thus gay people will not be significantly affected. See Carpenter, How to Read *303 Creative*, supra note 18. But see Robert Post, What About the Free Speech Clause Issue in *Masterpiece*?, Take Care ( June 13, 2018), https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece [https://perma.cc/2XZP-RYRX] (describing how, following *Masterpiece Cakeshop*, "every carpenter, dress-maker, chef, florist, jeweler, designer, decorator, tailor, chauffeur, architect, lawyer, physician, dentist, nurse, baker, or undertaker could claim that [their service] constituted their own personal expression, . . . [which] would cut the heart out of antidiscrimination laws"); Yoshino, Rights, supra note 18, at 277 ("While Carpenter is correct that only a fraction of the goods we buy are customized and expressive, the sheer number of commercial goods means that even that fraction will be a large number of cases." (footnote omitted)).

discriminatory. To be clear, *a finding of discrimination will not necessarily be enough to change outcomes*; the Court may still decide that First Amendment interests must prevail, and this Article does not purport to engage speech doctrine. But in weighing the interests involved, it is important to keep in mind gay people's injuries rather than writing them out of existence.

## I. JUSTIFICATIONS FOR DISCRIMINATION DENIAL

In *303 Creative*, the Court's first claim—that Smith's speech is expressive—receives the bulk of its (and others') attention.[42] The Court's next claim—that Smith's service denial is not discriminatory—is also remarkable.[43] As justification, the Court's majority emphasizes the "distinction between status and message."[44] Smith does not seek to discriminate against gay *people*, but only against certain *messages*. Countering Colorado's claim that "Ms. Smith refuses" to offer her services "because she objects to the 'protected characteristics' of certain customers," the majority notes that Smith would "gladly" serve gay or lesbian customers.[45] The issue is the message: "Ms. Smith . . . will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments."[46] Quoting from the United Kingdom Supreme Court, the majority emphasizes "[t]he less favourable treatment was afforded to the message not to the man."[47] In other words, there is no discrimination based on status.

The Court does not articulate why a service denial here is not both expressive and discriminatory. The service denial does not cease to be conduct—possibly discriminatory conduct—merely because it might be expressive.[48] But under the Court's holdings, with a sufficiently weighty purpose, the state can sometimes prohibit such expressive conduct—

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42. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2311–12 (2023); see also Nicholas Almendares, Blunt Speech Rights, 32 Wm. & Mary Bill Rts. J. 919, 923 (2024) (discussing the limits of *303 Creative* as primarily that of requiring expression); Robert Post, Public Accommodations and the First Amendment: *303 Creative* and "Pure Speech", 2023 Sup. Ct. Rev. 251, 281–86 (same).

43. *303 Creative*, 143 S. Ct. at 2312–14.

44. Id. at 2317 n.3.

45. Id. at 2316–17.

46. Id. at 2317.

47. Id. at 2317 n.3 (citing Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47]).

48. The test for expressive conduct asks, at least in part, whether there is "[a]n intent to convey a particularized message" and what the likelihood is "that the message would be understood by those who viewed it." See Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam). The test has received critique, but the Court has found marching, sitting in, nude dancing, playing music, wearing a black armband as a war protest, and burning, inverting, and saluting the United States flag to all be expressive. See, e.g., Richard P. Stillman, Comment, A Gricean Theory of Expressive Conduct, 90 U. Chi. L. Rev. 1239, 1240 (2023).

burning crosses to show racial animus, for example.[49] Thus, the service denial, and the message it expresses, may in fact be discriminatory and constitutionally proscribable.

The Court's "no-discrimination" claim is best read as relying on two possible justifications. An outpouring of scholarship explains the first justification. In early cases like *Hurley* and *Dale*, the Court claimed that refusers objected not to gay status but to the specific conduct of the gay people in those cases.[50] This Part first examines that scholarship.

As the "no-discrimination" claim reappears in the Court's most recent round of cases, the status–conduct explanation remains understood as the norm even today.[51] But scholars have not critically interrogated this claim as they did two decades ago.

This Article argues that today's Court has also turned to a new justification that focuses on the *product* the seller is offering, in which their putative message inheres. On the Court's account, as long as the seller offers everyone equal access to the product, it does not discriminate by not altering its content.[52] While this "access–content" distinction is familiar to scholars of disability discrimination, it has not been fully critiqued in the literature. Part III critiques the distinction, but for now, this Part simply situates that distinction in marriage service refusals.

### A. *The Status–Conduct Justification*

To understand the novelty of the Court's access–content distinction, it is important to explore the earlier justifications ascribed to the Court's denials that discrimination has occurred. On these earlier accounts, the discrimination does not target *individuals* but rather their behavior. To understand how this so-called status–conduct distinction has become the standard justification for discrimination denial, this section explores the origins of the distinction in the 1970s and 1980s. When *Hurley* and *Dale*

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49. See, e.g., Virginia v. Black, 538 U.S. 343, 363 (2003) ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate . . . in light of cross burning's long and pernicious history as a signal of impending violence.").

50. See, e.g., Darren Lenard Hutchinson, Accommodating Outness: *Hurley*, Free Speech, and Gay and Lesbian Equality, 1 U. Pa. J. Const. L. 85, 87 n.13 (1998) ("[W]hile the criminalization of homosexual sodomy . . . may not violate notions of fundamental fairness, the oppression of . . . [LGBTQ+] persons by the state may violate notions of equality . . . . This reasoning, however, opens up a dangerous conduct–status distinction which ignores the role of sexual conduct in constructing sexual identity."); Andrew R. Varcoe, The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law, 9 Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues 163, 206 (1999) (situating the status–conduct distinction in the context of *Dale*).

51. Yoshino, Rights, supra note 18, at 252 ("[C]onduct (same-sex marriage) and the status (gay identity) . . . [are] linked.").

52. *303 Creative*, 143 S. Ct. at 2315 ("[T]his Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech.").

were decided, scholars easily turned to the status–conduct critique to analyze these cases. Status–conduct thus became the standard justification for claims denying discrimination.

1. *Explaining the Status–Conduct Distinction.* — In the 1980s and early 1990s, the Court and Congress collapsed the distinction between status and conduct to justify denying rights to gay people. In 1986, the Supreme Court upheld Georgia's law that prohibited consensual sodomy in *Bowers v. Hardwick*, a case it overturned nearly two decades later in *Lawrence v. Texas*.[53] Georgia's law prohibited both same-sex and different-sex sodomy.[54] But the Court couched its holding in a way that linked the act of sodomy to homosexual identity. "The issue presented" intoned the Court, "is whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in *sodomy*."[55] Further in the opinion, the Court links sodomy with homosexual identity even more tightly—the case, it stated, was about the "fundamental right to engage in homosexual sodomy."[56] In this characterization, the conduct itself—sodomy—is inflected with gay identity.[57] The link between sodomy-as-act and homosexuality-as-identity is rendered complete later in the opinion where the Court admits that the question of whether sodomy is constitutionally protected turns on opinions regarding the "morality of homosexuality."[58]

Primed, in particular, by work published in the previous decade by prominent theorist Michel Foucault, the Court's opinion led to an outpouring of scholarship. In the 1970s, Foucault had argued that before the nineteenth century, the concept of a "homosexual," and of homosexual identity, did not exist—individuals engaged in certain sexual acts, which did not characterize the person, but which were "a temporary aberration."[59] Until that shift, individuals were not discriminated against as a "class"—there was no identifiable group that could be targeted.[60] By

53. Bowers v. Hardwick, 478 U.S. 186, 188–89 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 578 (2003).

54. Id. at 200–01 (Blackmun, J., dissenting).

55. Id. at 190 (majority opinion) (emphasis added).

56. Id. at 191.

57. Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1747 (1993) ("Sodomy can receive its definitive characteristic from the 'homosexuals' who do it, or can stand free of persons and be merely a 'bad act.' The majority Justices have enabled themselves to treat sodomy as a metonym for homosexual personhood—or not, as they wish.").

58. *Bowers*, 478 U.S. at 196.

59. See Foucault, supra note 23, at 46.

60. Id. ("Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny . . . ."). Foucault's historical account has been criticized. See, e.g., Carolyn J. Dean, The Productive Hypothesis: Foucault, Gender, and the History of Sexuality, 33 Hist. & Theory 271, 272 (1994) ("Foucault purports to be engaged in extending social justice through sociohistorical critique. Yet . . . he provides absolutely no grounds on which we might distinguish the powerful from the powerless, and he robs individual actors of agency and hence the power to create meaning." (citing Nancy Fraser, Unruly Practices: Power, Discourse and Gender in

the early twentieth century, however, homosexuality became an identity: The "homosexual" became "a species"—an identifiable group—subject to a broader set of controls.[61] Thus, argued Foucault, when it came to homosexuality, the rhetoric of acts had been displaced (but not necessarily eclipsed) by a rhetoric of identities.[62]

*Hardwick* and its aftermath appeared to confirm Foucault's claim that the abstraction of conduct into status enhanced discrimination and control. Although *Hardwick* was technically about whether certain *conduct*—consensual sodomy—was constitutionally protected, lower courts saw the case as a condemnation of homosexual *status*. Thus, lower courts declined to extend heightened equal protection scrutiny to homosexual identity on the grounds that sodomy is the behavior that "defines the class" seeking protection.[63] As Professor Janet Halley put it: "Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym."[64]

Even as the legal world came to grips with *Hardwick*, in 1993, Congress replaced the military's ban on homosexuals with a putative "Don't Ask, Don't Tell" Policy (DADT).[65] The policy purported to allow gay people to serve in the military as long as they were not *out*. But their outness—their *status* of being gay—was determined by their *conduct*. If the service member "engaged in . . . a homosexual act," they would be fired, unless, inter alia,

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Contemporary Social Theory 17–34 (1989))); George Huppert, Divinatio et Eruditio: Thoughts on Foucault, 13 Hist. & Theory 191, 191 (1974) ("Disregarding all his predecessors, Foucault wipes the slate clean: no one had ever understood anything about the origins of our culture. All the scholarship of the past century or two was wasted effort, for lack of the method which alone can supply the answers."); Allan Megill, The Reception of Foucault by Historians, 48 J. Hist. Ideas 117, 125 (1987) ("The reception of Foucault by historians also falls into three stages . . . of 'non-reception,' 'confrontation,' and 'assimilation' . . . .").

61. Foucault, supra note 23, at 43 ("The nineteenth-century homosexual became a personage . . . . The sodomite had been a temporary aberration; the homosexual was now a species.").

62. Halley, supra note 57, at 1739.

63. See Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (stating that the reasoning in *Hardwick* forecloses the argument that homosexuals should receive heightened scrutiny under the Equal Protection Clause because "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal").

64. Halley, supra note 57, at 1737. Halley was only one of numerous scholars to recognize the falsity of this distinction, as the citations below indicate.

65. 10 U.S.C. § 654 (2006), repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516. Interestingly, the military argued in several subsequent cases that its goal was to punish only the conduct, not status, even though status was the linchpin that determined the conduct. See, e.g., Cook v. Gates, 528 F.3d 42, 68 (1st Cir. 2008) (Saris, J., concurring in part and dissenting in part) ("Here, the government insists that the purpose of the Act is to target conduct, not status . . . ."); Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) ("The government argues that the Act in this case proscribes homosexual conduct and that, since any governmental differentiation is based on conduct, not status, no heightened scrutiny is required.").

"such conduct is a departure from the member's usual and customary behavior"; "is unlikely to recur"; or "the member does not have a propensity or intent to engage in homosexual acts."[66] Similarly, if the member "stated that he or she is a homosexual or bisexual," then again, they would be discharged unless they "demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[67]

In other words, the *conduct* of engaging in homosexual acts (whatever those are) or declaring one's homosexuality leads to a (rebuttable) presumption of one's homosexual *identity*.[68]

2. *The Status–Conduct Distinction in Public Accommodations Cases.* — Given the debates of the 1980s and early 1990s, by the time *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* was decided in 1995,[69] scholars were familiar with the status–conduct distinction. Yet, while *Hardwick* and DADT *collapsed* status and conduct, according to many scholars, *Hurley* and *Dale separated* status from conduct to undermine gay interests.[70]

*Hurley* inaugurated the line of cases in which the Court permitted anti-LGBTQ+ speech exemptions. The Court held that the speech rights of the organizers of the Boston St. Patrick's Day Parade allowed them to exclude a gay and lesbian group from marching.[71] Even though the state had found the exclusion to be discriminatory, the Court hastened to add its own gloss: "Petitioners disclaim any intent to exclude homosexuals as

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66. 10 U.S.C. § 654.

67. Id.

68. See, e.g., Judith Butler, Excitable Speech: A Politics of the Performative 107 (1997). Professor Judith Butler's book, *Excitable Speech*, argues that in DADT, "The words, 'I am a homosexual,' . . . perform[] what they describe, not only in the sense that they constitute the speaker as a homosexual, but that they constitute the speech as homosexual conduct." Id.

69. 515 U.S. 557 (1995).

70. Scholarship of the era was aware the Court's behavior necessitated contradictions in strategy and produced dilemmas. See, e.g., Toni M. Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45, 55 (1996) ("Disaggregating homosexual status and homosexual conduct might secure for gay people the dubious right to say 'I am a homosexual,' but *not* the right to engage in conduct that might give evidence of that identity . . . . [Disaggregation] may bifurcate the gay or lesbian individual in strange and undesirable ways."). On the dilemmas and double binds in the status–conduct distinction, see Eve Kosofsky Sedgwick, Epistemology of the Closet 70 (1990) ("The most obvious fact about this history of judicial formulations is that it codifies an excruciating system of double binds, systematically oppressing gay people, identities, and acts by undermining through contradictory constraints on discourse the grounds of their very being."); Diana Fuss, Inside/Out, *in* Inside/Out: Lesbian Theories, Gay Theories 1, 4 (Diana Fuss ed., 1991) ("To be out, in common gay parlance, is precisely to be no longer out; to be out is to be finally outside of exteriority and all the exclusions and deprivations such outsiderhood imposes."). The general point worth noting is that the status–conduct divide gives opponents of LGBTQ+ rights a dual strategy for attack—conflation or disaggregation—as the circumstances of the situation demand.

71. See *Hurley*, 515 U.S. at 581.

such, and no individual member of GLIB claims to have been excluded from parading as a member of any [approved] group."[72] The issue was the message that GLIB sought to send through admission "as its own parade unit carrying its own banner,"[73] "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants."[74] GLIB's proclamation "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals," would, the Court felt, conflict with the organizers' desired message.[75]

Five years after *Hurley*, the Court decided *Boy Scouts of America v. Dale*, in which the Boy Scouts successfully sought to exclude James Dale as an openly gay scoutmaster.[76] Dale's presence, the Scouts appeared to argue, would send a message that conflicted with the Scouts' desired message regarding homosexuality.[77] Dale was "open and honest about [his] sexual orientation," notes the Court.[78] In the Question Presented and in all its briefs, the Boy Scouts mentioned that Dale was an "avowed homosexual."[79]

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72. Id. at 572.

73. Id.

74. Id. at 570.

75. Id. at 574.

76. 530 U.S. 640 (2000).

77. There is some dispute as to the reason for the exclusion. Professor Mark Strasser argues that unlike in *Hurley*, in which the problem was GLIB's desire to carry a pro-gay banner, the Boy Scouts sought to exclude "Dale's very presence" itself. Mark Strasser, Leaving the *Dale* to Be More Fair: On *CLS v. Martinez* and First Amendment Jurisprudence, 11 First Amend. L. Rev. 235, 266 (2012); see also Randall P. Bezanson, Speaking Through Others' Voices: Authorship, Originality, and Free Speech, 38 Wake Forest L. Rev. 1023–24 (2003) (pointing out that the Court's decision in *Dale* was based on the "attribution to the Boy Scouts of a message constructed by an audience and attributed to Dale"); Arthur S. Leonard, *Boy Scouts of America v. Dale*: "The Gay Rights Activist" as Constitutional Pariah, 12 Stan. L. & Pol'y Rev. 27, 30 (2001) (arguing that "status and conduct are conflated" in *Dale*); James P. Madigan, Questioning the Coercive Effect of Self-Identifying Speech, 87 Iowa L. Rev. 75, 90–92 (2001) ("That Dale is gay does not mean that being gay is central either to his identity or to any message he exudes. . . . Even assuming . . . Dale's speech does amount to the . . . message that the GLIB banner advanced, . . . Dale has never sought to bring that banner into the Scouting 'parade.'").Thus, Justice John Paul Stevens observed in dissent: "Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message." *Dale*, 530 U.S. at 694–95 (Stevens, J., dissenting).

But scholars who take the opposite position seem to have the better of the argument. Thus, Knauer suggests that Dale was doing precisely what GLIB did in *Hurley*—just as GLIB put a banner up to send a message of normalization and inclusion to the observers of the Boston parade, Dale did the same for those who knew he was in the Boy Scouts and was gay: "Once his name appears in the paper, or he tells a co-worker, or he fails to deny a rumor of homosexuality, he has 'put a banner around his neck.'" Nancy J. Knauer, "Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After *Boy Scouts of America v. Dale*, 89 Ky. L.J. 997, 1037 (2001).

78. *Dale*, 530 U.S. at 653 (internal quotation marks omitted) (quoting Joint Appendix at 11, *Dale*, 530 U.S. 640 (No. 99-699)).

79. See, e.g., Petition for a Writ of Certiorari at i, 8, 22, *Dale*, 530 U.S. 640 (No. 99-699), 1999 WL 35238158.

This avowal, notes Professor Nancy Knauer, "helps normalize homosexuality, which in turn encourages others to come out and increases societal tolerance."[80] Such normalization went against the Scouts' desired message.

Indeed, the Boy Scouts was open to reinstating Dale—if he sent a message that conformed with theirs: "[T]he Boy Scouts' counsel acknowledged at oral argument that Dale could serve as an assistant Scoutmaster provided he said that homosexuality was 'morally wrong' and refrained from homosexual conduct."[81] In other words, the problem was Dale's message—conveyed simply by his being an out-and-proud homosexual—"of self-worth inherent in self-identification."[82] Thus, the Court notes:

> That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist.[83]

Thus, in both *Hurley* and *Dale*, the Court concluded that petitioners did not object to gay *people*, but that they objected to their *messages* as inconsistent with their own.

Primed by *Hardwick* and DADT, scholars immediately analyzed this argument using the status–conduct framework. Expression, they argued, was conduct that *constituted* gay identity. For example, drawing from *Hardwick*, DADT, *Hurley*, and *Dale*, Professor Nan Hunter argues that "representation or expression of identity is necessary for that identity to have a social existence."[84] Thus, in *Hurley*, the organizers of the parade and the Justices "read into the banner a message of the existence and celebration of gay identity, with its implicit claim of self-worth."[85] "But . . . [t]o

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80. Knauer, supra note 77, at 1052; see also Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from the denial of certiorari) ("[O]nce spoken, [an acknowledgment of homosexuality] necessarily and ineluctably involve[s] [the individual] in [the] debate [that] . . . is currently ongoing regarding the rights of homosexuals."); Darren Lenard Hutchinson, "Closet Case": *Boy Scouts of America v. Dale* and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility, 76 Tul. L. Rev. 81, 107 (2001) ("[T]he Court legitimizes the Boy Scouts' discrimination against Dale on account of his 'outness,' which the Court treats as distinct from his mere 'membership' in a 'particular group' (gay males) or from his gay-male 'status' alone.").

81. Knauer, supra note 77, at 1038.

82. Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 Harv. C.R.-C.L. L. Rev. 1, 28 (2000).

83. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (quoting Joint Appendix, supra note 78, at 11).

84. Hunter, supra note 82, at 9.

85. Id. at 19.

exclude that message is to exclude that identity, as it is the full identity claim that makes equality a meaningful concept."[86]

Professor Darren Hutchinson similarly argued that "[o]utness . . . is a critical component of gay, lesbian, bisexual, and transgender identities."[87] "Dale's expression and association thus constituted the mechanics of identity formation; Dale's expression and his gayness were inseparable."[88] As yet others put it, "Status and expression . . . intersect when a gay person identifies himself or herself. . . . [G]ay or lesbian self-identification does not simply reveal identity, as if it were merely the communication of some pre-existing sexual identity that the communication leaves wholly unchanged, but . . . it realizes or constructs identity."[89] Nor were these insights restricted to scholars. As a concurring New Jersey Supreme Court Justice in *Dale v. Boy Scouts of America* noted, citing various scholars, including Hunter: "[W]hile Boy Scouts frames its expulsion of Dale as grounded on an objection to his expression of his homosexuality, that exclusion is tantamount to one based on Dale's status as a homosexual."[90]

The line that *Dale* appeared to draw between status and conduct was soon rendered unstable even in the Supreme Court. In *Lawrence v. Texas*, decided three years later, the Court overturned *Hardwick*, noting in dicta that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."[91] In 2010, a majority of the Court signed onto an opinion that even more clearly recognized these deep links between status and conduct. In *Christian Legal Society*, a Christian law student group sought to exclude students who engaged in "unrepentant homosexual conduct," or who held "religious convictions different from those in the Statement of Faith."[92] Writing for the majority, Justice Ruth Bader Ginsburg held, in relevant part, that the exclusion survived because the stipulated facts showed that the law school required groups it supported to be open for all law students.[93]

Yet Ginsburg also went out of her way to emphasize the problems that arose when exclusions were made—as they were in *Hurley* and *Dale*—based on message. "[S]tatus exclusion" could be "cloaked"

> in belief-based garb[.] If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for

86. Id. at 19–20.

87. Hutchinson, supra note 80, at 108.

88. Id. at 115.

89. Varcoe, supra note 50, at 231.

90. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1237–38 (N.J. 1999) (Handler, J., concurring), rev'd and remanded, 530 U.S. 640 (2000).

91. 539 U.S. 558, 575 (2003) (emphasis added).

92. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672 (2010) (internal quotation marks omitted) (quoting Joint Appendix Volume I at 226, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), 2010 WL 372139).

93. Id. at 669.

> example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?[94]

Thus, Justice Ginsburg (incorrectly) claimed, the Court's "decisions *have declined to distinguish between status and conduct.*"[95]

While the Court has increasingly turned to a different justification for denying the existence of discrimination, litigants in today's public accommodations cases do raise the status–conduct distinction. For example, in *Klein v. Oregon Bureau of Labor & Industries,* a baker seeking to refuse services for a same-sex wedding argued to the Oregon Court of Appeals that "the statute" prohibiting discrimination "is silent as to whether it encompasses 'gay conduct' as opposed to sexual orientation."[96] But the court held that even though the United States Supreme Court had sometimes distinguished between status and conduct, in the *Oregon* statute, "there is no reason to believe that the [state] legislature intended a 'status–conduct' distinction."[97]

### B. *The Access–Content Justification*

Given how pervasive the status–conduct distinction was from the 1980s into the early 2000s, it is unsurprising that commentators have read the Court's "no-discrimination" claim today as disinterring the status–conduct chestnut. For example, in one of the first commentaries on *303 Creative*, Professor Kenji Yoshino alludes to the Court's claim that no status-based discrimination has occurred.[98] He notes that the status–conduct distinction arose during oral argument,[99] and criticizes it, citing DADT: "The LGBTQ+ community has encountered this distinction between status and conduct before," which "[o]ver time . . . has been rejected as untenable."[100]

While Yoshino is correct that the status–conduct distinction still carries force, the *303 Creative* opinion's denial of the existence of

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94. Id. at 688.

95. Id. at 689 (emphasis added); see also id. ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." (alteration in original) (internal quotation marks omitted) (quoting Lawrence, 539 U.S. at 583 (O'Connor, J., concurring))).

96. 410 P.3d 1051, 1061 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.).

97. Id. at 1062.

98. See supra note 18 (discussing Yoshino's treatment).

99. Yoshino, Rights, supra note 18, at 252 ("The Deputy Solicitor General . . . observed during the oral argument that '[t]here are certain rare contexts where status and conduct are inextricably intertwined, and I think the Court has rightly recognized that same-sex marriage is one of them.'" (alteration in original) (quoting Transcript of Oral Argument at 58, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 17980103)).

100. Id. at 251–52.

discrimination relies on a new logic—the access–content distinction. On this mapping, those providing certain services are engaging in an expressive act. They thus provide only those services, goods, and content that conform to messages they wish to send. They allow all individuals *access* to those services, goods, and content, and thus do not discriminate based on status.

This section focuses on this distinction. It first explains the development of the access–content distinction in a different context—that of disability law. It then shows how the distinction evolved in LGBTQ+-retail exemption contexts.

1. *Explaining the Access–Content Distinction.* — Although Justice Gorsuch presents his argument as original, the access–content distinction developed decades ago in the disability law context and is best articulated in the 1999 case *Doe v. Mutual of Omaha*.[101] In that case, Seventh Circuit Chief Judge Richard Posner explained that an insurance company could impose a cap on AIDS-related treatment without violating the Americans with Disabilities Act (ADA).[102] Under the ADA, public accommodations, including "insurance office[s]" cannot "discriminate[] against" individuals "on the basis of disability in the full and equal enjoyment of the goods [or] services."[103] Posner conceded that under Supreme Court precedent, discrimination against people living with HIV and AIDS was illegal under the ADA, and "an insurance company cannot . . . refuse to sell an insurance policy to a person with AIDS."[104] But, he explained:

> Mutual of Omaha does not refuse to sell insurance policies to such persons—it was happy to sell health insurance policies to the two plaintiffs. But because of the AIDS caps, the policies have less value to persons with AIDS than they would have to persons with other, equally expensive diseases or disabilities. This does not make the offer to sell illusory, for people with AIDS have medical needs unrelated to AIDS, and the policies give such people as much coverage for those needs as the policies give people who don't have AIDS.[105]

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101. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999). The original appearance of this kind of reasoning appears in Alexander v. Choate, 469 U.S. 287 (1985). See Leslie Pickering Francis & Anita Silvers, Debilitating *Alexander v. Choate*: "Meaningful Access" to Health Care for People With Disabilities, 35 Fordham Urb. L.J. 447, 451 (2008) ("The core of the Court's approach in *Choate* was that the fourteen-day limit applied to the disabled and the non-disabled alike. There were no barriers to this benefit as everyone could use it. Therefore, everyone had 'meaningful access' to the benefit provided." (footnotes omitted) (citing *Choate*, 469 U.S. at 309)).

102. *Doe*, 179 F.3d at 564. Notably, the cap applied to payment for "'opportunistic' diseases that HIV allows, as it were, to ravage the body are exotic cancers and rare forms of pneumonia and other infectious diseases." Id. at 561.

103. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181, 12182(a).

104. *Doe*, 179 F.3d at 559.

105. Id.

Were Mutual of Omaha rendered liable, reasoned the court, a bookstore that declined to stock books in Braille, "a furniture store's decision not to stock wheelchairs, or a psychiatrist's refusal to treat" certain psychiatric conditions would all be vulnerable to legal attack.[106] *Doe* represents the dominant position when it comes to insurance companies' ADA liability.[107]

Disability law scholar Professor Samuel Bagenstos ultimately traces this line of thinking to a line of Supreme Court case law developed in the Medicaid context, which held that neutral limitations on coverage did not discriminate based on disability.[108] Bagenstos points out that the access–content distinction depends completely on the "level of generality" at which the product at issue is framed.[109] To illustrate his point, consider two examples.[110]

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106. Id. at 560.

107. The Fifth Circuit, for example, concluded "that Title III prohibits . . . denying the disabled access to . . . goods and services . . . [but] does not . . . regulate the content of goods and services that are offered. . . . The goods and services that the business offers exist a priori and independently from any discrimination." McNeil v. Time Ins. Co., 205 F.3d 179, 186 (5th Cir. 2000) (emphasis omitted). Like *Doe,* it listed a parade of horribles from bookstores to shoe stores to restaurants that "would have to limit their menus to avoid discriminating against diabetics." Id. at 187; see also Lenox v. Healthwise of Ky., Ltd., 149 F.3d 453, 457 (6th Cir. 1998) ("Lenox's claim is not analogous to a claim that a video store has failed to remove a physical barrier depriving her of access to the facility and the goods and services available therein."). In another case, a court faced with situations in which insurance companies treated mental and physical disabilities differently explained that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998). Arguably, in this case, such language is dicta, as a key aspect of the reasoning is that "differentiat[ing] between types of disabilities . . . is a far cry from a specific disabled employee facing differential treatment due to her disability." Id.; see also Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015–16 (6th Cir. 1997) (en banc) (holding that "[b]ecause all employees . . . received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied," but also noting "the ADA does not mandate equality between individuals with different disabilities").

That said, the First and Second Circuits disagree. The First Circuit noted (without deciding) that there could be debate "about whether this is intended merely to provide access to whatever product or service the subject entity may offer, or is intended . . . to shape and control which products and services may be offered. Indeed, there may be areas in which a sharp distinction between these two concepts is illusory." Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 19 (1st Cir. 1994). This Article discusses the approach of the Second Circuit below, see infra note 117 and accompanying text.

108. Samuel R. Bagenstos, The Future of Disability Law, 114 Yale L.J. 1, 47 (2004) [hereinafter Bagenstos, Future of Disability Law] (analyzing Alexander v. Choate, 469 U.S. 287 (1985)).

109. Id.

110. Bagenstos notes that one might frame the product differently: "[P]eople without AIDS can expect to 'have all their medically necessary care fully covered' to a large degree, while people with that condition 'will have care for their most necessary, life-prolonging

First, in a case that has received almost no academic attention,[111] the Ninth Circuit offered a framing even more restrictive than *Doe*'s. In *Doe*, Judge Posner had distinguished between offering the same policy on the same terms to people with and without disabilities, versus, inter alia, "charging" a person living with AIDS "a higher price for such a policy."[112] The latter, he appeared to concede, would violate the ADA.[113] But in *Chabner v. United of Omaha Life Insurance Co.*, the Ninth Circuit held otherwise.[114] According to the court, the ADA mandated only that "an insurance office must be physically accessible to the disabled" but not that the insurance "treat[] the disabled equally with the non-disabled."[115] Accordingly, the court approved the insurer's "overcharg[ing]" the person living with AIDS.[116]

At the other extreme, in *Pallozzi v. Allstate Life Insurance Co.*, the Second Circuit required insurers to sell "a life insurance policy 'at a price which is based on sound actuarial principles, or actual or reasonably anticipated experience.'"[117] Recognizing that some conditions are more expensive than others, the ADA explicitly allows insurers to calculate charges based only upon actuarial principles.[118] The Second Circuit reasoned that this provision meant that the ADA did in fact regulate underwriting practices, and, in turn, policies' content.[119]

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care limited to a fraction of that amount.'" Id. at 45 (quoting Mary Crossley, Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities, 52 Ala. L. Rev. 51, 82 (2000)). In other words, if one were to frame the product as involving, on average, full coverage for X% of one's healthcare, where X is a relatively high number, then Mutual of Omaha provided that product only to people without AIDS.

111. The only work that discusses this aspect of the case is a footnote in Sidney D. Watson, Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity, 55 How. L.J. 855, 880 n.153 (2012) (citing Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000)).

112. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999).

113. See id. at 564 ("[S]ection 302(a) [of the ADA] relates specifically to the business of insurance . . . limited to a simple prohibition of discrimination . . . ."); see also Equal Emp. Opportunity Comm'n v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) ("It did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled." (citations omitted)).

114. 225 F.3d 1042 (9th Cir. 2000).

115. Id. at 1047 (internal quotation marks omitted) (quoting Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000)).

116. Id. at 1045.

117. 198 F.3d 28, 30 (2d Cir. 1999) (quoting Complaint, Pallozzi v. Allstate Life Ins. Co., 998 F. Supp. 204 (N.D.N.Y. 1998) (No. 97–CV–0236)).

118. 42 U.S.C. § 12201(c)(2) (2018).

119. *Pallozzi*, 198 F.3d at 32. *Doe* rejected this reasoning on specious grounds. It claimed that the language was just a "backstop," that is, a backup argument for insurers to use. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 562 (7th Cir. 1999). This "backstop" canon runs straight into rules against surplusage in statutes. See Duncan v. Walker, 533 U.S. 167, 174 (2001) ("We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting." (alteration in original) (quoting Babbitt v. Sweet Home Chapter, Cmtys. for Great Or., 515

The courts in these cases interpret the ADA differently. But Bagenstos would likely argue that they also frame the insurance product in different ways. *Doe* frames the product as the specific policy that the insurance company has available—"access" equals people with disabilities getting access to *that* policy.[120] *Chabner* frames the product more generally as any insurance policy—"access" is being able to enter the office to get *any* policy.[121] And *Pallozzi* frames the product differently as an actuarially sound policy.[122] "Access" involves people with disabilities getting access to policies that are just as actuarially sound as those available to nondisabled persons.

2. *The Access–Content Distinction in the Gay Rights Context.* — The access–content distinction appeared in protean form in the earliest of the Court's refusal cases. For example, in *Hurley*, the Court noted that gay people had access in that they could *march* in the parade.[123] What was impermissible was "requir[ing] speakers to modify the *content* of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[124] The argument appeared in subsequent cases, but judges and scholars usually confused it with the status–content argument, given the latter's venerable history.

Consider one of the first cases to address retail exemptions, *Elane Photography, LLC v. Willock*.[125] There, the New Mexico Supreme Court addressed the claims of a business that "argue[d] that it did not violate the [relevant state statute] because it did not discriminate on the basis of sexual orientation when it refused service to Willock."[126] The business explained that it "would have taken portrait photographs and performed other services for same-sex customers," "would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other[,]" and "would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage . . . 'even if the ceremony was part of a movie and the actors playing the same-sex couple

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U.S. 687, 698 (1995))). To be clear, plaintiffs did not claim that the ADA prohibited higher charges for certain conditions, only that it prohibits charges unjustified by actuarial data—a question which *Pallozzi*, unlike *Doe*, found to be a triable issue of fact. See *Pallozzi*, 198 F.3d at 30; see also 2 Karen Moulding, Nat'l Lawys. Guild Lesbian, Gay, Bisexual & Transgender Comm., Sexual Orientation and the Law § 19:12 (2023) ("In practical terms, the EEOC's use of actuarial principles could hurt people with HIV or AIDS if an employer could show that it is indeed an exceptionally expensive disease.").

120. *Doe*, 179 F.3d at 559.

121. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1047 (9th Cir. 2000).

122. *Pallozzi*, 198 F.3d at 36.

123. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.").

124. Id. at 578 (emphasis added).

125. 309 P.3d 53 (N.M. 2013).

126. Id. at 61.

were heterosexual.'"[127] The reason for this, Elane Photography explained, is "that it 'did not want to convey through . . . pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners'] beliefs.'"[128]

What is notable is that all of these explanations rely on the access–content justification (access to "portrait photographs and . . . other services").[129] But, after describing the retailer's argument, in the very next paragraph, the court pronounced that these claims boiled down to status–conduct arguments: namely, "an attempt to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex."[130] The remaining four paragraphs which constitute nearly all of the court's explanation as to why discrimination *had* occurred focus only on the status–conduct distinction. The *Elane* court is not unique in its confusion.[131]

But hints of the access–content distinction also appeared in the opinion. After the *Elane* court's excursion into case law on status and conduct, the court's final paragraph returned to "Elane Photography's argument that it . . . will photograph a gay person" and deny other services to heterosexual people.[132] But, it explains, "if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers."[133] Other courts addressing similar claims

127. Id.

128. Id. at 62 (second alteration in original).

129. Id. at 61.

130. Id.

131. Consider *Klein*, a case in which the Oregon Court of Appeals held that a wedding cake could not "be understood to fundamentally and inherently embody the [bakers'] expression." Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1072 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.). In addressing whether the plaintiffs had suffered discrimination under the state statute, the lower court had explained: "The Kleins state that they are willing to serve homosexual customers, so long as those customers do not use the Kleins' cakes in celebration of same-sex weddings." Id. at 1061. This is not discrimination according to the Kleins, as "the statute is silent as to whether it encompasses 'gay conduct' as opposed to sexual orientation. . . . As such, . . . they do not discriminate against same-sex couples 'on account of' their status; rather, they simply refuse to provide certain services that those same-sex couples want." Id. at 1061–62 (emphasis omitted). The court goes on to treat each of these statements as a question of whether "the drafters of Oregon's public accommodations laws intended that type of distinction between status and conduct"—a question they answered in the negative. Id. at 1062. Yet each statement holds a slightly different connotation. The first statement points to the access–conduct distinction: The Kleins will serve people who are gay, but their products cannot be used in ways that convey approbation of same-sex wedding. The second statement relates to the status–conduct distinction: The Kleins are not discriminating against gay people, just their conduct. And third, the Kleins do not discriminate: Their services simply do not encompass what same-sex couples want.

132. *Elane*, 309 P.3d at 62.

133. Id.

in the years after similarly picked up on *Elane*'s limited menu analogy,[134] including in Justice Sonia Sotomayor's dissent in *303 Creative*.[135] The courts would frequently connect the menu argument to the status–conduct distinction in conclusory fashion—but the relationship is hardly apparent.[136] After all, the limited menu would be offered to some groups and not to others based on their status, not their conduct.

But the turn to the limited menu analogy possibly reflects the fact that what is actually at stake is the access–content distinction. Judges and scholars regularly used the menu analogy to expose the problems with the access–content distinction in the *disability* context.[137] For example, the *Doe* dissent itself claimed that by demanding policies without AIDS treatment caps, the plaintiffs were "not . . . ask[ing the court] to force a restaurant to alter its menu" but rather "to stop a restaurant that is offering to its nondisabled diners a menu containing a variety of entrees while offering a menu with only limited selections to its disabled patrons."[138]

As Justice Gorsuch began to intervene in the debate, the access–content distinction came into sharper relief. In *Masterpiece Cakeshop*, his first foray into the issue, he explained that the question was whether the baker could be forced to produce a cake that celebrated same-sex marriage. "Suggesting that this case is only about 'wedding cakes'—and not a wedding cake celebrating a same-sex wedding—actually points up the problem."[139] If we restrict the framing of the good at issue to wedding cakes celebrating same- and different-sex weddings, then there is no problem—the baker Mr. Phillips is happy to produce a cake celebrating different-sex weddings. That is simply the good that he provides. Justice Gorsuch's defense thus focuses not on the status–conduct distinction, but on the content—that is, the particular good—being sold.

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134. See, e.g., Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 372 (W.D.N.Y. 2021) ("[T]he statute does not permit businesses to offer a limited menu of goods and services to customers on the basis of a status that fits within one of the protected categories." (internal quotation marks omitted) (quoting Gifford v. McCarthy, 23 N.Y.S.3d 422, 428–29 (App. Div. 2016), aff'd in part, vacated in part, rev'd in part, 107 F.4th 92 (2d Cir. 2024))).

135. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2339 (2023) (Sotomayor, J., dissenting) (noting that Smith, "like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu" (citing Katzenbach v. McClung, 379 U.S. 294, 296 (1964))).

136. *Emilee Carpenter*, 575 F. Supp. 3d at 372 ("Plaintiff thus makes a plausible case that the 'limited menu' prohibition compels her to create speech—*i.e.*, photographs celebrating the marriage of same-sex clients—to the same extent she creates such speech for opposite-sex clients.").

137. Though they do not always cite the case, they appear to have drawn it, as did Justice Sotomayor, from *McClung*. See *303 Creative*, 143 S. Ct. at 2339. This analogy is not a strong one: The point is whether individuals can receive the same menu when that menu ignores the needs of certain individuals.

138. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 565 (7th Cir. 1999) (Evans, J., dissenting).

139. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1738 (2018) (Gorsuch, J., concurring).

Therefore, Justice Gorsuch explains, the only way in which one could consider the baker to have acted in a discriminatory way "is . . . to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all."[140] In making this point, Justice Gorsuch echoes Bagenstos's own discussion of the access–content distinction—"the application of the access–content distinction turns crucially on the level of generality at which the benefit offered by the defendant is defined."[141] As noted above, framing the content at issue as a particular insurance policy, complete with AIDS cap, would lead one to conclude there is no discrimination: Everyone has access to the same policy. But framing it at a "higher level of generality," namely, as a policy that covers a certain amount of health needs, entails a finding of discrimination.[142] And like Justice Gorsuch, Bagenstos criticizes judges for manipulating the level of generality in their description of the good in determining whether discrimination (in his case, in the disability context) has occurred.

Justice Gorsuch's majority opinion in *303 Creative*, then, represents another step in the direction of the access–content distinction. Justice Sotomayor's wry observation in dissent that "a gay or lesbian couple might buy a wedding website for their straight friends" reflects the shift.[143] Just as—one might add—a person living with AIDS might purchase an insurance policy that is of no use to them.[144]

### C. *Relationship Between the Justifications*

In *Hurley*, what determined the organizers' message was the *conduct* of gay people—the organizers protected their message by prohibiting that conduct. In *303 Creative*, the *content* of what was sold defined the message. The distinctions in each case are analytically different—and yet, in certain cases, they can both apply.[145]

In cases like *Hurley* and *Dale*, advancing an access–content claim was harder because no "product" per se was involved. The organizers were engaged in an activity. One might reframe the question in those cases as whether GLIB or Dale could demand alteration of the content of the

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140. Id. at 1737–38.

141. Bagenstos, Future of Disability Law, supra note 108, at 42.

142. Id. at 45 (internal quotation marks omitted).

143. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2339 (2023) (Sotomayor, J., dissenting).

144. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 564–65 (7th Cir. 1999) ("[T]he Americans with Disabilities Act does not regulate the content of the products or services sold in places of public accommodation . . . . If . . . the AIDS caps . . . are not consistent with state law and sound actuarial practices . . . plaintiffs can obtain all the relief to which they are entitled from the state commissioners . . . .").

145. Note that "access" and "status" are identical concepts. To discriminate based on access is to discriminate based on status and vice versa. But this Article uses access—content rather than "status–content," as the former is the phrase traditionally used in the literature.

activity,[146] but a further complication arises. In *303 Creative* and *Masterpiece Cakeshop*, the Court paints the product as primarily created by the vendor.[147] In *Hurley* and *Dale*, the question was whether GLIB and Dale could participate in the *creation* of the activity at issue—they were on the supply, rather than the demand, side. The question of access and content in cases without a clear seller or buyer becomes complicated and less clean. Thus, arguing that the *conduct* defines the message and relying on the status–conduct distinction is far more straightforward.

Inversely, one might imagine situations in which a store engages in an access–content distinction, but there is no analogous distinction based on status and conduct. Imagine a store owned by a same-sex couple. The store is decorated with rainbow flags. Because of supply chain issues, stocking miscalculations, and customer demand, they lack wedding toppers for weddings for same-sex couples. This store explains that it has limited content but is happy to serve everyone the content it has. It therefore distinguishes between access and content, but not between status and conduct.

In situations like *303 Creative*, however, when there is a *product* that symbolically represents certain *conduct*, both justifications can apply.[148] A refuser can claim that they seek to target a certain kind of conduct. Or, they might claim, they are simply creating a certain kind of product (defined, in turn, either by certain conduct or status).[149] Why does the Court shift from the justification of status–conduct (which was mentioned at oral argument) to access–content? The next Part attempts to answer this question.

## II. THE STAKES OF DISCRIMINATION DENIAL

The denial that discrimination has occurred has important doctrinal implications. Further, the access–content justification can affect identity- and status-based claims made by religious and gay claimants. To be sure, it may seem reassuring that the Court does not simply say that *any* expressive conduct, even if it is discriminatory, is constitutionally protected—it appears to use the status–conduct and access–content justifications to limit the kinds of expressive denials of service it will approve. But the cost of

146. See supra note 31 and accompanying text.

147. See supra note 16 and accompanying text.

148. Sending a *message* is not required here. The owner could refuse to stock a product because of secret hostility to same-sex marriage but claim that supply chain issues are at stake. He has engaged in both content and conduct discrimination but has not necessarily sent a message.

149. That is, the item being sold can be defined either by the conduct it supports or objects to, or by its relationship to certain identity groups. For further discussion, see infra text accompanying notes 245–249.

these fig leaves is that they obscure actual discrimination that can have long-term harms.[150]

### A. *Doctrinal Stakes*

The claim that no discrimination has occurred may have doctrinal importance for two reasons. First, it might limit the scope of antidiscrimination law. If there is no discrimination, then no antidiscrimination statute is violated in the first place—courts need not even reach the First Amendment inquiry. Second, even if discrimination has occurred, the claim that there is no discrimination can affect the constitutionally required compelling interest assessment.

1. *Discrimination Determination.* — First, the claim that no discrimination has occurred—using either the access–content or status–conduct rationales—limits the reach of antidiscrimination law. Consider the judgment of the Supreme Court of the United Kingdom cited by *303 Creative*, *Lee v. Ashers Baking*.[151] There, Ashers Baking declined to make a cake with the message iced with "a coloured picture of cartoon-like characters 'Bert and Ernie,' the QueerSpace logo, and [a] headline 'Support Gay Marriage.'"[152] Lee filed suit, alleging discrimination based on sexual orientation (among other things), and the trial and appeals courts sided with him. The United Kingdom Supreme Court reversed.

Unlike in *303 Creative* or its predecessors, the British court did not analyze whether Lee's sexual orientation discrimination claim was trumped by the bakery's speech rights. Rather, it held that there was no sexual orientation discrimination in the first place. First, it turned to the findings of the lower court: "The District Judge did *not* find that the bakery refused to fulfil the order because of Mr Lee's actual or perceived sexual orientation" but rather "'because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs.'"[153] Similarly, "the Court of Appeal pointed out, . . . the bakery would have supplied Mr Lee with a cake without the message 'support gay marriage' and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer."[154] Accordingly, the British Supreme Court concluded that there was no status-based discrimination: "The objection was to the message, not the messenger."[155]

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150. This Article does not necessarily claim that the Court's majority offers the nondiscrimination claim in bad faith. But even if the Court genuinely believes the claim, the malleability that underlies its reasoning renders the claim meaningless as a constraint.

151. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 (appeal taken from N. Ir.).

152. Id. [12].

153. Id. [22] (emphasis omitted) (quoting Lee v. Ashers Baking Co. Ltd. [2015] (County Court) (N. Ir.), [43]).

154. Id.

155. Id.

The court considered two counterarguments. First, could the bakery's discrimination simply be a *proxy* for discrimination based on sexual orientation?[156] In other words, is support for gay marriage "indissociable from sexual orientation?"[157] The court concluded "there is no . . . identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any sexual orientation."[158]

Second, it considered the possibility that the discrimination was directed not at Lee but at a third party, which the antidiscrimination provision also prohibited. The appellate court had held that "this was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community."[159] But the court rejected that possibility as well. "The evidence was that [Ashers Baking] both employed and served gay people and treated them in a nondiscriminatory way."[160] The court ultimately held that there was no identified individual who was being targeted, and thus the regulation did not apply: "In a nutshell, the objection was to the message and not to any particular person or persons."[161]

American courts have generally not yet followed suit. But one lower federal court has held, in a judgment later vacated on other grounds, that under Title VII, discrimination based on conduct does not count as discrimination based on status. Thus, an employer is "permitted to require employees to abide by Biblical standards of sexual conduct, or . . . fire an employee who engages in some form of sexual conduct prohibited by its policies."[162] But in the future, lower federal courts might feel bound by the Supreme Court's claim in *303 Creative* when interpreting federal law, and state courts might also find its analysis persuasive.[163]

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156. Id. [25] (considering "the question of whether the criterion used by the bakery was 'indissociable' from the protected characteristic and holding that support for same sex marriage was indissociable from sexual orientation").

157. Id.

158. Id. Arguably, the court would hold differently if the requested cake were a wedding cake. People from all sexualities, as they point out, support marriage equality. But usually only LBGTQ people marry someone of the same sex.

159. Id. [28] (internal quotation marks omitted) (quoting Lee v. Ashers Baking Co. Ltd. [2016] NICA [58] (N. Ir.)).

160. Id.

161. Id. [34].

162. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021), aff'd in part, vacated in part, rev'd in part sub nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

163. Cf. Commonwealth v. Carter, 172 N.E.3d 367, 378–80 (Mass. 2021) (citing federal antidiscrimination cases regarding sexual orientation to interpret state antidiscrimination law); Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 328–29 (Tex. App. 2021) (same). It bears noting that while there is no federal law prohibiting discrimination in public accomodation on the basis of sexual orientation (or sex, for that matter), other federal

2. *Compelling Interest Analysis.* — Discrimination denial can also affect the interests analysis. In applying strict scrutiny under free speech doctrine, as the cases that find in favor of anti-marriage plaintiffs usually do,[164] courts investigate whether the putatively violated public accommodation law serves a compelling interest.[165]

Thus, in *Brush & Nib Studio, LC v. City of Phoenix*, the Arizona Supreme Court held that state and federal free speech rights allowed a custom wedding invitation business to discriminate against same-sex weddings.[166] The city defendants asserted that this holding would undermine what the court admitted was a "compelling purpose of eradicating discrimination in the provision of publicly available goods and services."[167] But the court disagreed that the compelling interest was implicated in that case because, among other things, the vendor's refusal was "based solely on the

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statutes are relevant. To take one example, an employer might fire an employee for marrying someone of the same sex. But only if this counts as discrimination based on sexual orientation would Title VII be violated. See Bostock v. Clayton County, 140 S. Ct. 1713, 1740 (2020) (finding that termination of employment constituted discrimination within the meaning of Title VII); cf. Shahar v. Bowers, 114 F.3d 1097 (1997) (assenting to a withdrawn employment offer from Shahar for marrying someone of the same sex, but declining to describe this as discrimination.).

164. Yoshino suggests that "Justice Gorsuch did not view strict scrutiny to be the apt approach to [*303 Creative*]. Like the *Barnette* Court, he adhered to a categorical approach, finding that if the conduct is speech, government compulsion is absolutely forbidden." Yoshino, Rights, supra note 18, at 280–81 (footnote omitted). He notes that Justice Clarence Thomas *did* adopt a strict scrutiny analysis in *Masterpiece Cakeshop*. Id.; see also John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1493–96 (1975) (providing an early explanation contrasting the approaches). There is perhaps more ambiguity in the Court's opinion than Professor Yoshino sees. Justice Gorsuch cited West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), to argue that the issue at stake was compelled speech but relied on other cases' constitutional test and did not explicitly adopt the *Barnette* framework. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023). He was also the only Justice to sign on to Justice Thomas's partial concurrence in *Masterpiece Cakeshop*. While Justice Thomas argued only that speech rights were at issue and did not apply strict scrutiny there as he ultimately did in *303 Creative*, this suggests that Justice Gorsuch does not yet seek to split sharply from Justice Thomas. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1742–44 (2018) (Thomas, J., concurring in part and concurring in the judgment). Finally and most importantly, the Court goes out of its way to deny that any discrimination had occurred here. *303 Creative*, 143 S. Ct. at 2318 (rejecting the dissent's claim that the Court "grants a business open to the public" a "right to refuse to serve members of a protected class"). Just as Yoshino reads Justice Sotomayor's discussion of the important interests public accommodations laws serve as "tacitly follow[ing] the structure" of strict scrutiny, Yoshino, Rights, supra note 18, at 281, Justice Gorsuch appears to do the same, if not to the identical degree.

165. See, e.g., Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 922 (Ariz. 2019) (finding that the government furthered a compelling interest when it passed an ordinance prohibiting discrimination on the basis of sexual orientation because "eradicating discrimination in the provision of publicly available goods and services" is a compelling government interest).

166. Id.

167. Id. at 922.

celebratory *messages* Plaintiffs convey[ed] (or refuse[d] to convey), not the race, gender or sexual orientation of the customer. . . . Plaintiffs consistently testified that they were willing to serve all customers, regardless of their status."[168] No compelling interest meant that the vendor's refusal won the day.

Compelling interest considerations are particularly important in federal court holdings. State courts can simply interpret the state statute narrowly, as *Lee* did the British statute, to avoid the constitutional analysis.[169] (Indeed, it is unclear why the *Brush & Nib* court did not do just that.[170]). But federal courts are bound by state court interpretations of statutes. Even so, if a federal court finds that a First Amendment interest *is* implicated, it can hold that the state's interest is not compelling enough to overwhelm a refuser's speech rights.

A federal court is not bound by a state's assessment of whether an interest is compelling enough to withstand incursion into constitutionally protected rights.[171] The federal court might hold that even if it is bound by the state court's finding that discrimination *has* occurred under the state statute,[172] the state's understanding of discrimination does not correspond to federal courts' understanding of discrimination. If there is no discrimination from a federal law perspective, then there is no countervailing interest to the vendor's loss of expression—the court will hold that the vendor can proceed to deny the service. Alternatively, the federal court might hold that even if discrimination has occurred, it is not sufficiently compelling unless status-based discrimination is involved.

Indeed, this is arguably what occurs in *303 Creative*.[173] The Court begins its analysis by canvassing its precedent, concluding ultimately that Smith's service denial was expressive.[174] It then agreed that "governments in this country have a 'compelling interest' in eliminating discrimination

168. Id. at 925 (citations omitted).

169. See supra section II.A.1.

170. In other words, the court could have simply held, as the *Lee* court did, that there was no discrimination. If that had been its holding, it would have neither had to consider whether the First Amendment applied nor concluded (as it did) that the First Amendment interests trumped any interests of the couple involved.

171. See, e.g., Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[W]e do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose."). There, the state court had adhered to precedent that stated that "preserv[ing] the racial integrity of its citizens" was a sufficiently important state purpose. Id. at 7 (internal quotation marks omitted) (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)). The Supreme Court nonetheless held that no compelling interest existed. Federal courts have never appeared to consider themselves bound to state interpretations of what constitutes a compelling interest. See, e.g., id. at 8.

172. A question on which there is doubt. See Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255, 1271–77 (2012) (discussing the increased frequency with which Justices engage in factfinding).

173. See supra note 164 (analyzing whether scrutiny is being applied).

174. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

in places of public accommodation."[175] But then it rejects Colorado's argument that Smith's refusal constitutes an objection to the "'protected characteristics' of certain customers," by distinguishing between status and message.[176] In other words, the Court's reasoning tracks the path laid out in the Introduction—it holds that Smith's behavior is (a) expressive, and (b) not discriminatory.[177]

### B. *Identity Stakes*

The doctrinal stakes of obscuring the fact that discrimination has occurred are high. But the access–content justification, in particular, raises the stakes even further. It makes it easier for religious claimants to advance their claims and obscures the harms and claims of gay litigants. It thereby shifts the social movement possibilities of different groups of litigants, each "vying for visibility" in the public sphere.[178]

1. *Honoring Religious Status Claims.* — Why has Justice Gorsuch shifted from the classic focus on the status–conduct distinction to the access–content distinction to support his claim of discrimination denial? It is hard to answer this question with certainty, but the reason might lie in the distinction between cases like *Hurley* and *Dale*, and *Masterpiece Cakeshop* and *303 Creative*. Unlike the litigants in the first set of cases, those making anti-same-sex marriage claims in the newer cases also have a stake in the status–conduct debate—namely, religious status.[179] The status–conduct debate did not affect the Irish American or Boy Scout plaintiffs in *Hurley* or *Dale*. The "act" of discriminating against gay expression is arguably not

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175. Id. at 2311–21 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

176. Id. at 2316–17.

177. Some might argue that the Court is willing to accept First Amendment claims even when a protected trait is clearly involved. In passing, the Court questions the notion that "the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait." Id. at 2313. But that is not the best reading of this passage. The Court here is primarily rebutting the Tenth Circuit's claim that the uniqueness of the product makes the state's interest compelling. See *303 Creative*, 143 S. Ct. at 2312 (agreeing that governments have a compelling interest in eliminating discrimination in public accommodations). Further, the message being sent may "somehow implicate[]" a protected trait without being the trait itself: same-sex marriage "somehow implicates" homosexuality, but on the Court's analysis is not itself homosexuality. *303 Creative,* 143 S. Ct. at 2313–14. The Court's examples support that analysis, among them scenarios in which a provider has to produce services that support Zionist or anti-same-sex marriage messages. Id. While these messages "somehow implicate" protected characteristics—presumably Jewish and conservative religious identities—they are not the same as those identities. It may be the case that the Court would approve of a message that clearly targets a certain protected characteristic, but it is not *this* case.

178. Yoshino, Rights, supra note 18, at 270.

179. See Craig Konnoth, The One Remaining Identity the Supreme Court Is Willing to Protect, Slate (July 5, 2023), https://slate.com/news-and-politics/2023/07/supreme-court-winners-losers-christians.html [https://perma.cc/CDG4-9RTN] ("There is one group that the court does not put into an identity straitjacket—those claiming religious exemptions.").

as intimately connected with Irish American or Boy Scout identity as it is with the religious identity of the refusers in *Masterpiece Cakeshop* and *303 Creative*.[180] Thus, emphasizing the status–conduct distinction is a fraught move.

Consider *Masterpiece Cakeshop* where Justice Gorsuch first begins to emphasize the access–content distinction, though the case turned on a religious discrimination claim. There, the Court noted that in various cases, bakers had refused a request to bake cakes with an anti-gay message for a customer, William Jack.[181] The Colorado Civil Rights Commission had denied Jack's claim that these refusals were anti*religious* discrimination even though they found that the refusal to bake a cake for a same-sex wedding was anti-gay discrimination.[182] The Court seemed troubled by this apparent disparity but did not analyze it much further—to the point that Justice Elena Kagan's concurrence claimed that Jack's claim had no bearing on *Masterpiece Bakeshop*.[183]

But Justice Gorsuch took issue with her assertion. He noted that the Commission held in Jack's cases that the bakers "didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions."[184] But, he reasoned, if an objection to same-sex marriage "is 'inextricably tied' to a protected class," to gay people,

> then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic.[185]

Justice Gorsuch goes on to explain how the *Masterpiece Cakeshop* baker's objection to same-sex marriage is tied to his religious beliefs.[186]

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180. Boy Scouts of Am. v. Dale, 530 U.S. 640, 670–71 (2000) (Stevens, J., dissenting) ("[I]t is exceedingly difficult to believe that [Boy Scouts of America] nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574–75 (1995) ("The parade's organizers . . . may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade.").

181. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring).

182. Id.

183. See id. at 1733 (Kagan, J., concurring) ("The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law . . . .").

184. Id. at 1735 (Gorsuch, J., concurring) (citing Joint Appendix at 237, 247, 255–56, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4232758).

185. Id. at 1736.

186. See id. at 1738.

It bears noting that in a series of free exercise cases, Justice Gorsuch has also taken exception to the claim that discrimination against religious behavior does not count as discrimination based on religious status. In 2022, the year before *303 Creative* was decided, the Court invalidated Maine's education voucher scheme because it restricted voucher use at religious schools in *Carson ex rel. O.C. v. Makin*.[187] The First Circuit had held that the restriction was distinguishable from previous cases, in which states had engaged in "solely status-based religious discrimination," while the challenged provision here "imposes a use-based restriction."[188] Justice Stephen Breyer's dissent made a similar argument: Maine targeted not religious schools but rather schools that promoted a certain religious point of view.[189] Justice Gorsuch's majority opinion, however, concluded that the "prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."[190]

Based on *Carson* and his characterization of similar decisions,[191] Justice Gorsuch arguably seeks to preserve legal space for future litigants to argue that any discrimination they may suffer because of their (anti-gay) *actions* constitutes discrimination based on their (religious) *identity*, resulting in a free exercise violation.[192]

2. *Strengthening Discrimination Denial Claims.* — Shifting the justification toward the access–content binary depersonalizes and belittles the burden gay people experience. The original status–conduct justification required service deniers to target an individual for a specific objectionable behavior.[193] Frequently, courts have recognized those behaviors as having deep personal, social, and legal significance. Thus, those objecting to marriage equality object to an act that many believe "embodies the highest ideals of love, fidelity, devotion, sacrifice, and family," and that entails "two people becom[ing] something greater than

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187. See 142 S. Ct. 1987, 2002 (2022).

188. Carson ex rel. O.C. v. Makin, 979 F.3d 21, 37–38 (1st Cir. 2020), rev'd, 142 S. Ct. 1987.

189. See *Carson*, 142 S. Ct. at 2006 ("Maine chooses not to fund only those schools that 'promot[e] the faith or belief system with which [the schools are] associated and/or presen[t] the [academic] material taught through the lens of this faith'—i.e., schools that will use public money for religious purposes." (alterations in original) (quoting *Carson*, 979 F.3d at 38)).

190. *Carson*, 142 S. Ct. at 2001.

191. See id. (discussing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020), and Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017)).

192. See, e.g., 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021) ("Appellants challenge Colorado's Anti-Discrimination Act . . . on free speech, free exercise, and vagueness and overbreadth grounds."), rev'd, 143 S. Ct. 2298 (2023); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. Ct. App. 2015) ("[W]e next consider whether the Commission's application of the law . . . violated Masterpiece's rights to freedom of speech and free exercise of religion . . . ."), rev'd sub. nom. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

193. See supra sections I.A.1–.2.

once they were."[194] Even if the distinction between status and conduct is valid, there are high stakes to exhibiting animus toward particular acts.

Shifting from a status–conduct justification to an access–content justification diminishes service deniers' agency, reframes their message, and depersonalizes the harm gay people experience. The service denial becomes unlinked from an individual's animus toward specific actions—or people. Rather, the denial can be framed as analogous to other market decisions about the kinds of services an individual wants to provide, just as other store owners make decisions about the kinds of products they seek to stock. Those kinds of decisions benefit from the presumption of market rationality. Reframing the question into a capitalist, market-informed framework offers a powerful antidote to the image of someone stricken with prejudice targeting personal behavior of which they disapprove. Especially in a cultural and legal context in which intentional bias and animus play an important role in determining moral, if not legal, liability, the perception of rationality offers insulation against critique;[195] indeed, it is not the first time that market rationales have been leveraged to disguise anti-LGBTQ+ animus.[196]

Thus, by deploying an access–content argument, discrimination based on status is not at issue, nor, indeed, is discrimination based on conduct. In fact, the store owner's behavior has nothing to do with the individuals involved at all. Rather, the focus shifts simply to what kinds of goods the store stocks. The gay person's injury is no worse than if the local grocery store failed to stock a favorite brand of cookies. Framing the harm as lack of access to a product was made possible because of the shift from *Hurley*, *Dale*, and *Christian Legal Society* to *Masterpiece Cakeshop* and *303 Creative*. Unlike the first set of cases, which involved membership-based nonprofits that implicated LGBTQ+ people's intersecting identities—being Irish American, a Boy Scout, or a law student—*Masterpiece Cakeshop* and *303 Creative* involve commercial transactions.

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194. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

195. For examples of works that discuss the importance of intent in finding liability in various discrimination law contexts, see Stephanie Bornstein, Reckless Discrimination, 105 Calif. L. Rev. 1055, 1077 (2017) (observing that "federal case law interpreting Title VII . . . currently requires proof of" discriminatory intent); Leora F. Eisenstadt & Jeffrey R. Boles, Intent and Liability in Employment Discrimination, 53 Am. Bus. L.J. 607, 613 (2016) (noting that proof of workplace disparate treatment discrimination "requires consideration of the decision maker's state of mind or intent"); Aziz Z. Huq, What Is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1231 (2018) (describing intent to discriminate as "an organizing principle in Equal Protection jurisprudence"); W. Kerrel Murray, Discriminatory Taint, 135 Harv. L. Rev. 1190, 1196–97 (2022) ("The Supreme Court's antidiscrimination doctrine is widely understood as requiring specific, subjective intent to harm because of a protected trait.").

196. See Alex Reed, Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation, 9 Stan. J. C.R. & C.L. 153, 212 (2013) ("[T]hese measures are likely to be upheld against any equal protection challenge on the grounds they are rationally related to promoting intrastate commerce.").

Second and relatedly, the shift also reframes the harm narrative. Advocates who press against LGBTQ+ rights frame their motives as not "anti-gay" but "pro-family."[197] Anti-abortion activists paint themselves as pro-life.[198] And racist groups like the Ku Klux Klan and the National Policy Institute claim that they are not racist because they are "not anti-black," but instead "pro-white."[199] The access–content justification allows individuals to partake of this rhetorical shift.[200] Rather than painting themselves as *against* a particular group or activity, as the status–conduct justification would require, they can argue that the products and services they choose to sell simply advance a certain vision of family and marriage.

Finally, when discrimination is justified based on the status–conduct distinction, the service denial targets a specific individual—their status or their behavior. But under the access–content distinction, the target of the action is not the individual directly, but rather, a specific product. The action of the service denier is directed first at the product they choose to stock (or not stock) or the service they choose to provide (or not provide). The product or service exists independently of any specific gay plaintiff.

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197. See Kevin Begos & Catherine Dolinski, New Campaign Manager Faces Challenge, Tampa Trib., July 28, 2006, at 4 (on file with the *Columbia Law Review*) ("Friedes . . . described Rudnick as a zealot who appears to think gays and lesbians are inferior, despite Rudnick's protestations . . . that his motives were pro-family, not anti-gay."); Adam Graham, The Christian Moral Agenda, RenewAmerica (Mar. 24, 2005), https://web.archive.org/web/20151011120244/http://www.renewamerica.com/columns/graham/050324 (on file with the *Columbia Law Review*) ("The American family has many problems and challenges, the homosexual movement is just one of them."); People Are Not Anti-Gay but Pro-Family, Lancashire Telegraph (UK) (Feb. 7, 2000), https://www.lancashiretelegraph.co.uk/news/6093945.people-not-anti-gay-pro-family/ [https://perma.cc/U4WD-Y72A] ("[O]rdinary people are not anti-gay - indeed, they are anti-discrimination - but they are far from 'pro' the promotion of sexual behaviour that goes beyond the family values guidelines . . . .").

198. E.g., Fireworks Few as Candidates Air Their Views, Whidbey News-Times (Oak Harbor, Wash.), (Oct. 15, 2000), https://www.whidbeynewstimes.com/news/fireworks-few-as-candidates-air-their-views/ [https://perma.cc/4F3F-KKG2] ("When one audience member called him anti-choice on women's issues, Koster said he was not anti-choice but pro-life.").

199. Corky Siemaszko, Who Is David Duke, the White Supremacist Who Endorsed Donald Trump?, NBC News (Feb. 29, 2016), https://www.nbcnews.com/news/us-news/who-david-duke-white-supremacist-who-endorsed-donald-trump-n528141 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting David Duke); see also Eric Franklin Amarante, Why Don't Some White Supremacist Groups Pay Taxes?, 67 Emory L.J. Online 2045, 2047 (2018), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1011&context=elj-online [https://perma.cc/GZ2Z-BNU6] ("In the parlance of modern white supremacists, [the National Policy Institute (NPI)] is pro-white, not anti-black or anti-immigrant, and NPI members are not racists, they are 'race realists.'").

200. Some evidence suggests that the shift is more than rhetorical. See Clark Freshman, Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research, 55 Stan. L. Rev. 2293, 2326–27 (2003) ("[I]ngroup sympathy, rather than outgroup hostility, explains most modern prejudice and discrimination in the United States.").

Indeed, *303 Creative* brings the point home, since Smith filed a pre-enforcement challenge: No gay couple was involved in the lawsuit, and the allegation that a specific gay couple sought Smith's services turned out to be falsified.[201] But Smith, anyway, did not object to any specific wedding—rather, as the Court frames it, she was focused on the product she sought to offer to the public.

3. *Normative Concerns.* — There were other ways in which the Court could have framed matters that would have acknowledged the real burdens on either side. Indeed, there are moments when it came close to doing so. In a footnote, the Court discusses the reach of the First Amendment: "While it does not protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself."[202] This passage *may* be read as an acknowledgment that when "status-based discrimination" has occurred, that "discrimination unrelated to expression" would not generally be protected,[203] but here, when "a speaker's right to control her own message is at stake," that expressive right trumps the right against discrimination because of the First Amendment. In other words, there are times when controlling one's message involves status-based discrimination but such instances deserve special First Amendment protection. Had this been what the Court said, it would have at least acknowledged the stakes on both sides of the issue.[204]

But that is not the course the Court took.[205] Rather, it erases the stakes for gay people. The Court distinguishes "status-based discrimination

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201. Adam Liptak, What to Know About a Seemingly Fake Document in a Gay Rights Case, N.Y. Times (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html (on file with the *Columbia Law Review*).

202. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 n.3 (2023).

203. Indeed, this would be the better reading if the comma were placed after the "generally" rather than before. Id.

204. Some may argue that this approach is more dangerous than the status quo. Yet, if the status quo consists of a distinction that is ultimately somewhat manufactured as the final Part argues, it simply constitutes a fig leaf for the Court to do what it wants. This Article argues for removing the fig leaf in ways that can enable mobilization and engagement with the Court's decisions for what they are.

205. Some colleagues have generously engaged with this Article at length and suggest that it is incorrect to read the Court as claiming that no discrimination has occurred. They offer four reasons, to which I provide responses below.

> The first reason comes from the language the Court uses (and does not use) regarding discrimination itself. "[T]he Court did not deny the existence of discrimination . . . . First . . . , there is no passage in the opinion that explicitly states that discrimination does not exist. For this reason, the no-discrimination interpretation must . . . [be] inferred . . . ."

Email from Lawrence Solum to Craig Konnoth (on file with the *Columbia Law Review*).

Yet, the inference—if there is any—is a strong one. At the relevant portion of the opinion, the Court says that the record "speaks differently" from certain claims that Colorado and Justice Sotomayor in dissent make. *303 Creative*, 143 S. Ct. at 2317. What are

these claims with which the majority disagrees? The Court notes that "the State insists . . . [that Smith] objects to the 'protected characteristics' of certain customers." Id. at 2316–17. At the cited portion of the brief, Colorado accuses Smith of "refusing to sell based on an attribute inextricable from a customer's protected characteristic[,] [which] is discriminatory." Brief on the Merits for Respondents at 16, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2022 WL 3597176. Similarly, at the cited portion of Justice Sotomayor's opinion, she claims that Smith's behavior "is status-based discrimination, plain and simple." *303 Creative*, 143 S. Ct. at 2338 (Sotomayor, J., dissenting).

By *explicitly* disagreeing with Colorado's and Justice Sotomayor's claim that status-based discrimination has occurred, the Court is therefore taking the position that status-based discrimination has *not* occurred. It goes on to explain why: the parties "agree that Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients.'" Id. at 2317 (majority opinion) (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045). Some might feel that any failure to mention antidiscrimination values "is a more definitive statement of rejection of such claims than explicit discussion of them in the opinion would have been." Frederick Schauer, The Politics and Incentives of First Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1629–30 (2015). But in any case, here, the values were mentioned—and rejected. (In conversation another colleague hinted that the Court's reference to "status-based discrimination unrelated to expression" implicitly acknowledges that expression might sometimes involve discrimination. Id. at 2317 n.3. But it is a stretch to assume from that passage that the Court seeks to imply that such discrimination has occurred in this case.)

A second reason my colleagues disagree with the claim that the Court denies the existence of discrimination arises from their reading of free speech doctrine.

> [T]he discussion of the status-message distinction in the opinion strongly suggests that Justice Gorsuch views the distinction as internal to free-speech doctrine [and not about the legal concept of discrimination], . . . [namely a] fundamental feature of the Free Speech Clause. While [the clause] does not protect status-based discrimination unrelated to expression, generally it does protect a speaker's right to control her own message—even when we[ ]may disapprove of the speaker's motive or the message itself. This passage strongly implies that Justice Gorsuch believed that the [status-message] distinction was an element of First Amendment doctrine and was not implying that 'message' could not be an element of discrimination itself.

Email from Lawrence Solum, supra (quoting *303 Creative*, 143 S. Ct. at 2317 n.3). Another colleague points out that the Court does not identify any antidiscrimination interests, not because it believes that discrimination has not occurred, but rather, because it takes a categorical approach to First Amendment doctrine, meaning that expression always trumps, whatever the antidiscrimination interest. Email from Colleague 1 to Craig Konnoth (on file with the *Columbia Law Review*).

Suggesting that actually what is occurring is a novel and dramatic doctrinal move to a categorical First Amendment approach seems strained. It would be strange for Justice Gorsuch to invoke the "distinction between status and message" as an attempt to distinguish between cases where there was status-based discrimination without expression and status-based discrimination with expression. *303 Creative*, 143 S. Ct. at 2317 n.3. It is far more likely—especially in the context of his rebuttal of the dissent's claim that there is "status-based discrimination"—that he is distinguishing between status- and message-based discrimination in the same case. Not to mention the fact that he cites to a British opinion in which that is precisely what happens. See id. at 2317 n.3 (quoting Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47] ("The less favourable treatment was afforded to the message not to the man.")); see also supra note 164 (rejecting the claim that Justice Gorsuch adopts a categorical approach to the First Amendment and explaining why).

[from] . . . a speaker's right to control her own message."[206] Speech rights do not clash with equality claims. That is because, as the body of the opinion explains, "all customers" are subject to Smith's refusal; and as she does not target only gay people, there is no status discrimination.[207] Indeed, she "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons."[208]

It may seem reassuring that the Court is at pains to parse out whether the allegedly expressive conduct is discriminatory before approving it. Yet, the porosity between status and conduct or access and content outlined above makes the Court's reasoning extremely malleable. In such situations, the supposed boundaries the Court imposes on itself do not actually limit the Court's reasoning. Rather, they create both normative and practical harms.

At a normative level, the Court's opinion makes claims that undermine gay people's understanding of their lived experience. Even if this does not affect LGBTQ+ people's understanding of what has happened, such behavior might amount to epistemic injustice.[209]

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A third reason for counseling against my reading is "because it is inconsistent with Justice Gorsuch's understanding of discrimination in *Bostock* . . . and with the Supreme Court's decisions in a wide variety of contexts in which a message is an element of a discrimination claim." Email from Lawrence Solum, supra. But rather than seek consistency with *Bostock*, it is more likely that the Court was seeking consistency with *Hurley* and *Dale*—cases that are on point and repeatedly cited in the opinion—than with *Bostock*. The latter, in any case, involved a different question—whether sexual orientation discrimination is sex discrimination. But the parameters of gay identity can be narrowly drawn just as those of womanhood have been for purposes of Title VII. See Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (holding that California's state disability insurance program, which excluded certain disabilities resulting from pregnancy, does not violate the Equal Protection Clause). And especially given the criticism he received for his position in *Bostock*, Justice Gorsuch may well be seeking to do just that. See, e.g., Nelson Lund, Unleashed and Unbound: Living Textualism in *Bostock v. Clayton County*, 21 Federalist Soc'y Rev. 158, 158 (2020), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/dXJwyyWQDylardYLxHoyTbbi3KcSWsQkWpG409eo.pdf [https://perma.cc/S859-9PD8] (noting that "*Bostock* invites unconfirmable speculation, even cynical speculation, about the motives of Gorsuch and the other members of the majority").

Finally, yet another colleague notes that as the state statute treats marriage discrimination as sexual orientation discrimination, the Court must admit there is discrimination. Email from Colleague 2 to Craig Konnoth (on file with the *Columbia Law Review*). As I explain above, I do not think this is true for the purposes of constitutional interests analysis. See supra section II.A.2.

206. *303 Creative*, 143 S. Ct. at 2317 n.3.

207. Id. at 2317.

208. Id. (internal quotation marks omitted) (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045).

209. Rachel McKinnon, Allies Behaving Badly: Gaslighting as Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice 167, 167–74 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017) (noting that this is true regardless of intention, and that either testimonial or hermeneutic harm is possible); see also Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing 154–55 (2007) ("From the epistemic point of view, what

Philosophers have begun squarely reckoning with the problem of epistemic injustice only in the last two decades.[210] They argue that knowledge production is a collective enterprise: what we understand about the world and people, and how we interpret those facts is largely secondhand, mediated by sources that hold positions of trust and authority in our communities.[211] Epistemic injustice occurs when certain individuals or groups of individuals are not allowed to participate in the process of constructing this shared reality, obscuring unjust and oppressive experiences.[212]

There are debates as to whether a specific act counts as epistemic injustice and if there is such injustice, a question of how egregious it is.[213] Whether injustice has occurred is a function of how confidently one endorses the claims of the next Part that discrimination has occurred. The more apparent it is to an observer that discrimination has occurred, the more egregious the Court's denial appears. For those who agree that discrimination *has* occurred, the epistemic injustice here has important implications. As critical race theory scholars have argued in analogous contexts, it diminishes not only the harm that gay people experience but also their standing and dignity in society.[214] Whether someone is

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is bad about . . . hermeneutical marginalization is that it . . . will tend to issue interpretations of that group's social experiences that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerful groups . . . .").

210. Inaugurated by Fricker, supra note 209, at 1.

211. See Amy Allen, Power/Knowledge/Resistance: Foucault and Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 187, 193 ("Foucault's aim is to show how the production of scientific knowledge is entangled with relations of power . . . ."); Katherine Hawley, Trust, Distrust, and Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 69, 69–70 ("Trusting, distrusting, being trusted, and being distrusted can all flow from the exercise of social power, and all can have consequences for social power."); Heidi Grasswick, Understanding Epistemic Trust Injustices and Their Harms, 84 Royal Inst. Phil. Supplement 69, 71 (2018) ("[M]embers of socially marginalized lay communities can suffer epistemic trust injustices when potentially powerful forms of knowing such as scientific understandings are generated in isolation from them . . . .").

212. "Who has voice and who doesn't? . . . Who is being understood and who isn't (and at what cost)? Who is being believed? And who is even being acknowledged and engaged with?" asks the introduction to one of the foremost volumes examining questions of epistemic justice. Ian James Kidd, José Medina & Gaile Pohlhaus, Jr., Introduction, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 1, 1.

213. For example, sexual harassment was not understood as a concept at all until the 1970s, and even afterwards many women are not believed when they claim such harassment has occurred—such women thus experience epistemic injustice. See Deborah Tuerkheimer, Incredible Women: Sexual Violence and the Credibility Discount, 166 U. Pa. L. Rev. 1, 51 (2017) ("To conceive of credibility discounting as a form of discrimination that should be actionable under certain circumstances raises a host of questions, the answers to which are largely dependent on context.").

214. See Angelique M. Davis & Rose Ernst, Racial Gaslighting, 7 Pol., Grps. & Identities, no. 4, 2019, at 1, 2 ("Th[e] manipulation of perception [caused by racial gaslighting] is powerful because our reality — how we perceive the world and our place in it — is socially

acknowledged and believed and whether their interpretation of an incident is accepted helps determine their social standing—whether they are understood to be equal, autonomous, and competent members of society. [215]

One might, of course, question the extent of the discrimination, or its importance—the Colorado area has other wedding vendors.[216] But to deny that there is discrimination altogether disrespects those who experienced it.

Diminishing the burden experienced and disrespecting those who experienced it also has the effect of undermining movement organizing. My previous work documents how 1960s and 1970s activism in the gay rights movement "altered individual gay self-perceptions from that of religious outcasts and medical case studies to those of members of a political minority seeking legal rights."[217] Gay people and their allies increasingly saw themselves reflected in the civil rights movement—they saw the harms they experienced not as the inevitable result of medical or religious fate but through the lens of the movement, as discrimination and legal injustice. This perception created space for legal and political activism. Those who accept the Supreme Court's claim that no discrimination has occurred will be less likely to frame the harms in *303 Creative*, *Masterpiece Cakeshop*, and a range of other cases as injustices. They will less willingly take on the "task of making gays self-consciously seek to change the law as a minority movement."[218] These consequences can affect the future of LGBTQ+ rights claims.

Finally, the denial of discrimination potentially violates the duty of what Professor David Shapiro called "judicial candor."[219] The Court's majority does not necessarily deny the existence of discrimination in

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constructed."); Leah M. Watson, The Anti-"Critical Race Theory" Campaign—Classroom Censorship and Racial Backlash by Another Name, 58 Harv. C.R.-C.L. L. Rev. 487, 498 (2023) ("While culturally relevant teaching aids all students, some students are disproportionately harmed by its exclusion. [Especially] BIPOC students and students with intersecting identities, such as social class, English proficiency, disability status, and LGBTQ+ status . . . .").

215. See Tuerkheimer, supra note 213, at 42–46 ("[T]estimonial injustice occurs when a credibility assessment results from prejudice. . . . Hermeneutical injustice undermines one's ability to make sense of certain experiences . . . ." (citing Fricker, supra note 209, at 1)).

216. See infra Part III.

217. Craig J. Konnoth, Note, Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s, 119 Yale L.J. 316, 346 (2009) [hereinafter Konnoth, Created in Its Image]. See generally William N. Eskridge Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419 (2001) (discussing how identity-based social movements have affected the formulation of legal concepts).

218. Konnoth, Created in Its Image, supra note 217, at 349.

219. See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987) ("In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.").

subjective bad faith. But claiming that there is no discrimination, rather than parsing the stakes of each case, is much more convenient and less messy. The clearer it is to the observer that Smith engages in discrimination, the more disingenuous the Court's reasoning appears. To the extent candor requires judges to reflect on the actual motivations of their decisions and engage in a clear weighing of the facts to ensure respect for litigants and the integrity of the judicial process,[220] the failure of the Court to do so is normatively problematic.[221]

In the long run, obscuring the existence of discrimination may offer short-term gain. Long-run consequences are problematic, however, and the normative stakes incline in favor of a frank weighing of the issues at stake.

## III. ADDRESSING THE ACCESS–CONTENT JUSTIFICATION

The Court's claims—both historical and contemporary—that no discrimination has occurred are misplaced. The counterargument is fairly straightforward on certain accounts of antidiscrimination theory.

Scholars generally see antidiscrimination law as vindicating three sets of values: antisubordination, antibalkanization, and anticlassification. and symbolic resources in society.[222] A second nondiscrimination goal of more recent provenance is the antibalkanization principle, which targets behavior that harms social cohesion.[223] This approach disapproves of behavior that results in any sense of "social estrangement," even if those experiencing it are the socially privileged.[224]

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220. To be clear, the weighing of the stakes would be permissible under current doctrine. See Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651, 1654 (2023) ("As a matter of first principles, the three primary interpretive inputs in the United States legal system are literal text, legislative goals, and pragmatic consequences. When two or more of these incommensurable factors strongly conflict, . . . formal principles of law do not dictate how to weigh or reconcile them." (footnote omitted)).

221. Cf. Guido Calabresi, A Common Law for the Age of Statutes 181 (1982) (indicating uncertainty as to whether judges should be candid).

222. This definition differs from typical formulations that speak in terms of power, dominance, or status (albeit with minute but relevant variations), but also best encapsulates each of them. See Laurence H. Tribe, American Constitutional Law §§ 16–21, at 1515 (2d ed. 1988) (explaining that the "antisubjugation principle . . . aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens"); Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Affs. 107, 167 (1976) (explaining that "[u]nder the group-disadvantaging principle, it is harm to a specially disadvantaged group" that triggers an equal protection inquiry); Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L.J. 1278, 1288 (2011) ("[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification.").

223. Siegel, supra note 222, at 1300 ("[Justices reasoning from an antibalkanization perspective] often explain their position in opinions concerned with threats to social cohesion.").

224. See id. at 1284.

Service refusals are discriminatory under both theories of discrimination. Behaviors such as these refusals materially disadvantage and symbolically denigrate their targeted groups and encourage social divisions by enabling some members of the polity to expel and exclude others.[225] These refusals require gay people to expend time, effort, and expense seeking alternative services and means of transportation to access those services.[226] LGBTQ+ individuals who are constrained in terms of where they live—for family or work reasons—may be particularly affected. LGBTQ+ service members in particular who are posted in "military installations . . . located in out-of-the-way areas" might be more vulnerable to these denials.[227] And denials affect subsequent service-seeking in various contexts: LGBTQ+ people who had experienced expressive service denials reported avoiding stores, restaurants, banks, medical offices, houses of worship, and other public places.[228] Finally, most importantly, psychologists argue that such refusals would *code* as discrimination for LGBTQ+ individuals: "[A] wedding vendor's declining to serve same-sex couples would be a prejudice event—a type of minority stress—which would subject LGB persons to indignities that have both tangible and symbolic impacts."[229]

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225. See Samuel R. Bagenstos, Bottlenecks and Antidiscrimination Theory, 93 Tex. L. Rev. 415, 433 (2014) [hereinafter Bagenstos, Bottlenecks] (reviewing Joseph Fishkin, Bottlenecks: A New Theory of Equal Opportunity (2014)) ("[D]isparate impact doctrine is often thought of as a paradigmatic application of anti-subordination . . . . "); see also Francis & Silvers, supra note 101, at 449–52 (explaining that the access–content distinction does not account for disparate impact).

226. Caitlin Rooney & Laura E. Durso, Ctr. for Am. Progress, The Harms of Refusing Services to LGBTQ People and Other Marginalized Communities 4 (2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/11/112717_ServiceRefusals-brief.pdf [https://perma.cc/K9PQ-UFCN]. Twenty-one percent of LGBTQ+ people said it would be "very difficult" or "not possible" to find the same type of service at a different retail store selling wedding attire; and eleven percent each said it would be "very difficult" or "not possible" to find the same type of service at a different bakery. Ten percent said the same about a different florist. Id. These numbers increase to thirty-nine percent, twenty-nine percent, and twenty-one percent respectively in nonmetropolitan areas. Id. at 5.

227. Brief of Outserve-SLDN, Inc., American Military Partner Ass'n & American Veterans for Equal Rights as Amici Curiae in Support of Respondents at 14, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5152970.

228. Caroline Medina & Lindsay Mahowald, Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022, Ctr. For Am. Progress (Jan. 12, 2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/ [https://perma.cc/JQ97-5XLF] (describing how LGBTQ+ people who had experienced discrimination were seven times more likely to steer clear of public places to avoid anti-LGBTQ+ discrimination than LGBTQ+ people who had not experienced discrimination).

229. Brief for Ilan H. Meyer, PhD & Other Social Scientists & Legal Scholars as Amici Curiae Supporting Respondents at 27, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 3757343 [hereinafter Brief for Ilan H. Meyer]; see also id. at 15 (citing Ilan H. Meyer, Minority Stress and Mental Health in Gay Men, 36 J. Health & Soc.

The third and dominant approach to antidiscrimination under current doctrine is the anticlassification principle. The final section expands on the principle in greater detail, but in short, on this account, disparate treatment against groups defined on the basis of certain characteristics is wrong.[230] *303 Creative*'s discrimination denial rests on the claim that the service denial does not *classify* based on sexuality. But this claim fails.

The status–conduct binary—one hook on which the Court's discrimination denial hangs—has been roundly criticized and undermined by legal scholarship.[231] Filling a gap in the scholarship,[232] this Part offers two responses to address the access–content distinction.

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Behav. 38, 38 (1995); Ilan H. Meyer, Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 Psych. Bull. 674, 674 (2003); Ilan H. Meyer, Sharon Schwartz & David M. Frost, Social Patterning of Stress and Coping: Does Disadvantaged Social Status Confer More Stress and Fewer Coping Resources?, 67 Soc. Sci. & Med. 368, 371 (2008)); id. at 27, 29–31 (quoting Mark L. Hatzenbuehler, Jo C. Phelan & Bruce G. Link, Stigma as a Fundamental Cause of Population Health Inequalities, 103 Am. J. Pub. Health 813, 813 (2013) (describing how stigma leads to poor health outcomes)); Rooney & Durso, supra note 226, at 2 ("For LGBTQ people, discrimination—including in wedding-related services—also undermines the promise of equality."); Sejal Singh & Laura E. Durso, Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways, Ctr. For Am. Progress (May 2, 2017), https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/ (on file with the *Columbia Law Review*) ("LGBT people who've experienced discrimination in the past year are significantly more likely to alter their lives for fear of discrimination . . . ."). Discrimination, including anti-LGBTQ+ discrimination, can lead to "higher rates of depression, anxiety, and substance abuse as well as an increased risk for physical health problems, such as cardiovascular disease." Rooney & Durso, supra note 226, at 3 (citing Inst. of Med. of the Nat'l Acads., The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011), https://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf [https://perma.cc/MB5F-9JSS]; David J. Lick, Laura E. Durso & Kerri L. Johnson, Minority Stress and Physical Health Among Sexual Minorities, 8 Persps. on Psych. Sci. 487, 487 (2013)); see also Brief for Ilan H. Meyer, supra, at 17 (citing David M. Frost, Keren Lehavot & Ilan H. Meyer, Minority Stress and Physical Health Among Sexual Minority Individuals, 38 J. Behav. Med. 1, 1 (2015)); id. at 9 ("Engaging in commercial activities in such a segregated marketplace will have both *tangible* and *symbolic* stressful effects on LGB consumers. LGB people will bear the burden of finding businesses that do not discriminate against them, a process that may entail significant harm to their dignity and wellbeing.").

230. See id. at 1288.

231. See Konnoth, Created in Its Image, supra note 217, at 337–38 (summarizing the origins of the act–identity distinction and critiquing its implications); see also Jessica A. Clarke, Against Immutability, 125 Yale L.J. 2, 6–7 (2015) (critiquing the use of immutability considerations in discrimination analysis). See generally Deborah A. Widiss, Intimate Liberties and Antidiscrimination Law, 97 B.U. L. Rev. 2083, 2109–15 (2017) (discussing the distinction courts make between status and conduct); Kimberly A. Yuracko, Trait Discrimination as Race Discrimination: An Argument About Assimilation, 74 Geo. Wash. L. Rev. 365 (2006) (categorizing different forms of trait discrimination).

232. Scholarship on the access–content distinction largely ends with Bagenstos's authoritative statement that the framing of "content" is indeterminate and arguments that

First, content discrimination is illegitimate when the content is clearly identified with the group in question. And second, the access–content distinction cannot be framed in a way such that the content is defined in terms of the protected characteristic at issue. For both arguments, the Article takes the Supreme Court and lower courts at their word that objections to gay conduct constitute objections to gay status[233] and that same-sex marriage is seen by society at large, for better or worse,[234] as a defining factor of gay identity.

### A. *Taxonomizing the Access–Content Distinction*

Before embarking on these arguments, it is important to recognize that not all instances of the access–content distinction are discriminatory. Under the anticlassification theory of discrimination, denying certain content to individuals involves illegal discrimination only when there is disparate treatment based on a protected characteristic.[235] Situations in which a protected group is simply *impacted* differently do not count under this definition.[236] Someone claiming discrimination must show that the

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Congress did not intend the access–content distinction. Bagenstos, Future of Disability Law, supra note 108, at 54.

233. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." (alteration in original) (emphasis omitted) (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring))).

234. Compare Paula L. Ettelbrick, Since When Is Marriage a Path to Liberation?, OUT/LOOK, Fall 1989, at 9, 14 (criticizing the fight for gay marriage as "undermin[ing] the very purpose of [the gay liberation] movement"), with Thomas B. Stoddard, Why Gay People Should Seek the Right to Marry, OUT/LOOK, Fall 1989, at 9, 10 (arguing in favor of gay marriage despite the shortcomings of marriage as an institution).

235. While this definition is the one most in keeping with standard understandings of antidiscrimination law, it is not necessarily the most preferred.

236. The Court has held that the Equal Protection Clause does not protect protected groups from disparate impact without more. See Washington v. Davis, 426 U.S. 229, 242 (1976). Some statutes, like Title VII, do protect against disparate impact, but evidentiary standards are so high that disparate impact theories are hard to advance. See Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA L. Rev. 701, 705, 738–43, 769 (2006) (analyzing outcomes of Title VII challenges to employment decisions under a disparate impact theory). In any case, public accommodations statutes, the primary focus of this Article, do not contemplate disparate impact theories. See Jessica A. Clarke, Sex Discrimination Formalism, 109 Va. L. Rev. 1699, 1709–10 (2023) (describing judge-made limits on disparate impact) [hereinafter Clarke, Sex Discrimination Formalism].

discrimination is intentional,[237] namely, that the protected characteristic was a motivating factor in the service refusal.[238]

But when does a distinction between access and content simply produce a disparate impact, and when is it the result of targeting a protected characteristic? This depends on what factors count as "the characteristic itself."[239] One might take a subjective approach to this question—for discrimination to have occurred, the discriminator must have self-consciously sought to disadvantage a certain sexual orientation. Under an objective approach, discrimination occurs when certain practices and behaviors that society recognizes as constituting the category are targeted, whether or not the refuser agrees as such.[240] This is precisely the claim of the various scholars who reject the status–conduct distinction: they recognize that sexuality is constituted by certain thoughts, behaviors, and practices—participation in a certain community, self-identification, certain sexual predilections, actions taken based on those predilections, and, indeed, relationships and even marriages with someone of the same

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237. That is, when there is usually no facial classification. See Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("In so-called 'disparate treatment' cases like today's, this Court has . . . held that the difference in treatment based on sex must be intentional."); see also Jessica A. Clarke, Scrutinizing Sex, 92 U. Chi. L. Rev. (forthcoming Jan. 2025) (manuscript at 12), https://ssrn.com/abstract=4787833 [https://perma.cc/A6GP-4XRJ] ("[A]s a matter of Supreme Court doctrine, facial classifications trigger heightened scrutiny regardless of other measures of disparate treatment, such as intent . . . ."). For complications in accounts of intention, see Deborah Hellman, Diversity by Facially Neutral Means, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742118 [https://perma.cc/6ZKL-PUAG] (explaining that the Court's use of "intention," "purpose," and "motive" is ambiguous).

238. Which is different from "but-for" causation. See Mitchell N. Berman & Guha Krishnamurthi, *Bostock* Was Bogus: Textualism, Pluralism, and Title VII, 97 Notre Dame L. Rev. 67, 101 (2021) (arguing that "[e]ven if . . . an adverse job action must fail the ordinary but-for standard, not the lessened 'motivating factor' standard, to be unlawful," it does not necessarily follow that the action automatically happens "because of" a specific reason just because it wouldn't have occurred without that reason); David A. Strauss, Sexual Orientation and the Dynamics of Discrimination, 2020 Sup. Ct. Rev. 203, 207 ("An employee's sex might be the but-for cause of many attributes that an employer is entitled to take into account."). Whether but-for causation also applies depending on the state statute at issue does not affect this Article's analysis.

239. With thanks to Lily Hu for helpful conversations on this issue. See Lily Hu, Race, Reasons, and Acting on the Basis of Race (As a Reason) 11 (unpublished manuscript) (on file with the *Columbia Law Review*).

240. On the question of motivation, one might similarly adopt an objective or subjective approach. Let us say that a shop owner excludes someone because they are gay but does not realize it—that is, their bias is implicit rather than explicit. See generally Jerry Kang, What Judges Can Do About Implicit Bias, 57 Ct. Rev. 78, 81–89 (2021) (relaying strategies for judges concerned with checking their own biases in adjudicating). One account might require that the owner explicitly avow their bias for it to count as a motivating factor; other accounts might hold otherwise. This Article does not focus on this particular issue—it assumes for the purposes of its analysis that any motivation is explicit and fully acknowledged.

sex.[241] No one factor is decisive in this analysis.[242] These scholars hold that targeting those characteristics and behaviors amounts to a denial based on the status they constitute, whether or not the refuser sees themself as acting based on the status.

On this account, not every access–content distinction would be discriminatory: some simply create a disparate impact. Consider the following examples.

- First, the store mentioned in Part I, run by a same-sex couple with rainbow flags in their store, which has run out of same-sex wedding toppers due to supply chain issues, but otherwise allows gay people to access the store on equal terms;
- Second, a large environmentally conscious chain store issues an edict that only biodegradable plastic items (including wedding toppers) can be stocked. It turns out that only different-sex biodegradable wedding toppers are available on the market. The store has historically expressed strong support for marriage equality;
- Third, a store owner who has no objection to marriage equality himself realizes his customer base does. The store owner thus declines to stock products relating to same-sex marriage;
- Fourth, a store owner objects to marriage equality on religious grounds. The owner has numerous gay friends—though he has fastidiously refused to attend their weddings. Otherwise, the owner treats gay people equally and believes them to be equal to straight people;
- Fifth, a store owner objects to marriage equality and consciously connects those beliefs to their negative beliefs about gay people.

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241. Konnoth, Created in Its Image, supra note 217, at 324–28.

242. Notably, the characteristics of interest are those that *constitute* the identity, not those that are structurally related to it such that discriminating against one effectively constitutes discrimination against the other, what some might call proxies. See, e.g., Larry Alexander, What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies, 141 U. Pa. L. Rev. 149, 167–72 (1992) ("In conclusively presuming for purposes of a particular decision that an individual with a proxy trait possesses the material trait, we stereotype those with the proxy trait.").

Thus, most would agree that discriminating against people who engage or have a desire to engage in same-sex sodomy *is* anti-gay discrimination. But a policy discriminating against those who live in urban zip codes is not, even though such a policy might have been adopted because of the perception that gay people tend to congregate in urban areas (a perception that is merely stereotypical). Movement Advancement Project, Where We Call Home: LGBT People in Rural America 6 (2019), https://www.lgbtmap.org/file/lgbt-rural-report.pdf [https://perma.cc/XP99-CJCQ]. Structural relationships can, of course, transmute into constitutive relationships. For example, zip codes 94114 or 10037—zip codes for the Castro and Harlem—might be considered constitutive of gay and Black identity. Targeting those codes might, for some, count as targeting the characteristic itself. Thanks to Deborah Hellman for her contribution to this discussion.

> They only allow gay people into their store because the law requires it.

The first two examples do not involve anti-gay discrimination—on the anticlassification account as the owners have not deliberately classified based on sexuality. The last two accounts involve classification and discrimination against same-sex marriage. There is a question under the Court's reasoning: Are these also examples of anti-gay discrimination, given that gay people are given access to the store, even if they are denied certain content? As the rest of this Part will argue, the reasons the Court gives for defending content discrimination are problematic because the refuser's actions target behavior that is constitutive of the group identity in question.[243]

### B. *Rethinking Content Discrimination*

As noted above, the Supreme Court has retreated from, and lower courts have roundly rejected, the claim that discrimination against same-sex weddings is not anti-gay discrimination. In so doing, they reject the status–conduct distinction. But does the access–content distinction still hold water?

The answer depends on the content at issue. As the Supreme Court explained in a decision that was heavily cited by courts rejecting the status–conduct distinction,

> Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.[244]

Yarmulkes and menorahs help define Jewish identity; crosses and scapulars define Christian identity. Scholars have written at length about how other items, like archeological artifacts, bodily remains, and land, define collective or national identity.[245] At a more retail level, portraits of ancestors, a great-grandparent's wedding ring, or urns containing the

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243. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) ("[W]e do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment.").

244. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993); see also Elane Photography, LLC v. Willock, 309 P.3d 53, 62 (N.M. 2013); Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1063–64 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.).

245. Kristen A. Carpenter, Real Property and Peoplehood, 27 Stan. Env't L.J. 313, 316–17 (2008) (explaining that land is the foundation of social practices and collective identities for Native American communities); John Henry Merryman, Thinking About the Elgin Marbles, 83 Mich. L. Rev. 1881, 1912–13 (1985) ("For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell people who they are and where they come from.").

remains of a family member can define and constitute family identity.[246] One's own wedding ring helps constitute the bond and relationship one shares with another. Various artifacts similarly represent gay identity: Rainbow flags or banners[247] and cake-toppers with same-sex couples symbolize gay identity.[248]

By focusing on the status–conduct distinction, the scholarship and judicial analysis have tended to be unidirectional—how do things define the identity of people or the groups to which they belong. But just as things can help constitute social identities, social identities can be imprinted onto things. A yarmulke or a menorah is not simply a head covering or a candlestick set but a Jewish item. A cross is similarly not just sticks linked together. A wedding ring isn't just jewelry but is imprinted by the relationship which it symbolizes. Just as items can define and symbolize collective social categories, those categories come to define the item.

Just as individuals get imprinted with a social identity because of their traits, behaviors, self-identification, and affiliations, so do things. That is precisely the situation with, say, the wedding cakes of same-sex couples (though one can pick other wedding artifacts). Indeed, that is the very

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246. Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959 (1982) ("[I]f a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so."); Fred O. Smith, Jr., On Time, (In)equality, and Death, 120 Mich. L. Rev. 195, 205 (2021) (describing the author's father asking at a public hearing: "If you can't get outraged about someone destroying your great-grandparents' graves, what can you get outraged about?" (internal quotation marks omitted) (quoting Rebecca McCarthy, Panel Wrestles With UGA's Legacy of Slavery, Flagpole (Mar. 27, 2017), https://flagpole.com/news/city-dope/2017/03/27/panel-wrestles-with-ugas-legacy-of-slavery/ [https://perma.cc/3GK5-9AJ6])).

247. Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995) (discussing the group's desired banner).

248. Some may object to the suggestion that "marriage" is inherently part of gay identity. See Konnoth, Created in Its Image, supra note 217, at 325 (discussing opposition to marriage as a goal within the gay community dating back to the 1950s). But it is hard to claim as a descriptive matter that items symbolizing a same-sex wedding are not associated and—for many people and in the law—constitutive of gay identity. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 666 (2015) ("The nature of marriage is that . . . two persons together can find other freedoms, such as expression, intimacy, and spirituality. . . . There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."). Whether or not that is a good thing normatively is a different issue. But in any case, the association between same-sex weddings and homosexuality comes, not from the fact that the object at issue is a wedding—weddings are jointly a part of straight and LGBTQ+ culture and do not uniquely define LGBTQ+ identity. Rather, it is the same-sex nature of the underlying romantic relationship that, like all kinds of same-sex romantic relationships, characterize gay identity. Konnoth, Created in Its Image, supra note 217, at 325 (citing David M. Halperin, How to Do the History of Homosexuality 109 (2002)). Indeed, many argue that gay married couples have queered or at least once sought to queer marriage. See, e.g., Michael Boucai, Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J.L. & Humans. 1, 62 (2015) ("What made the publicity of [early gay] marriage litigation uniquely powerful was its refutation of certain ideas about what it meant to be 'a queer.'").

basis of the baker's claim in *Masterpiece Cakeshop*. As Justice Gorsuch's concurrence described: "Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.' It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith."[249] Not just artifacts but messages can be imprinted by speaker-identity. As *303 Creative* notes, a provided service can "implicate[] a customer's statutorily protected trait" and the state could force "'an unwilling Muslim movie director to make a film with a Zionist message,' or 'an atheist muralist to accept a commission celebrating Evangelical zeal.'"[250]

Individuals can be disfavored because of their social statuses. But so can things. Certain items are seen as undesirable because of their uses, or the contexts and groups they are associated with. Sex toys have been disfavored as obscene[251] because of the social categories they occupy. Similarly, an anti-Semite's antipathy to a yarmulke or an Islamophobe's demand as to "why can't [Muslim women] dress like *us*?"[252] constitute discriminatory attitudes toward Judaism and Islam—the clothes are targeted because of the social categories imprinted on them rather than sartorial taste.[253] The baker's antipathy to the same-sex wedding cake or the website designer's rejection of messages relating to same-sex weddings are premised on the social categories those artifacts represent—these are cakes and websites for same-sex weddings and are thus imprinted with gay identity. And when a certain good or service is metonymically associated with a specific group and their attributes, then discrimination against that good or service can constitute discrimination "on the basis of" that attribute.

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249. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1738 (2018) (Gorsuch, J., concurring) (alteration in original) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)); see also id. at 1743 (Thomas, J., concurring in part and concurring in the judgment) ("The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.").

250. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313–14 (2023) (first citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1198 (10th Cir. 2021) (Tymkovich, C.J., dissenting), then quoting id. at 1199).

251. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004) (upholding obscenity prohibition on sex toys).

252. Ruth Nasrullah, Why Don't You Dress Like Us?, Muslim-Matters (Apr. 5, 2008), https://muslimmatters.org/2008/04/05/why-dont-you-dress-like-us/ [https://perma.cc/UXU5-WVPD].

253. This may not always be clear from the face of an action. For example, an airport might require a Muslim woman or Sikh man to remove head coverings in the interests of security, and a plaintiff can prove discrimination if they can show that the requirements are enforced inequitably. Michael T. Luongo, Traveling While Muslim Complicates Air Travel, N.Y. Times (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html (on file with the *Columbia Law Review*) (explaining that TSA officers may ask passengers to remove head coverings and both Muslim women and Sikh men are frequently asked to do so).

This doesn't mean that every expression of distaste toward goods associated with a certain identity is actionable. As the previous Part notes, discriminating based on sexual orientation in the abstract does not involve discriminating against any specific gay person.[254] This allows individuals to escape liability under some statutes that require a specific person to be harmed in order for there to be a cause of action. Take the original text of Title VII, which prohibits adverse employment action against "any individual, . . . because of *such individual's* race, color, religion, sex, or national origin."[255] The operation of this provision of the statute, some courts therefore hold, turns on the protected attribute of the individual, not generalized animus against the attribute.[256] Thus, with such statutes, claiming that there is discrimination against a generalized attribute without showing discrimination against an individual would be insufficient.[257]

Courts might adopt a limited reading even when there are no limitations on the face of the statute. For example, in *Lee*, the British

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254. The access–content distinction allows the service denier to claim that the service denial is about the product, not about any specific person. See supra section II.B.2.

255. 42 U.S.C. § 2000e-2(a)(1) (2018) (emphasis added).

256. See Jessica A. Clarke, Protected Class Gatekeeping, 92 N.Y.U. L. Rev. 101, 113–14 (2017). Note that some courts have still interpreted Title VII to apply to white employees in certain circumstances. For example, when white employees have been fired for associating with or marrying Black people, employers have argued that Title VII does not apply because the firing occurred because of the race of *third* parties. But courts have explained that the firing occurred not *just* because of the race of the third parties but also because of the race of the employee—the employers objected to the fact that a *white* employee was associating with Black people. Id. at 129; see also Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000) (noting that "to state a cognizable claim under Title VII, the plaintiff himself need not be a member of a recognized protected class").

257. In blunt terms, the store can discriminate against gay cakes. As long as the store allows gay people access to straight cakes, it is not discriminating, since the statute prohibits discrimination based on the traits of the people given access, not the content of the goods. Note that textual readings such as this can sometimes expand liability in analogous circumstances. Consider City of Los Angeles v. Manhart, 435 U.S. 702, 709 (1978), in which the Court invalidated a pension plan that required women to make a larger contribution to pension plans on the theory that women live longer. The contribution requirements were actuarially valid. But the Court relied on a textual reading of Title VII that required treating women as individuals rather than as a class. A pension plan that treated women as a group rather than as individuals violated this requirement. This Article will not parse the textual distinctions of the ADA and Title VII here to determine whether *Doe* was valid as a textual matter. Compare Brief of Petitioner Liberty National Life Insurance Co. at 44, Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209 (11th Cir. 2001) (No. 00-14507), 2000 WL 33978824 ("Whereas drawing distinctions between groups based upon their race, sex, or age may be socially unacceptable in other contexts, such distinctions are critical to guaranteeing actuarial equity in the context of pricing life insurance."), with Jesse A. Langer, Comment, Combating Discriminatory Insurance Practices: Title III of the Americans With Disabilities Act, 6 Conn. Ins. L.J. 435, 460–61 (2000) ("If Congress intended the 'full and equal enjoyment' clause to refer only to degrees of access, and not to the content of the products offered, then it would be unnecessary for Congress to enumerate the distinctions between the types of benefits to be received by individuals.").

Supreme Court looked to the provision at issue which stated that discrimination occurs when "on grounds of sexual orientation," the discriminator treats another "less favourably than he treats or would treat other persons."[258] The court admits that the provision "is not limited to less favourable treatment on the grounds of the sexual orientation of [the victim] . . . . There is no 'his or her' in the definition."[259] It looks to case law that held that discrimination based on association with members of a protected class, or "*imagin[ed]*" sexual orientation, violated the antidiscrimination law.[260] It also considered administrative guidance that interpreted the provision to apply when discrimination occurred based on the sexual orientation "of another person with whom they associate."[261] But the court declined to go beyond this: "[t]hat is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is 'on grounds of' sexual orientation."[262]

But a textualist reading in other contexts may require some courts to conclude just the opposite. For example, the public accommodations statute at issue in Colorado does not have the limiting text of Title VII as originally enacted,[263] or the limiting guidance of the British law. It states simply that disadvantaging "an individual or a group," in a public accommodation "because of . . . sexual orientation" violates the law.[264] This means precisely that "because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is 'on grounds of' sexual orientation."[265] The statute here is not limited only to access. Thus, even if the store allows access to gay people but discriminates against *gay content*, it violates the statute.

There are three caveats to this conclusion. First, this claim does not mean that simply expressing disapproval and disdain toward certain products violates the statute. Under the statute, the store's act of discrimination must involve limiting service to a specific individual or group

258. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [20] (appeal taken from N. Ir.) (internal quotation marks omitted) (quoting The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SR 2006/439 art. 3, ¶1).

259. Id. [27] (quoting Equality Act 2006 § 82 (UK))

260. Id. [30] (emphasis added) (internal quotation marks omitted) (quoting English v. Thomas Sanderson Blind Ltd. [2009] ICR 543 [38]).

261. Id. [32] (internal quotation marks omitted) (quoting The Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, Explanatory Notes ¶ 7.3 (UK)).

262. Id. [33]; see also discussion supra note 158.

263. It bears noting that Title VII was amended in 1991 to add 42 U.S.C. § 2000e-2(m), which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor." This effectively renders the modern Title VII to reach cases of discrimination as broadly as the Colorado statute.

264. Colo. Rev. Stat. § 24-34-601(2)(a) (2024).

265. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [33] (appeal taken from N. Ir.).

because of its antipathy to the product because of its association with the group. In other words, there must be a specific individual or group that suffers a concrete harm because of the store's discrimination based on sexual orientation (such concrete and particularized harm is likely required to satisfy constitutional standing requirements in any case).[266] Similarly, a store can make an anti-gay cake for a customer. The store might be making content that stigmatizes based on sexual orientation, but in so doing, it does not harm a specific individual.

Second, this does not mean that stores must stock all items that would appeal to all groups at all times. To see why, it bears looking to the ADA context. The DOJ disapproved of the access–content distinction in *Doe*.[267] At the same time, regulations it promulgated specified that "a public accommodation" need not "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities."[268] DOJ offered analogous commentary in the context of services.[269]

Under this reasoning, stores carrying ready-made items would not generally be required to alter their inventory. This makes sense as a normative matter. First, unless one is presented with a conveniently worded hypothetical, it is hard to prove that the reason a store does not carry certain ready-made items in stock is because of animus. A range of issues could be at play.[270] Second, as commentators have argued, antidiscrimination statutes consider costs and benefits.[271] The antidiscrimination

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266. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("Over the years, our cases have established that the irreducible constitutional minimum of standing . . . [requires] the plaintiff [to] have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized.").

267. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 562–63 (7th Cir. 1999) (contending "that the insurance exemption has no function if section 302(a) [of the ADA] does not regulate the content of insurance policies," and thus the court "should infer that the section does regulate that content"). This position disagrees with this Article's premise that the access–content distinction is valid, but that does not affect its argument.

268. 28 C.F.R. § 36.307 (2024). This limitation is "consistent with the 'fundamental alteration' defense to the reasonable modifications requirement of § 36.302," which in turn, is required by statute. 28 C.F.R. § 36.302 app. C; see also 42 U.S.C. § 12182 (2018); 28 C.F.R. 36.302.

269. For example, it notes that medical providers need not provide services that go beyond their usual expertise. See 28 C.F.R. § 36.302 app. C.

270. Further, sometimes the motivation requirement that the Supreme Court demands is high. At least in some cases the Supreme Court has narrowly defined discrimination as occurring when the discriminator acts "because of" not "in spite of" a characteristic, as in the case of Store 2 in the hypotheticals above. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979) (internal quotation marks omitted) (upholding state law giving hiring preference to veterans over nonveterans, though it effectively discriminated against women).

271. See, e.g., Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, Accommodating Every Body, 81 U. Chi. L. Rev. 689, 713 (2014) ("Under the ADA, an employer does not have to provide an accommodation that would impose costs constituting an 'undue hardship' on the operation of the employer's business.").

mandate is limited in various ways to avoid overburdening those it regulates. Of course, while the ADA has limiting regulations, state sexual orientation public accommodation laws may not.[272] In that case, however, courts may require a showing that the refusal to stock a certain item arises from animus toward a group, rather than other problems like supply chain issues. Stores, as in *Masterpiece Cakeshop* or *303 Creative*, however, which are offering custom products, and are logistically capable of satisfying a customer's demand, will have to provide clearer justification.[273]

Third, this Article's concern is only with *statutory* violations. It may be the case that the Court will hold that the First Amendment trumps the statute and allows for content-based decisions that stigmatize sexual orientation. Justice Clarence Thomas contemplated the possibility in his *Masterpiece Cakeshop* concurrence that "blocking [gays and lesbians] from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say 'God Hates Fags'" "stigmatizes gays and lesbians."[274] Similarly, "burn[ing] a 25-foot cross" or "conduct[ing] a [white supremacist] rally on Martin Luther King Jr.'s birthday" can constitute "racist, demeaning, and even threatening speech."[275] Nonetheless, such speech is permitted under the First Amendment, he concludes. Similarly here, the stigma a group suffers by denying content to a specific individual might be permitted by the First Amendment—but, for the reasons discussed above, it is important to acknowledge that the actions *do* discriminate.

### C. *Limiting the Access–Content Distinction*

Not every item is imprinted by identity, however: The content-based analysis above only goes so far. In such situations, it is important to clearly identify when a refuser only limits content and when it limits access as well.

Recall from the discussion above, however, that whether the denial is one of access or of content depends entirely on the level of generality at which one defines the good.[276] In his *Masterpiece Cakeshop* opinion, Justice Gorsuch offered no guidance as to which level of generality was appropriate, demanding only that the level of generality applied to products requested by religious individuals and gay individuals be similar.[277] And Bagenstos himself appears agnostic on the distinction: The "application of the access–content distinction turns crucially on the level of generality at

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272. Colorado's does not. Colo. Rev. Stat. § 24-34-601 (2023).

273. This inverts Carpenter's view in *How to Read* 303 Creative v. Elenis, supra note 18, that the burden–benefit analysis counsels in favor of deferring to custom providers.

274. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and concurring in the judgment).

275. Id. (citing Virginia v. Black, 538 U.S. 343 (2003); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)).

276. See supra section I.B.1.

277. See *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

which the benefit offered by the defendant is defined—a matter on which the distinction itself provides no guidance."[278]

The problem, ultimately, is one of comparison. How should we situate a product in comparing the needs of a gay couple to those of a straight couple? In so doing, another area of equality law in which questions of comparison arise proves useful for understanding the problem at hand.

In various contexts involving equality law—both statutory and constitutional—courts often inquire into whether plaintiffs are similarly situated to some other group that receives the benefit that the plaintiffs seek.[279] Consider *Women Prisoners of D.C. Department of Corrections v. District of Columbia*, in which the D.C. Circuit reviewed a trial court holding that women inmates did not get "access to academic, vocational, work, recreational, and religious programs that were available to similarly situated men at other prisons."[280] The district court had determined that women and men were similarly situated "by virtue of their similar custody levels, sentence structures and purposes of incarceration."[281] The panel majority reversed, finding that "five factors: population size of the prison, security level, types of crimes, length of sentence, and special characteristics" were more relevant—a different prison size, in particular, merited different resources.[282] Because men and women were differently situated (because their prisons were differently situated), there was no legitimate comparison that the women could assert, and thus, no cognizable discrimination claim.

Judge Judith W. Rogers dissented from that analysis, claiming that the majority's invocation of prison size was an "irrelevanc[y]" that has only "to do with the cost of administering programs."[283] Instead, the key question was "the purpose [of the program, good, or service] with respect to which [the plaintiffs] are dissimilarly situated" and the court should ask whether women were "similarly capable of benefiting from" the programs as men.[284] Scholars have persuasively argued that Judge Rogers's position is the correct one as a doctrinal matter: One looks at purpose to determine similar situatedness.[285] Yet, resolving that question, much as in the access–

278. Bagenstos, Future of Disability Law, supra note 108, at 42.

279. Clarke, Sex Discrimination Formalism, supra note 236, at 1722–23 (explaining that some areas are relatively consistent, including "Title VII, where a 'similarly situated' inquiry is the 'default methodology' for determining if intentional discrimination occurred"). For a discussion of the inconsistency in the constitutional context, see generally Giovanna Shay, Similarly Situated, 18 Geo. Mason L. Rev. 581 (2011).

280. 93 F.3d 910, 923–24 (D.C. Cir. 1996).

281. Id. at 924 (quoting Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 675 (D.D.C. 1994)).

282. Id. at 925 (citing Pargo v. Elliott, 894 F. Supp. 1243, 1259–61 (S.D. Iowa 1995)).

283. Id. at 954 (Rogers, J., concurring in part and dissenting in part).

284. Id.

285. See Brenda V. Smith, Watching You, Watching Me, 15 Yale J.L. & Feminism 225, 275 (2003) ("[They] are similarly situated because the State of Nebraska and the Department of Corrections view the purpose of incarceration to be the same for all

content context, has to do with the *level of generality* at which we should understand the program (or good or service) to exist. One might argue that the government purpose is not only to provide programs to those who benefit, as Judge Rogers would have it, but to provide programs to the greatest number of people who will benefit. In that case, the size of the prison is hardly an irrelevancy.

But Judge Rogers's arguments do not stop there. Her analysis begins with a hypothetical: "Two people commit the same crime. Each is similarly convicted by a District of Columbia court. In all respects—criminal history, family circumstances, education, drug use, favorite baseball team—they are identical. All save one, that is: they are of different sexes."[286] And "[s]olely because of that difference, they are sent to different facilities at which the man enjoys superior programming options."[287] Thus, the majority "errs because it starts in the middle," *after* the discrimination occurs that disparately situates the men and women, "rather than at the beginning" where they are similarly situated.[288]

Thus, although Judge Rogers does not quite state it in these terms, taking the characteristics of the prison-like size into account is wrong for a second reason. Not only, according to her, is it irrelevant—it is also illegitimate. The majority effectively says that women('s prisons) are not similarly situated to men('s prisons) because of sex. Therefore, they can be treated differently from men. This reasoning is "circular."[289]

This move is important to focus on. In determining comparators for "similarly situated" analysis, we can focus on a range of characteristics depending on the program. But—depending on the regime at issue—we are forbidden from distinguishing based on certain characteristics determined by what Professor Kent Greenawalt referred to as "substantive norms of equality."[290] Under federal employment law, characteristics that *cannot* render someone dissimilarly situated are race, sex, religion,

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inmates . . . ." (alteration in original) (internal quotation marks omitted) (quoting Klinger v. Nebraska Dep't of Corr., 107 F.3d 609, 734 (8th Cir. 1997) (McMillan, J., dissenting))); see also Donna L. Laddy, Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons, 5 Temp. Pol. & C.R. L. Rev. 1, 21 (1995) ("[C]ourts should consider factors such as purposes of incarceration and need rather than cost-driven, gender proxy differences between prison populations." (footnote omitted)).

286. *Women Prisoners*, 93 F.3d at 951.

287. Id.

288. Id.

289. Id. at 952 (internal quotation marks omitted) (quoting United States v. Virginia, 518 U.S. 515, 545 (1996)).

290. Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167, 1178–79 (1983) (explaining that substantive norms of equality are different from other norms of equality in that it centers on "a particular concrete choice" and "particular individuals" who come with set equality characteristics).

national origin,[291] disability,[292] and, after *Bostock v. Clayton County*, sexuality and gender identity.[293] Education and experience, however, are characteristics that can properly distinguish individuals. In voting, the list of characteristics that constitute substantive equality norms expands, excluding nearly all factors except age, nationality, and basic competency pursuant to a court judgment.[294] When it comes to public accommodations, federal law permits distinguishing individuals based on sex (and LGBTQ+ status), as there is no federal public accommodations law prohibiting sex discrimination.[295]

In framing a certain resource at issue then, we cannot manipulate its description in ways that refer to forbidden characteristics.[296] Take wedding cakes for example. Let us frame the product as a "different-sex wedding cake." Framing the resource in that way will situate people who engage in

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291. See 42 U.S.C. § 2000e-2 (2018).

292. See 42 U.S.C. § 12112.

293. 140 S. Ct. 1731 (2020). *Bostock*'s holding, of course, is subject to new and developing limitations. See Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914, 937 (5th Cir. 2023) ("[The Religious Freedom Restoration Act] requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct."); A. Russell, Note, *Bostock v. Clayton County*: The Implications of a Binary Bias, 106 Cornell L. Rev. 1601, 1612 (2021) (explaining that *Bostock* "reflects and reinvents . . . patterns of nonbinary erasure").

294. Charles P. Sabatino, Guardianship and the Right to Vote, ABA Hum. Rts. Mag. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/ (on file with the *Columbia Law Review*).

295. Title II of the Civil Rights Act of 1964 prohibits "discrimination or segregation on the ground of race, color, religion, or national origin" in public accommodations but not on the ground of sex. 42 U.S.C. § 2000a(a). In the early 1970s, the National Organization for Women (NOW) sought to add "sex" as a prohibited basis for discrimination under Title II of the Civil Rights Act, but this effort was ultimately unsuccessful. See Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 Yale L.J. 78, 103 (2019); see also Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 Nw. J.L. & Soc. Pol'y 274, 287 (2010) ("Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.").

296. Arguably, the same problem exists in *Hardwick*. By referring to the issue there as involving exclusively homosexual sodomy, as noted supra notes 53–58 and accompanying text, the Court was able to limit the "product" subject to constitutional analysis. The Court described in disparaging terms the historical treatment of "homosexual" sodomy (as opposed to heterosexual sodomy), and thus concluded that the particular behavior did not deserve protection. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) ("Proscriptions against that conduct have ancient roots."). As Justice Stevens notes in dissent,

> Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. But his claim that [the law] involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Id. at 201 (Stevens, J., dissenting) (citations omitted).

same-sex and different-sex weddings differently. As we stipulate above,[297] that is equivalent to situating people who are gay and straight differently in the first place. Along those lines, framing the insurance policy in *Doe* as an AIDS-restrictive insurance policy, which would situate people with a certain disability (AIDS) and people without differently, is similarly problematic. In *Women Prisoners*, the majority sought to address Judge Rogers's concerns by noting that sex segregation in prisons does not violate equal protection principles, and that the resultant prison differentiation in terms of size and other characteristics was therefore a valid factor to take into account—in other words, only factors resulting from *illegitimate* discrimination must be excluded from a similarly situatedness analysis.[298] But even if one agrees with the majority that prison characteristics are not inherently related to sex, the question in *Doe* or *Masterpiece Cakeshop* is not even close—*the product is defined precisely in terms of the group in question.*

One response to this Article's argument is to draw a further distinction between the *Women Prisoners* case (and similar equal protection cases) and the cases here. On one hand, in *Women Prisoners*, women were not given equal access to facilities (however framed). In the examples above, on the other hand, gay people and people with AIDS are *given* access to the good in question. But if the question in *Women Prisoners* was simply about accessing particular facilities, then there would be no case—the answer was clearly that women did not have access to the facilities. Rather, the fundamental question in *Women Prisoners* was whether the plaintiffs were given access to *unequal* resources to men. Under the majority's analysis, the answer was no.[299] The dissent held the answer was yes.[300] They framed what an "unequal resource" was in different ways because they disagreed on what factors should be taken into account in assessing how to compare groups. In *Masterpiece Cakeshop* and *Doe*, the question is also whether the minorities in question have access to a resource on equal terms.[301] And in determining the answer, one cannot gerrymander the nature of the resource based on the characteristics of the group in question to render them dissimilarly situated.

That does not mean that we cannot manipulate the description of the resource in other ways that produce a disparate impact. For example, a cakeshop might say that it does not make rainbow cakes as they are too

297. That is, the stipulation at the beginning of this Part that the status–conduct distinction between gay identity and same-sex marriage is invalid.

298. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926–27 (D.C. Cir. 1996).

299. See id. at 932.

300. See id. at 951.

301. See Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

laborious. It may be the case that gay people order rainbow cakes more,[302] and therefore that decision will harm them more. The decision to exclude rainbow cakes might indeed be grounded in the intent to deter gay customers. But as long as gay people are given equal access to nonrainbow cakes (and in contexts, like here, in which disparate impact is not prohibited),[303] then equal access is not violated. The key point is that framing the good at issue as a rainbow cake is acceptable as rainbowness does not constitute gay identity in the same way that gay marriage does.[304] Framing the cake as a non-gay(-marriage) cake is circular. And of course, defenses to claims of animus including supply chain issues or other problems discussed in the previous section continue to apply.[305]

## CONCLUSION

Refusal to provide marriage-related services because of antipathy to same-sex marriage is discrimination. The Supreme Court's conservative majority has sought to sweeten its overhaul of First Amendment law to favor powerful religious majorities by painting the harms to LGBTQ+ communities as minimal. This is not a new strategy. In previous cases in which the Court held in favor of gay people, dissents, usually penned by Justice Antonin Scalia, painted gay individuals as powerful, wealthy, and capable of getting their way in legislatures and courts.[306] The burdens they faced were therefore ephemeral and limited. Similarly, today, the Court paints the harms of discrimination as minimal, and magnifies the burdens on those who oppose same-sex marriage, with both doctrinal and normative consequences.

In so doing, courts that claim that no discrimination has occurred denigrate gay people even further. What they seek can only be achieved by carving out marriage to someone of the same sex from gay identity, even though marriage constitutes the kind of behavior, conduct, and indeed, love that is often central to gay identity. The manipulation of the identity by these courts goes even further, as they seek to define the symbols of gay identity in ways that erase it.

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302. See Manuel Betancourt, The Radical History of the Rainbow Cake, Food52 (June 2, 2019), https://food52.com/blog/22603-rainbow-cake-40th-anniversary-gilbert-baker [https://perma.cc/FCZ7-V44S].

303. Cf. Mary Crossley, Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities, 52 Ala. L. Rev. 51, 68, 81 (2000) (noting that the "ADA clearly contemplates reaching at least some forms of disparate impact discrimination" but that the situation with respect to insurance is "murkier").

304. Whether or not something constitutes an identity is an objective inquiry based on social circumstances. It does not depend on the subjective attitudes and associations of the parties involved. The determination depends on social circumstances and artifacts of identity as scholars of queer theory have documented; definitions might be contested.

305. See supra Part III.A.

306. See, e.g., Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (arguing that gay people "enjoy[] enormous influence in American media and politics").

Recognizing services denials for what they are—acts of real discrimination and harm that gay couples face from their fellow citizens—is at least an honest accounting of the stakes involved. Those seeking to deny services may have speech interests, but those experiencing the denials can suffer a loss of resources, material and dignitary, because of the discrimination they experience.[307] The Court may yet decide that notwithstanding this discrimination, *the putative speech rights of the refusers must win the day*. But it owes at least an honest accounting of what is at stake before depriving individuals of these basic benefits.

307. See Brief of Amici Curiae Colorado Organizations & Individuals in Support of Respondents, supra note 41, at 26.

# NOTES

## CRIMINALIZING ABUSE: SHORTCOMINGS OF THE DVSJA ON BLACK WOMAN SURVIVORSHIP

*Tashayla Sierra-Kadaya Borden**

*Commentators posit that reducing domestic abuse requires an increase in prosecutions and a decrease in criminal reform efforts. The "abuser" is as set a role as the "sympathetic victim," with little room to examine how both may exist simultaneously within an individual. A deeper look into what occurs for survivors reveals that legal discourse often overlooks and scrutinizes Black women's abuse, particularly with Black women who exist within the same "abused" and "abuser" realm.*

*The Domestic Violence Survivors Justice Act (DVSJA) aimed to help survivors categorized as both "perpetrator" and "victim." The law's harsh requirements leave much to be desired. This Note analyzes the limitations of the DVSJA for Black women survivors. It contextualizes historical and modern biases, investigates how abuse affects Black women uniquely, and proposes how legislators can improve the DVSJA for survivors in New York and across the country.*



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*If anyone should ask a Negro woman in America what has been her greatest achievement, her honest answer would be: "I survived!"*

— Rev. Dr. Pauli Murray.[1]

## INTRODUCTION

Existing literature does little to address the unique victimization of Black women in the law. Studies looking through a racial lens may ignore Black women by failing to address gender.[2] Alternatively, gender analysis may center around issues specific to white women.[3] White feminist scholars promote carceral feminism, a "neoliberal law-and-order agenda pursued by a coalition of secular anti-prostitution feminists and white evangelicals."[4] Carceral Feminism focuses on white womanhood and harms marginalized communities, actively pushing Black women into

1. Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. & Lab., 91st Cong. 335 (1970) (statement of Rev. Dr. Pauli Murray, Professor of American Studies, Brandeis University).

2. See Stewart M. Coles & Josh Pasek, Intersectional Invisibility Revisited: How Group Prototypes Lead to the Erasure and Exclusion of Black Women, 6 Translational Issues Psych. Sci. 314, 315 (2020) ("Existing conceptualizations of intersectional invisibility identify its source as a dual lack of recognition of Black women as women and as Black people—that is, intersectional invisibility occurs because the prototypical woman is a White woman and the prototypical Black person is a Black man."). In cases involving domestic violence and criminal culpability, readers may discern the gender of the defendant, but neither the opinion, nor the court itself, may reveal race. See, e.g., People v. T.P., 188 N.Y.S.3d 842, 843 (App. Div. 2023). The race of the woman was not mentioned in the opinion, but the media revealed a photo of a Black woman. See Buffalo Woman to Spend 8 Years in Prison for Killing Her Boyfriend, 2 WGRZ (Sept. 6, 2019), https://www.wgrz.com/article/news/crime/71-9def0c07-4e39-4f32-8b5f-a776061c0982 [https://perma.cc/X8ZS-6NKR].

3. See Coles & Pasek, supra note 2, at 315 ("Black women may be systematically harmed by single-axis feminist movements that fail to recognize . . . their unique concerns as Black women.").

4. Shirley LaVarco, Note, Reimagining the Violence Against Women Act From a Transformative Justice Perspective: Decarceration and Financial Reparations for Criminalized Survivors of Sexual and Gender-Based Violence, 98 N.Y.U. L. Rev. 912, 922 (2023) (citing Elizabeth Bernstein, The Sexual Politics of the "New Abolitionism", Differences: J. Feminist Cultural Stud., Fall 2007, at 128, 137, 143).

prison.[5] To address this, Black feminist scholars have developed key theories to understand Black women's experiences.[6] One such scholar, Moya Bailey, coined the term misogynoir to describe "the uniquely co-constitutive racialized and sexist violence that befalls Black women as a result of their simultaneous and interlocking oppression at the intersection of racial and gender marginalization."[7] Misogynoir operates as a form of implicit or explicit bias that informs how and why the state views Black women as dual victims and victimizers.

In 2019, the New York State Legislature passed the DVSJA.[8] The DVSJA amended New York's existing Penal Law § 60.12 and created Criminal Procedure Law § 440.47 to provide resentencing for currently incarcerated individuals.[9] This statute permits a judge to change a domestic violence survivor's initial sentence if the abuse was a "significant contributing factor" to the crime.[10] The DVSJA is the first legislation of its kind in the United States.[11] Advocates and survivors promoted this statute

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5. See id. ("[T]he carceral approach . . . culminat[ed] in the passage of the Violence Against Women Act as part of the notoriously racist 1994 Crime Bill." (footnote omitted)).

6. See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1244 (1991) (explaining the concept of intersectionality "to denote the various ways in which race and gender interact to shape the multiple dimensions of Black women's employment experiences" (footnote omitted) (citing Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 140)); see also, e.g., Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 2–3 (2d ed. 2000) (detailing Black women's unique viewpoints of themselves within their communities as a part of a larger "intellectual tradition").

7. Moya Bailey, Misogynoir Transformed: Black Women's Digital Resistance 1 (2021).

8. Domestic Violence Survivors Justice Act, ch. 31, 2019 N.Y. Laws 144 (codified as amended at N.Y. Crim. Proc. Law § 440.47 and N.Y. Penal Law §§ 60.12, 70.45 (McKinney Supp. 2024)); see also Nicole Fidler & Ross Kramer, New York Appellate Court Issues Landmark Ruling on DVSJA in the Case of Nicole Addimando, Sanctuary for Fams. (July 23, 2021), https://sanctuaryforfamilies.org/dvsja-appeal-nicole-addimando/ [https://perma.cc/E5TY-ZHZS] (explaining that the DVSJA allows judicial discretion to reduce a defendant's "unduly harsh" sentence if they were a victim of domestic violence inflicted by "a member of the same family or household" and if the abuse was "a significant contributing factor" of the crime (internal quotation marks omitted) (quoting Penal § 60.12(1))).

9. Domestic Violence Survivors Justice Act, ch. 31, 2019 N.Y. Laws 144 (codified as amended at Crim. Proc. § 440.47 and Penal §§ 60.12, 70.45); The Law, Survivor's Just. Project, https://www.sjpny.org/dvsja/the-law [https://perma.cc/QXL8-V3NF] (last visited Aug. 8, 2024) ("The DVSJA amended Penal Law § 60.12, which allows for an alternative sentence, and created Criminal Procedure Law § 440.47, which allows for resentencing for survivors currently in prison serving sentences of 8 years or more." (emphasis omitted)).

10. See Penal § 60.12(1)(b) (describing the "significant contributing factor" requirement when assessing a defendant survivor's claim of abuse); The Law, supra note 9.

11. SJP Trainings, Survivors Just. Project, https://www.sjpny.org/new-page-1 [https://perma.cc/UV2F-PTPW] (last visited Aug. 24, 2024) ("It is the first sentencing reform of its kind in the country, and one of the only sentencing reform efforts to include

to decriminalize trauma and help individuals who commit crime while suffering abuse.[12] Other states have enacted similar laws,[13] but Black women still face lingering issues that exacerbate coercive abuse, racism, and gendered violence.

This Note examines the impact of New York's revolutionary DVSJA on Black woman survivorship while proposing solutions and improvements for other states aiming to replicate the statute. Part I summarizes the DSVJA and contextualizes the case law that preceded its passing. Part II describes the unique impact of domestic violence on Black women, the challenges of qualifying for relief under the statute, and the limitations of resentencing. Lastly, Part III offers noncarceral solutions that replace sentencing and help Black women share their experiences as abuse survivors.

## I. UNDERSTANDING THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, ITS ORIGINS, AND THE CONSEQUENCES OF GOOD INTENTIONS

### A. *The Domestic Violence Survivor in the Carceral State*

Intimate Partner Violence (IPV), alternatively called domestic violence,[14] occurs when "one partner asserts power and control over the other," though the legal definition varies by state.[15] The effects of IPV are

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survivors convicted of serious violent crimes and offenses involving harm to people other than an abuser.").

12. The Domestic Violence Survivors Justice Act (DVSJA), Sanctuary for Fams., https://sanctuaryforfamilies.org/our-approach/advocacy/justice-for-incarcerated-survivors-ny [https://perma.cc/ZYF7-652H] (last visited Aug. 7, 2024) [hereinafter Sanctuary for Fams., The DVSJA] ("By untying judges' hands and giving them discretion, the DVSJA would help restore humanity and justice to the way we treat survivors of severe abuse who act to protect themselves and would bring long overdue relief to survivors who have been incarcerated for many years.").

13. See Liz Komar, Alexandra Bailey, Clarissa Gonzalez, Elizabeth Isaacs, Kate Mogulescu & Monica Szlekovics, Survivors Just. Project & Sent'g Project, Sentencing Reform for Criminalized Survivors: Learning From New York's Domestic Violence Survivors Justice Act 1 (2023), https://www.sentencingproject.org/app/uploads/2024/02/Sentencing-Reform-for-Criminalized-Survivors.pdf [https://perma.cc/GTX6-YGQT] ("Across the country, a growing number of jurisdictions are . . . passing or considering bills designed to allow survivors of family violence, intimate partner violence, and human trafficking to receive shorter sentences for offenses deeply entwined with their victimization.").

14. Domestic or Intimate Partner Violence, Office on Women's Health, https://www.womenshealth.gov/relationships-and-safety/domestic-violence [https://perma.cc/74MW-PV4B] (last updated Feb. 15, 2021).

15. Off. for Victims of Crime, DOJ, 2018 National Crime Victims' Rights Week Resource Guide: Intimate Partner Violence Fact Sheet, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf [https://perma.cc/PM8P-ACZ6] (last visited Aug. 7, 2024) (emphasis omitted); Nat'l Coal. Against Domestic Violence, Domestic Violence and the Black Community, https://assets.speakcdn.com/assets/2497/dv_in_the_black_community.pdf [https://perma.cc/M94S-X5PF] [hereinafter Nat'l Coal. Against Domestic Violence, Domestic Violence and the Black Community] (last visited Aug. 7, 2024) ("Domestic

disastrous, with abusers inflicting psychological aggression, stalking, and violence.[16] One in three women and one in four men experience some form of IPV.[17] Additionally, one in three women will experience physical violence, while one in five women will experience sexual violence by an intimate partner.[18] These statistics are even more alarming when investigating the impact abuse has on larger society. While nonexhaustive in its damages, incarceration destroys families, perpetuates cycles of poverty, and violently disrupts communities.[19] This leaves no question that IPV remains a large issue within the United States.

Abuse alters physical and mental comportment. Many abuse survivors develop "Battered Person Syndrome" (BPS), also called "Abused Person Syndrome" (APS).[20] Abuse inflicts deep psychological wounds that create feelings of isolation and put survivors at the mercy of the carceral state.[21] The onset of unhealthy coping mechanisms, post-traumatic stress disorder, and behavioral disorders are common psychiatric symptoms of IPV.[22] Survivors of IPV experience trouble sleeping, substance dependency, heightened anxiety, avoidant mannerisms, and a list of many other symptoms that alter their behavior.[23] A survivor may perceive a closer

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violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another.").

16. See About Intimate Partner Violence, CDC (May 16, 2024), https://www.cdc.gov/intimate-partner-violence/about/index.html [https://perma.cc/BAX2-RJX6] (noting the "harmful and long-lasting effects of intimate partner violence on individuals, families, and communities").

17. Domestic Violence Statistics, Nat'l Domestic Violence Hotline, https://www.thehotline.org/stakeholders/domestic-violence-statistics/ [https://perma.cc/449N-VZU6] [hereinafter NDVH Statistics] (last visited Aug. 24, 2024).

18. Id.

19. See Inès Zamouri, Self-Defense, Responsibility, and Punishment: Rethinking the Criminalization of Women Who Kill Their Abusive Intimate Partners, 30 UCLA J. Gender & L. 203, 209 (2023) ("[S]tatistics hint at the existence of a domestic abuse-to-prison pipeline that leads women — especially women of color and poor women — to be criminalized and punished by the state for being victims of abuse.").

20. N.Y. State Unified Ct. Sys., Abused Person Syndrome 1, https://www.nycourts.gov/JUDGES/evidence/7-OPINION/7.06_Abused_Person_Syndrome.pdf [https://perma.cc/RA22-8VBH] (last updated May 2024).

21. See Delaney Rives Knapp, Note, Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution, 83 Alb. L. Rev. 313, 316–17 (2020) (arguing that "through the criminal justice process, a victim of domestic violence becomes a criminal defendant" only to discover that "[t]he current criminal justice system contributes to the continued gaslighting of domestic violence victims by labeling them criminal defendants when they are truly survivors" (emphasis omitted)).

22. Intimate Partner Violence: A Guide for Psychiatrists Treating IPV Survivors, APA, https://www.psychiatry.org/psychiatrists/diversity/education/intimate-partner-violence [https://perma.cc/3ZVK-GPP9] (last visited Aug. 7, 2024).

23. See Gunnur Karakurt, Douglas Smith & Jason Whiting, Impact of Intimate Partner Violence on Women's Mental Health, 29 J. Fam. Violence 693, 693–94 (2014) ("Intimate partner violence (IPV) has numerous mental health consequences for women.

threat of harm after experiencing long-term abuse.[24] These outcomes inform why survivors may exhibit changed behaviors.

Abuse coaxes survivors into acting contrary to their typical nonthreatened behavior. A survivor managing substance dependence, potentially as a coping mechanism, is less likely to act the same as they would while sober or without a substance dependency.[25] Instead, they might experience physical withdrawals that push them to act outside of their character.[26] Survivors in retraumatizing situations may additionally engage in avoidant behaviors from fear of impending abuse, potentially complying with requests that they otherwise would reject. If a survivor is experiencing both substance dependence and heightened anxiety, their abuser could exploit substance use or threaten violence to force compliance.

Some survivors commit crimes to protect a loved one while others do so as a consequence of their abuse.[27] Consequently, after incarceration, IPV survivors may be unhoused and resort to crime "to meet basic survival needs,"[28] often resulting in further criminal charges.[29] Most women in the carceral system have endured some form of physical or sexual violence as children.[30] Even more have experienced IPV as adults.[31] Prisons do not happen upon traumatized people—they latch on to the less fortunate and hollow them out, leaving them worse than when they came in and battling new wounds. Experiencing abuse strips individuals of their wellbeing and personhood, making them vulnerable to imprisonment.[32]

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These consequences include depression, anxiety, post-traumatic stress disorder (PTSD), substance abuse, and low self-esteem." (citations omitted)).

24. See Zlatka Rakovec-Felser, Domestic Violence and Abuse in Intimate Relationship From Public Health Perspective, 2 Health Psych. Rsch. 62, 62 (2014) (explaining how an abuser oscillates between amicable and violent tendencies); see also Debra Pogrund Stark & Jessica Choplin, Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence, 32 Wis. J.L., Gender & Soc'y 13, 24–32 (2017) (illuminating why a survivor who is experiencing long-term effects of abuse can believe harm is imminent).

25. Stark & Choplin, supra note 24, at 25–28.

26. Id.

27. Komar et al., supra note 13, at 5, 7.

28. Id. at 1.

29. Id. at 7.

30. See Melissa E. Dichter & Sue Osthoff, VAWnet.org: The Nat'l Online Res. Ctr. on Violence Against Women, Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update 10 (2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf [https://perma.cc/M9C9-DHCD] ("[Most] incarcerated women reported having experienced some form of interpersonal trauma in their lifetimes prior to their incarceration. Experiences of physical or sexual violence in childhood are reported by approximately 60-70% of incarcerated women or girls. . . .").

31. Id. ("[A]dulthood intimate partner violence [is] reported by approximately 70-80% of incarcerated women.")

32. See Patricia Warth, Unjust Punishment: The Impact of Incarceration on Mental Health, N.Y. State Bar Ass'n (Dec. 5, 2022), https://nysba.org/unjust-punishment-the-

Incarceration presents many challenges for advocates, but researchers contextualize women's incarceration as uniquely harmful. In the last two decades, women's incarceration has grown at twice the rate of men's.[33] Overwhelming numbers of women, many of whom are primary household caregivers, are stuck in pretrial detention in their local jails because they cannot afford to leave.[34] Women of color, especially Black women, are the most overrepresented group among incarcerated women and receive the longest sentences.[35] Despite the global pandemic reducing women's incarceration between 2020 to 2021, trends still indicate that women's incarceration is a pervasive issue.[36] While ample data speak to incarcerated women's issues generally, limited information restricts proper analysis of the lives of Black women uniquely affected by mass incarceration.[37]

Given the data on the relationship between women's incarceration and IPV, it is unsurprising that states showing disparate sentencing, like Oklahoma,[38] have among the highest rates of IPV.[39] Oklahoma particularly illuminates the impact of the carceral state on women, as the state heavily persecutes incarcerated women of color for failing to protect their children from IPV.[40] Oklahoma highlights disparate sentencing for women in domestic violence relationships as well, with women often getting

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impact-of-incarceration-on-mental-health/ [https://perma.cc/LZ98-PT6M] ("People with mental illness in the U.S. are 10 times more likely to be incarcerated than they are to be hospitalized." (citing Nat'l Jud. Task Force to Examine State Courts' Response to Mental Illness, State Courts Leading Change: Report and Recommendations 9 (2022))).

33. Press Release, Aleks Kajstura & Wendy Sawyer, Prison Pol'y Initiative, Women's Mass Incarceration: The Whole Pie 2024 (Mar. 5, 2024), https://www.prisonpolicy.org/reports/pie2024women.html [https://perma.cc/HS68-XTSL].

34. Id.

35. Ashley Nellis, In the Extreme: Women Serving Life Without Parole and Death Sentences in the United States 7 (2021).

36. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2022 (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/9U9T-JDH3] ("Unfortunately, [reductions in women's incarceration] were largely the result of pandemic-related slowdowns in the criminal legal system—not permanent policy changes. And as the criminal legal system has returned to "business as usual," prison and jail populations have already begun to rebound to pre-pandemic levels.").

37. Id.

38. See, e.g., Komar et al., supra note 13, at 5 (describing how Oklahoma's laws lead to women disproportionately facing higher sentences than their male counterparts).

39. Domestic Violence by State 2024, World Population Rev., https://worldpopulationreview.com/state-rankings/domestic-violence-by-state [https://perma.cc/DG6Q-PP9V] (last visited Aug. 7, 2024).

40. See Komar et al., supra note 13, at 5 (highlighting "Oklahoma's failure to protect law" being used "disproportionately [against] women of color, . . . result[ing] in survivors of abuse facing longer sentences for allegedly failing to protect their children from harm than the person who committed the abuse").

harsher punishments than their abusive male partners.[41] In recent years, activists have centered the stories of murdered women, illuminating how the legal system fails IPV survivors.[42]

Abuse-to-incarceration is a reality for many women in New York as well. A third of New York women will experience IPV in their lifetime,[43] while nine out of ten women in New York prisons have survived abuse.[44] New York Evidence Rule 7.06(1)(a) defines BPS as a "constellation of medical and psychological symptoms of a person of any gender who, at the hands of a 'member of the complainant's family or household' has suffered physical, sexual, or emotional abuse or has been coerced to do something contrary to their right not to do so."[45] Naturally, there are cases of battered women receiving substantial jail time in the state.[46]

Cases in which women are punished for not acting how they should when dealing with abuse demonstrate how the state vilifies mothers who fail to protect.[47] In the highly publicized case of Nixzmary Brown, the judge sentenced Nixzaliz Santiago, Nixzmary's mother, to forty-three years in prison while her abusive partner only received twenty-nine years despite abusing and subsequently killing Nixzmary.[48] Nixzaliz treated her child's wounds after her abusive partner wounded her for breaking a printer.[49]

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41. AP Poythress, Who We Fail to Protect: Coalition Building in Oklahoma Women's Prisons, *in* Good Things for Us to Read, https://open.library.okstate.edu/goodthingstoread/chapter/who-we-fail-to-protect-coalition-building-in-oklahoma-womens-prisons/ [https://perma.cc/C23P-5CUE] (last visited Aug. 26, 2024) ("In Oklahoma, this more often than not leads to a conviction of the mother, with harsher penalties imposed against her than even the perpetrators of the crime itself." (citing Ryan Little, An Obscure Law Is Sending Oklahoma Mothers to Prison in Droves. We Reviewed 1.5 Million Cases to Learn More., Mother Jones (Aug. 9, 2022), https://www.motherjones.com/mojo-wire/2022/08/failure-to-protect-data-oklahoma/ [https://perma.cc/93CA-GYUE]))).

42. See id.

43. Nat'l Coal. Against Domestic Violence, Domestic Violence in New York, https://assets.speakcdn.com/assets/2497/ncadv_new_york_fact_sheet_2020.pdf [https://perma.cc/2FS2-CHDS] (last visited Aug. 7, 2024).

44. See Sanctuary for Fams., The DVSJA, supra note 12.

45. N.Y. State Unified Ct. Sys., supra note 20, at 1 (quoting the Criminal Procedure Law and Family Court Act, N.Y. Crim. Proc. Law § 530.11(1) (McKinney 2024); N.Y. Fam. Ct. Act § 812(1) (McKinney 2024)).

46. See, e.g., Kareem Fahim, Mother Gets 43 Years in Death of Child, 7, N.Y. Times (Nov. 12, 2008), https://www.nytimes.com/2008/11/13/nyregion/13nixzmary.html (on file with the *Columbia Law Review*) (describing the case of an abused mother who received almost double the time for not protecting her child from her abusive partner than her partner did for perpetrating the abuse).

47. See, e.g., Jeanne A. Fugate, Note, Who's Failing Whom? A Critical Look at Failure-to-Protect Laws, 76 N.Y.U. L. Rev. 272, 273 (2001) (illustrating the prevalence of undermining abused mothers, noting one case where the prosecutor suggested that the defendant should have suffered more harm for the jury to believe her abuse).

48. Fahim, supra note 46.

49. Santiago v. Kaplan, No. 13-CV-00218 (ERK)(LB), 2014 WL 3696024, at *1 (E.D.N.Y. July 24, 2014) (recalling the abuse that transpired after the stepfather became enraged over a printer).

The rationale of one juror, after giving Nixzaliz Santiago the maximum sentence and acquitting her abusive partner for murder, was that Nixzaliz failed her "duty" as a mother by allowing her abusive partner to kill her child.[50] The judge expressed similar sentiments.[51]

Further research also reveals the implicit sexism plaguing the carceral system that specifically targets single mothers.[52] Women especially suffer from failing to protect their children, facing "a disproportionate share of arrests and convictions in this area."[53] Punishing women for failing one's duty as a mother, while simultaneously holding a lower standard for their male abusers, is prevalent in the United States and within New York.[54] The Nixzmary Brown case underscores a larger issue of gender bias in sentencing, with a "battered mother" receiving a harsher sentence than their male codefendants because of sex stereotyping.[55]

It is important to recognize then how disproportionate sentencing affects Black mothers. Assessing criminalized motherhood from a racial lens, Ann Cammett, Law Professor at CUNY School of Law, notes how "often[,] it is black mothers' *perceived parenting deficiencies* that make them vulnerable to criminal justice intervention."[56] Such negative ideologies about Black motherhood feed Black women to prison doors. Section II.A

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50. Id.; see also Fahim, supra note 46 (recalling the juror's phone interview where they stated that "[s]he was the mother," that it was "her duty to protect her child," and that "she allowed" her abusive partner to kill her child). Communications with the Kings County Supreme Court revealed the initial case of Nixzaliz Santiago is not a matter of public record.

51. See Fahim, supra note 46 ("You may not have delivered the fatal blow, but the jury found it was in your power to prevent the effects of it . . . . Were it not for your failure to act, Nixzmary Brown would have probably not died from that blow on that day." (quoting Justice Patricia DiMango)). The sentencing of Nixzaliz Santiago is not a matter of public record.

52. See Fugate, supra note 47, at 288 n.66 (discussing the uneven treatment of single mothers, particularly of color).

53. Id. at 275 (explaining the gender disparity amongst sentencing men and women for failing to protect their children and how sex-stereotyping plays a role); see also Ann Cammett, Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism, 25 S. Cal. Interdisc. L.J. 363, 389 (2016) ("Taylor's status as a poor black mother subjected her to a high degree of scrutiny and public scorn for her decisionmaking, and ultimately, criminalization.").

54. See G. Kristian Miccio, A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings, 22 Harv. Women's L.J. 89, 105 (1999) ("Through police avoidance of arrest, the assailant learns that his conduct is outside state concern and state reach. Violence within the home is extraneous to state concern and, for the survivor, the private sphere functions as a movable prison.").

55. Id. at 118 ("The perception of woman-as-mother is relational, not individual; her existence is contrived by her proscribed role within the family. Thus, in *Williquette*, the state extracts a higher price for maternal failure to protect because such failure violates social norms of mothering." (footnote omitted) (citing State v. Williquette, 385 N.W.2d 145 (Wis. 1986)).

56. See Cammett, supra note 53, at 367 (arguing that tropes of Black women, particularly deriving from the "Welfare Queen" stereotype, feed into the criminalization and hypersexualization of Black women).

will highlight prominent stereotypes of Black women and how those stereotypes inform their vilification.[57]

It was not until New York passed the DVSJA, the first legislation of its kind in the country, that scholars interrogated the relationships between abuse and incarceration.[58]

### B. *New York and the DVSJA*

Originally introduced in 2011,[59] the New York state legislature enacted the DVSJA in May 2019 to be a resentencing tool for incarcerated individuals who survived abuse.[60] District attorneys opposed the legislation, believing there were already adequate remedies at law,[61] while survivors spent each year educating officials on the effects of harsh sentencing for domestic violence victims.[62] Domestic violence survivors and advocates across the state of New York pushed the state government to address the criminalization of survivors.[63] Proponents of the initial DVSJA bill recognized that:

> All too often, when a survivor defends herself and her children, our criminal justice system responds with harsh punishment instead of with compassion and assistance. Much of this punishment is a result of our state's current sentencing structure which does not allow judges discretion to fully consider the impact of domestic violence when determining sentence lengths. This leads to long, unfair prison sentences for many survivors.[64]

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57. See infra section II.A.

58. See SJP Trainings, supra note 11 ("It is the first sentencing reform of its kind in the country, and one of the only sentencing reform efforts to include survivors convicted of serious violent crimes and offenses involving harm to people other than an abuser.").

59. See DVSJA History, Survivors Just. Project, https://www.sjpny.org/dvsja/history [https://perma.cc/MRP2-CX2A] (last visited Aug. 7, 2024) (detailing the history of the DVSJA).

60. See Fidler & Kramer, supra note 8 ("In 2019, the Initiative, along with survivors and advocates across New York, achieved a major success when New York enacted the Domestic Violence Survivors Justice Act ('DVSJA') after nearly a decade of hard-fought advocacy.").

61. Letter from Janet DiFiore, President, Dist. Att'ys Ass'n of the State of N.Y., to Ruth Hassell-Thompson, Sen. & Jeffrion Aubry, Assemb. (May 8, 2012) (on file with the *Columbia Law Review*).

62. DVSJA History, supra note 59.

63. See Fidler & Kramer, supra note 8 ("In New York, the passage of the DVSJA was hailed as a major victory by advocates of criminal justice reform and the movement to end gender violence.").

64. Legislative Memorandum in Support of Bill 2019-A03974, from Aubry, Assemb. to NY Assemb. (Jan. 31, 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03974&term=2019&Summary=Y&Actions=Y&Memo=Y [https://perma.cc/9TKC-L7TH].

For many, the arrival of the legislation brought in a new era for abuse survivors that allowed them to share their experiences in court.[65]

Since its enactment, the DVSJA has seen some success. The legislation has helped over forty people obtain reduced sentences totaling over eighty years of imprisonment.[66] In *People v. Addimando*, Judge Reinaldo Rivera decided that survivor-defendant Nicole Addimando qualified for one of the first applications of the DVSJA after shooting her abusive partner following years of sexual abuse.[67] She received a sentence reduction from nineteen years to seven-and-a-half years and an additional five years of post-release supervision.[68] Several states have begun to adopt similar forms of the DVSJA as a means of addressing IPV and the incarceration of women.[69]

Still, the statute's effectiveness remains in question. While the DVSJA could help hundreds of incarcerated survivors,[70] one may ask why it has not already. While the *Addimando* case found success for the survivor, there may be other cases with Black female survivors who are not seen as victims due to racial bias within courts.[71] Furthermore, a jury or judge might have more sympathy for a woman shooting an abusive partner than a woman committing a crime *for* her abuser fearing long-term consequences.[72] The procedural requirements imposed by the statute and the substantive arguments that the defendant is required to make affect whether a

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65. See Cynthia Feathers, Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes, N.Y. State Bar Ass'n J., March 2020, at 15, 16 (detailing how progress was "finally achieved" with the enactment of the DVSJA).

66. See Komar et al., supra note 13, at 1 ("35 women, 4 men and 1 non-binary person, 28 of whom are people of color, have received retroactive sentencing relief. These sentence reductions saved a collective 80 years of incarceration . . . .").

67. See People v. Addimando, 152 N.Y.S.3d 33, 46 (App. Div. 2021) (holding that the facts of Addimando's case met the DVSJA's qualifications); Fidler & Kramer, supra note 8.

68. *Addimando*, 152 N.Y.S.3d at 46.

69. See Komar et al., supra note 13, at 1 ("[T]he DVSJA has inspired a wave of legislative advocacy in Louisiana, Oklahoma, and Oregon.").

70. See Sanctuary for Fams., The DVSJA, supra note 12 ("About 360 incarcerated survivors of domestic violence would be eligible for re-sentencing under the bill.").

71. See Maya Finoh & Jasmine Sankofa, The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence, ACLU (Jan. 28, 2019), https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non [https://perma.cc/42L6-FYX5] (explaining that "[t]he silencing of and structural biases against Black women, girls, and non-binary people can have devastating consequences — including the incarceration of survivors themselves").

72. Heather R. Skinazi, Comment, Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect", 85 Calif. L. Rev. 993, 999 (1997) ("[W]e are often torn between sympathy for the coerced actor and abhorrence at the act she committed.").

survivor receives relief.[73] Limited in its remedies,[74] the statute leaves much to be desired.

The DVSJA is a tool for judges to look outside of the sentencing guidelines and examine whether the domestic abuse was a "significant contributing factor" to the alleged crime.[75] The language of the statute has several criteria alongside the "significant contributing factor" requirement, though a survivor-defendant can be eligible for resentencing under the DVSJA if they were "a victim of domestic violence subjected to substantial physical, sexual or psychological abuse."[76] For individuals seeking resentencing relief who committed the crime before the enactment of the statute, the defendant must be currently incarcerated, serving a minimum sentence of at least eight years,[77] and serving as "first or second felony offenders" in the original proceeding, while not serving a crime after August 12, 2019, and not being considered a "second . . . or persistent violent felony offender[]."[78] For crimes committed after August 12, 2019, the DVSJA still "gives judges the discretion to sentence to shorter prison terms and, in some cases, to community-based alternative-to-incarceration programs," notably without the requirement of serving an eight-year minimum sentence.[79] The defendant, however, must still request DVSJA consideration before their initial sentencing.[80]

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73. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(2)(c) (McKinney 2024) ("An application for resentencing pursuant to this section must include at least two pieces of evidence corroborating the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence . . . .").

74. See Survivors Just. Project, Domestic Violence Survivors Justice Act: Resource Guide 3 (2021) [hereinafter Resource Guide] (explaining that the statute provides relief to obtain resentencing, and in some cases, sentencing to "Alternative to Incarceration" programs that may include substance abuse programs).

75. See Domestic Violence Survivors Justice Act (DVSJA), So I Stayed, https://andsoistayedfilm.com/dvsja [https://perma.cc/F2DE-FBT2] (last visited Aug. 7, 2024).

76. Crim. Proc. § 440.47(2)(c); see also Elizabeth Langston Isaacs, The Mythology of the Three Liars and the Criminalization of Survival, 42 Yale L. & Pol'y Rev. 427, 442 n.32 (2024) (recognizing that the statute did not define "substantial abuse").

77. Crim. Proc. § 440.47(1)(a).

78. N.Y. Off. of Indigent Legal Servs., What Is the Domestic Violence Survivors Justice Act? 1, https://www.ils.ny.gov/files/NYC%20-%20What%20is%20DVSJA.pdf [https://perma.cc/3DSN-9L7J] (last visited Aug. 7, 2024).

79. Resource Guide, supra note 74, at 3, 34; see also N.Y. Penal Law § 60.12(1) (McKinney 2024).

80. Penal § 60.12(1); see also Resource Guide, supra note 74, at 10 ("[F]or offenses committed after August 12, 2019, you will NOT have the option to bring your case back to court for reduced DVSJA resentencing once you are sentenced." (emphasis omitted)). This means that if you commit an offense after the enactment of the statute and failed to request relief under the DVSJA upon your initial sentence, you are barred from seeking resentencing relief. See Komar et al., supra note 13, at 10 ("Individuals whose offenses occurred after the enactment date of the DVSJA are not eligible to apply for resentencing, even if they were unable or declined to raise their DVSJA claim at their original sentencing. They are limited to seeking relief at their original sentencing hearing.").

Lastly, the statute excludes people convicted of murder in the first degree, aggravated murder, sex offenses, terrorism offenses, or conspiracy to commit any of the acts.[81] These exclusionary measures are too narrow to properly address domestic violence survivors. Section II.B will cover the specific limitations of the statute's narrow requirements and how resentencing worsens the mental and physical state of survivors.

## II. BLACK WOMAN SURVIVORSHIP

Implicit biases develop into longstanding stereotypes that push Black women into the carceral system. Black women face among the highest rates of IPV.[82] The depiction of Black women as being worthy of abuse originates from enslavement.[83] These stereotypes use imagery and negative associations to objectify Black women, manifesting as implicit biases and harsher carceral punishments.[84]

The DVSJA, previously an object of hope, now reveals substantive and procedural limitations that further harm Black women. Strenuous requirements under the DVSJA make it difficult for Black women to speak on their experiences as victims. Nevertheless, it is important to conceptualize the social barriers facing Black women survivors and how misogynoir harmfully elevates Black women's incarceration.

Section II.A will detail society's abuse of Black women and what ways social norms further their criminalization. Section II.B will then examine the substantive limitation of New York's DVSJA through the timely nexus requirement and section II.C will elucidate procedural limitations. Both will address how the DVSJA often exacerbates Black women's oppression.

### A. *Black Women and the Privilege of Victimhood*

Negative associations of Black women inform their abuse. To rationalize the continuous subjugation of Black persons, white people seeking to maintain social superiority forced unfounded, and often reflective, ideologies.[85] Stereotypes depicting Black women as bestial,

81. Penal § 60.12(1). Upon further investigation, the DVSJA appears to hold more procedural limitations. Continuing research should interrogate how the statute excludes certain crimes, such as possession with intent to distribute, despite covering more serious crimes like murder.

82. See Nat'l Coal. Against Domestic Violence, Domestic Violence and the Black Community, supra note 15 ("[B]oth Black women and Black men experience intimate partner violence at a disproportionately high rate.").

83. See Collins, supra note 6, at 5 ("[C]ontrolling images applied to Black women that originated during the slave era attest to the ideological dimension of U.S. Black women's oppression." (citations omitted)).

84. See Finoh & Sankofa, supra note 71 (explaining how Black women, girls, and nonbinary persons are not seen as victims).

85. See Collins, supra note 6, at 146 ("Violence against Black women tends to be legitimated and therefore condoned while the same acts visited on other groups may remain nonlegitimated and non-excusable.").

hypersexual, and deserving of punishment arose during the time of slavery.[86] These ideologies excused and promoted the continuous rape of Black women, with owners rationalizing control over Black women to manage their labor force.[87] The common stereotype of the "Jezebel," for example, depicts Black women as hypersexual beings who cannot experience sexual assault as sexual objects.[88] Another common stereotype, "The Welfare Mother" or "The Welfare Queen," describes single Black mothers as being a burden on the government with their own self-inflicted poverty and as cardinally bad mothers who eugenicists believe "produc[ed] too many economically unproductive children."[89] This belief blames Black women for living in poverty and for their abuse instead of focusing on what the state and the larger society should be aiming to fix.

These biases continue into the modern century, normalizing Black women's abuse. Society continuously masculinizes Black women and removes them from the "cult of domesticity," a realm of privilege afforded to white women that calls for society to protect them.[90] This outlook is an instance of positive stereotyping, the "subjectively favorable beliefs about members of social groups" that still keep them subjugated with "domain-specific advantage, favorability, or superiority based on category

86. See id. at 51 ("Efforts to control Black women's sexuality were tied directly to slave owners' efforts to increase the number of children their female slaves produced."); see also Brianna N. Banks, Note, The (De)Valuation of Black Women's Bodies, 44 Harv. J.L. & Gender 329, 338 (2021) (noting that "[t]he Jezebel image 'arose during the slavery era as an explanation for slave owners' sexual attraction to and sexual abuse of Black women'" (quoting Danice L. Brown, Rhonda L. White-Johnson & Felicia D. Griffin-Fennell, Breaking the Chain: Examining the Endorsement of Modern Jezebel Images and Racial-Ethnic Esteem Among African American Women, 15 Culture, Health & Sexuality 525, 526 (2013)).

87. See Collins, supra note 6, at 51 (explaining that the desire to control Black women's reproductivity was directly tied to the white enslaver's economic benefit).

88. See Bernadine Y. Waller, Jalana Harris & Camille R. Quinn, Caught in the Crossroad: An Intersectional Examination of African American Women Intimate Partner Violence Survivors' Help Seeking, 23 Trauma, Violence & Abuse 1235, 1236–37 (2022) ("Raping African American women contributed to the expansion of the slave population and therefore the American economy. Framing African American women as inherently hypersexual rationalized their sexual abuse and torture."); see also Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 116 (2012) (noting the "strong evidence that for the most marginalized groups, deviance from hegemonic gender and sexuality norms continues to be associated with negative consequences").

89. See Collins, supra note 6, at 79–80 (citation omitted) (describing the idea of Black women embodying "The Welfare Queen," a caricature that depicts single Black mothers as negligent and irresponsible, thereby justifying state negligence of resources).

90. See Waller et al., supra note 88, at 1237 ("While the American family ethic and the cult of domesticity decreed that a woman's place was in the home, the ongoing marginalization and exploitation of African American men made this nearly impossible for African American families." (citation omitted)); see also Michelle S. Jacobs, The Violent State: Black Women's Invisible Struggle Against Police Violence, 24 Wm. & Mary J. Women & L. 39, 47 n.40 (2017) [hereinafter Jacobs, The Violent State] ("Collins lists the virtues that are essential to 'true' womanhood as piety, purity, submissiveness, and domesticity. Black women could not be true women as they lacked piety and purity." (citing Patricia H. Collins, Controlling Image and Black Women's Oppression, Race & Ethnicity 266 (1991))).

membership."[91] Living within the "cult of domesticity" is a privilege that protects certain groups of women and demonizes others.[92] On the other hand, and through the manifestation of stereotypes formed during slavery, Black women hold burdensome responsibilities within their home and within larger society. Individuals praising Black women for their "strength" undermine their need for support.[93] Many Black women are the main breadwinners as the heads of their respective households,[94] yet, to illustrate the sparseness of care, incarcerated Black women are frequently lacking adequate emotional and financial support compared to incarcerated men.[95]

IPV is inextricably linked to the incarceration of Black women. Modern ideologies perpetuating white supremacy characterize Black women as inherently criminal and deserving of abuse. Black women are uniquely affected as survivors, with almost half of Black women suffering from IPV at some point in their life.[96] This abuse includes "any physical or sexual violence, psychological aggression, stalking, and/or controlling

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91. Alexander M. Czopp, Aaron C. Kay & Sapna Cheryan, Positive Stereotypes Are Pervasive and Powerful, 10 Persps. on Psych. Sci. 451, 451 (2015).

92. See Waller et al., supra note 88, at 1239 (explaining a study of female participants' experience with police officers, noting African American women's "diminished need for the same level of support and intervention that White women survivors are generally afforded").

93. See id. at 1237 ("The Mammy trope characterized African American women as strong, large, asexual, and obedient . . . and trustworthy woman devoid of personal needs." (citations omitted)).

94. See Jared Trujillo, Reducing Multigenerational Poverty in New York Through Sentencing Reform, 26 CUNY L. Rev. 225, 260 (2023) ("A majority of incarcerated women are parents, and many of them are caregivers and breadwinners for their families."); Sarah Jane Glynn, Ctr. for Am. Progress, Breadwinning Mothers Continue to Be the U.S. Norm 11 (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/Breadwinners2019-report1.pdf (on file with the *Columbia Law Review*) ("Black mothers are by far the most likely to be the primary source of economic support for their families; they are more than twice as likely as white mothers to be their family's breadwinner, and more than 50 percent more likely than Hispanic mothers.").

95. See Breea C. Willingham, Black Women's Prison Narratives and the Intersection of Race, Gender, and Sexuality in US Prisons, 23 Critical Surv. 55, 59 (2011) ("When men are incarcerated, women are usually the ones 'holding them down', supporting them and taking care of their children, on the outside. The woman will regularly visit her man and promise to wait for him. But when these women become inmates themselves, they rarely get that same . . . support.").

96. See Nat'l Coal. Against Domestic Violence, Domestic Violence and the Black Community, supra note 15 ("45.1% of Black women and 40.1% of Black men have experienced intimate partner physical violence, intimate partner sexual violence and/or intimate partner stalking in their lifetimes.").

behaviors"[97] with a particular emphasis on exercising power and control.[98] Black women are incarcerated at higher rates than other women,[99] with their traumatic experiences of abuse often contributing to their criminal convictions. The National Institute of Justice acknowledges that many women in prison have endured childhood trauma, sexual violence, and substance abuse.[100] Political figures also recognize that many women have experienced sexual assault prior to prison, with Black women facing incarceration at twice the rate of white women.[101] Meanwhile, scholars have uncovered how the consequences of sexual violence and coercive control lead women to prison, examining how police surveillance and the constant criminalization of abuse survivors inform harsher sentences for Black women.[102]

Coercive control and abuse affect Black women uniquely, yet go ignored in the literature.[103] Coercive control is an abuse tactic that centers "'intimate terrorism,' 'coercive controlling violence[,]' or 'battering,'" developing into "a systematic pattern of behavior that establishes dominance over another person through intimidation, isolation, and terror-inducing violence or threats of violence."[104] Abusers may threaten

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97. Waller et al., supra note 88, at 1235 (citing Matthew J. Breiding, Kathleen C. Basile, Sharon G. Smith, Michele C. Black, and Reshma Mahendra, Nat'l Ctr. for Inj. Prevention & Control of the Ctrs. for Disease Control & Prevention, Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements, Version 2.0, at 18 (2015)).

98. Id.

99. See Kristen M. Budd, Incarcerated Women and Girls 2 (2024) (on file with the *Columbia Law Review*) ("In 2022, the imprisonment rate for Black women . . . was 1.6 times the rate of imprisonment for white women . . . .").

100. See Holly Ventura Miller, Nat'l Inst. of Just., DOJ Off. of Just. Programs, FY 2020 Report to the Committees on Appropriations Formerly Incarcerated Women and Reentry: Trends, Challenges, and Recommendations for Research and Policy 3 (2021), https://www.ojp.gov/pdffiles1/nij/303933.pdf [https://perma.cc/R2RU-FFJF] ("Histories of childhood maltreatment and abuse, co-occurring psychiatric disorders, familial dysfunction, and negative self-concept are also more common among justice-involved women compared to men." (citations omitted)).

101. DOJ, The Impact of Incarceration and Mandatory Minimums on Survivors: Exploring the Impact of Criminalizing Policies on African American Women and Girls 5 (2017), https://www.justice.gov/media/1082786/dl?inline [https://perma.cc/M9PL-P9U8] (quoting Bea Hanson, Principal Deputy Director of DOJ Office on Violence Against Women).

102. See Jacobs, The Violent State, supra note 90, at 82 ("When a Black woman is assaulted by an intimate partner[,] she must think carefully about whether to seek the assistance of the police. Police intervention can be lethal for the partner, and it may also expose the woman, herself, to arrest and prosecution.").

103. See Komar et al., supra note 13, at 1 ("[R]esearch on the criminalization of survivors is egregiously scarce . . . .").

104. Melissa E. Dichter, Kristie A. Thomas, Paul Crits-Christoph, Shannon N. Ogden & Karin V. Rhodes, Coercive Control in Intimate Partner Violence: Relationship With Women's Experience of Violence, Use of Violence, and Danger, 8 Psych. Violence 596, 596 (2018); see also Jacobs, The Violent State, supra note 90, at 69–77, 96 (explaining how Black

physical violence to maintain control over their partner.[105] This type of IPV dangerously burrows within the psyche, instilling fear and isolation within an individual, with abusers using the law to threaten their partner into compliance.[106] Unfortunately, current conceptions of violence deemphasize psychological and emotional abuse.[107] Police rely on "incidents over patterns" when addressing domestic violence disputes, ignoring incidents that occur over periods of time.[108] Coercive control may force Black women to stay silent about their abuse, especially if it is psychological in nature.[109] Moreover, Black women are hesitant to come forward to legal authorities for several reasons. Black women may be unwilling to invite the police into their communities and homes over fear of their lives and the lives of even their abusive partners.[110] They may fear discrimination and isolation.[111] Black women may also fear for their own safety when facing police officers.[112] Literature often fails to investigate the

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women's sexual assault is frequently ignored within literature and studies, stating that the "[v]ictimization of [Black] women has come to be accepted as normal").

105. See Komar et al., supra note 13, at 7 ("Survivors may still be under the coercive control of the person who abused them – for instance, that individual may threaten to harm them or their family if they disclose.").

106. See Battered Women's Just. Project, Coercive Control Codification: A Brief Guide for Advocates and Coalitions 2 (2021), https://bwjp.org/assets/documents/pdfs/cc-codificationbrief.pdf [https://perma.cc/8679-XZR3] ("Some [abusers] are . . . coercing their partners to have sex by threatening to contact ICE and get their partner deported." (footnote omitted)).

107. See Alan Rosenthal & Christiana Wierschem, DVSJA Statewide Def. Task Force, An Introductory Guide to Coercive Control for the DVSJA Attorney: Coercive Control Is Domestic Violence 16 (2023), https://cdn.ymaws.com/www.nysda.org/resource/resmgr/news_picks_items/Coercive_Control_Guide_FINAL.pdf [https://perma.cc/ZF5X-KB6V] ("[S]o much of the dominance a partner establishes over his victim stems from seemingly 'minor' physical violence and fights. Domestic violence is not just physical; it is psychological and emotional as well." (footnote omitted)).

108. Id. at 16–17.

109. See Jacobs, The Violent State, supra note 90, at 94 ("The inability to tell their stories may prevent battered women from healing and exacerbate doubts about battered women's credibility." (internal quotation marks omitted) (quoting Leigh Goodmark, When Is a Battered Woman Not a Battered Woman? When She Fights Back, 20 Yale J.L. & Feminism 75, 114 (2008))).

110. See Understanding the Impact of Domestic Violence, Mass. Gen. Brigham: McLean (Apr. 17, 2023), https://www.mcleanhospital.org/essential/domestic-violence (on file with the *Columbia Law Review*) ("Black survivors of violence may avoid seeking health care or reporting abuse to law enforcement. . . . Black women may fear judgment from within their own communities, feel pressured to keep their family together, or become influenced by the stereotype of the strong Black woman.").

111. See Sherri Gordon, Unique Issues Facing Black Women Dealing With Abuse, verywellmind, https://www.verywellmind.com/unique-issues-facing-black-women-dealing-with-abuse-4173228 [https://perma.cc/SG74-Y78G] (last updated Jan. 25, 2023) (noting that any Black women act under fear of being labeled a "snitch" and promoting police presence to their immediate community and even their partners).

112. See Banks, supra note 86, at 344 ("Because police frequently perceive Black women as 'potentially violent, predatory, or noncompliant regardless of their actual conduct or circumstances,' Black women are hyper-vulnerable to police sexual abuse." (quoting

role of coercive abuse on Black women, a demographic already overrepresented as incarcerated women and facing a higher risk of IPV.[113] Prosecutors and other criminal justice actors also aggravate the effects of Black women's incarceration. Public defenders often fail to screen for domestic violence,[114] prosecutors charge women as accomplices when they are victims in other cases,[115] and judges hold significant discretion to determine the adequacy of a Black woman survivor's claim of abuse.[116]

Black woman survivorship—the ways in which Black women face systemic and interpersonal violence—manifests especially dangerously in the criminal system. The accumulation of psychological abuse may push Black women into prison.[117] Criminalization and dehumanization conflict with, and ultimately subsume, Black women's victimhood. As mentioned previously, Black women do not have the privilege of protection almost exclusively synonymous with white womanhood.[118] White womanhood affords white women protections under the law, which nonwhite women are unable to receive.[119]

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Jasmine Sankofa, Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform, 59 How. L.J. 651, 679 (2016))).

113. DOJ, supra note 101 ("The incarceration rate for [B]lack women is twice as high as the rate for white women. Many women in prison . . . have been victims of . . . domestic violence . . . ." (quoting Bea Hanson, Principal Deputy Director of the DOJ Office on Violence Against Women)).

114. See Letter from Malori M. Maloney to Floyd Prozanski, Chair, Kim Thatcher, Vice-Chair & Members of the Oregon Senate Committee on Judiciary, Or. Just. Res. Ctr. (Mar. 28, 2023), https://olis.oregonlegislature.gov/liz/2023R1/Downloads/PublicTestimonyDocument/88047 [https://perma.cc/GET2-53W7] [hereinafter Letter from Malori M. Maloney to Floyd Prozanski et al.] ("Public defenders are not typically trained to screen their clients for domestic violence. But even when they have the tools to identify clients affected by such abuse, they're faced with prosecutors and judges who don't appreciate the significance of it."); see also Komar et al., supra note 13, at 7 (explaining that defense counsel may not be "sufficiently trauma-informed").

115. See Sarah L. Swan, Conjugal Liability, 64 UCLA L. Rev. 968, 994 (2017) (examining accomplice liability as a "doctrinal disaster" that embodies sexist ideas of a woman being punished for the actions of her husband, resulting in convictions for individuals close to the offender as opposed to the "offense").

116. See, e.g., Komar et al., supra note 13, at 3 (describing the judicial power under the DVSJA for judges to "impose significantly reduced sentences").

117. See TK Logan, Kellie Lynch & Robert Walker, Exploring Control, Threats, Violence and Help-Seeking Among Women Held at Gunpoint by Abusive Partners, 37 J. Fam. Violence 59, 68 (2022) (describing the psychological torture strategies that force abused persons into complying with the demands of their abuser).

118. See Kali Nicole Gross, African American Women, Mass Incarceration, and the Politics of Protection, 102 J. Am. Hist. 25, 25 (2015) (highlighting "the legacies of an exclusionary politics of protection whereby black women were not entitled to the law's protection, though they could not escape its punishment").

119. See id. at 30 (discussing the southern chain gang and Black women's participation, adding how "[w]hite women, 'defined as female, would be protected from the brutal throes of the chain gang'" while Black women were exploited alongside their male counterparts).

The DVSJA is a ripe topic for discussion. A fellow student author at Harvard Law, Brianna Banks, bolstered the sparse literature surrounding Black women survivors, writing *The (De)Valuation of Black Women's Bodies* to examine how stereotypes of Black women "increase the potential for judges and other criminal justice officers to disbelieve them."[120] Banks notes how common stereotypes plaguing Black women survivors relate to their incarceration.[121] Banks also examines the impact of domestic violence in Black women's lives. Banks briefly references the DVSJA within the history of Black women facing hypersexualized scrutiny, examining issues of judicial discretion, the standards under DVSJA that ignore the experiences of Black women, and the difficulty in qualifying under the DVSJA's nexus requirement.[122] Most recently, New York appellate attorney Elizabeth Langston Isaacs discussed the difficulty that Black women face when trying to find corroborating evidence for DVSJA qualification, highlighting how requiring formalized proof of abuse to preemptively disprove potential claims of lying is problematic.[123]

This Note discusses the criminalization of Black women as abuse survivors more broadly and pinpoints other issues that Black women have when qualifying for the DVSJA.[124] Furthermore, this Note explains the limitations of resentencing.[125] While Banks and Isaacs discuss the limitations of requiring a survivor-defendant to provide two pieces of evidence corroborating their abuse under the DVSJA,[126] this Note expands upon the limitations of the DVSJA's nexus requirement, introduces limitations in its time requirement, and acknowledges the setbacks of a statutory resentencing tool.

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120. Banks, supra note 86, at 358.

121. Id. at 331 (discussing "the historic devaluation of Black women's bodies and further detail[ing] how that particular discrimination has impacted the current criminal justice system's failure to protect Black women and girls").

122. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(2)(c) (McKinney 2024) (explaining that a victim–defendant must show that "at the time of the offense," they were "subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household").

123. See Isaacs, supra note 76, at 503 ("[T]he DVSJA's corroboration requirement closely parallels the rule of prompt outcry—the message conveyed is that if you did not report your abuse when it happened, then you are presumed to be lying." (footnote omitted)).

124. See infra sections II.B–.C.

125. See infra section II.D.

126. See Isaacs, supra note 76, at 435 ("By requiring documentary evidence corroborating that abuse occurred, this ostensibly progressive legislative reform perpetuates deeply sexist and racist assumptions about who we believe, and who is presumptively incredible."); Banks, supra note 86, at 355–56 (arguing that statutes such as the DVSJA fail to help Black women by failing to recognize how difficult it is for Black women to produce the two required pieces of evidence to corroborate under the DVSJA due to implicit bias and fear of legal authority).

### B. *Black Women Living Outside the DVSJA Nexus Requirement*

The first substantive limitation is the "nexus requirement." To qualify under the New York statute, an individual must prove that the abuse they suffered was "a significant contributing factor to the defendant's criminal behavior."[127] Furthermore, the person must prove a temporal nexus between the crime committed and the abuse alleged.[128] In *People v. Williams*, survivor-defendant Erica Williams killed her abuser and applied for relief under the DVSJA.[129] The appellate court denied her motion for resentencing under the statute because she asserted substantial abuse that was "in the past."[130] The court held that physical and psychological abuse in the past did not support a strong enough temporal nexus.[131] Following this decision, a survivor must prove that the "abuse and abusive relationship were ongoing."[132]

Proving the nexus requirement poses many difficulties for Black women. The DVSJA allows a defendant to prove the nexus of abuse with corroborating evidence. Section (2)(c) of the DVSJA states:

> An application for resentencing pursuant to this section must include at least two pieces of evidence corroborating the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant as such term is defined in subdivision one of section 530.11 of this chapter.

At least one piece of evidence must be a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or an order of protection.[133]

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127. See N.Y. Penal Law § 60.12(1)(b) (McKinney 2024) (allowing the court to determine resentencing if "at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant").

128. See People v. Williams, 152 N.Y.S.3d 575, 576 (App. Div. 2021) ("Although the DVSJA does not require that the abuse occur simultaneously with the offense, . . . the 'at the time of' language must create some requirement of a temporal nexus between the abuse and the offense or else it is meaningless." (citations omitted)).

129. See id. ("The court correctly denied defendant's motion for resentencing under the DVSJA because defendant failed to demonstrate that she was a victim of 'substantial' abuse 'at the time of' the offense." (citation omitted)).

130. See id. ("It is also not enough that defendant was indisputably subjected to substantial physical and psychological abuse in the past.").

131. See id.

132. See Mandy Jaramillo & Daniel C. Speranza, DVSJA Statewide Defender Task Force, Experts and the Domestic Violence Survivors Justice Act: A Guidebook for Defense Attorneys 4 n.6 (2023), https://www.ils.ny.gov/sites/ils.ny.gov/files/DVJSA%20Expert%20Guidebook_2023_v2.pdf [https://perma.cc/4744-L7RJ] (discussing the temporal nexus).

133. Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(b) (McKinney 2024).

To satisfy the nexus requirement, individuals may also use an expert witness to explain the nexus of abuse and the criminal action.[134] This option requires financial resources that indigent Black women may lack. Some Black women may be too scared to reach out, fearing the police or distrusting their attorney's ability to properly communicate their abuse.[135] Also, attorneys may not screen people for IPV at all,[136] an error that may close a vital door to resentencing in the future. The current framework places the burden of collecting evidence of abuse on the survivor,[137] which may put Black women back into their abusive situations or even kill them—unless they have enough formal evidence to satisfy the state.

Additionally, the effects of trauma from domestic abuse can continue long after the abuse has ended.[138] In *People v. B.N.*, survivor-defendant Brenda M. Newkirk pled guilty to second-degree murder after killing her boyfriend.[139] She appealed her sentence after serving nine years out of the indeterminate twenty-one-year life sentence.[140] On appeal, she shared that her stepfather and her deceased partner substantially sexually abused her.[141] While the court accepted that Newkirk's decision to shoot her partner was the culmination of domestic disputes over a series of days,[142] the court held that the evidence necessary to show the nexus must be corroborated by evidence outside of what the defendant stated.[143] This case highlights several ways that the DVSJA may fail Black women. Scrutinizing a Black woman survivor's timeliness for addressing her abuser may put her on the outskirts of qualifying for the DVSJA. Additionally, the inherent discretion afforded to the courts, combined with implicit biases, may leave Black women on the outskirts, unable to adequately address their abuse.

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134. See Jaramillo & Speranza, supra note 132, at 2 (explaining the value of an expert providing key insight on a survivor's abuse informing their criminal actions).

135. See Jacobs, The Violent State, supra note 90, at 41 (describing the violence Black women experience at the hands of the state, noting that the "most severe violence causes death").

136. See Letter from Malori M. Maloney to Floyd Prozanski et al., supra note 114 ("Public defenders are not typically trained to screen their clients for domestic violence.").

137. See N.Y. Crim. Proc. Law § 440.47(2)(c) (explaining that a defendant must have two pieces of corroborating evidence to prove they are a victim of domestic violence).

138. See Jaramillo & Speranza, supra note 132, at 4 ("Expert testimony may be especially helpful in: Explaining the ongoing and cumulative effects of the trauma . . . .").

139. 192 N.Y.S.3d 445, 449 (Sup. Ct. 2023).

140. Id.

141. See id. at 450 ("The Defendant alleged that she suffered domestic abuse by two people during her life: sexual abuse during her childhood at the hands of her stepfather, and physical and psychological abuse inflicted by [her deceased partner].").

142. Id. at 451.

143. See id. at 455 (holding that, while the DVSJA allows reliable hearsay from the defendant's own circumstances, there was still an "objective" evidence requirement that must be satisfied).

Despite general aims of making the law colorblind,[144] misogynoir exists in the courts. In the first case where a survivor was released under the DVSJA, prosecutors called Tanisha Davis a plethora of stereotypes directed at Black women.[145] Although she was released, these statements highlight the underlying bias that Black women must deal with when attempting to speak about their abuse. Still, courts have successfully applied the DVSJA to help Black women with resentencing. In *People v. T.P.*, the appellate court held that Taylor Partlow, convicted in the Supreme Court of Erie County of first-degree manslaughter, suffered "[s]ubstantial physical, sexual or psychological abuse" that was "a significant contributing factor to the defendant's criminal behavior" and therefore qualified her for resentencing under the DVSJA.[146] It is difficult to determine, however, if the facts of the case merely highlight a victim with more sympathetic facts.[147] Had the court determined that Partlow waited slightly longer than the nexus allowed, or that the evidence proffered by the defendant was insufficient, the outcome may have differed. To address the potential consequences for Black female defendants, one must understand how their oppression informs their perception in the courtroom. Issues of discretion amongst judges, prosecutors, and defenders can conflate with racial bias.

Judicial discretion opens the door for disparate impact, and implicit misogynoir dictates whether judges allow a defendant relief under the DVSJA. Judges ultimately have the choice to apply the DVSJA to determine whether, under the social conditions that relegate Black women as victimizers, Black women deserve leniency.[148] Implicit biases, the unconscious associations about certain groups,[149] and stereotypes that

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144. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023) ("[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens." (alteration in original) (internal quotation marks omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

145. See LaVarco, supra note 4, at 959 ("At [the defendant's] trial, prosecutors played on anti-Black tropes, referring to Davis as a 'hood diva' and making disparaging remarks about 'the culture she is from.'" (quoting Tanisha Davis, Survived & Punished, https://survivedandpunishedny.org/tanisha-davis/ [https://perma.cc/ZN54-ZMHN] (last visited Oct. 24, 2024)).

146. 188 N.Y.S.3d 842, 845 (App. Div. 2023) (quoting N.Y. Penal Law § 60.12 (McKinney 2024)).

147. The initial case detailing the facts appears sparse.

148. See Banks, supra note 86, at 357–58 ("[T]he DVSJA's allowance of judicial discretion fails to acknowledge the extent to which the criminal justice system discounts the credibility of women survivors. . . . Additionally, the previously discussed negative stereotypes ascribed to Black women increase the potential for judges and other criminal justice officers to disbelieve them.").

149. See L. Song Richardson & Phillip Atiba Goff, Implicit Racial Bias in Public Defender Triage, 122 Yale L.J. 2626, 2629 (2013) (describing "[i]mplicit racial biases" as "the unconscious associations we make about racial groups").

permit the maltreatment of Black women inform why judges may not be willing to look at such women and call them survivors.[150] Social reality dictates that Black women endure mental, physical, and psychological pain on a day-to-day basis.[151] If Black women are innately seen as deviating from white-centered survivorship, judges may not readily see what is apparent: Black women deserve protection.

Judges may also not consider the circumstances surrounding a Black woman's crime as indicative of domestic abuse, particularly if they believe that inadequate time elapsed between the crime and the abuse suffered.[152] While a court "may consider any fact or circumstances relevant to the imposition of a new sentence which are submitted by the applicant or the district attorney,"[153] a case with more nuanced facts may illuminate greater racial disparities. If the case perhaps displays the defendant in a less sympathetic light, such as a Black mother failing to protect her child or a Black woman navigating threats of long-term violence, the court may be less inclined to consider the impact of the abuse she suffered and find her actions inappropriate despite her every effort to survive. Scholars already highlight the impact of racial priming on judicial discretion,[154] arguing that judges may be hesitant to link the criminal offense to trauma.[155]

Public defenders may also be ineffective while assisting survivors. As previously stated, public defenders may not screen for IPV,[156] leaving many women unable to address their abuse and obtain remedies that would otherwise be available to them.[157] Public defenders may not screen for

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150. See Jacobs, The Violent State, supra note 90, at 50 ("Legal scholars and legal practitioners also find that judges tend to weigh the testimony of their Black female clients as less credible than the testimony of their abusers."); Banks, supra note 86, at 347 (explaining how the Jezebel trope, a trope calling Black women sexually promiscuous, legitimized their sexual abuse).

151. See, e.g., Waller et al., supra note 88, at 1243 ("Exploitative, stereotypical images have been popularized and perpetuated as normative behavior which have been weaponized against African American women and are salient to their daily interactions." (citation omitted)).

152. See Alaina Richert, Note, Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival, 120 Mich. L. Rev. 315, 325–26 (2021) (citing State v. Norman, 378 S.E.2d 8, 10–11 (N.C. 1989), in which the survivor did not meet the imminence prong since she shot her abuser while he slept, despite enduring twenty years of abuse).

153. Maria S. v. Tully, 186 N.Y.S.3d 332, 335 (App. Div. 2023) (internal quotation marks omitted) (quoting Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47 (McKinney 2024)).

154. See Richert, supra note 152, at 326 ("It is particularly difficult for Black women to convince a court that they acted in self-defense because of stereotypes that portray Black women as angry, strong, and assertive.").

155. See id. at 339 ("Thus, nexus requirements enable judges who are unaware of, or who simply ignore, the links between trauma and criminal offenses to refuse to grant statutory relief.").

156. Letter from Malori M. Maloney to Floyd Prozanski et al., supra note 114.

157. Id.

abuse for several reasons: (1) They are overworked in a crowded system[158] and (2) they may be uninformed on when to see the signs, instead relying on the forthcomingness of their abused defendants.[159] Public defenders, an overwhelmingly white group,[160] might also hold their own biases that emerge during what academics L. Song Richardson and Phillip Atiba Goff call "defender triage."[161] This triage occurs when overworked public defenders, with limited resources and limited time, prioritize certain cases.[162] This may result in advocates choosing to expend more energy on a case that they think they are likely to win.[163] Depending on the race of the defendant, the public defender may see the merits of the case as inherently lower.[164] They may also see their own client as innately hostile,[165] leading them to exert less effort while seeking plea bargains.[166] Believing, even implicitly, that Black women are hostile clients, undeserving of effort, strips them of the adequate representation they need. These implicit actions keep Black women in a system that further abuses them, dissolves them of their personal attachments, and follows them even after they leave prison.[167] Consequently, implicit bias perpetuates a cycle of poverty that feeds into the incarceration pipeline.[168]

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158. See Richardson & Goff, supra note 149, at 2631 ("Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads.").

159. Letter from Malori M. Maloney to Floyd Prozanski et al., supra note 114.

160. Public Defender Demographics and Statistics in the US, Zippia: The Career Expert, https://www.zippia.com/public-defender-jobs/demographics/ [https://perma.cc/XEQ3-GLWP] (last visited Aug. 7, 2024) (showing that roughly seventy-five percent of public defenders were white); see also Lawyers by Race & Ethnicity, ABA, https://www.americanbar.org/groups/young_lawyers/about/initiatives/men-of-color/lawyer-demographics/ (on file with the *Columbia Law Review*) (last visited Aug. 28, 2024) (sharing that eighty-six percent of lawyers were non-Hispanic whites as of 2020).

161. Richardson & Goff, supra note 149, at 2634, 2636 ("Defender triage involves choices about how to allocate precious resources. . . . [S]tudies suggest that when clients are black or otherwise criminally stereotyped, [implicit biases] can influence evidence evaluation, potentially causing PDs to unintentionally interpret information as more probative of guilt.").

162. See id. at 2628, 2631–34 (describing the public defender's "process of prioritizing cases").

163. See id. at 2635 ("[A]fter reviewing the discovery, [public defenders] may decide that expending resources to conduct a fact investigation would be a waste of time because the state's evidence is strong.").

164. See id. at 2636 (noting that the darker complexion and the race of a public defender's client influence attitudes on whether a case "warrant[s] much effort").

165. See id. at 2637 (explaining how perception of a client's behavior alters a public defender's attitudes on whether their client is agreeable or worth assisting).

166. See id. at 2641 ("[Public defenders] may be less likely to fight for their client's release on bail and spend time, effort, and scarce resources negotiating a better plea deal.").

167. See infra text accompanying notes 205–209.

168. See Trujillo, supra note 94, at 226–27 ("The relationship between incarceration and poverty is circular, cyclical, and symbiotic—poverty is a cause of incarceration and incarceration is a cause of poverty.").

State agents—police officers and prosecutors—also perpetuate implicit bias in how they investigate and indict cases with abused survivors. Prosecutorial discretion may label a Black woman as a codefendant rather than a victim of abuse.[169] In making Black women codefendants, particularly in violent crimes, prosecutors bar them from DVSJA resentencing.[170] Under threats of life sentences and trials where they are labeled as principal accomplices, Black women can be pressured into taking a plea deal because they need to support their families as heads of their household and the main guardians of their children.[171] From this, prosecutors may deem Black women survivors as repeat violent offenders if they succumb to the overwhelming pressure to accept a plea deal.[172] This has an alarming effect on Black women and the greater Black community.[173] Police also reveal implicit biases and exercise a level of discretion that can be harmful to Black women. For example, during police questioning, officers implement "psychodynamic" interrogation practices closely related to intimate terrorist interrogation techniques that force Black women into coping strategies, similar to when they were in their abusive environments.[174] Brianna Banks discusses how police officers may harbor racial biases,[175] but what legal authorities may not realize is

169. Swan, supra note 115, at 995 ("The typical person captured under these forms of conjugal liability is black, poor, and a girlfriend or wife of the primary wrongdoer.").

170. See N.Y. Penal Law § 60.12(1) (McKinney 2024) (revealing that people convicted of child-sex crimes, or even the conspiracy of such, are barred from obtaining relief); N.Y. Off. of Indigent Legal Servs., supra note 78 (listing first-degree murder and the conspiracy to do so among a list of other convictions barring someone from obtaining relief under the DVSJA).

171. See Glynn, supra note 94, at 11 ("Black mothers are by far the most likely to be the primary source of economic support for their families; they are more than twice as likely as white mothers to be their family's breadwinner, and more than 50 percent more likely than Hispanic mothers.").

172. Lucian E. Dervan, Fourteen Principles and a Path Forward Toward Plea Bargaining Reform, ABA (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/fourteen-principles-path-forward-plea-bargaining-reform/ (on file with the *Columbia Law Review*) ("Plea bargaining accounts for almost 98 percent of federal convictions and 95 percent of state convictions in the United States."); see also ABA Crim. Just. Section, Plea Bargain Task Force Report 7, 28 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf (on file with the *Columbia Law Review*) (noting the high likelihood that Black defendants take plea deals and their high rates of pretrial detention compared to their white counterparts).

173. See Rick Jones & Cornelius Cornelssen, Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism, 31 Fed. Sent'g Rep. 265, 266 (2019) (explaining the different forms of police corruption that promote plea bargaining, highlighting the monetary incentive in which they can "increase their pay by transporting individuals to long-term detention facilities").

174. Janet Ainsworth, When Police Discursive Violence Interacts With Intimate Partner Violence: Domestic Violence as a Risk Factor for Police-Induced False Confessions, 8 Language & L., no. 2, 2021, at 10, 16–18.

175. See, e.g., Banks, supra note 86, at 356 (illustrating cases where police officers do not believe Black women victims because of their skin color).

that the unwillingness to come forward in the face of abuse is how Black women try to protect themselves against violence.[176]

Black women, alongside Native women, are murdered at higher rates than any other racial group[177] and are three times more likely to be killed by a partner than any other racial group.[178] In 2020, the Violence Policy Center found that Black women who were killed in a single victim/single offender scenario almost always knew their killer's identity.[179] When Black women do not act within a specific time frame, they are barred from exercising DVSJA as an option.[180] The potential unwillingness of courts to consider how fear and interpersonal relationships affect victims' reporting may conflict with this timing requirement. Courts have dismissed abuse from qualifying under the DVSJA because it occurred outside of the temporal requirement.[181] Even outside New York and the DVSJA context, the court in *State v. Norman* rejected survivor-defendant Judy Ann Norman's self-defense claim after shooting her abuser in her sleep, despite twenty years of physical and sexual abuse and numerous attempts to flee, because she was not in imminent harm.[182] This phenomenon, called "learned helplessness," occurs when a victim views attempts to escape as futile.[183] Instead of criminal justice figures understanding learned

176. See Waller et al., supra note 88, at 1244 ("African American women have been routinely objectified, overlooked, experienced overt mistreatment, and had their voices minimized by providers within the very systems that were supposed to assist them. The criminal justice system fails to provide the same deference to African American women as they do White survivors." (citation omitted)).

177. Emiko Petrosky, Janet M. Blair, Carter J. Betz, Katherine A. Fowler, Shane P.D. Jack & Bridget H. Lyons, Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014, 66 CDC Morbidity and Mortality Wkly. Rep. 741, 741 (2017).

178. Inst. on Domestic Violence in the Afr. Am. Cmty., Facts About Domestic Violence and African American Women 1, 5 (2015), https://idvaac.org/wp-content/uploads/Facts%20About%20DV.pdf [https://perma.cc/7D85-3KBE]; see also Miccio, supra note 54, at 103 ("Thus, requiring that every battered mother flee the batterer as a condition of 'reasonable conduct' may be signing a death warrant for a specific class of battered mothers.").

179. Violence Pol'y Ctr., When Men Murder Women: An Analysis of 2020 Homicide Data 7–8 (2022), https://www.vpc.org/studies/wmmw2022.pdf [https://perma.cc/Q4CZ-HZT6] ("Where the relationship could be determined, 90 percent of Black females killed by males in single victim/single offender incidents knew their killers (464 out of 516).").

180. See Richert, supra note 152, at 325 (explaining how victims of domestic violence are often denied self-defense or duress claims because the danger was not imminent enough).

181. See id. at 325–26 (showing when a defendant, after having tried to escape and being brutally beaten, was shown to have been outside of the imminent danger requirement of self-defense).

182. 378 S.E.2d 8, 9–11 (N.C. 1989).

183. See Richert, supra note 152, at 326 ("[M]any victims of IPV suffer over time from a psychological phenomenon called 'learned helplessness,' where victims may stop seeking to escape since doing so seems futile.").

helplessness, they demand that Black women continue to fight and not surrender hope of escaping abuse.

To complicate Black women and survivorship further, cases in which the victim is also a perpetrator of violence are difficult to fit within the victim–offender binary. Cynthia Godsoe, a professor at Brooklyn Law School, describes the victim–offender overlap as the connection between the "victimization and the perpetration of crime and delinquency."[184] Legal figures deny Black women their survivorship status and label them as perpetrators of violence[185] despite the coercive control of their partner.[186] Consequently, legal authorities may not recognize such abuse, or choose to cast a wide mask of criminality that erases any nuance instead.

### C. *The DVSJA's Procedural Harm Against Black Women*

From the outset, the DVSJA has several procedural obstacles outside of the substantive nexus requirement that burden Black women.

First, the DVSJA requires a survivor-defendant to affirmatively request relief.[187] While the DVSJA allows for judicial discretion to shorten sentences and provides alternate sentencing schemes for crimes after August 12, 2019,[188] defendants are still required to "request DVSJA consideration before [being] sentenced."[189] People who commit crimes after this date can request relief only upon their initial sentencing.[190]

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184. Cynthia Godsoe, The Victim/Offender Overlap and Criminal System Reform, 87 Brook. L. Rev. 1319, 1319 (2022) ("The victim/offender overlap is the 'link between victimization and the perpetration of crime and delinquency . . . .'" (quoting Jennifer M. Reingle Gonzalez, Victim-Offender Overlap, *in* I The Encyclopedia of Theoretical Criminology 3, 4 (J. Mitchell Miller ed., 2014))).

185. See Richert, supra note 152, at 322 (explaining the various ways abusers will use the threat of violence, incarceration, or kidnapping allegations to ensure their victims comply).

186. See Susan Green, Violence Against Black Women—Many Types, Far-Reaching Effects, Inst. for Women's Pol'y Rsch. (July 13, 2017), https://iwpr.org/violence-against-black-women-many-types-far-reaching-effects [https://perma.cc/J6NX-RBP6] ("Black women also experience significantly higher rates of psychological abuse—including humiliation, insults, name-calling, and coercive control—than do women overall.").

187. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(1)(a) (McKinney 2024) (declaring that an individual must put in a "request to apply for resentencing" under the penal law).

188. Resource Guide, supra note 74, at 10 ("If you are facing sentencing for offenses committed after August 12, 2019, you must request DVSJA consideration before you are sentenced." (emphasis omitted)).

189. See N.Y. Penal Law § 60.12(2) (McKinney 2024) ("Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title . . . .").

190. DVSJA Statewide Def. Task Force, Investigations Under the Domestic Violence Survivors Justice Act: A Best Practices Manual for Defense Attorneys 3 n.2 (2023), https://cdn.ymaws.com/www.nysda.org/resource/resmgr/news_picks_items/DVSJA_Investigations_Best_Pr.pdf [https://perma.cc/CE2G-DREM] [hereinafter Best Practices] ("For

The statute also provides resentencing relief for individuals incarcerated before the August 12, 2019 mark,[191] unless the individual is on parole.[192] For crimes committed before August 12, 2019, the defendant must have a sentence of at least eight years to qualify for the DVSJA[193] and still file for relief, assuming they knew of the statute. This requirement demonstrates a potential disparity with some individuals, who may have committed similar crimes under abuse, facing prison time, while others may not receive jail time at all.

There are practical setbacks limiting Black women's relief under the DVSJA. Some incarcerated people spend a large portion of their sentencing in prison before they find the DVSJA.[194] There may be people who need relief but are unsure if they qualify for a reduced sentence or they may not have the necessary emotional or financial resources to appeal. In *People v. T.P.*, survivor-defendant Taylor Partlow was successful at the appellate level, but she was still denied initial resentencing at the lower court level after shooting her abuser.[195] Had she committed the crime after 2019, she would have had to proactively request consideration, know that she qualified for the DVSJA, and be upfront about her abuse, requiring work that undermines the subtle pervasiveness of trauma. Compounding this, the same issues regarding judicial, prosecutorial, and public defender resource discretion still apply, and survivors must still navigate biases

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survivors whose offenses occurred *after* August 12, 2019, they may pursue a DVSJA sentencing at their *initial* sentencing under Penal Law § 60.12, but they may not pursue resentencing at a later date, as the law is currently written.").

191. Crim. Proc. § 440.47(4) (allowing judicial discretion for reduced sentencing); Jaramillo & Speranza, supra note 132, at 1 (explaining that "[the DVSJA] gives judges the ability to resentence survivors to shorter prison terms for offenses committed before August 12, 2019.").

192. Domestic Violence Survivors Justice Act: Resentencing Options, Pro Se (Prisoners' Legal Servs., New York, N.Y.), Aug. 2019, at 11, 12, https://www.ils.ny.gov/files/Pro%20Se%20Newsletter%20Article%20August%202019.pdf [https://perma.cc/7ZUU-F47R] ("The law does not permit a Survivor of Domestic Violence who is under parole supervision to apply for resentencing.").

193. Isaacs, supra note 76, at 444 ("[T]o qualify for resentencing, in addition to the offense date pre-dating August 12, 2019, the applicant must be (1) in custody, serving a sentence of eight years or more; (2) a first- or second-felony offender; and (3) serving a sentence for one of the included offenses."); Jean Lee, Domestic Violence Survivors Aren't Getting the Reduced Sentences They Qualify For, PBS News Hour (July 14, 2021), https://www.pbs.org/newshour/nation/domestic-violence-survivors-arent-getting-the-reduced-sentences-they-qualify-for [https://perma.cc/KGB4-9HH2].

194. See, e.g., People v. Coles, 158 N.Y.S.3d 611, 611 (App. Div. 2022) (showing that the defendant qualified for a reduced sentence under DVSJA Penal Law § 60.12 after spending roughly nineteen years in prison after being sentenced to twenty years, despite the law passing three years prior).

195. 188 N.Y.S.3d 842, 843 (N.Y. App. Div. 2023). Her race was absent in the facts of the case, but she appeared on the news and was a Black woman. See WGRZ Staff, Buffalo Woman to Spend 8 Years in Prison for Killing Her Boyfriend, 2 WGRZ (Sept. 6, 2019),https://www.wgrz.com/article/news/crime/71-9def0c07-4e39-4f32-8b5f-a776061c0982 [https://perma.cc/X8ZS-6NKR].

within the courtroom. Importantly, while the DVSJA does allow "[a] court [to] determine that such abuse constitutes a significant contributing factor . . . regardless of whether the defendant raised a defense,"[196] a court, through misogynoir, may not see the defendant as qualifying.

Addressing the second obstacle, the DVSJA narrows the scope of Black women who may otherwise qualify under the DVSJA. Under the DVSJA, only specific crimes allow an individual to qualify for resentencing.[197] The survivor-defendant must also be a first or second violent felony offender.[198] The type of crime is especially important because many women are considered codefendants for violent crimes, even in failing to act, due to abuse or fear of impending abuse,[199] the latter of which is not currently recognized as substantial enough abuse under the DVSJA.[200] Additionally, excluding nonviolent offenses ignores the reality that over a quarter of women who are currently in prison are incarcerated for violent offenses.[201] This crucial quarter includes women who are lumped into crimes as codefendants or principal actors.[202] The Sentencing Project writes how "[e]xcluding certain offenses also has the potential to create racial disparities among those who receive relief, given that prosecutors are more likely to bring serious charges against people of color and plea bargaining operates unevenly, often also at the expense of marginalized people."[203] Prosecutors, in making Black women co-conspirators to violent crimes, force them out of qualifying for relief, either because they are lumped into a heavier violent offense or are pushed into being second- and third-time offenders. Furthermore, women who kill their abusers out of fear of retaliation or lapsed time, as seen in *Norman*,[204] cannot qualify for the

196. N.Y. Penal Law § 60.12(1) (McKinney 2024).

197. See id. (defining the offenses that the law covers).

198. Id.

199. See Michelle S. Jacobs, Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes, 88 J. Crim. L. & Criminology 579, 587 (1998) (explaining how an abused mother is held more liable for the abuse and death of her child by her abusive partner than her partner).

200. People v. Williams, 152 N.Y.S.3d 575, 575 (App. Div. 2021) ("Although the DVSJA does not require that the abuse occur simultaneously with the offense . . . the 'at the time of' language must create some requirement of a temporal nexus between the abuse and the offense or else it is meaningless." (citations omitted)); see also People v. B.N., 192 N.Y.S.3d 445, 458 (Sup. Ct. 2023) ("If 'substantial' does not carry its ordinary dictionary meaning and require a DVSJA application to prove abuse which was 'considerable in quantity' or 'significantly great,' then any abuse whatsoever qualifies, including a single insult or slap.").

201. Kajstura & Sawyer, supra note 33.

202. Mindy B. Mechanic, Battered Women Charged With Homicide: Expert Consultation, Evaluation, and Testimony, 32 J. Aggression, Maltreatment & Trauma 189, 208 (2023) (explaining how courts view battered women who complied with abuser demands as potential accomplices).

203. Komar et al., supra note 13, at 16.

204. State v. Norman, 378 S.E.2d 8, 10–11 (N.C. 1989).

DVSJA either.[205] Courts have criminalized abuse survivors acting in self-defense.[206] With the criminal system over-relying on plea deals, prosecutors deeming Black women as co-conspirators instead of victims, and the statute narrowly applying to specific crimes, the state ignores the compounding reasons why Black women may be overrepresented in the carceral system.

### D. *When Resentencing Does Not Go Far Enough*

Resentencing is not accessible for many survivors. Survivors may spend many years in prison before getting resentencing relief under the DVSJA.[207] Courts may also reject Black women if they fail to meet the numerous qualifications specified within the statute,[208] such as if the initial sentence was not "unduly harsh."[209] As a result, Black women's mental and emotional state can deteriorate while in prison.

Black women often do not have the same support systems as men when they are in prison.[210] Denise Mann, a pseudonym for a Black mother of four and domestic violence survivor, recalled her experience while incarcerated: "My children's grandmother refused to bring them to come see me [at Rikers], . . . . She said, 'I wouldn't bring my dog there.[']  That broke me. Once I got [to Bedford Hills] our bond collapsed somehow."[211] Beyond leading to emotional neglect while in prison, prison retraumatizes

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205. See *Williams*, 152 N.Y.S.3d at 576 ("It is . . . not enough that defendant was indisputably subjected to substantial physical and psychological abuse in the past.").

206. See Ellie Williams, Note, Leaving Doesn't Mean Living: Analyzing the Case of Angela Vaughn, Criminalized Survivors of Gender-Based Violence, and International Human Rights Law, 51 Ga. J. Int'l & Compar. L. 587, 595 (2023) ("[S]urvivors may act to protect themselves from what they know to be a dangerous situation in circumstances that may not satisfy the traditional legal requirements for self-defense, particularly the requirement that the danger be imminent.").

207. See, e.g., Jennifer Andrus, Taking Another Look: How the Domestic Violence Survivors Justice Act Works in Practice (Feb. 26, 2024), https://nysba.org/taking-another-look-how-the-domestic-violence-survivors-justice-act-works-in-practice/ [https://perma.cc/6M7M-XVJE] (explaining that Patrice Smith, a woman who was sentenced at sixteen, spent twenty-one years in prison before getting the rest of her sentence vacated).

208. See supra sections II.A–.C (discussing the limitations of the DVSJA in addressing Black woman survivorship).

209. See N.Y. Penal Law § 60.12 (McKinney 2024) (noting the standard for relief requires an inquiry into whether the initial sentence was unduly harsh).

210. See Willingham, supra note 95, at 59 ("When men are incarcerated, women are usually the ones . . . supporting them and taking care of their children, on the outside. The woman will regularly visit her man and promise to wait for him. But when these women become inmates themselves, they rarely get that same . . . support.").

211. Tamar Sarai, Bias and Misinformation About Domestic Abuse Survivors Still Plague the Courts, Prism (Apr. 28, 2021), https://prismreports.org/2021/04/28/bias-and-misinformation-about-domestic-abuse-survivors-still-plague-the-courts/ [https://perma.cc/4WCU-6L44] (first and third alteration in original) (internal quotation marks omitted).

women with violence and sexual assault.[212] Forcing Black women survivors to endure incarceration disrupts their lives and is antithetical to what the DVSJA was supposed to be: a second chance.

Resentencing, even when successfully obtained, does little to mitigate the effects of incarceration. Imprisonment forces Black women to carry a burden that forever follows their shadows, affecting their families, their communities, and their wellbeing. The stigma of going to prison forces many Black women back behind bars. Survivors lose custody of their children because they lack any other familial or economic support.[213] Many of these women, like Denise Mann, are shunned by their families and by the larger community.[214] Black women face high unemployment rates post-incarceration.[215] Many also face rampant physical and sexual abuse while in prison.[216] For these women, the trauma of being incarcerated forces a toxic stronghold over their lives that replicates the abuse they faced prior to prison. Other states hoping to model their own DVSJA must consider the potential success of adopting a rehabilitative framework, instead of sentencing reform, to help abuse survivors.

## III. REIMAGINING THE DOMESTIC VIOLENCE SURVIVOR

Reducing punitive measures and promoting rehabilitation can assist Black female survivors.[217] Courts should offer services to prepare and assist

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212. See Richert, supra note 152, at 335 (explaining the high rates of physical and sexual violence among incarcerated individuals).

213. See Glynn, supra note 94, at 11 ("Black mothers . . . are more than twice as likely as white mothers to be their family's breadwinner, and more than 50 percent more likely than Hispanic mothers.").

214. See Willingham, supra note 95, at 60 ("[T]hough physically free after being released from prison, black women are still being held captive . . . . Patrice Gaines, who was briefly incarcerated in 1970 on drug-related charges, notes that when women go to jail or prison, they become part of an ostracised community . . . .").

215. See Council of Econ. Advisers, Expanding Economic Opportunity for Formerly Incarcerated Persons, White House (May 9, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/ [https://perma.cc/TLE4-FYWF] (showing that "the unemployment rate for formerly incarcerated Black women was about 43 percent, compared with 5 percent for their never-incarcerated counterparts").

216. See Emily D. Buehler & Shelby Kottke-Weaver, Off. of Just. Programs, DOJ, Sexual Victimization Reported by Adult Correctional Authorities, 2019–2020—Statistical Tables 7 (2024), https://bjs.ojp.gov/document/svraca1920st.pdf [https://perma.cc/DAU6-DY2D] ("There were 21.3 allegations of sexual victimization per 1,000 prison inmates in 2020, which was a significant increase from 2013 (7.7 per 1,000 prison inmates)." (citation omitted)); Yunsoo Park, Addressing Trauma in Women's Prisons, Nat'l Inst. Just., Off. Just. Programs, DOJ (May 11, 2022), https://nij.ojp.gov/topics/articles/addressing-trauma-womens-prisons [https://perma.cc/HCN3-MCW2] (explaining that "incarcerated women are more likely to experience victimization while incarcerated").

217. See Holly Corbett, Why Alternatives to Incarceration Are Good for Communities, Workplaces and the Economy, Forbes (Feb. 24, 2023), https://www.forbes.com/sites/hollycorbett/2023/02/24/why-alternatives-to-

in rehabilitation efforts.[218] While incarceration hinders survivors from reintegrating into society, programs aimed at healing one's trauma may be effective in assisting abuse survivors. This Note charges advocates to make the DVSJA an entirely rehabilitative form of relief without including the carceral consequences. Furthermore, this Note posits the possibility of legislators making the DVSJA an affirmative defense under the duress model.

This Part proposes solutions and insights on how legislators should look beyond the DVSJA in future cases involving abuse survivors facing incarceration. Section III.A will provide solutions to combat bias in courts. Section III.B will propose amendments to the DVSJA. Lastly, section III.C will provide alternatives to resentencing relief for the DVSJA.

### A. *Addressing Bias in Courts*

To help Black women survivors, legislators should address bias within the criminal justice system. If the statute's intent is to allow survivors to speak up regarding their abuse, legal authorities and advocates must find ways to mitigate implicit biases that strip Black women of survivorship.

Educating judges on the full effects of abuse could help them make a more informed decision when handling cases involving survivor-defendants. Providing training resources to judges to help screen for signs of abuse may reduce bias.[219] It is important to understand that, while the current discourse surrounding implicit biases separates race with Black men and gender with white woman,[220] judges must learn how oppression and perceptions conflate and interact. This can help elucidate for judges the often-erased hardships and trauma facing Black women.[221] Paired with educational resources for implicit biases surrounding women of color, judges will be more prepared to exercise discretion in a way that is fully

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incarceration-are-good-for-communities-workplaces-and-the-economy/ (on file with the *Columbia Law Review*) (showcasing the success of an alternative to incarceration program with "94% of AFJ's court-involved participants . . . not [being] reconvicted of a new crime within three years of starting the program").

218. Id. ("[O]nce incarcerated people return to society, they often lack the resources, such as education and networks, to set them up for success.").

219. See Richardson & Goff, supra note 149, at 2646 ("Accordingly, we recommend that attorneys be taught about implicit biases and their probable effects on behaviors and judgments. This type of education is already occurring with judges, so it should be fairly simple to implement this suggestion.").

220. Coles & Pasek, supra note 2, at 315 ("[I]ntersectional invisibility occurs because the prototypical woman is a White woman and the prototypical Black person is a Black man.").

221. See Banks, supra note 86, at 357–58 (examining the prevalence of Black women's trauma and issues surrounding incarceration going ignored).

informed about how trauma and coercive control conflate with misogynoir.[222]

To reduce public defender bias, advocates should uniformly screen for domestic abuse as a requirement for effective assistance of counsel. Recently, New York courts ruled that not screening for the DVSJA does not constitute ineffective assistance of counsel.[223] Ideally, lawyers are well-informed about the law and can better screen for DVSJA eligibility than Black women defendants, who may not know of the statute or if they qualify. Furthermore, placing the responsibility to request relief within the public defender's purview forces them into a more active role that may compel them to avoid settling for plea deals and may encourage them to engage more effectively than they would in cases that they deem futile. It should be noted that this remedy does not help alleviate burdens affecting public defenders but rather ensures that individuals have proper representation. As such, if defenders are unable to meet this requirement for any reason, the defendant should not be barred from bringing the request for relief and they should have the opportunity to seek it in the future, even if the defense was not raised. Currently, the burden is on the defendant to maintain evidence of their abuse.[224] If they fail to consider DVSJA in their own cases, they cannot raise the claim again.[225] Requiring court actors to screen for IPV, and ensuring that the failure to do so is not a hindrance on the defendant, can allow the defendant to pursue avenues of relief that would otherwise be lost to them.

### B. *Amending the DVSJA*

States across the country are looking to replicate the DVSJA and provide their own tool for assisting abuse survivors.[226] If they want to be sure that their statute readily addresses the complexity of survivors who commit crime while under the stronghold of their abuse, they should consider altering several factors. The first alteration should address the substantive time requirement under the nexus, allowing all crimes to be considered regardless of timing, and interpreting the language to include

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222. Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, Getting Explicit About Implicit Bias, Judicature, Fall/Winter 2020–2021, at 75, 76 (examining the "subtle" ways judges show implicit bias and negative associations with Black defendants).

223. See People v. Riley, 200 N.Y.S.3d 150, 151 (App. Div. 2023) ("[A] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success." (internal quotation marks omitted) (quoting People v. Stultz, 2 N.Y.3d 277, 287 (2004)).

224. See Resource Guide, supra note 74, at 15 (instructing survivor-defendants on the best way to find corroborative evidence and to reach out to witnesses while navigating trauma).

225. See Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47(1)(a) (McKinney 2024) (explaining that an individual must "submit to the judge or justice who imposed the original sentence" to apply for relief).

226. See Komar et al., supra note 13, at 1 ("[T]he DVSJA has inspired a wave of legislative advocacy in Louisiana, Oklahoma, and Oregon.").

the fuller effects of coercive control. The second alteration should modify the DVSJA's procedural requirements to be more inclusive of abused victims' circumstances.

Addressing the substantive nexus requirement, advocates and states looking to replicate the statute should consider changing the requirement to include a fear of impending abuse and a more inclusive view of coercive control. Scholars argue that "[s]ince the DVSJA is relatively recent, jurisprudence is still developing. Judges are still interpreting this particular language of the DVSJA. The interpretation of this phrase should be informed by current research and science about coercive control and the trauma caused by domestic violence."[227] The Sentencing Project also recognizes the need to "[a]dopt an expansive definition of domestic abuse beyond IPV that includes all family relationships and commercial sexual exploitation."[228] Judges should not consider the IPV survivor a passive actor, but rather an individual forced to choose between life and death.[229] With Black women survivors fearing for their life or forced into prolonged sexual exploitation, courts must broaden their understanding of trauma, either by expanding the current language or by adopting entirely new language. Biases that inform how and why Black women are seen as complacent coperpetrators must be accounted for if the aim is to assist all survivors, not simply the ones in groups that are favored.[230]

Next, advocates should alter the procedural elements within the DVSJA. First, advocates should consider adding a pretrial element, incorporating a third-party actor who is involved in the community and who specializes in abuse. This would occur before any case where there is explicit mention of coercive control or at the request of educated public defenders who have flagged the potential abuse. Mindy B. Mechanic, a scholar at California State University-Fullerton, proposes expert consultation during pretrial for survivor-defendants.[231] This service occurs before the start of the trial and includes an expert on IPV to consult with the survivor-defendant.[232] Shortfalls within the statute occur because Black women's abuse goes unnoticed or unscreened. A separate case actor,

227. Rosenthal & Wierschem, supra note 107, at 17.

228. See Komar et al., supra note 13, at 2.

229. See Mechanic, supra note 202, at 198 ("Intimate partner violence (IPV) can have lethal consequences. At least one in seven homicides globally are committed by intimate partners . . . .").

230. See Richardson & Goff, supra note 149, at 2630 ("We use the term implicit racial biases to refer both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups).").

231. See Mechanic, supra note 202, at 203 (noting pretrial expert consultation "can shape the process, as well as the ultimate outcome or disposition of a case" (emphasis omitted)). Consolidating this pretrial proposal within an evidentiary hearing that Isaacs discusses can alleviate the burden on the state. See Isaacs, supra note 76, at 447 ("An initial evidentiary proffer [at the pleading stage] would avoid an onslaught of frivolous litigation.").

232. Id. at 203–04.

dedicated to handling these issues and with exposure to uniquely impacted communities, would allow Black women survivor-defendants the opportunity to feel prepared and consult an individual outside of the legal space that they can trust. Furthermore, providing additional resources would alleviate the burden plaguing public defenders, help their clients, and assist judges in utilizing their discretion effectively. It would also undermine the automatic assumption that the Black woman survivor is a co-conspirator by inquiring into their experiences of trauma and abuse without the burden being on them to do so. Next, there are some procedural requirements that should be changed. Changing procedure may still require additional remedies to implement because it does not erase bias entirely. Moreover, there may still be cases where defendants are not seen as defendants. Still, with the incentive for public defenders to have an extra pair of eyes on the case and education within the courtroom on bias, there may be useful effects in making another figure available to help defense counsel.

Second, advocates must remove the specific crime and offender status criteria if they want to assist more survivors. Removing these criteria would allow more Black women to qualify for relief and address the pattern of punishing women as accomplices instead of seeing them as victims of abuse.[233] If the specific crime and offender status were removed, judges would be able to discern facts of Black women's cases. Judges could bypass the stigmatization of violent charges to see that the survivor-defendant may have been lumped into accomplice liability, had ineffective assistance of counsel that led to convictions, or desperately pled guilty to crimes that made them unqualified for relief. There would be less of an impediment to addressing abuse victims because their prior sentences would play no part in assessing their survivorship. Opponents may argue that this promotes a windfall of defendants frivolously applying for a reduced sentence. Balanced with the egregiously high rates of plea bargaining for state and federal convictions,[234] the pool of defendants who would otherwise *not* be second and third offenders may instead be drastically reduced.

Third, reforms should remove the eight-year minimum sentencing requirement for crimes before August 12, 2019 and its "unduly harsh" extension.[235] There should be no minimum sentence because abuse does not change depending on the length of the sentence. What *does* change is the additional trauma from having to be in prison.[236] The current makeup

233. Id. at 207–08 (illustrating how a battered person's belief of harm pushes them into assisting with crime or acting as an accomplice).

234. Dervan, supra note 172.

235. See N.Y. Penal Law § 60.12(1) (McKinney 2024) (noting the standard for relief requires an inquiry into whether the initial sentence was unduly harsh).

236. See Richert, supra note 152, at 335 ("Spending time in prison denies people suffering from these kinds of trauma the care they need and oftentimes retraumatizes them.").

creates a disparate effect of relief, differentiated only by the date that survivor-defendants committed their crime.[237] Imposing mandatory minimum sentences unduly harms defendants.[238] If legislators removed the minimum sentencing requirements, the change could assuage Black women's trauma and fulfill the purpose of the DVSJA in allowing for informed judicial discretion and a second chance for survivors.[239]

Lastly, advocates should allow applications for relief at any time, regardless of whether they brought the claim up prior to, or during, their initial sentencing. Scholars argue that individuals should have the capacity to apply at any time, not just at initial sentencing, to help as many survivors as possible.[240] Lifting a barrier for relief would allow more Black women survivors to qualify, giving current incarcerated Black women another opportunity for relief if they failed to raise the request.

The Eighth Amendment also prohibits states from imposing cruel and unusual punishments.[241] What is more cruel than disparate sentencing for similar, if not the same, crimes, separated by the date of a law? While legal practitioners communicated practical concerns of individuals overutilizing the statute, [242] it is clear that the pendulum has not quite swung in the direction of the statute being as far reaching as once expected. [243] With these realities in mind, advocates should consider removing the enactment of the statute as a flag for who qualifies for resentencing relief.

### C. *Replacing Resentencing*

Resentencing does not mitigate the harm for women who are already incarcerated and who have been in prison for several years. As such, other bills should consider alternative forms of relief outside of resentencing.

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237. See Resource Guide, supra note 74, at 25–28, 50 (noting that some individuals do not have a minimum sentence while others, sentenced before the August 12, 2019 deadline, have a minimum eight-year sentence and an original sentence that must be "unduly harsh," leaving more room for judicial scrutiny on survivors' experiences).

238. See Richert, supra note 152, at 335 (explaining that incarcerated survivors of abuse have issues dealing with post-incarceration realities through housing, employment, education, and more).

239. See Sanctuary for Fams., The DVSJA, supra note 12 (explaining that the initial goal of the DVSJA was to allow judges the flexibility to provide lighter or alternative sentencing).

240. See Komar et al., supra note 13, at 13 ("Given the potential psychological and logistical barriers to reporting victimization at the initial trial sentencing stage, survivors should always have the opportunity to seek resentencing . . . .").

241. See U.S. Const. amend. VIII, § 1 ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (emphasis added)).

242. See Isaacs, supra note 76, at 447 ("The District Attorneys Association of the State of New York (DAASNY) expressed concern that adjudicating post-conviction resentencing motions under the DVSJA 'could prove burdensome and costly' . . . . They viewed a robust pleading requirement as a way to ease this burden.").

243. See Komar et al., supra note 13, at 1 (stating the law has helped around forty individuals).

1. *Alternative to Incarceration Programs.* — First, legislators hoping to enact similar statutes to the DVSJA should consider replacing resentencing relief with 'Alternative to Incarceration' (ATI) Programs. The DVSJA does allow judges to sentence defendants to ATI programs, but this is not the only form of discretionary relief under the statute.[244] Currently, New York's Division of Probation and Correctional Alternatives (DPCA) helps implement over 150 ATI programs "designed to reduce reliance on pretrial detention and/or incarceration and operate in a manner consistent with public safety."[245] DPCA replaces incarceration with specialized psychological services, substance abuse programs, and additional noncarceral programs aimed at rehabilitating defendants.[246] Changing the DVSJA from a resentencing tool[247] to a holistic rehabilitative program would allow Black women to circumvent the additional trauma of incarceration. Furthermore, it could reduce recidivism and allow pathways for Black women survivors to restart their life. The Mayor's Office of Criminal Justice credits sentencing alternatives as being useful tools in New York.[248]

Changing resentencing to more holistic relief allows advocates to shift away from punitive attitudes within courts and toward the rehabilitation of Black women. Associate Professor at Widener Law School Michal Buchhandler-Raphael coins the term "survival homicide" to refer to "cases where survivors of domestic abuse become criminal defendants after killing abusive intimate partners or abusive family members."[249] Buchhandler-Raphael recognizes that cases with survivor-defendants should be treated under a mitigated criminal responsibility model, a framework described as a "shared responsibility model acknowledg[ing] that survival homicide is far from being only a problem of individual

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244. See N.Y. Penal Law § 60.12 (McKinney 2024) ("Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title . . . .").

245. Alternative to Incarceration (ATI) Programs, N.Y. State: Div. Crim. Just. Servs., https://www.criminaljustice.ny.gov/opca/ati_description.htm [https://perma.cc/5FP2-YASH] (last visited Aug. 8, 2024).

246. See id.

247. See Sentencing Reform, Survivors Just. Project (Apr. 19, 2023), https://www.sjpny.org/sentencing-reform [https://perma.cc/M4RD-EMWK] ("New York's law created opportunities for survivors to receive a shorter sentence at their original sentencing hearing and, for those already incarcerated, provided an opportunity for resentencing.").

248. See Alternatives to Incarceration, NYC: Mayor's Off. Crim. Just., https://criminaljustice.cityofnewyork.us/programs/alternatives-to-incarceration/ [https://perma.cc/5TRM-7ZHY] (last visited Aug. 8, 2024) ("The success of these programs on reducing re-offending and re-incarceration rests in large part on programs' adherence to evidence based practices . . . as well as programs' provision of longer term services to people on a voluntary basis following their completion of a court-mandated program.").

249. Michal Buchhandler-Raphael, Survival Homicide, 44 Cardozo L. Rev. 1673, 1676 (2023).

survivors' culpability . . . [with] states hav[ing] a duty to domestic abuse survivors to ensure that they are able to live dignified lives free of violence."[250] Ultimately, this framework places the responsibility on the state to address the circumstances surrounding an abused victim committing a crime.[251] If the state actively addresses circumstances of a Black woman survivor committing a crime, such as sexual exploitation and poverty, it would benefit the larger Black community and survivors of abuse who are coerced into criminal conduct.[252]

Some academics go further, exploring an anticarceral feminist approach. Supporters of anticarceral feminism advance collective liberation, clemency, and rehabilitation instead of police interference.[253] Proponents of the anticarceral feminism approach maintain that states need to compensate incarcerated survivors for "unjust prosecutions and confinement, as well as . . . the state violence they have been forced to endure in prisons."[254] Shirley LaVarco, a civil rights attorney, argues that the state should offer monetary reparations to incarcerated survivors within legislative text like the DVSJA.[255] The reparative ambitions of this framework give room for Black women to repair their lives from abuse and actively addresses trauma by placing community resources directly in Black women's hands. Furthermore, imposing required trauma programs may conflict with Black women's lives managing jobs and their households. Creating a monetary incentive would contribute to their lives and provide an incentive to engage. A sustainable path toward trauma and social recovery could break Black women's abuse-to-prison pipeline, mitigate poverty, and create a sustainable path toward trauma and social recovery.

2. *Creating an Affirmative Defense.* — It is difficult for survivors to make an affirmative duress claim. Currently, a survivor may make such an affirmative defense if they can prove that they were under immediate threat of imminent harm and had no legal alternative.[256] Under the Model Penal Code, defendants can make an affirmative duress claim if they were

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250. Id. at 1681.

251. Id.

252. Id.

253. See Isaacs, supra note 76, at 464 ("[F]or Black, indigenous, migrant, LGBTQ, and disabled survivors, . . . calling the police invites a perpetuation of the harm they have already experienced."); LaVarco, supra note 4, at 958 ("For example, advocates in New York have called on Governor Kathy Hochul to grant mass clemency and full pardons to criminalized survivors as the most urgently needed form of reparations for human rights violations against them.").

254. LaVarco, supra note 4, at 959.

255. See id. at 960 ("[T]he sort of reparations I refer to would be for the benefit of those who have themselves been criminally prosecuted—whether despite or because of their status as survivors of violence—and, oftentimes, subjected to further violence while in state custody.").

256. Dixon v. United States, 548 U.S. 1, 17 (2006) (holding that the defendant held the burden to prove beyond a preponderance of evidence the affirmative defense of duress).

"coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."[257]

To complicate this issue further, the Supreme Court has limited coercive control as a defense. The Supreme Court has been skeptical of defense requests of duress from individuals who "recklessly or negligently placed [themselves] in a situation in which it was probable that [they] would be forced to perform the criminal conduct."[258] Circuit courts also narrowed the affirmative defense from including threats that are not imminent, restricting threats that they might deem as not remote.[259] The Supreme Court should account for the impact that abuse has in changing behavior and developing fear in victims. Moving forward, the Court should consider broadening the scope of duress to include perceived harm, as the impact of looming harm is one that primarily affects marginalized identities.[260] Advocates should also consider the difficulty for survivors to live after seeking help for abuse, which informs why a uniform "time" to address abuse may be inappropriate when discussing victims.

Broadening the scope of duress may push courts to scrutinizing abuse even more, especially with the political makeup of the current Supreme Court, but attorneys should still persist in developing arguments that nuance crime with trauma and interpersonal violence. Such experiences are prevalent and, with the changing makeup of courts in the future, may prove to be a revolutionary endeavor.

Lawmakers hoping to amend and replicate the DVSJA should also broaden the scope of relief at the state and federal level, changing the resentencing tool to instead mitigate, or erase, criminal liability. Rooted in Eighth Amendment constitutional arguments, congressional representatives should develop a national bill addressing federal crimes committed while under the throes of abuse to circumvent years of "crime and punishment" policies that have harmed survivors, particularly survivors of marginalized backgrounds. State legislators should also do the work on a more grassroots level to ensure that outlets for survivors are still maintained and, if thwarted at the federal level, can be sought through an alternative means.

Making coercive control a defense within the DVSJA instead of an aspect of eligibility offers survivors a chance to navigate, and potentially

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257. Model Penal Code § 2.09 (Am. L. Inst. 2023).

258. *Dixon*, 548 U.S. at 4 n.2.

259. See United States v. Dingwall, 6 F.4th 744, 759 (7th Cir. 2021) ("[C]ircumstances justify a duress defense only when the coercive party threatens immediate harm which the coerced party cannot reasonably escape.").

260. See Kindaka J. Sanders, Defending the Spirit: The Right to Self-Defense Against Psychological Assault, 19 Nev. L.J. 227, 234 (2018) ("The problem of psychological assault appears across ethnic, gender, and socio-economic lines, but may have a greater impact on marginalized social groups such as women, children, African Americans, and the LGBT community.").

avoid, the harmful effects of incarceration. If states and the federal government adopt the DVSJA as an affirmative defense model, and extend the current duress claims to account for more realistic issues of abuse, Black women will not need to face the remedial consequences of incarceration or be burdened by the state imposing programs they are required to attend, conflicting even more with their onerous personal responsibilities. They would be free to heal and live without state disruption.

## CONCLUSION

Black women face a unique hardship of domestic violence that falls outside the realm of many current initiatives tailored toward abuse survivors. To rectify lingering issues of enslavement, systemic oppression, and misogynoir, IPV survivors helped bring forth the "Domestic Violence Survivors Justice Act" in New York. While the DVSJA contains considerable limitations, it provides an incredible foundation that can change the lives of many Black women in the carceral system. For New York legislatures looking to modify the statute and other states hoping to remodel it for themselves, understanding the drawbacks for Black women is key to helping all survivors. Their unique experiences provide insights on how to best shape legislation centering abuse. Reducing bias, providing alternative programs that center mitigating trauma, upgrading statutory language, curating pretrial conversations for defendants to feel empowered, and crafting affirmative defenses are the possible avenues advocates should consider in their efforts to recognize the Black domestic violence survivor.

# JURISDICTIONAL RESTRAINT: RESCUING THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

*Mohamed Camara**

*The African Court on Human and Peoples' Rights, the continental human rights court in Africa, is struggling. Many African states have yet to ratify the protocol that established the Court; and those that have, have begun to withdraw their declarations to allow individuals and nongovernmental organizations (NGOs) to bring cases against them before the Court. The Court's expanding jurisdiction is part of the problem. Despite being an international court, the Court seems to operate as an appellate domestic court—overturning domestic courts' decisions and nullifying enacted state laws. This Note argues that lasting human rights protection in Africa requires an African court of a more defined jurisdiction. In doing so, this Note unpacks two schools of thought—opportunity structure theory and neoliberalism—which endorse the expansion of the Court's jurisdiction and highlights the deficiencies in their arguments. Importantly, this Note questions the overreliance on legal means as solutions to the African human rights crises and provides alternative means of assessing and addressing the crises.*



* J.D. Candidate 2025, Columbia Law School. I thank my colleagues at the Institute for Human Rights and Development in Africa (IHRDA), whose work and insights inspire this Note; Professor Lori F. Damrosch for her supervision and feedback; and the staff of the *Columbia Law Review* for their excellent editorial assistance. This Note is dedicated to Mariame Camara, whose resilience and sense of purpose remain a source of hope.

## INTRODUCTION

The African Court on Human and Peoples' Rights ("African Court" or "Court") has been expanding its de jure jurisdiction, which limits its role as a subsidiary to the national courts,[1] to effectively become the de facto appellate court to domestic courts within African states.[2] The African Court reverses domestic courts' decisions and nullifies national legislations.[3] This is extraordinary for an international court, subverting the principles of subsidiarity[4] and margin of appreciation.[5] The

1. Generally, international courts are considered subsidiaries to national courts. See infra text accompanying notes 22–23. In *Prince v. South Africa*, the African Commission stated that "the margin of appreciation doctrine informs the African Charter." No. 255/02, Judgment, Afr. Comm'n H.P.R., ¶ 50–51 (Dec. 7, 2004), https://achpr.au.int/en/decisions-communications/garreth-anver-prince-south-africa-25502 (on file with the *Columbia Law Review*). The concept of margin of appreciation, a corollary of subsidiarity, seeks to give states primacy on executing human rights norms within their borders. Id. ¶ 37.

2. Sègnonna Horace Adjolohoun, Jurisdictional Fiction? A Dialectical Scrutiny of the Appellate Competence of the African Court on Human and Peoples' Rights, 6 J. Compar. L. Afr., no. 2, 2019, at 1, 6 [hereinafter Adjolohoun, Jurisdictional Fiction] ("[W]hile it is not granted appellate jurisdiction *de jure* or by statute, the African Court assumes such competence *de facto* albeit on a normative basis.").

3. See infra section I.A.

4. See Principle of Subsidiarity, EUR-Lex, https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-subsidiarity.html [https://perma.cc/GGH2-LWMA] (last visited Dec. 25, 2023) ("[Subsidiarity] aims to ensure that decisions are taken at the closest possible level to the citizen . . . ."). The idea is expressed in Article 56(5) of the African Charter on Human and Peoples' Rights, which requires that a plaintiff "exhaust[] local remedies" before taking their complaint to international courts. See African Charter on Human and Peoples' Rights art. 56, ¶ 5, opened for signature June 27, 1981, 21 I.L.M. 58, 66 (entered into force Oct. 21, 1986) [hereinafter, Banjul Charter].

5. See *Prince*, No. 255/02, Afr. Comm'n H.P.R., ¶ 37 (defining "margin of appreciation" as "a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards").

ramifications of the Court's modus operandi threaten its own existence and the welfare of the developing human rights system in Africa.[6]

The adverse consequences are already evident. In 2020, Côte d'Ivoire and Benin joined Rwanda and Tanzania in withdrawing their declarations under Article 34(6) ("Optional Declaration") of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Protocol on the African Court"),[7] which grants individuals and NGOs direct access to the Court to sue African states that have ratified the African Charter on Human and Peoples' Rights ("Banjul Charter").[8] The withdrawing states cited the Court's jurisdictional expansion as the reason for their withdrawal.[9]

In general, the Court is experiencing a decline in its reputation on the continent.[10] African states are either ignoring its judgments[11] or, increasingly, challenging its competence.[12] This state of disrepute is concerning for the Court's future. To use Alexander Hamilton's remark about the American judiciary long ago, the Court has neither the purse nor the sword to make African states abide by its decisions.[13] Nevertheless, two conceptual frameworks have been offered to justify the Court's behavior. The first follows the neoliberal, globalist outlook.[14] According to

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6. See infra note 320 and accompanying text.

7. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 34(6), Assembly of Heads of State and Government, Thirty-Fourth Ordinary Session (June 10, 1998), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/5VJM-3JJU] [hereinafter Protocol on the African Court] ("[T]he State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol."); Rep. of the Afr. Ct. H.P.R., at 2, EX.CL/1323(XL) (2022) [hereinafter 2021 Report] (listing Benin, Côte d'Ivoire, Rwanda, and Tanzania as the four withdrawing states).

8. See Banjul Charter, supra note 4.

9. See infra notes 37–43 and accompanying text.

10. The Court's 2022 activity report shows that African states have complied with less than ten percent of its decisions. Rep. of the Afr. Ct. H.P.R., at 24, EX.CL/1409(XLII) (2023) [hereinafter 2022 Report].

11. Id. annex 2, at 4 (showing that Tanzania refused to comply with the Court's order because "[t]he order seeks to overturn the decision of the Court of Appeal of Tanzania").

12. Out of the thirty-three African states that have ratified the Protocol on the African Court, twelve deposited their declarations under Article 34(6). See Declarations, Afr. Ct. on Hum. & Peoples' Rts., https://www.african-court.org/wpafc/declarations/ [https://perma.cc/KUR5-HDBG] (last visited Dec. 25, 2023). Out of the twelve, four (Benin, Côte d'Ivoire, Rwanda, and Tanzania) withdrew their declarations between 2016 and 2020. See id.

13. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The African Court is an international court, by virtue that it was established through "an international convention adopted by 54 Members States of the African Union, which itself is an international and intergovernmental organisation." See Adjolohoun, Jurisdictional Fiction, supra note 2, at 7. The African Court, therefore, does not belong to the internal apparatus of any single African State.

14. See infra section II.A.

this view, an African court of an expansive jurisdiction helps to harmonize the distinct domestic laws within African states, widening the private sector, to facilitate Africans' participation in the global market.[15] In an increasingly globalized world, according to the neoliberals, market forces, not states, should dictate people's lives.[16] The second view—the opportunity structure theory—justifies the expansion on the grounds that the Court's checks on the powers of African states positively contribute to the prodemocratic movements on the continent.[17] Under this framework, the Court is portrayed as a "fulcrum" of social and political mobilization[18]—its broad jurisdiction increasingly clashing against the sovereignties of African states.

This Note argues that neither of these views are advisable. As the remaining eight states signed to the Optional Declaration threaten to withdraw their declarations,[19] and twenty-two others refuse to ratify the Protocol on the African Court,[20] the Court should resort to a more defined jurisdiction, refraining from political questions not entailed therein. It should be a consensus builder, not the impetus for African states to abandon the progress that has been made in the realm of human rights in Africa, leading to the Court's own demise.[21] This Note thus contributes to

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15. See Christopher Hartmann, Postneoliberal Public Health Care Reforms: Neoliberalism, Social Medicine, and Persistent Health Inequalities in Latin America, 106 Am. J. Pub. Health 2145, 2145 (2016) ("Neoliberalism typically refers to minimal government intervention, laissez-faire market policies, and individualism over collectivism and has been adopted by—and pressed upon—the majority of national governments and global development institutions." (footnote omitted)).

16. See Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism 1 (2018) (noting that by the end of the twentieth century, neoliberalists saw market forces and "the global economy" as main drivers of the international order); Kathomi Gatwiri, Julians Amboko & Darius Okolla, The Implications of Neoliberalism on African Economies, Health Outcomes and Wellbeing: A Conceptual Argument, 18 Soc. Theory & Health 86, 90 (2020) ("[N]eoliberal ideology adopts the language of freedom and choice, increased foreign investments, and open markets and trade to progress policies that lead to privatisation of basic needs . . . .").

17. See infra section II.C.

18. See James Thuo Gathii & Jacquelene Wangui Mwangi, The African Court of Human and Peoples' Rights as an Opportunity Structure, *in* The Performance of Africa's International Courts 211, 213 (James Thuo Gathii ed. 2020) ("[T]he African Court becomes a fulcrum through which grassroots movements and individuals can collectively mobilize, organize, promote, and advance their causes."); Olabisi D. Akinkugbe, *Houngue Éric Noudehouenou v. Republic of Benin*, 115 Am. J. Int'l L. 281, 285 (2021) (discussing how "opposition politicians" are mobilizing the African Court against their governments).

19. See 2022 Report, supra note 10, ¶ 7 tbl.2 (showing the remaining countries under the Optional Declaration: Burkina Faso, Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger, and Tunisia). The 2021 Report noted that "States against which the Court has rendered a judgment . . . threaten to withdraw their Article 34(6) Declaration." See 2021 Report, supra note 7, at 20.

20. See 2022 Report, supra note 10, at 25 ("Twenty-two (22) [African Union] Member States are yet to ratify the Protocol . . . .").

21. See infra note 320 and accompanying text.

the literature on the African human rights system by exposing the deficiencies in the arguments for the Court's jurisdictional expansion and proposing a path forward to preserve the Court amidst its current precarious position on the continent.

Part I provides an overview of the historical and normative underpinnings of the Court's current position. Part II describes the motivations and the processes that led to the Court's creation, against the backdrop of colonialism and the Cold War. Part III offers some solutions for the future of the Court and the African human rights system, suggesting a broader approach to rights protections that contemplates national legal fora and customary procedures.

## I. HOW DID WE GET HERE?

This Part outlines the ways in which the Court arrived at its current position of disrepute. Section I.A will show some recent examples of the Court expanding its jurisdiction through its reversals of domestic courts' decisions and its nullifications of national legislations. Section I.B will explain the ensuing backlash against the Court's jurisdictional expansion. Section I.C places the African human rights system in the larger context of Africa's colonial past, to make sense of its contemporary challenges. Section I.D outlines the considerations that led to the Court's creation and the warnings that were ignored.

### A. *The African Court's Encroachment on Domestic Courts' Jurisdictions*

The Court has claimed that it prefers to refrain from interfering in African states' domestic affairs.[22] "Referral to international courts," says the Court, "is a subsidiary remedy compared to remedies available locally within States."[23] But the Court's rulings have tended to suggest a lack of fidelity to this principle. In *Thomas v. Tanzania*, a criminal defendant sued Tanzania under the Optional Declaration after he had been convicted and

22. See Onyachi v. Tanzania, No. 003/2015, Judgment, Afr. Ct. H.P.R., ¶ 49(5) (Sept. 28, 2017), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/637/595/5f5637595474d057190288.pdf (on file with the *Columbia Law Review*) (noting that plaintiffs must "exhaust[] local remedies," in cases where access to such remedies would not be "unduly prolonged," before they can file their cases to the Court); Abubakari v. Tanzania, No. 007/2013, Judgment, Afr. Ct. H.P.R., ¶ 40(5) (June 3, 2016), https://caselaw.ihrda.org/en/entity/lkp2rcmhynovs9osa89z4cxr?file=16137364800711ahvtshzoqj.pdf&page=2 (on file with the *Columbia Law Review*) (same); Tanganyika L. Soc'y v. Tanzania, No. 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 80.1 (June 14, 2013), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/c18/48a/62bc1848a3912905722263.pdf (on file with the *Columbia Law Review*) (same).

23. Konaté v. Burkina Faso, 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 78 (Dec. 5, 2014), https://www.african-court.org/cpmt/storage/app/uploads/public/633/40b/e27/63340be2743c3757080189.pdf (on file with the *Columbia Law Review*).

sentenced domestically.[24] In *Abubakari v. Tanzania*, the Court was tasked with reviewing Tanzania's Court of Appeals' judgment.[25] Similarly, in *Onyango v. Tanzania*, the question before the Court was the legitimacy of Tanzania's trial court's judgment that had been appealed twice in Tanzania's courts of appeals.[26] In *Thomas*, as in *Onyango*, the plaintiffs had standing to bring their cases against Tanzania,[27] but they failed to invoke any human rights instrument to which Tanzania was a signatory.[28] In other words, the Court did not have the material jurisdiction to hear their cases. Relying on the jurisprudence of the African Commission on Human and Peoples' Rights ("African Commission") and the European Court of Human Rights (ECtHR), the Court reasoned that, because the "rights allegedly violated are protected by the Charter," it could hear the case (even though the plaintiffs had not invoked the Charter).[29] Proceeding thus, the Court overturned the judgments of Tanzania's domestic courts in all three cases.[30]

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24. See No. 005/2013, Judgment, Afr. Ct. H.P.R., ¶ 3 (Nov. 20, 2015), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/2e5/16e/62b2e516e0fbb807792095.pdf (on file with the *Columbia Law Review*).

25. See *Abubakari*, No. 007/2013, Afr. Ct. H.P.R., ¶ 3 ("The Annex comprised a copy of the Judgment of the Court of Appeal of Tanzania in Criminal Appeal No. 48 of 2004 . . . .").

26. See No. 006/2016, Judgment, Afr. Ct. H.P.R., ¶ 20 (Afr. Ct. H.P.R., Mar. 18, 2016), https://www.african-court.org/cpmt/storage/app/uploads/public/631/861/003/631861003c494661666119.pdf (on file with the *Columbia Law Review*) ("Applications have proceeded all the way to the Court of Appeal twice, both times without success.").

27. Because Tanzania was a signatory to the Optional Declaration, the plaintiff was allowed to bring the case against it. But the Optional Declaration merely grants a procedural right—the right to sue one's government before the Court—not a substantive right.

28. *Onyango*, No. 006/2016, Afr. Ct. H.P.R., ¶ 52 ("[T]he Applicants have merely cited ongoing cases against [Tanzania] within the national judicial system and have made no attempt to even mention the Protocol. . . ."); *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶ 38 ("The Respondent contends that the Applicant's citation of Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court to invoke the jurisdiction of the Court is not proper as these articles only provide him standing before the Court.").

29. See *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶¶ 45, 116–118.

30. *Abubakari*, No. 007/2013, Afr. Ct. H.P.R., ¶ 242; see also *Onyango*, No. 006/2016, Afr. Ct. H.P.R., ¶ 193; *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶ 161. In a series of cases, the Court maintained jurisdiction to review national laws and effectively called for their nullification. See Ass'n Pour le Progrès et la Défense des Droits des Femmes Maliennes v. Mali, No. 046/2016, Judgment, Afr. Ct. H.P.R., ¶ 130 (May 11, 2018), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/215/dbc/5f5215dbcd90b917144785.pdf (on file with the *Columbia Law Review*); Tanganyika L. Soc'y v. Tanzania, 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 126 (June 14, 2013), https://www.african-court.org/cpmt/storage/app/uploads/public/633/449/e0e/633449e0e1666269181785.pdf (on file with the *Columbia Law Review*); see also Konaté v. Burkina Faso, No. 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 176 (June 3, 2016), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/c03/0b7/62bc030b73208119164258.pdf (on file with the *Columbia Law Review*). In reviewing and nullifying national laws, the African Court

### B. *Backlash Against the African Court's Encroachment on Domestic Courts' Jurisdictions*

The Court's encroachment on domestic courts' jurisdictions was a subtext of Benin's withdrawal of its Optional Declaration in 2020. In *Ajavon v. Benin*, a Beninois man was convicted of trafficking cocaine into Benin.[31] He was sentenced to a term of twenty years in prison and fined five million CFA francs.[32] Amidst the appeal process, Ajavon brought a case against Benin under the Optional Declaration and asked the Court, inter alia, to stay the judgment of the Beninois court and have Benin pay him over five hundred billion CFA francs for moral and economic damages.[33] Benin replied that the case had not been resolved at home—Ajavon had not exhausted local remedies[34]—so the Court could not hear the case.[35]

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plays a role of a quasi-legislature, despite being composed of unelected judges who are removed from the scrutiny of the people whose lives it shapes.

31. See Ajavon v. Benin, No. 013/2017, Judgment, Afr. Ct. H.P.R., ¶¶ 3–8 (Mar. 29, 2019), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/9ee/1f3/5f59ee1f3010d110121716.pdf (on file with the *Columbia Law Review*) (asserting that Ajavon and his employees imported eighteen kilograms of "pure cocaine" into Benin).

32. See id. ¶ 8.

33. See id. ¶ 17, ¶ 25.

34. "[E]xhausting local remedies" is one of the seven prerequisites for admitting a case to the African Court (and the African Commission). See Banjul Charter, supra note 4, ¶ 56(5). But the African Commission's jurisprudence has made some important exceptions to this rule. See, e.g., Afr. Inst. Hum. Rts. Dev. v. Guinea, No. 249/2002, Judgment, Afr. Comm'n H.P.R., ¶ 34 (Dec. 7, 2004), http://hrlibrary.law.umn.edu/africa/comcases/Comm249-2002.pdf (on file with the *Columbia Law Review*) (waiving the exhaustion of local remedies requirement because the plaintiffs were too numerous); Purohit v. Gambia, No. 241/2001, Judgment, Afr. Comm'n H.P.R., ¶ 37 (May 29, 2003), https://caselaw.ihrda.org/entity/4t3ozl7fs99?file=1555500420242kukm7jcwond.pdf&page=1 (on file with the *Columbia Law Review*) (exempting an indigent plaintiff from exhausting local remedies); Soc. Econ. Rts. Action Ctr. v. Nigeria, No. 155/96, Judgment, Afr. Comm'n H.P.R., ¶ 37 (Oct. 27, 2001), https://caselaw.ihrda.org/entity/ys82x4w7gcn?file (on file with the *Columbia Law Review*) (exempting the exhaustion of local remedies requirement where rights claimed are not "provided for in domestic law"); Jawara v. Gambia, No. 147/95 and 149/96, Judgment, Afr. Comm'n H.P.R., ¶ 36 (May 11, 2000), https://caselaw.ihrda.org/entity/e40rz60vzqmhi2y9zncwpzaor?file (on file with the *Columbia Law Review*) (exempting the plaintiff from exhausting local remedies because it was dangerous for him to return to his country); Media Rts. Agenda v. Nigeria, No. 105/93, 128/94, 130/94 and 152/96, Judgment, Afr. Comm'n H.P.R., ¶ 82 (Oct. 31, 1998), https://caselaw.ihrda.org/en/entity/rdz28a0ywtl21781bwitl0udi/references?page=8 (on file with the *Columbia Law Review*) (stating that plaintiffs are not required to exhaust local remedies when the domestic legislature has ousted the jurisdiction of the national courts); Free Legal Assistance Grp. v. Zaire, No. 25/89, 47/90, 56/91, and 100/93, Judgment, Afr. Comm'n H.P.R., ¶ 5 (Oct. 11, 1995), https://caselaw.ihrda.org/entity/s4i80a2g88ijcnz75yngynwmi?file=1530706502464k1hyuqb15xtkui8mh7fn1m7vi.pdf&page=2 (on file with the *Columbia Law Review*) (exempting plaintiffs of "massive violation of human rights" from exhausting local remedies). Finally, Article 56(5) of the Banjul Charter also waives the exhaustion of local remedies requirement for plaintiffs whose cases have been "unduly prolonged" in domestic legal fora. See Banjul Charter, supra note 4, art. 56, ¶ 5.

35. *Ajavon*, No. 013/2017, Afr. Ct. H.P.R., ¶ 79.

The Court rejected Benin's argument and overruled the decision of the Beninois domestic trial court.[36] The decision was consequential: Benin withdrew its Optional Declaration, closing the avenue for future Beninois litigants to directly bring cases to the Court.[37]

This sort of backlash is not unique to the African Court.[38] While some scholars have refrained from confining the phenomenon to nondemocratic governments,[39] others have not.[40] This Note does not debate the fact that African states lag on many important democracy metrics.[41] The nondemocratic nature of African states, however, is an insufficient explanation for the recent withdrawals.[42] For one, that explanation overlooks the African Court's own malfeasance: The Court's interference in national affairs, beyond its jurisdiction, was a catalyst for the recent withdrawals.[43]

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36. See id. ¶ 292.

37. See Sègnonna Horace Adjolohoun, A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights, 20 Afr. Hum. Rts. L.J., no. 1, 2020, at 1, 14–15 [hereinafter Adjolohoun, Crisis] (showing that Benin challenged the Court's order in *Ajavon* and subsequently withdrew its declaration on the grounds that the order was "in breach of its sovereignty"); Benin: Withdrawal of Individuals Right to Refer Cases to the African Court a Dangerous Setback in the Protection of Human Rights, Amnesty Int'l (Apr. 24, 2020), https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/ [https://perma.cc/P7D6-SHSD] (discussing the significance of Benin's withdraw for human rights protection in the country).

38. See Ximena Soley & Silvia Steininger, Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights, 14 Int'l J.L. Context 237, 243 (2018) (detailing similar backlashes against the Inter-American Court of Human Rights).

39. Id. at 242 ("[T]his phenomenon is not only restricted to autocratic states.").

40. See Gathii & Mwangi, supra note 18, at 222 (arguing that "Tanzania's withdrawal . . . is consistent with the authoritarian regime of the country's current President").

41. See The State of Democracy in Africa, Int'l IDEA, https://www.idea.int/gsod/2023/chapters/africa/ [https://perma.cc/AHE3-Y47Y] (last visited Aug. 7, 2024) (showing that only South Africa and Tunisia are ranked in the top fifty countries on the question of rights); Dominique E. Uwizeyimana, Democracy and Pretend Democracies in Africa: Myths of African Democracies, 16 Law Democracy & Dev. 139, 154 (2012) ("[W]hile there are a small number of *fully democratic* states in the post-colonial era, most African states claiming to be democratic are in fact *pretend democracies*.").

42. See Gathii & Mwangi, supra note 18, at 222 ("Tanzania, Rwanda, Benin and Coôte d'Ivoire's withdrawal of the optional declarations . . . are in part the result of the effectiveness with which litigants brought pressure and unwelcome scrutiny to bear on their governments.").

43. See Adjolohoun, Crisis, supra note 37, at 12 (stating that Benin withdrew its declaration because the African Court was interfering with the jurisdictions of its national courts (paraphrasing Withdrawal of Benin from the ACHPR—Statement by the Minister of Justice and Litigation, Gov't Republic Benin (Apr. 28, 2020), https://www.gouv.bj/article/635/retrait-benin-cadhp—declaration-ministre-justice-legislation/ [https://perma.cc/EZ9L-8URS])); infra notes 259–262 and accompanying text.

Second, under the leadership of the African Union (AU), African states have been creating instruments and institutions to protect human rights (the rights of women,[44] children,[45] the disabled,[46] and senior citizens[47]), schemes of conflict resolution,[48] democratic governance,[49] and international courts.[50] The Banjul Charter, from which these instruments draw their roots,[51] "uniquely recognizes collective rights, individual duties[,] and third generation rights,"[52] including the "right to development."[53] These initiatives, in different stages of ratification and

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44. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 2, ¶ 2, Assembly of the Union, Second Ordinary Session (July 11, 2003), https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf [https://perma.cc/VCY8-ULJ5] [hereinafter Maputo Protocol] (asserting that the statute's goal is to eliminate discriminatory social and cultural practices that adversely affect women).

45. African Charter on the Rights and Welfare of the Child, art. 32, opened for signature July 1, 1990, Assembly of Heads of State and Government, Twenty-Sixth Ordinary Session (entered into force Nov. 29, 1999), https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf [https://perma.cc/DF8B-T7JT] [hereinafter Charter on the Welfare of the Child] (establishing the African Committee of Experts on the Rights and Welfare of the Child to administer the Statute).

46. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Assembly of the Union, Thirtieth Ordinary Session (Jan. 29, 2018), https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf [https://perma.cc/E4G8-JJYB].

47. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, Assembly of the Union, Sixth Ordinary Session (Jan. 31, 2016), https://au.int/sites/default/files/treaties/36438-treaty-0051_-_protocol_on_the_rights_of_older_persons_e.pdf [https://perma.cc/BLF2-D36B] [hereinafter Protocol on the Rights of Old Persons].

48. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Assembly of the African Union, First Ordinary Session (July 9, 2002), https://au.int/sites/default/files/treaties/37293-treaty-0024_-_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf [https://perma.cc/HJ4V-CYM6] [hereinafter Protocol on Peace and Security]; Constitutif Act of African Union, Assembly of Heads of States and Government, Thirty-Sixth Ordinary Session (July 11, 2000), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [https://perma.cc/4ZJA-E5Q8] [hereinafter Constitutif Act].

49. African Charter on Democracy, Elections and Governance art. 23, Assembly of the Union, Eighth Ordinary Session (Jan. 30, 2007) https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf [https://perma.cc/CE9J-QFCH] [hereinafter Charter on Democracy].

50. Protocol on the African Court, supra note 7, at 1 (establishing the African Court).

51. See Banjul Charter, supra note 4, art. 66 ("Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.").

52. Moussa Samb, Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union, 15 Ann. Sur. Int'l & Compar. L. 61, 62 (2009).

53. See Banjul Charter, supra note 4, art. 22, ¶ 2 ("States shall have the duty, individually or collectively, to ensure the exercise of the right to development."); Samb, supra note 52, at 72 ("The 'right to development' is considered as a specific African contribution to the international human rights discourse.").

effectiveness, show that the above antidemocratic narrative may be too simple an explanation for the withdrawals. How can African states, the great many of whom are nondemocratic (and hence despise scrutiny),[54] draw more attention to themselves by legislating a series of expansive human rights treaties?[55]

Of course, the existence of these mechanisms is by no means a sufficient answer to the African human rights crises. Indeed, Professor Nsongurua J. Udombana maintains that so long as sovereignty remains the central fixture of the African political imagination, African human rights treaties are likely to amount to no more than empty promises.[56] Professor Gina Bekker goes further in her critique, arguing that the AU structured the Banjul Charter to safeguard the interests of African states.[57] These scholars have a point. African leaders, worried about neocolonialism,[58] made "non-interference" a core principle of African states' sovereignties following their independence.[59] Udombana also correctly observed that the African Commission's deficiencies impeded it from doing anything

54. Democracy and the rule of law are considered to be interlinked, the latter being "fundamental in advancing" the former. See Rule of Law and Democracy: Addressing the Gap Between Policies and Practices, UN (2012), https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices [https://perma.cc/G4FP-UD4U].

55. The question is especially relevant for Benin because Benin has been a proponent of the Charter and the human rights instruments that have come from it. Its constitution integrates the Charter. See Constitution de la République du Bénin [Benin Constitution] Dec. 2, 1990, tit. II, art. 7 (Benin) (stating the rights in the Charter are integral to Benin's constitution). Benin was also the second country, after Lesotho, to ratify the Protocol on the Rights of Old Persons, a protocol that has not been uniquely popular among African states. See Protocol on the Rights of Old Persons, supra note 47.

56. See Nsongurua J. Udombana, Can the Leopard Change Its Spots? The African Union Treaty and Human Rights, 17 Am. U. Int'l L. Rev. 1177, 1178-86 (2002) ("There has been little progress in the real enjoyment of fundamental rights and freedoms by Africans, despite the numerous treaties, resolutions, and declarations executed by the OAU in recent memory.").

57. See Gina Bekker, The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States, 51 J. Afr. L. 151, 171 (2007) ("Given the preoccupation of African states with the principle of sovereignty and non-interference, it is hardly surprising that when they did capitulate to external pressure in relation to the creation of an African human rights mechanism, they were . . . concerned with sovereignty and the maintenance of the status quo . . . .").

58. See A. Bolaji Akinyemi, The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member States, 46 Brit. Y.B. Int'l L. 393, 394 (1973) (showing that the intent to "resist . . . neo-colonialism in all its forms including political and economic intervention" was embedded in African international coalition-building (quoting the working paper tabled by Ethiopia)).

59. See Constitutif Act, supra note 48, art. 4 § g (stating that the AU will function by the principle of "non-interference by any Member State in the internal affairs of another").

beyond merely promoting human rights (as opposed to protecting them).[60]

But these arguments seem to rest on the assumption that, because African states are simultaneously the legislators, enforcers, and violators of human rights in Africa, there can be little hope for an alternative future. That assumption is not entirely consistent with the views of those around the time of the African Court's creation; the Court was viewed by many human rights advocates as "a step in the right direction."[61] Second, as explained below, human rights violations in Africa tend to be more diffused—occurring both vertically and horizontally—and often, they are part of deep-seated social and cultural practices against which political will and litigation are not always effective.[62]

Third, viewed in the proper chronology, African human rights institutions have steadily improved over time—from the Commission of Mediation, Conciliation and Arbitration (CMCA),[63] to the African Commission, to the African Court. Indeed, the Court was created to "enhance the efficiency of the African Commission."[64] Unlike the African Commission,[65] the Court has both contentious and advisory jurisdictions; the former allows it to preside over any case against a defendant African state that has ratified the Banjul Charter and other prerequisite instruments.[66] The Court's decisions under its contentious jurisdiction are

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60. See Nsongurua J. Udombana, Toward the African Court on Human and Peoples' Rights: Better Late Than Never, 3 Yale Hum. Rts. & Dev. L.J. 45, 67 (2000) [hereinafter Udombana, Toward the African Court].

61. See id. at 47 ("[N]othing short of an African Human Rights Court will effectively protect the human rights guaranteed in the Banjul Charter."); Michael Fleshman, Human Rights Move up on Africa's Agenda, Afr. Renewal (July 2004), https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda [https://perma.cc/Z9YE-GSMV] (summarizing the positive reactions of a variety of human rights experts to the establishment of the African Court on Human and People's Rights).

62. See infra section II.D.

63. Protocol of the Commission of Mediation, Conciliation and Arbitration, art. XIX, Assembly of Heads of State and Government, Third Ordinary Session (July 17, 1964), https://archives.au.int/bitstream/handle/123456789/2616/charter%20of%20the%20organization%20of%20African%20Unity_E.pdf?sequence=1&isAllowed=y [https://perma.cc/7NG8-JW38] [hereinafter CMCA] ("Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration . . . .").

64. See Protocol on the African Court, supra note 7, at 1.

65. See Banjul Charter, supra note 4, art. 45 (stating, inter alia, that the African Commission is "to formulate and lay down[] principles and rules . . . upon which African Governments may base their legislations").

66. The ratification of the listed instruments provides the African Court the material, personal, and temporal jurisdiction over the defendant state and the legal issue at hand. See Protocol on the African Court, supra note 7, art. 3. As for temporal jurisdiction, the African Court generally cannot preside over cases that took place before it was created. When the effect of a case continues after the Court's creation, however, the Court is permitted to preside over the case. This is the *continuous violation* doctrine. See Afr. Comm'n Hum. &

binding on defendant African states.[67] The African Commission investigates and produces reports on the implementation of African Court's decisions for the AU Assembly of Heads of States.[68]

Lastly, African states' commitment to human rights protection extends beyond the contours of Africa. From the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[69] to the International Covenant on Civil and Political Rights (ICCPR),[70] African states have been receptive to the growth of human rights protections within Africa and abroad. They were proponents of the Rome Statute of the International Criminal Court from the very beginning.[71] Senegal was the first country in the world to ratify the Rome Statute.[72] To date, African states remain the largest regional block to have ratified the Rome Statute.[73]

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Peoples' Rts. v. Kenya, 006/2012, Judgment, Afr. Ct. H.P.R. ¶¶ 64–66 (2017), https://minorityrights.org/app/uploads/2024/01/final-mrg-merits-submissions-pdf.pdf [https://perma.cc/3RLA-HZHW]; Tanganyika L. Soc'y v. Tanzania, 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 84 (June 14, 2013), https://afchpr-commentary.uwazi.io/en/document/gt0cgvz5hveu3di?page=2 [https://perma.cc/9H3L-AGEB].

67. See Protocol on the African Court, supra note 7, art. 30 ("The States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.").

68. See id. art. 31 ("The Court shall submit to each regular session of the Assembly, a report on its work during the previous year.").

69. See G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979); State and Non-State Parties to CEDAW, IWRAW Asia Pac., https://cedaw.iwraw-ap.org/cedaw/state-and-non-state-parties-to-cedaw/ [https://perma.cc/3BTK-ZC9J] (last visited Oct. 15, 2023) (showing that Somalia and Sudan remain the only two African countries that have not ratified CEDAW).

70. See G.A. Res. 2200A(XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); International and Regional Treaties Aimed at the Abolition of the Death Penalty, La Peine de Mort Dans le Monde [The Death Penalty Across the World], https://www.peinedemort.org/traite/recherche? [https://perma.cc/V6AL-TLYU] (last visited Jan. 2, 2024) (showing that fifty-four African states have ratified ICCPR).

71. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544; Hassan Jallow & Fatou Bensouda, International Criminal Law in an African Context, *in* African Guide to International Criminal Justice 15, 41 (Max du Plessis ed. 2008) ("African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised.").

72. Jallow & Bensouda, supra note 71, at 43.

73. See The States Parties to the Rome Statute, ICC, https://asp.icc-cpi.int/states-parties [https://perma.cc/3G9L-6FYL] (last visited Aug. 7, 2024). There have been some disagreements between the ICC and African states in recent years. See Isaac Kaledzi, Africa's Fractured Relationship With the ICC, Made for Minds (July 17, 2023), https://www.dw.com/en/africas-fractured-relationship-with-the-icc/a-66257611# [https://perma.cc/4S2M-S5UJ] (discussing the ICC's fraught relationship with some African states).

### C. *Colonialism and the Cold War in Africa*

These important initiatives, however, have not corresponded to a significant amelioration of human rights in Africa. African states continue to score poorly on human rights indexes, despite the many human rights instruments they have ratified in the last forty years.[74] This Note offers no simple explanation to this paradox. It suggests, however, that by broadening the temporal and contextual frames of analysis on the issue, it may be possible to diagnose the sources of the crisis and perhaps find a path forward.

An indispensable element of this analysis is colonialism, the process of European empires expanding into Africa (and other parts of the world).[75] Colonialism adversely affected both traditional African institutions and those that emerged post-independence.[76] Philosopher Georg Wilhelm Friedrich Hegel's assertion that Africans had not attained "consciousness," and therefore did not have history,[77] encapsulated the colonial attitude towards traditional African institutions. Indeed, it was under the guise of "civilization" that Leopold II of Belgium committed his historic crime against the people of the Congo.[78] The late legal

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74. See World Just. Project, Rule of Law Index 2023, at 24–25, 31 (2023), https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf [https://perma.cc/EB33-8PZQ] (showing African states' ratings relative to those of other countries).

75. See Tsenay Serequeberhan, The Critique of Eurocentrism and the Practice of African Philosophy, *in* Postcolonial African Philosophy: A Critical Reader 141, 144 (Emmanuel Chukwudi Eze ed., 1997) (defining colonialism); Colonial Presence in Africa, Facing Hist. & Ourselves, https://www.facinghistory.org/resource-library/colonial-presence-africa [https://perma.cc/FM7H-SGDT] (last updated July 22, 2022) (showing a map of all the African states that were colonized).

76. See Clara Neupert-Wentz & Carl Müller-Crepon, Traditional Institutions in Africa: Past and Present, 12 Pol. Sci. Rsch. & Methods 267, 270–71 (2023) ("European colonial rule constituted the most rampant and continent-wide external shock to indigenous institutions."); Nathan J. Robinson, A Quick Reminder of Why Colonialism Was Bad, Current Affs. (Sept. 14, 2017), https://www.currentaffairs.org/2017/09/a-quick-reminder-of-why-colonialism-was-bad [https://perma.cc/J9CC-H4E4].

77. See Georg Wilhelm Friedrich Hegel, The Philosophy of History 110–11 ( J. Sibree trans., Batoche Books Kitchener ed. 2001) ("In Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence . . . ."). For a synthesis of Hegel's view of Africa and its role in world history, see generally Ronald Kuykendall, Hegel and Africa: An Evaluation of the Treatment of Africa in *The Philosophy of History*, 4 J. Black Stud. 571 (1993).

78. See Dean Pavlakis, The Crime of the Congo: A Question of Genocide in the Congo Free State, 1885–1908, *in* 2 The Cambridge World History of Genocide 585, 602–03 (2023) (estimating that between 3.4 and 13 million Congolese people died under Leopold's reign in the Congo); Adam Hochschild, Leopold II: King of Belgium, Britannica (Oct. 9, 2023), https://www.britannica.com/biography/Leopold-II-king-of-Belgium [https://perma.cc/3V9B-HG9F] (stating that Leopold presented himself as a "philanthropist eager to bring the benefits of Christianity, Western Civilization" to native African people). For a more thorough treatment of Leopold II's atrocities in the Congo, see

philosopher, Peter Fitzpatrick, maintained that one of the lasting consequences of colonialism in Africa was that African "traditional law [lost its] substantive identity in its subordination to the capitalist mode of production."[79] Regarded as inferior to European institutions, African traditional laws were primarily used by Europeans to "control the African population or to advance [their] segregationist policy."[80] As such, traditional African laws experienced extensive changes as a result of their contact with Europe.[81]

This history informed the creation of the Organization of African Unity (OAU), the predecessor to the AU, in 1963.[82] The OAU was designed to be a bulwark against the reinstatement of colonialism: to make real the "heroic struggles" of the African people for their political, dignitary, and economic emancipations.[83] Institutions like the Court, which emerged later, were asked to consider the "historical tradition and values of African civilization" in their interpretations of the governing laws of the continent—the Banjul Charter in particular.[84] They were not to minimize them as the Europeans had done to traditional African laws centuries prior.[85]

The salience of this guiding principle could not be overstated. During the Cold War, Western democracies sabotaged African states' efforts to build political and economic alliances on the continent that extended

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generally Adam Hochschild, King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa (1999) (portraying King Leopold's violent control over Congo).

79. See Peter Fitzpatrick, Traditionalism and Traditional Law, 28 J. Afr. L. 20, 22 (1984).

80. See Thandabantu Nhlapo, Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously, 13 Third World Legal Stud. 49, 49 (1993). See generally Richard Morrock, Heritage of Strife: The Effects of Colonialist "Divide and Rule" Strategy Upon the Colonized Peoples, 37 Sci. & Soc'y 129 (1973) (discussing strategies used by colonial powers to control their colonies).

81. See Nhlapo, supra note 80, at 53 ("[I]ndigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states.").

82. See About the African Union, Afr. Union, https://au.int/en/overview# [https://perma.cc/QM5C-38YR] (last visited Dec. 27, 2023) (listing "rid[ding] the continent of the remaining vestiges of colonisation" among the "main objectives" of the OAU).

83. See Constitutif Act, supra note 48, at 2; P. Mweti Munya, The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation, 19 B.C. Third World L.J. 537, 541 (1999) ("There was a consensus that regional cooperation and unity were crucial if the vast resources of Africa were to be utilized for the prosperity of the continent and its people." (citing P. Olisanwuche Esedebe, Pan-Africanism: The Idea and Movement, 1776–1991, at 165–91 (2d ed. 1994)).

84. The following provisions from the Banjul Charter and the Charter on the Welfare of the Child all emphasize the need for appreciating the African context. See Banjul Charter, supra note 4, at 2, art. 29.7, art. 45, ¶ 1 (a)–(b), art. 61; Charter on the Welfare of the Child, supra note 45, at 7, art. 11, ¶ 2(c), art. 46.

85. See Nhlapo, supra note 80, at 49 (discussing colonial powers' manipulation of African traditional laws for their own ends).

beyond their roles as proxies.[86] The CIA spent millions of dollars in covert operations to oust Patrice Lumumba, the anticolonial leader of the Congo.[87] France engaged in plots to topple then-President Sekou Touré's government in Guinea.[88] Portuguese troops were in Guinea-Bissau (then Portuguese Guinea) trying to quell the country's call for independence.[89] Many independence leaders in Africa were assassinated by their countries' ex-colonial rulers.[90] These violent tactics frustrated the democratization process in Africa.[91] Journalist Victoria Brittain has argued that the loss of these early African leaders "crippled each of their countries, and the African continent."[92]

Colonialism, thus, did not dissipate after the independence of African states; instead, it morphed into what the French philosopher Jean-Paul Sartre termed neocolonialism: the continual deprivation of African states

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86. Throughout the Cold War, the United States and the Soviet Union pulled African states into their respective ideological camps by meddling in their national political processes, buying votes for leaders who aligned with them and overthrowing those who did not. These tactics led to intra-state violence—termed "proxy wars"—between factions vying to fill the power vacuums in many newly independent African states. See Proxy Wars During the Cold War: Africa, Atomic Heritage Found. (Aug. 24, 2018), https://ahf.nuclearmuseum.org/ahf/history/proxy-wars-during-cold-war-africa/ [https://perma.cc/ZV47-9NPJ] (providing context for the proxy wars in Angola, the Congo, Namibia, Ogaden (modern-day Somalia), and South Africa).

87. David Robarge, CIA's Covert Operations in the Congo, 1960–1968: Insights From Newly Declassified Documents, Stud. Intel., Sept. 2014, at 1, 1–3 ("The [CIA's] activities included contacts with oppositionists who were working to oust Lumumba with parliamentary action; payments to army commander Mobutu . . . and 'black' broadcasts from a radio . . . to encourage a revolt against Lumumba.").

88. Elizabeth Schmidt, The Historical Roots of Guinea's Latest Coup, Wash. Post (Sept. 21, 2021), https://www.washingtonpost.com/outlook/2021/09/21/historical-roots-guineas-latest-coup/ (on file with the *Columbia Law Review*) (stating that "France engaged in successive plots to overthrow the Guinean president" shortly after the country's independence); Guinea Reports Invasion from Sea by Portuguese, N.Y. Times, Nov. 23, 1970, at 1, https://www.nytimes.com/1970/11/23/archives/guinea-reports-invasion-from-sea-by-portuguese-lisbon-denies-charge.html (on file with the *Columbia Law Review*) ("President Sékou Touré of Guinea said today that Portuguese forces had invaded his West African nation.").

89. See CIA, The Guerrilla War in Portuguese Guinea, Weekly Summary Special Report 1 (Dec. 20, 1968), https://www.cia.gov/readingroom/docs/CIA-RDP79-00927A006800030003-4.pdf [https://perma.cc/F4UQ-8T8D] (providing background on Portuguese military involvement in Guinea at the time); Schmidt, supra note 88.

90. Victoria Brittain, Africa: A Continent Drenched in the Blood of Revolutionary Heroes, The Guardian (Jan. 17, 2011), https://www.theguardian.com/global-development/poverty-matters/2011/jan/17/lumumba-50th-anniversary-african-leaders-assassinations [https://perma.cc/Y2M3-NKRT] ("Between 1961 and 1973, six African independence leaders were assassinated by their ex-colonial rulers . . . .").

91. One of the consequences of this, as Professor Elizabeth Schmidt observed in the Guinean context, was the distrust of political oppositions. This, in turn, paved the way to the single-party state paradigm that became common in many African countries after their independence. See Schmidt, supra note 88.

92. See Brittain, supra note 90.

to keep them reliant on the old empires.[93] In the Cold War context, the largesse African states sought to develop their nascent countries were conditioned on their political alignments with their former-colonizers-turned-democracies or the Soviet Union and its satellite states.[94] For example, when Guinea became independent in 1958,[95] France halted all development projects in the country.[96] Cuba provided Guinea with the assistance it needed to train its first military.[97]

But whether they called themselves democracies, socialists, or communists, African states did not blindly adopt these political philosophies: They considered them in the context of their domestic cultural, economic, and political situations. For example, Modibo Keita, Mali's first President, noted that even though Mali was inspired by the "socialist construction," it did not "adopt its materialist philosophy" because Mali was a Muslim country.[98] African leaders' reservations to adopt Western political ideologies wholeheartedly were born of the fact that Africa was dealing with a different material reality than the West during

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93. See Kwame Nkrumah, Neo-Colonialism: The Last Stage of Imperialism, at ix (1965) ("The essence of neocolonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside."); Jean-Paul Sartre, Colonialism and Neocolonialism 109 (1964) (arguing that neocolonialism consisted of "buying the new masters, the bourgeoisie of the new countries, as classic colonialism bought the chiefs, the emirs, the sorcerers").

94. See Jeffrey James Byrne, The Cold War in Africa, *in* The Routledge Handbook of the Cold War 149, 154 (2014) ("Numerous governments manipulated the liberation movements to serve their own ends or indirectly attack regional rivals, while others buckled to Western pressure to withhold their support in the name of stability."); Mohamed Saliou Camara, From Military Politization to Militarization of Power in Guinea-Conakry, 28 J. Pol. & Mil. Socio. 311, 320 (2000) (detailing Fidel Castro's assistance to Guinea in the first decade after its independence from France).

95. Eric Pace, Ahmed Sékou Touré, a Radical Hero, N.Y. Times, Mar. 28, 1984, at A6, https://www.nytimes.com/1984/03/28/obituaries/ahmed-sekou-toure-a-radical-hero.html (on file with the *Columbia Law Review*) (discussing the circumstances around Guinea's independence).

96. See Byrne, supra note 94, at 152 (detailing the retaliations that Guinea and Ghana faced following their independence).

97. See id. ("[T]he Eisenhower administration alienated Ghana and Guinea by declining to provide development economic assistance, thereby providing an opportunity for the Soviet Union to step in with alternative offers."); Camara, supra note 94, at 319–20 ("Touré turned to Fidel Castro of Cuba for the training of a large number of Guinean youth destined to form the mighty National Militia."). Guinea, under Sekou Touré, was considered a socialist country. See Rajen Harshe, Guinea Under Sekou Toure, Econ. & Pol. Wkly., Apr. 14, 1984, at 624, 624 ("[Touré] moved with a conviction that socialism is compatible with traditional African Communalism.").

98. Francis G. Snyder, The Political Thought of Modibo Keita, 5 J. Mod. Afr. Stud. 79, 86 (1967). Keita, like Touré, despite his socialist outlook, did not see any contradictions between workers and owners of industries in Africa; their contentions lay "between European colonialism and the African people[]." See id. at 82. Sekou Touré was of similar view because "class," as a system of social stratification, was in its embryonic stages in the immediate aftermath of independence in Guinea. See Harshe, supra note 97, at 624.

the Cold War. Africans believed that they needed to achieve similar levels of material prosperity as other nations to be of equal standing.[99] The great need for the "mythical value" of "factory chimn[ies]"[100] made African leaders think hard about internal economic development, as they played their proxy roles in the ideological war between the United States and the Soviet Union.[101]

The emerging international institutions on the continent, as noted above, were equally expected to appreciate the "African context" in their functions.[102] The current strife between the African Court and African states is emblematic of the Court's deviation from this principle.

### D. *On the Road to the African Court*

The OAU was moved by both endogenous and exogenous pressures to put in place an African Human Rights system following the adoption of the Charter for the Organization of African Unity.[103] Internally, Uganda's war with Tanzania created a massive refugee crisis for South Sudan.[104] Algeria and Morocco were fighting over their "unresolved colonial-era land dispute[s]" in the vacuum left by France.[105] Civilian protests for necessities were deadly.[106] Remnants of colonialism, evident in apartheid

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99. See K.M. Barbour, Industrialisation in West Africa—the Need for Sub-Regional Groupings Within an Integrated Economic Community, 10 J. Mod. Afr. Stud. 357, 357 (1972).

100. See id. (quoting Pierre Moussa, the President of the Commission of the Economic and Monetary Community of Central Africa).

101. Id. The development-centric logic of many African states during the Cold War can be summarized as follows: If the disagreement between democratic free market capitalism and communism was due, in great part, to their diverging proscriptions for material production and distribution, African states could not effectively participate in that ideological war without their own equivalent means of production—i.e., industry. This Note juxtaposes "democratic free market capitalism" with "communism" because, like the notion of "separation of powers," "free market" is an indispensable element of liberal democracy. See Reginald Ezetah, The Right to Democracy: A Qualitative Inquiry, 22 Brook. J. Int'l L. 495, 498–99 (1997).

102. See supra notes 83–84 and accompanying text.

103. Organization of African Unity Charter, opened for signature May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept. 13, 1963) [hereinafter OAU Charter].

104. See Charles Thomas, Uganda–Tanzania War, Oxford Rsch. Encycs. ( Jan. 28, 2022), https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-1040 (on file with the *Columbia Law Review*) (detailing the war between Uganda and Tanzania); see also South Sudan–Uganda Relations, Accord (Dec. 23, 2015), https://www.accord.org.za/conflict-trends/south-sudan-uganda-relations/ [https://perma.cc/F978-YWSK] (outlining the historical relationship between South Sudan and Uganda, born of the former's refugee crisis).

105. Ilhem Rachidi, Morocco and Algeria: A Long Rivalry, Carnegie Endowment for Int'l Peace (May 3, 2022), https://carnegieendowment.org/sada/87055 [https://perma.cc/2HQL-8XUP].

106. Carey Winfrey, After Liberia's Costly Rioting, Great Soul-Searching, N.Y. Times, May 30, 1979, at A2, https://www.nytimes.com/1979/05/30/archives/after-liberias-costly-

in South Africa and the subjugation of people to European racism and exploitation in the yet-to-be-independent African states, was inescapable.[107] The Law of Lagos, from the African Conference on the Rule of Law in 1961, declared that "fundamental human rights . . . should be written and entrenched in the Constitutions of all [African] countries."[108] The Conference on African Legal Process and the Individual in 1971 equally contemplated the ways in which law could be used as a tool for safeguarding human rights in both intrastate and international fora in Africa.[109]

Externally, "[H]aving outlived their purpose as proxies during the Cold War era, [African states] came under fresh scrutiny, with the protection of human rights increasingly being mandated as a pre-condition for the granting of Western development aid."[110] The Vienna Declaration and Programme of Action (Vienna Declaration), from the World Conference on Human Rights in Vienna in 1993, called on the world "to promote and protect all human rights and fundamental freedoms."[111] It also emphasized the need for regional and subregional human rights protection mechanisms.[112] Despite the universality of human rights principles, the Vienna Declaration recognized that "national and regional particularities and various historical, cultural and religious backgrounds" matter.[113] The IMF also adopted the language of human rights in its approach to the poor countries of the world: "If one looks below the surface, all of the IMF's activities contribute directly or indirectly to . . . fostering human rights."[114] In the new international order, acquiescence to human rights principles was the way for the emerging

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rioting-great-soulsearching-personally.html (on file with the *Columbia Law Review*) (discussing the deadly protest in Liberia).

107. The apartheid regime in South Africa became effective in 1948 and it was not abolished until 1994. See AUHRM Project Focus Area: The Apartheid, Afr. Union, https://au.int/en/auhrm-project-focus-area-apartheid [https://perma.cc/3EFY-T398] (last visited Oct. 27, 2023). Regarding independence, a substantial number of African countries remained colonized well into the 1970s. See Alistair Boddy-Evans, African Countries' Independence Dates, ThoughtCo. (Jan. 25, 2020), https://www.thoughtco.com/chronological-list-of-african-independence-4070467 [https://perma.cc/6EFY-JJET] (last updated July 17, 2024) (listing African states, their independence dates, and former colonizers).

108. See Int'l Comm'n of Jurists, African Conference on the Rule of Law: A Report on the Proceedings of the Conference 9 (1961), https://icj2.wpenginepowered.com/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf [https://perma.cc/B6H5-J8N4].

109. U.N. Econ. Comm'n for Africa, Report of the Conference of African Jurists on African Legal Process and the Individual, ¶ 5, U.N. Doc. E/CN.14/521 (July 5, 1971).

110. See Bekker, supra note 57, at 159.

111. See World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).

112. Id. ¶ 37.

113. Id. ¶ 5.

114. Sérgio Pereira Leite, Human Rights and the IMF, Fin. & Dev., Dec. 2001, at 45, 46.

African states to have standing in the community of states, even if they lacked the means to effectively carry out those ideals.

The question of *how* African states would utilize legal structures to protect the people on the continent did not have an easy answer. Before the first judges of the Court sat for duty in 2006, there preceded decades-long debates about rights adjudication on the continent.[115] Article 19 of the OAU Charter established the CMCA, an organ that was tasked with resolving disputes between African states.[116] The CMCA was not a court.[117] African states were wary of litigation. "Traditional African dispute settlement places a premium on improving relations between the parties on the basis of equity, good conscience, and fair play, rather than on strict legality."[118] The significant difference between the CMCA and the African Commission is that, whereas the CMCA had jurisdiction over "disputes between States only,"[119] the African Commission can oversee both disputes arising between states and human rights violations intrastate.[120]

But whether between states or people, "The African system 'is one of forgiveness, conciliation and open truth, not legal friction or technicality.'"[121] The establishment of the African Court—its broad jurisdiction, procedure, and the binding nature of its judgment—was a departure from the traditional notions of rights and dispute resolutions in Africa. The zero-sum nature of litigation abrogated the traditional practices of consensus building and amicable dispute resolution for the adversarial procedures common to the legal systems of the West.[122]

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115. See Scott Lyons, The African Court on Human and Peoples' Rights, Am. Soc'y of Int'l L. (Sept. 19, 2006), https://www.asil.org/insights/volume/10/issue/24/african-court-human-and-peoples-rights [https://perma.cc/7Q4U-YUB4] (discussing the inauspicious beginnings of the processes that led to the creation of the African Court); Why the African Court Should Matter to You, Amnesty Int'l, https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/ [https://perma.cc/FFE4-5JGE] (providing a general summary on the African Court—its history, composition, and function); infra text accompanying notes 130–134.

116. See OAU Charter, supra note 103, art. 19 ("Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration . . . .").

117. See CMCA, supra note 63, art. XII–XXXI (outlining the responsibilities of the CMCA, which involved the investigation and mediation of disputes amongst Member States).

118. Nsongurua J. Udombana, An African Human Rights Court and an African Union Court: A Needful Duality or Needless Duplication? 28 Brook. J. Int'l L. 811, 818 (2003) [hereinafter Udombana, A Needful Duality].

119. See CMCA, supra note 63, art. XII.

120. See Banjul Charter, supra note 4, art. 45–47 (detailing the mandate of the African Commission and the kinds of complaints that can be brought before it).

121. See Udombana, A Needful Duality, supra note 118, at 818 (citing A. L. Ciroma, Time for Soul-Searching, Daily Times (Nigeria) (Aug. 23, 1979)).

122. See Udombana, Toward the African Court, supra note 60, at 74 ("[African states'] tendency had been to shy away from litigation, preferring forms of dispute settlement considered more 'African.'").

The creation of the African Court also placed the AU, which was already struggling to maintain the Commission, in an even greater financial bind. The AU "inherited an empty treasury from the OAU."[123] "[D]ue to financial problems . . . several projects of the Commission had to be suspended."[124] The UN, European Community, and governments of Scandinavian countries, like Sweden and Denmark, have been the funders of many of the Commission's projects.[125] The Commission has also depended on the generosity of private organizations and nongovernmental international institutions to function.[126]

In the first ten years of its existence, the AU did not have a headquarters of its own. China funded its two-hundred-million-dollar headquarters in Ethiopia in 2012.[127] To date, the AU is substantially dependent on foreign donations to meet its budgetary needs. In 2017, African states managed to contribute only 27% of AU's annual budget.[128] The rest of the budget was provided by donors.[129]

In light of these material and structural challenges, many observers of the African human rights system expressed concerns about the need to create the African Court.[130] Why create the African Court when the African Commission was barely operational? The former Commissioner, Moleleki D. Mokama, lamented: "I am personally not eager on starting a court at this stage. I would rather get the Commission to be more aggressive and establish itself first before we move into the court . . . ."[131] Scholars expressed similar apprehensions: Udombana maintained in 2004 that "no

123. Udombana, A Needful Duality, supra note 118, at 862 ("The AU, for example, has inherited an empty treasury from the OAU and its finances are predictably dry.").

124. Rep. of the Afr. Comm'n H.P.R., ¶ 32, AHG/Res 250(XXXII) (1996) [hereinafter 1996 Report].

125. See Rep. of the Afr. Comm'n H.P.R., ¶ 18, AHG/Res. 207(XXVIII) (1992) (listing African Commission's external sources of funding).

126. See 1996 Report, supra note 124, ¶ 33 ("The Raoul Wallenberg Institute continued to finance the promotional activities of the Commission, including missions undertaken by Commissioners and the publishing of the Commission's Review.").

127. African Union Opens Chinese-Funded HQ in Ethiopia, BBC News (Jan. 28, 2012), https://www.bbc.com/news/world-africa-16770932 [https://perma.cc/ADH7-NGUM].

128. Kesa Pharatlhatlhe & Jan Vanheukelom, ECDPM, Financing the African Union on Mindsets and Money 3 (2019), https://ecdpm.org/application/files/7216/6074/7083/DP240-Financing-the-African-Union-on-mindsets-and-money.pdf [https://perma.cc/7QCT-FXTC].

129. Id. In 2021, the AU member states' contributions to the AU's budget were only marginally better from 2017: 32%. See PSC Rep., AU Financial Independence: Still a Long Way to Go (Mar. 24, 2021), https://issafrica.org/pscreport/psc-insights/au-financial-independence-still-a-long-way-to-go [https://perma.cc/2WG9-7BEQ].

130. See Udombana, Toward the African Court, supra note 60, at 75 ("Human rights groups and NGOs were also divided on the timing and desirability of a human rights court under the Charter.").

131. See id. at 75 (citing Interview with Hon. Justice Mokama, Gambia (Apr. 9, 1993)).

new international court should be created without first ascertaining if the existing institutions could better perform their duties."[132]

Despite these warnings, the African Court was established.

## II. WHY EXPANDING THE AFRICAN COURT'S JURISDICTION IS A BAD IDEA

This Part details the adverse consequences of the African Court's jurisdictional expansion and exposes the shortcomings of its justifications. Section II.A explains the ways in which the neoliberal theory of the free market was used to frustrate the sovereignties of African states. Section II.B discusses the way in which the African Court's jurisdictional expansion deviates from the normative goals that it was created to meet. Section II.C examines the opportunity structure theory as a basis for justifying the African Court's jurisdictional expansion and highlights its shortcomings. Section II.D focuses on a common oversight of the neoliberals and the opportunity structure theorists, paying special attention to horizontal violations of human rights in Africa.

### A. *Neoliberalism and Its Restraint of African States*

The Protocol on the African Court came into force in 2004.[133] Fifteen years prior, the Berlin Wall was hammered down,[134] following which scholar Francis Fukuyama declared the "end of history,"[135] and the Washington Consensus formulated the laissez-faire economic policies that the World Bank and IMF administered in poor countries around the world.[136] That was the end of the Cold War—the triumph of liberal democracy, a system of governance "based on the doctrines of separation of powers and free market economy."[137] The result was the suppression of

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132. See Udombana, A Needful Duality, supra note 118, at 817.

133. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Afr. Union, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/6EHN-Q78Y] (last visited Aug. 28, 2024) (showing that the Protocol on the African Court came into force on January 25, 2004).

134. See What Was the Berlin Wall and How Did It Fall?, IWM, https://www.iwm.org.uk/history/what-was-the-berlin-wall-and-how-did-it-fall [https://perma.cc/RZ48-WFHA] (last visited Dec. 28, 2023) (showing that the Berlin Wall fell on Nov. 9, 1989).

135. See Francis Fukuyama, The End of History?, Nat'l Int., Summer 1989, at 3, 4 ("[W]e may be witnessing . . . the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.").

136. See Belinda Archibong, Brahima Sangafowa Coulibaly & Ngozi Okonjo-Iweala, How Have the Washington Consensus Reforms Affected Economic Performance in Sub-Saharan Africa?, Brookings (Feb. 19, 2021), https://www.brookings.edu/articles/how-have-the-washington-consensus-reforms-affected-economic-performance-in-sub-saharan-africa/ [https://perma.cc/ECU9-ZX4S].

137. See Ezetah, supra note 101, 498–99.

"state" for the promotion of the market as the primary facilitator of human interactions.[138] In the words of Professor Ludwig von Mises, "[F]or the liberal, the world does not end at the borders of the state. . . . [W]hatever significance national boundaries have is only incidental and subordinate."[139] The absence of the state, however, did not mean the absence of law. Central to the neoliberal project was the melding of the "invisible hand" of the market with the "visible hand" of the law.[140]

In Africa, the language of economic development and the rule of law became inseparable.[141] But African states were constrained in their capacities to shape their national laws; their conceptions of national laws inherently conflicted with libertarian universalism.[142] In 2001, the IMF argued that "[m]aking globalization work in Africa is one of the most urgent tasks facing the region's policymakers."[143] This belief became a policy imperative for the IMF.[144] In a recent report, ActionAid revealed that the IMF and the World Bank called for strong privatization of public resources in Africa; they coerced African states to actively stifle their public sectors through salary freezes, layoffs, and other austerity-based measures within their borders.[145] Humanitarian organizations, like the UN, played their roles in calling for the adoption of these measures in Africa.[146] An important proposal in the Vienna Declaration was for the least developed

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138. See Slobodian, supra note 16, at 1 (arguing that the triumph of the free market ideology relegated politics to the "passive tense" and promoted the "global economy" as the primary actor).

139. See Ludwig von Mises, Liberalism: In the Classical Tradition 148 (Ralph Raico trans., Found. for Econ. Educ. 1985) (1927).

140. See Slobodian, supra note 16, at 7 ("The common starting point of the neoliberal economic theory is the insight that in any well-functioning market economy the 'invisible hand' of market competition must by necessity be complemented by the 'visible hand' of the law." (internal quotation marks omitted) (quoting E.U. Petersmann, International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order, *in* The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (R. St. J. Macdonald & Douglas M. Johnston eds., 1984))).

141. See Joseph M. Isanga, Rule of Law and African Development, 42 N.C. J. Int'l L. 729, 731 (2017) ("Africa's economic growth needs to be premised on the intrinsic and inseparable relationship and synergy between rule of law and sustainable economic growth . . . .").

142. See von Mises, supra note 139 and accompanying text.

143. G.E. Gondwe, Making Globalization Work in Africa, Fin. & Dev., Dec. 2001, at 31, 31.

144. Id.

145. See ActionAid, Fifty Years of Failure: The International Monetary Fund, Debt and Austerity in Africa 13 (2023) ("80[%] of countries were advised to cut or freeze the percentage of GDP spent on wage bills even though most started from a very low base . . . .").

146. See Frank Louis Kwaku Ohemeng, Getting the State Right: Think Tanks and the Dissemination of New Public Management Ideas in Ghana, 43 J. Mod. Afr. Stud. 443, 443–44 (2008) (stating that the United Nations and other international organizations served as the "main vehicles" for implementing the "[New Public Management] gospel" in the world).

countries, a great number of which were in Africa, to commit to "economic reforms."[147]

Professor Frank Louis Kwaku Ohemeng has detailed the ways in which neoliberal think tanks proliferated and influenced Ghana's national policies in the 1990s.[148] Much has been written about the ways in which NGOs increasingly undermined the sovereignties of African states following the Cold War.[149] A common objective of these endeavors was the "denationalization" of constitutional laws in Africa.[150] Professor Joseph M. Isanga's assertion that Africa's underdevelopment was a result of its lack of rule of law, was predicated on the notion that African states were not restrained enough.[151] In that vein, Economist Nick Curott maintained that the rule of law "provid[es] the framework for protecting private property and individual freedom, creates the stability and predictability in economic affairs necessary to promote entrepreneurship, saving and investment, and capital formation."[152] African states' primary function in this paradigm was to facilitate their constituents' participation in the global market.

The neoliberal proposal of availing newly independent African states to the global market, despite their lack of comparative infrastructures to their ex-colonizers, was a recipe for disaster. As understood by Fred L. Block, "a world order in which the flow of goods and capital is determined largely by market forces will maximize the advantages for the countr[ies] with the highest level of technical development and with the most enterprising and strongest firms."[153] African states, emerging from colonialism and severely lacking in industrial infrastructure, could only be

147. See World Conference on Human Rights, supra note 111, ¶ 9 ("The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.").

148. See Ohemeng, supra note 146, at 454–61 (examining the ways in which think tanks influenced Ghana's developing policies).

149. See, e.g., Joseph Hanlon, Mozambique: Who Calls the Shots 1 (1991) (demonstrating the ways in which Mozambique was "recolonized" through foreign aids, multinational and nongovernmental organizations following its independence in 1975); Julie Hearn, African NGOs: The New Compradors? 38 Dev. & Change 987, 1095 (2007) (stating many African states "are experiencing levels of Northern intervention not seen since colonialism").

150. See Charles Manga Fombad, Internationalization of Constitutional Law and Constitutionalism in Africa, 60 Am. J. Compar. L. 439, 439–40 (2012) (arguing for globalization because common problems "require common solutions").

151. See Isanga, supra note 141, at 734 ("Law can only function as a tool of development if it . . . 'impos[es] meaningful restraints on government actors . . . .'" (quoting R.P. Peerenboom, China's Long March Toward Rule of Law 128 (2002))).

152. See N.A. Curott, Foreign Aid, the Rule of Law, and Economic Development in Africa, 11 U. Bots. L.J. 3, 14 (2010).

153. Fred L. Block, The Origins of International Economic Disorder: A Study of United States International Monetary Policy from World War II to the Present 3 (1977).

exploited by the old empires in such a system. This was President Keita's concern, and one of the reasons for his attempt—along with President Touré and President N'Krumah—to create the Ghana-Guinea-Mali Union right after the independence of their respective countries.[154]

In a 2016 publication, *Neoliberalism: Oversold?,* the basis of this fear came to light.[155] The IMF came out against its own laissez-faire policies, which the likes of Isanga had promoted as the cure to Africa's sufferings. It concluded that, rather than promoting development, "both openness and austerity are associated with increasing income inequality," which "sets up an adverse feedback loop."[156] The solution? It suggested that "*policymakers should be more open to redistribution.*"[157] The tangible values of this critical self-assessment by the IMF are not likely to be felt immediately in Africa. That is because, whereas this publication calls for a greater assertion of states in determining the welfare of those within their borders, the formative literature of the African human rights system called for the minimization of states, internationalization of national law, on the grounds that "common problems" require "universal solutions."[158]

As such, African states' membership to the plethora of international treaties limits their ability to draft legislations tailored to their countries' needs. Political theorist Jon Elster has termed the problem *downstream constraints*: external considerations that impede the ratification of a new law.[159] In Adem Kassie Abebe's simple logic, the more international treaties a country ratifies, the more the country limits its "constitution-making power."[160] The constraint has been a thorny problem for African states. In fact, *Tanganyika Law Society v. Tanzania*, the first case that the

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154. Following their independence, Ghana, Guinea, and Mali began to combine their resources in order to build an economic bloc, the like of the European Community, in West Africa. See O.O. Olubomehin, The Ghana–Guinea–Mali Union (1958–1964): An Experiment in Regional Cooperation, 8 Afr. J. Int'l Aff. & Dev., no. 1, 2003, at 7, 9 ("[T]he formation of the Ghana–Guinea–Mali Union was motivated by the external influence of the European Economic Community (ECC) established in 1957, and the United Nations agencies such as Economic Commission for Africa (E.C.A) founded in 1958."); see also Munya, supra note 83, at 541 (highlighting the general understanding amongst African states that they needed to have regional cooperation for the "prosperity of the continent").

155. Jonathan D. Ostry, Prakash Loungani & Davide Furceri, Neoliberalism: Oversold?, Fin. & Dev., June 2016, at 38.

156. Id. at 40.

157. Id. at 41 (emphasis added).

158. See Fombad, supra note 150, at 440 ("The progressive internationalization of constitutional law appears to be an attempt to adopt universal solutions to some of the common problems we face today.").

159. See Jon Elster, Forces and Mechanisms in the Constitution-Making Process, 45 Duke L.J. 364, 373 (1995) ("Downstream constraints are created by the need for ratification of the document the assembly produces.").

160. See Adem Kassie Abebe, Taming Regressive Constitutional Amendments: The African Court as a Continental (Super) Constitutional Court, 17 Int'l J. Const. L. 89, 94 (2019) ("[I]nternational treaties that a relevant country has ratified theoretically provide certain substantive limits on the constitution-making power.").

Court decided on its merits, was about the conflict between Tanzania's Constitution, the Banjul Charter, and the ICCPR.[161]

### B. *The Structural and Normative Concerns Around the African Court's Jurisdictional Expansion*

The Court's material jurisdiction is broader than those of its counterparts in Europe and in the Americas. Unlike the ECtHR and the Inter-American Court of Human Rights (IACHR),[162] the African Court's jurisdiction extends to "*any . . . relevant Human Rights instrument ratified by the States concerned*."[163] Equally concerning, the Court has been borrowing its jurisprudence from abroad.[164] An empirical study conducted by Martin Lolle Christensen revealed that 69% of the Court's judgments on the merits between 2013 and 2020 referenced external sources.[165] In many cases, the African Court has made no distinction between foreign sources of law and relevant African human rights instruments. In *Abubakari v. Tanzania*, for example, the African Court relied on the ECtHR's and IACHR's precedents[166] to affirm the right to a fair trial for the plaintiff.[167]

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161. See No. 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 76 ( June 14, 2013), https://afchpr-commentary.uwazi.io/en/document/gt0cgvz5hveu3di [https://perma.cc/37TX-B6QQ] ("Declare that the Respondent is in violation of Articles 2 and 13(1) of the African Charter on Human and Peoples' Rights and Articles 3 and 25 of the ICCPR (International Covenant on Civil and Political Rights) . . . .").

162. The jurisdictions of the IACHR and ECtHR only extend to the interpretation of their respective conventions. See Organization of American States, American Convention on Human Rights art. 62, ¶ 3, Nov. 22, 1969, 1144 U.N.T.S. 123 ("The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention . . . ."); European Convention on Human Rights art. 32, ¶ 1, Nov. 4, 1950, C.E.T.S. No. 5 ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols . . . .").

163. Protocol on the African Court, supra note 7, art. 3, ¶ 1 (emphasis added).

164. See Martin Lolle Christensen, In Someone Else's Words: Judicial Borrowing and the Semantic Authority of the African Court of Human and Peoples' Rights, 36 Leiden J. Int'l L. 1049, 1050 & tbl.1 (2023) [hereinafter Christensen, In Someone Else's Words] (discussing the ways in which the Court is building its jurisprudence on ECtHR's and IACHR's precedents).

165. Id. at 1058. In a data set of 206 external references, 133 referred to ECtHR precedents, 49 to IACHR precedents, 16 to ICJ precedents, and 7 to ICC precedents. Id.

166. See No. 007/2013, Judgment, Afr. Ct. H.P.R., ¶ 158 & n.20 ( June 3, 2016), https://caselaw.ihrda.org/en/entity/lkp2rcmhynovs9osa89z4cxr?file=16137364800711ahvtshzoqj.pdf&page=2 (on file with the *Columbia Law Review*) (citing Pélissier v. Fr., App. No. 25444/94, ¶ 52 (Mar. 25, 1999), https://hudoc.echr.coe.int/eng?i=001-58226 (on file with the *Columbia Law Review*)); Balta v. Turk., App. No. 48628/12, ¶ 37 ( June 23, 2015), https://hudoc.echr.coe.int/eng?i=001-155375 (on file with the *Columbia Law Review*); Neptune v. Haiti, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 102–109 (May 6, 2008).

167. No. 007/2013, Afr. Ct. H.P.R., ¶ 158; id. ¶ 193 & n.24 (citing B.V. v. Neth., App. No. 14448/88, ¶ 33 (Oct. 27, 1993), https://hudoc.echr.coe.int/eng?i=001-57850 (on file with the *Columbia Law Review*) (holding that the judge violated the principle of equality of arms between the parties by relying only on evidence adduced by the prosecution)).

In *Konaté v. Burkina Faso*, the Court cited to the European Convention on the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the Optional Protocol to the ICCPR to affirm the principle of subsidiarity,[168] even though that principle is in the Banjul Charter.[169] These instances of judicial borrowing are not always innocuous. Christensen notes that the Court summarily adopted the principle of *non bis in idem* ("double jeopardy") from the ICCPR to make its ruling in *Ajavon*, one of the cases that led to Benin's withdrawal of its Optional Declaration.[170]

By relying on external sources of law to determine cases brought before it, the Court undermines the established legal apparatus it was created to uphold, similar to Europe's subversion of African traditional laws in the pre-independence era.[171] The Court was created to do the exact opposite.[172] Additionally, in borrowing from more established courts, rather than developing its own jurisprudence, the Court fails to appreciate its own limitations and those of African states relative to those of other international courts and states. Professors Eric Posner and John C. Yoo have noted that "the European courts are more like domestic courts than international courts."[173] The ECtHR, unlike the African Court, has a greater influence on its member states[174] because those states "share a legislative body, a bureaucracy, and a decades-long commitment to political unity."[175] Those countries also enjoy a greater level of affluence and autonomy than the African states.[176]

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168. No. 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 78 & n.5 (Dec. 5, 2014), https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf [https://perma.cc/WU8T-JF44].

169. See Banjul Charter, supra note 4, art. 56, ¶ 5.

170. See Christensen, In Someone Else's Words, supra note 164, at 1067 ("[T]he African Court borrows from the ECtHR's understanding of *non bis in idem* in *Grande Stevens and Others v. Italy* . . . .").

171. See supra section I.C.

172. See Charter on the Welfare of the Child, supra note 45, pmbl. 7, art. 11, ¶ 2(c) (discussing the significance of African values in interpreting and implementing the protocol); Banjul Charter, supra note 4, art. 29, ¶ 7, art. 61 (discussing the individual's duty to "strengthen positive African cultural values" as the Charter protects the individual's rights).

173. See Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 Calif. L. Rev. 1, 55 (2005).

174. See Shai Dothan, The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights, 42 Fordham Int'l L.J. 765, 770 (2019) ("The ECHR easily ranks as one of the most influential international courts in history.").

175. See Posner & Yoo, supra note 173, at 66.

176. See supra section I.C.

The significance of these differences is evident in the ECtHR's access to material support and its success relative to the African Court.[177] The ECtHR's budget for 2023 was €76,816,700.[178] The African Court's operating budget in 2022 was $11,911,668, 11% of which came from "[i]nternational [p]artners."[179] In 2017, the EU wrote a €1.8 million grant to support human rights institutions in Africa.[180] In 2018, the ECtHR issued 2,738 judgments on the merits.[181] In the six years between 2013 and 2019, the African Court managed to issue only thirty such judgments.[182] Although some scholars have attributed the African Court's low turnout of decisions to the difficulty of accessing the Court,[183] a more likely reason is that the Court is ineffective.[184] Since 2006, the Court has managed to resolve only 59% of the cases that have been brought under its contentious jurisdiction (198 out of 338 cases).[185] Greater access to the Court, therefore, is not likely to lead to a greater turn out of decisions—if anything, it might bring the Court to a grinding halt. Despite these warnings, the Court does not seem to have any plan to deviate from its current mode of operation anytime soon.[186]

### C. *Opportunity Structure Theory: Practical?*

The expansion of the Court's jurisdiction, despite its corollary diminishing effects on the Court's reputation and effectiveness, has been

177. See Dothan, supra note 174, at 770 (stating that ECtHR's success influenced the creation of the Court).

178. Eur. Ct. H.R., ECHR Budget, https://www.echr.coe.int/documents/d/echr/Budget_ENG# [https://perma.cc/9FU9-D8JB] (last visited Nov. 9, 2023).

179. 2022 Report, supra note 10, ¶ 38.

180. See EU Provides Support to Strengthen the African Human Rights System, European Union External Actions (Jan. 11, 2017), https://www.eeas.europa.eu/node/18459_en [https://perma.cc/5B2M-WG6J] (last visited Sept. 7, 2024) ("[I]n the wake of the 12th AU-EU Human Rights Dialogue, the EU signed a €1.8 million grant contract with the Pan-African Parliament (PAP).").

181. James L. Cavallaro & Jamie O'Connell, When Prosecution Is Not Enough: How the International Criminal Court Can Prevent Atrocity and Advance Accountability by Emulating Regional Human Rights Institutions, 45 Yale J. Int'l L. 1, 31 (2020) (providing details on ECtHR's budget, docket, and accomplishments relative to IACHR and the African Court).

182. Id.

183. See, e.g., Christensen, In Someone Else's Words, supra note 164, at 1058 ("[F]ew cases have been brought before the African Court due to problems of access and the lack of state parties signing up to the Court.").

184. But cf. Gathii & Mwangi, supra note 18, at 216 (arguing that the African Court has a "permissive interpretation of the requirement to exhaust local remedies").

185. See About Us, African Ct. on Hum. & People's Rts., https://www.african-court.org/wpafc/ [https://perma.cc/649Y-GTCL].

186. Strategic Plan 2021–2025, ¶ 16, Afr. Ct. on Hum. & People's Rights (2021), https://www.african-court.org/wpafc/wp-content/uploads/2021/06/ACtHPR-Strategic-Plan-2021-2025-Deepening-Trust-in-The-African-Court.pdf [https://perma.cc/NY83-S48G] [hereinafter 2021–2025 Strategic Plan] ("Here, the court will build on such mechanisms like . . . the European and Inter-American Human Rights Courts.").

celebrated by some scholars. James Thuo Gathii and Jacquelene Wangui Mwangi have praised the African Court (and other subregional courts) for being a legal opportunity structure in which individuals and groups can use "litigation as an additional point of leverage vis-à-vis their government."[187] But like the sub-regional courts on the Continent, the Court does not have jurisdiction over political questions, especially those arising under domestic elections.[188] Nevertheless, as Olabisi D. Akinkugbe notes, there has been a "growing mobilization of the African Court by opposition politicians as an alternative forum for engaging in political warfare against repressive national governments and for mobilizing social movements."[189]

Proponents of the Court's disregard for institutional neutrality in political matters justify their stance on the grounds that the Court contributes to the democratization process of the defendant states brought before it.[190] Undergirding this position is an attempt to challenge the result-oriented approach—measuring the Court's success based on African states' compliance to its decisions—that Western observers use to criticize the Court.[191] To Gathii and Mwangi, the alternative to the result-oriented approach is to consider the role of the Court in the greater pro-democratic movement against dictatorial leaders in Africa.[192] They argue that the recent "withdrawals very well indicate that the African Court is a victim of its success."[193] In that vein, Tom Ginsburg states that African human rights courts are "playing a role in continental justice simply by staying open."[194]

This Note maintains, on the contrary, that the recent withdrawals are evidence that the African Court might not be open much longer if it continues to overstep its jurisdiction. Furthermore, whatever truth Ginsburg's summary contains, it does not seem to resonate with the people who go before the African Court to safeguard their rights. According to

187. Gathii & Mwangi, supra note 18, at 213.

188. See Akinkugbe, supra note 18, at 285 ("Like its sister subregional courts, the African Court does not have jurisdiction to review election disputes arising out of political processes in its member states.").

189. Id. at 286.

190. See Gathii & Mwangi, supra note 18, at 233 ("These three cases [were] brought by opposition politicians or civil society groups involved in democratization processes in the respective countries."); see also Akinkugbe, supra note 18, at 285 ("The openness of Africa's regional and subregional courts to these sorts of disputes enhances the wider sociopolitical opportunities of pro-democracy activists and civil society.").

191. See Akinkugbe, supra note 18, at 281–87 (describing the circumstances that justify judging the African regional and subregional courts by alternative metrics).

192. Gathii & Mwangi, supra note 18, 233.

193. See id. at 222.

194. Tom Ginsburg, The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change, at xxv, xxviii, 115 Am. J. Int'l L. 777, 780 (2021) (reviewing James Thuo Gathii, The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change (2021)).

the African Court Coalition, one of the civil service organizations that lobbied for the creation of the African Court,[195] "implementation of the Court's judgments is the central measure of its efficacy."[196] NGOs and other litigants want a functioning African Court; they want its judgments to translate into tangible results. Following the African Court's decision in *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes v. Mali*,[197] for example, the Institute for Human Rights and Development in Africa (IHRDA) organized public dialogues in Mali to ensure that the country had a plan to amend its family code.[198] For NGOs like the IHRDA, there are important interests in the African Court maintaining a functional relationship with African states—for, absent this relationship, they lose an essential avenue to voice their grievances and receive remedies for them.

The opportunity structure theory equally contributes to the Court's inefficacy by encouraging people to add frivolous cases to the Court's already backlogged docket. For proponents of opportunity structure theory, winning is usually not the objective of litigation; the goal is to "encourage other litigants to sue."[199] Thus, in *Falana v. African Union*,[200] a Nigerian lawyer sued the AU for permitting African states to be signatories to the Optional Declaration before they could be directly sued by

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195. See Background & Structure, Afr. Ct. Coal., https://www.africancourtcoalition.org/background-structure/ [https://perma.cc/M8DC-UJM5] (last visited Nov. 9, 2023) ("[T]he Coalition . . . advocate[s] for an effective and independent African Court on Human and Peoples' Rights in order to provide redress to victims of human rights violations and strengthen the human rights protection system in Africa.").

196. African Ct. Coal., Booklet on the Implementation of Decisions of the African Court on Human and Peoples' Rights 4 (2d ed. 2021), https://www.africancourtcoalition.org/files/2023/08/ACC-Implementation-Booklet_ENG2021.pdf [https://perma.cc/22SM-3HDC]; Christof Heyns, The African Regional Human Rights System: In Need of Reform?, 2 Afr. Hum. Rts. L.J. 155, 156 (2001) ("The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.").

197. No. 046/2016, Judgment, Afr. Ct. H.P.R. (May 11, 2018), https://caselaw.ihrda.org/entity/xzvp9hhehgwjvtq5523ayvi?file=15308823259293nkxicwu89kjjm59eurpory66r.pdf [https://perma.cc/E4US-HNPL].

198. See Bessem Ayuk, Fostering Implementation of Decisions of African Regional Human Rights Mechanisms: IHRDA Organises Public Dialogue on Implementation of African Court's Decision on Mali Family Code Case, IHDRA (Mar. 2, 2023), https://www.ihrda.org/2023/03/fostering-implementation-of-decisions-of-african-regional-human-rights-mechanisms-ihrda-organises-public-dialogue-on-implementation-of-african-courts-decision-on-mali-family-code-case/ [https://perma.cc/ZF4T-T8DK].

199. See Gathii & Mwangi, supra note 18, at 31 ("[B]oth victories and losses in African international courts encourage other litigants to sue.").

200. No. 001/2011, Judgment, Afr. Ct. H.P.R. ( June 26, 2012), https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf [https://perma.cc/E9MF-DGWD].

individuals and NGOs in the Court.[201] The Court rightly dismissed the case.[202] But this case is not the only one of its kind that has come before the Court.[203] Fifty-five percent of the complaints in the Court's first five years were without "any legal basis."[204] Worse, due to the Court's limited resources, this litigation tactic is likely to impede the Court from resolving matters that do have merit in a timely manner.[205] In the thirty-three judgments that the Court issued between 2022 and 2023, only three were decided within two years.[206] The rest were decided between three and seven years.[207] Indeed, even if the opportunity structure theory worked the way its proponents propose it does, is three to seven years a reasonable time to resolve human rights problems?

Furthermore, it is unclear whether bypassing domestic political and legal institutions for the Court's judgments is an effective tool for resolving human rights violations. Currently, twenty-two out of the fifty-five countries in Africa have not ratified the Protocol on the Court.[208] It is hard to imagine how more African states will be incentivized to ratify the Protocol on the African Court (and especially the Optional Declaration)

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201. Id. ¶¶ 24–40.

202. See id. ¶ 75.

203. In *Atemnkeng v. African Union*, the plaintiff, like the one in *Falana*, sought for the African Court to nullify Article 34, paragraph 6 of the Protocol on the African Court. See No. 014/2011, Judgment, Afr. Ct. H.P.R., ¶ 1 (Mar. 18, 2013), https://caselaw.ihrda.org/entity/5gt4cf8r1gp3lkd0r6e4jkyb9?file=1613737530106ghq3w1tae4.pdf&page=1 [https://perma.cc/YH4B-K9YU] (stating that the issue at hand was legitimacy of the Article 34(6) of the Protocol on the African Court).

204. Frans Viljoen, Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights, 67 Int'l & Compar. L.Q. 63, 68 (2018) [hereinafter Viljoen, Understanding and Overcoming] ("[N]o fewer than 55[%] of the cases submitted in the first five years have been submitted manifestly without any legal basis.").

205. Of the eleven judges on the African Court, only one—the President—holds her office on a full-time basis. The rest of the judges work on a part-time basis. Welcome to the African Court, Afr. Ct. H.P.R., https://www.african-court.org/wpafc/welcome-to-the-african-court/ [https://perma.cc/2QLA-VQ2J] (last visited Aug. 10, 2024).

206. See ACtHPR Cases, African Ct., https://www.african-court.org/cpmt/decisions [https://perma.cc/6QFQ-DACB] (last visited Dec. 31, 2023) (listing the cases that were brought before the African Court between 2022 and 2023 and the African Court's rulings on those cases).

207. Id.

208. List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of the Union (Feb. 14, 2023) https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf [https://perma.cc/5tgb-r78c].

considering the Court's propensity to overstep its already expansive jurisdiction.[209]

In practice, the opportunity structure theory is likely to be ineffective. Even when litigants are able to receive favorable judgments from the Court, the remedy they seek remains in the hands of their governments.[210] Professor Frans Viljoen and Lirette Louw have noted that "the most important factors predictive of compliance are political, rather than legal."[211] In bypassing the domestic political and legal processes, however flawed they may be, plaintiffs risk wasting their time, energy, and resources by approaching the African Court.

### D. *A Common Oversight of Neoliberalism and Opportunity Structure Theory in the Context of the African Human Rights System*

A common oversight for the opportunity structure and the market-based rule of law theories of the African Court is a problem that philosopher and political economist John Stuart Mill recognized nearly two centuries ago: that suppression of liberty can be both vertical (e.g., a state's oppression of its citizens) and horizontal (e.g., citizens oppressions of other citizens).[212] A similar outlook is important for correctly assessing the African human rights question. Some of the most pressing human rights violations in Africa—slavery,[213] female genital mutilation (FGM),[214]

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209. See Yakaré-Oulé (Nani), Jansen Reventlow & Rosa Curling, The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter, 33 Emory Int'l L. Rev. 203, 208–09 (2019) (arguing that an "overly proactive" court may lose the support of Member States).

210. Moreover, the Court has a limited tool to follow-up on the implementation of its decisions. In *Ajavon,* the Court relied on "media reports" to ascertain that Benin complied with its judgment. See 2022 Report, supra note 10, annex 2, at 10.

211. Frans Viljoen & Lirette Louw, State Compliance With the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004, 101 Am. J. Int'l L. 427, 458 (2007).

212. See J.S. Mill, On Liberty 4 (Elizabeth Rapaport ed., 1978) (1859) ("Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against . . . the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . . ."). In writing *On Liberty*, Mill sought to assert the liberties of the individual against both encroaching powers of the state and society at large. See id.

213. See Jean Allain, *Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, 103 Am. J. Int'l L. 311–17 (2009) (providing context and the significance of ECOWAS's ruling in *Mani v. Niger*—an antislavery case); Peter Walker, Niger Guilty in Landmark Slavery Case, The Guardian (Oct. 27, 2008), https://www.theguardian.com/world/2008/oct/27/niger-slave-court [https://perma.cc/6VSA-N25M] ("Slavery was officially outlawed in Mauritania in 1981 but some human rights groups estimate up to 20% of the country's 3[million] people are still enslaved.").

214. See Ganiyu O. Shakirat, Muhammad A. Alshibshoubi, Eldia Delia, Anam Hamayon & Ian H. Rutkofsky, An Overview of Female Genital Mutilation in Africa: Are the Women Beneficiaries or Victims? 12 Cureus, no. 9, 2020, e10250, at 1, 2, https://pmc.ncbi.nlm.nih.gov/articles/PMC7536110/pdf/cureus-0012-00000010250.pdf

underage marriage[215]—are often part of entrenched cultural practices that African states are often repelled from correcting.[216]

In 2016, Mali was sued for setting girls' and boys' minimum age of maturity at sixteen and eighteen, respectively, in its Family Code.[217] The African Court correctly ruled that the provision in the Family Code violated Mali's international obligations under the Banjul Charter, the Maputo Protocol, the Charter on the Welfare of the Child, and CEDAW—all of which set girls' minimum age of maturity at eighteen.[218] Less known about the case, however, is that before the issue reached the African Court, Mali's National Assembly attempted to amend the Family Code in 2009.[219] The revised Family Code, among other progressive steps, set the minimum age for both genders at eighteen, abolished the death penalty, and outlawed traditional religious marriages.[220] In response, a conservative Muslim populace threatened the Assembly with violence to keep the Family Code the same.[221] The amendment did not come to fruition.

The Gambia undertook a similar step in 2015 by passing the Women's (Amendment) Act, which made FGM punishable by imprisonment and

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[https://perma.cc/UKQ2-PTHQ] (stating that "[80%] or more of the women undergoing FGM are from" six countries in Africa ("Egypt, Ethiopia, Mali, Sudan, Djibouti, and Guinea")); FGM in Africa, Equal. Now, https://equalitynow.org/fgm_in_africa/ [https://perma.cc/MNA7-H4MQ] (last visited Dec. 31, 2023) ("An estimated 55 million girls under the age of 15 in 28 African countries have experienced or are at risk of experiencing FGM . . . .").

215. See Forced and Child Marriage in Africa as a Manifestation of Gender-Based Violence and Inequality, Walk Free (May 28, 2019), https://www.walkfree.org/news/2019/forced-and-child-marriage-in-africa-as-a-manifestation-of-gender-based-violence-and-inequality/ [https://perma.cc/L5KE-GQ9L] ("In Africa, child and forced marriage are often promoted by longstanding religious and sociocultural traditions.").

216. See Shakirat et al., supra note 214, at 2 ("However, despite global and regional propositions towards the eradication of the practice via law and intervention methods, it's quite saddening to realize that the practice is deeply rooted in some cultures, thereby making its eradication difficult regardless of being tagged internationally as an infringement on human rights.").

217. See Ass'n Pour le Progrès et la Défense des Droits des Femmes v. Mali, No. 046/2016, Judgment, Afr. Ct. H.P.R. (May 11, 2018), https://caselaw.ihrda.org/entity/xzvp9hhehgwjvtq5523ayvi?file=15308823259293nkxicwu89kjjm59eurpory66r.pdf [https://perma.cc/497T-NYSZ].

218. See id. ¶ 135 (holding that Mali had violated multiple international treaties).

219. Mali: Far-Reaching Changes Proposed by Legislature in New Family Code, Libr. Cong. (Aug. 19, 2009), https://www.loc.gov/item/global-legal-monitor/2009-08-19/mali-far-reaching-changes-proposed-by-legislature-in-new-family-code/ [https://perma.cc/E65W-S7WA] ("Mali's National Assembly adopted a controversial new Family Code that introduces far-reaching changes to the existing family laws.").

220. Id.

221. Mali: Threats of Violence Greet New Family Code, Integrated Reg'l Info. Networks (Aug. 11, 2009), https://www.refworld.org/docid/4a85177cc.html [https://perma.cc/QLV3-H9QE] (last updated May 31, 2023) ("We will fight with all our resources so that this code is not promulgated or enacted." (internal quotation marks omitted) (quoting Mohamed Kimbiri, Secretary of Mali's highest-ruling Islamic Council)).

fines.[222] The Act was a reinforcement of the country's 2010 Women's Act, which sought to grant women greater protection and equality within the Gambia.[223] Remarkably, both laws were passed under the leadership of Yahya Jammeh, the country's dictator for over two decades.[224] But when President Jammeh was ousted from power in 2017,[225] there was resurgence of conservative movements against the ban on FGM.[226] The Gambia's Supreme Islamic Council issued a *Fatwa*,[227] calling for the repeal of the provisions banning FGM in the Women's (Amendment) Act.[228]

The Islamic Council urged that, because FGM is permissible in Islamic jurisprudence, it should not be banned by the state's secular law.[229] The connection between Islam and FGM is contested.[230] The Council's argument, nevertheless, gained traction in the Gambia. Assembly Member Sulayman Saho proposed the reinstatement of FGM based on "choice."[231] "Banning the act," he argued, "infringes on others' rights."[232] In 2024, a bill was introduced in the Gambia's Parliament to repeal the FGM ban in

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222. Women's (Amendment) Act, § 32A(1)–(2)(b) (Act No. 11/2015) (Gam.) (banning and criminalizing FGM).

223. See Women's Act, ¶¶ 1–3 (Act No. 12/2010) (Gam.) ("The Women's Act . . . is amended as set out in this Act.").

224. See Yahya Jammeh, Trial Int'l (July 29, 2020), https://trialinternational.org/latest-post/yahya-jammeh/ [https://perma.cc/997J-JRRB] (last updated Apr. 4, 2022) (stating that President Jammeh "ruled [the] Gambia unchallenged for 22 years").

225. See Ex-President Yahya Jammeh Leaves the Gambia After Losing Election, BBC (Jan. 22, 2017), https://www.bbc.com/news/world-africa-38706426 [https://perma.cc/NY9A-Y5LD].

226. Sarah Johnson, FGM Ban in the Gambia Under Threat as Calls Grow to Repeal Law, The Guardian (Oct. 11, 2023), https://www.theguardian.com/global-development/2023/oct/11/fgm-ban-in-the-gambia-under-threat-as-calls-grow-to-repeal-law [https://perma.cc/WR74-4JE9].

227. Fatwa on the Ruling on Female Circumcision in Islam (Fatwa No. 003/2023) GSIC (Gam.) (on file with the *Columbia Law Review*) [hereinafter GSIC, Fatwa]. "Fatwa, in Islam, is a formal ruling or interpretation on a point of Islamic law given by a qualified legal scholar . . . ." Fatwa, Encyc. Britannica, https://www.britannica.com/topic/fatwa [https://perma.cc/44HF-694U] (last updated Sept. 29, 2023).

228. See Johnson, supra note 226.

229. See GSIC, Fatwa, supra note 227 ("[T]he Fatwa Committee of the Gambia Supreme Islamic Council calls on the Government of The Gambia to reconsider the Law prohibiting Female Circumcision . . . given that we are Muslims, and the most precious thing we have in this life is our true Religion.").

230. Ibrahim Lethome Asmani & Maryam Sheikh Abdi, De-Linking Female Genital Mutilation/Cutting From Islam 27 (2008), https://www.unfpa.org/sites/default/files/pub-pdf/De-linking%20FGM%20from%20Islam%20final%20report.pdf [https://perma.cc/CB73-6QL2] ("The teachings of Islam provide overwhelming evidence that FGM/C is not a religious practice and that Islam condemns it.").

231. Omar Bah, NAMs Want Law on FGM Repealed, The Standard (Sept. 12, 2023), https://standard.gm/nams-want-law-on-fgm-repealed/ [https://perma.cc/Z82H-CYXU].

232. Id.

the Women's (Amendment) Act.[233] Hon. Almammeh Gibba, one of the bill's sponsors, stated that "[the bill] seeks to uphold religious purity and safeguard cultural norms and values."[234] Fortunately, the bill was referred[235] and later rejected by the Parliament.[236]

These episodes in Mali and the Gambia underscore two points not accounted for by the opportunity structure and neoliberal theorists. First, African people's lives are often structured by many different institutions, among which secular laws and institutions, like courts, are just one type, and not necessarily the most influential.[237] Second, in failing to distinguish between direct and indirect violations of human rights, the two theories obfuscate how rights violations manifest on the ground. The difference between the two categories of rights violations is significant because whereas the correction of direct violations might be a matter of adjusting a government's modus operandi, the correction of indirect violations can be contingent on many factors—including resources and public compliance—that are not always a given for many African states. Notwithstanding this important difference between direct and indirect violations, in *Zongo v. Burkina Faso*, the African Court interpreted Article 1 of the Banjul Charter[238] to hold Burkina Faso (and future defendant African states) liable for both direct and indirect violations of human rights.[239]

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233. Astha Rajvanshi, Gambia's Move to Repeal Female Genital Mutilation Ban Risks Women's Rights Globally, Time (May 23, 2024), https://time.com/6981349/gambia-africa-female-genital-mutilation-fgm-fgc/ [https://perma.cc/2A3H-JQHR].

234. Jankey Ceesay, Pro-FGM Bill Will Return if It Fails at 2nd Reading–Hon Gibba, The Point (Mar. 5, 2024), https://thepoint.gm/africa/gambia/headlines/anti-fgm-bill-will-return-if-it-fails-at-2nd-reading-hon-gibba [https://perma.cc/YS9C-ZAST].

235. Helena Tian, Gambia Lawmakers Refer Bill Reversing 2015 Female Genital Mutilation Ban to National Committee, Jurist News (Mar. 19, 2024), https://www.jurist.org/news/2024/03/gambia-lawmakers-refer-bill-reversing-2015-female-genital-mutilation-ban-to-national-committee/ [https://perma.cc/R2M8-A8X5].

236. Sofia Christensen, Gambia Parliament Rejects Bill to End Ban on Female Genital Mutilation, Reuters (July 15, 2024), https://www.reuters.com/world/africa/gambia-parliament-rejects-bill-unban-female-genital-mutilation-speaker-says-2024-07-15/ (on file with the *Columbia Law Review*).

237. See Muna Ndulo, African Customary Law, Customs, and Women's Rights, 18 Ind. J. Glob. Legal Stud. 87, 87 (2011) (stating that "[t]he national legal system of a typical African state is pluralistic").

238. "The Member States . . . shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them." See Banjul Charter, supra note 4, art. 1.

239. See Thomas v Tanzania, No. 005/2013, Judgment, Afr. Ct. H.P.R., ¶ 161(vii) (July 4, 2019), https://africanlii.org/akn/aa-au/judgment/afchpr/2019/63/eng@2019-07-04 [https://perma.cc/5XWR-SNYX]; Zongo v. Burkina Faso, No. 013/2011, Judgment, Afr. Ct. H.P.R., ¶ 199 (Mar. 28, 2014), https://afchpr-commentary.uwazi.io/en/entity/2oaw3sg0y1qkhuxr [https://perma.cc/49BZ-5JPA] ("[T]he Respondent State simultaneously violated article 1 of the Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the Applicants in terms of article 7 of the Charter."); Zim. Hum. Rts. NGO F. v. Zimbabwe, No. 245/02, Judgment, Afr. Comm'n H.P.R., ¶ 215

The Court reached this conclusion by relying on various tests that have been developed under the ECtHR's jurisprudence.[240] The decision, broad, is another evidence of the African Court's lack of appreciation for the African context; it presumes a level of institutional development that is not the reality for many African states. For example, many African states lack the resources to put in place robust police infrastructure that can investigate and arrest violators of human rights.[241] Sub-Saharan Africa is worse off than any other region of the world on this score.[242] Nigeria, the most populated country in Africa, has only 219 police officers for every hundred thousand people.[243]

Similarly, the great majority of African states are unequipped to resort to litigation as the means of resolving human rights violations. Burkina Faso, the defendant state in *Zongo*, has only one lawyer for every 125,635 people.[244] Its literacy rate is 37% and 22% for men and women, respectively.[245] The data on legal aid services is exceedingly bleak.[246] In light of these deficiencies, the emphasis on litigation as the means of addressing human rights violations in Africa is a faux pas. This Note, therefore, argues (in the following section) that traditional African

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(May 15, 2006), https://caselaw.ihrda.org/entity/ak15hbi38v969bqwqvn78ehfr?page=1&file=1511779553251vvc3hbgvkja7181pvw265hfr.pdf [https://perma.cc/RFN2-RE8Y].

240. See Onyango v. Tanzania, No. 006/2013, Judgment, Afr. Ct. H.P.R., ¶¶ 136–139 nn.6–8 (Mar. 18, 2016), https://afchpr-commentary.uwazi.io/entity/riga1feu1tfq1tt9?file=14744604705799jy4ldxtqqepzaor.pdf&page=1 [https://perma.cc/49Z6-5V73] (citing Cuscani v. United Kingdom, App. No. 32771/1996, Eur. Ct. H.R., (Sept. 24, 2002); Ferrantelli v. Italy, No. 19874/92, Eur. Ct. H.R., (Aug. 7, 1996); Boddaert v. Belgium, No. 12919/1987, Eur. Ct. H.R., (Oct. 12, 1992); Unión Alimentaria Sanders Sa v. Spain, No. 11681/1985, Eur. Ct. H.R., ( July 7, 1989)).

241. See Mandooh A. Abdelmottlep, Int'l Police Sci. Ass'n, World Internal Security & Index 11, 30 (2016), https://ipsa-police.org/wp-content/uploads/2023/11/WISPI-Report-2016.pdf [https://perma.cc/4QRW-W2FK] (noting that a lack of security resources leads to a country's inability to investigate internal security abuses). While the correlation between increased police presence and reduced crime rates remains an open question, "there is no argument . . . that the primary function of the police is crime prevention." Id. at 30.

242. Id. at 12, 30.

243. Id. at 25.

244. UN Off. on Drugs and Crime & UN Dev. Programme, Global Study on Legal Aid: Country Profiles 89 (2016) (on file with the *Columbia Law Review*) [hereinafter Global Study on Legal Aid]. Burkina Faso is not an outlier on this score. According to a 2011 UN report, Angola had 570 lawyers per thirteen million people; Burundi had 106 lawyers per nine million people; Central African Republic had thirty-eight lawyers per four million people; Côte d'Ivoire had 420 lawyers per twenty-one million people; Ethiopia had four thousand lawyers per eighty million people; Ghana had five thousand lawyers per twenty-two million people. See UN Off. on Drugs and Crime, Handbook on Improving Access to Legal Aid in Africa 12–13 & tbl. (2011) (on file with the *Columbia Law Review*) [hereinafter Handbook].

245. Global Study on Legal Aid, supra note 244, at 85.

246. Even in a country like Cabo Verde, where there is a relatively large number of attorneys (one lawyer per 2,635 people), there is no available data reporting the number of public defenders. See id. at 100. Ghana has one public defender for every 1,450,000. Id. at 128. South Africa is relatively better, providing one public defender for every 120,000 people. Id. at 168.

procedures must be utilized, along with improvements to the existing domestic legal structures, for effective and efficient rights adjudications on the continent.[247]

## III. WHERE DO WE GO FROM HERE?

This Part provides some solutions to the African Court's current predicaments, as well as considerations for the welfare of the African human rights system in the long term. Section III.A discusses the importance of legislation, education, and advocacy in the protection of human rights in Africa. Section III.B calls for the incorporation of traditional languages in African domestic courts, as a means of making them more accessible and reducing plaintiffs' reliance on the African Court. Section III.C proposes that traditional dispute resolution procedures be used as a means of efficiently adjudicating rights disputes in African states where legal infrastructures are lacking. Section III.D proposes that African states take advantage of the mechanisms provided by the Banjul Charter to hold one another accountable for human rights violations on the continent. Lastly, section III.E advances the position that the African Court, young and vulnerable, is better off as a consensus builder for its longevity than an activist court (as the neoliberals and opportunity structure theorists would have it).

### A. *Some Fruits of Progressive Legislation, Education, and Advocacy*

The African human rights system, like the countries that are creating it, is still young: Its ideals lie ahead. Positive norm building, however slow or meagerly fruitful, is important for the Court's development. Fortunately, African states have been expanding human rights protection mechanisms on the continent. As detailed above, they have been putting in place various Africa-specific human rights treaties,[248] incorporating rights from the Banjul Charter into their constitutions,[249] and issuing independent national legislations against harmful practices.[250]

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247. See infra section III.A.

248. See Banjul Charter, supra note 4; supra notes 44–52 and accompanying text.

249. See Constitution de la République du Bénin [Benin Constitution], Dec. 2, 1990, art. 7 (Benin) ("The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law."); Constitution de la République Gabonaise [Gabon Constitution], Jan. 12, 2011, pmbl. (Gabon) (affirming the human rights within Charter along with those in other international mechanisms); Constitution, May 7, 2010, art. 25 (Guinea), translated in Constitution of May 7, 2010 (Guinea) (Jefri Jay Ruchti ed., Maria del Carmen Gress trans., 2011) ("The State has the duty to assure the diffusion and the teaching of the . . . African Charter of the Rights of Man and of Peoples of 1981 . . . .").

250. See, e.g., Abolition of the Death Penalty in Subsaharan Africa, FIACAT, https://www.fiacat.org/en/our-actions/project-for-the-abolition-of-the-death-penalty-in-subsaharan-africa [https://perma.cc/M34V-S67C] (last visited Jan. 2, 2024) (showing an

International and domestic legislations and educational efforts, highlighting the adverse consequences of harmful practices, have been bearing fruit in the realm of human rights in Africa.[251] "I know it is not Islam," said Mama Jubi about FGM. "I will keep telling others about the consequences of this practice."[252] Before the passage of Gambia's Women's (Amendment) Act, Ms. Jubi used to cut girls, believing, at the time, that it was part of her religion.[253]

In 2021, Sierra Leone abolished the death penalty, becoming the twenty-third African state to do so.[254] The milestone was made possible by decades-long collaborations between local NGOs, the Universal Periodic Report (UPR), the UPR Implementation Voluntary Fund, educational opportunities for the Sierra Leonean population about capital punishment, legal advocacy for death row inmates in domestic legal fora, and lobbying the government for formal abolition.[255] "For us," said Rhiannon Davis, the then-Director of AdvocAid, "it was about using every tool that we had to advocate directly to the government . . . and really show that this request for abolition was not imposed from the outside on Sierra

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NGO's approach to abolishing capital punishment in Sub-Saharan Africa); Laws/Enforcement in Countries Where FGM Is Commonly Practiced, U.S. Dep't of State: Archive (June 27, 2001), https://2001-2009.state.gov/g/wi/rls/rep/9303.htm [https://perma.cc/E8QT-NELV] (showing the various African countries, previously strongholds for FGM, that have enacted laws against FGM).

251. Education, as a means of building human capital beyond the deterrence of bad acts, has been linked to a reduction of FGM as well. "In high- and low-prevalence countries alike, opposition to FGM is highest among girls and women who are educated." UNICEF, The Power of Education to End Female Genital Mutilation 5 (2022) (on file with the *Columbia Law Review*).

252. Johnson, supra note 226.

253. See Johnson, supra note 226. Ms. Jubi's story is not exceptional; there are countless stories about FGM practitioners who become advocates against the practice when they are exposed to information that debunks FGM's religious appeal and underscores its detrimental health consequences for girls and women. See Nuredin Hussen, 'I Gave Up' the Well-Known Woman Who Stopped Practicing Female Genital Mutilation (FGM), UNICEF (Dec. 10, 2021), https://www.unicef.org/ethiopia/stories/i-gave-well-known-woman-who-stopped-practicing-female-genital-mutilation-fgm [https://perma.cc/7V7C-A479] (detailing Amina Abdu's story of going from being an FGM practitioner to becoming an anti-FGM advocate in Ethiopia); Rooting Out FGM in Rural Uganda, UN Women (Feb. 2, 2022), https://www.unwomen.org/en/news-stories/feature-story/2022/02/rooting-out-fgm-in-rural-uganda [https://perma.cc/2j8n-cdly] (detailing Priscilla Nangiro's transition from being an FGM practitioner to an anti-FGM advocate in Uganda).

254. Sierra Leone Becomes 23rd African Country to Abolish the Death Penalty, Death Penalty Info. Ctr. (July 26, 2021), https://deathpenaltyinfo.org/news/sierra-leone-becomes-23rd-african-country-to-abolish-the-death-penalty [https://perma.cc/Z5GX-343Z].

255. Sierra Leone: UN Human Rights Recommendations Help Lead to End of Death Penalty, OHCHR (July 21, 2022), https://www.ohchr.org/en/stories/2022/07/sierra-leone-un-human-rights-recommendations-help-lead-end-death-penalty [https://perma.cc/F8DP-5T5W] (detailing the abolition process of capital punishment in Sierra Leone).

Leone."[256] These examples show that an adequate answer to the African human rights question requires changing minds and policies and investing in appropriate infrastructures.[257] They also show that the amelioration of the African human rights problem is better done through African states than against them.

In contrast, between 2016 and 2020, fourteen capital punishment cases were brought before the Court after they had been tried and appealed in Tanzania.[258] The African Court ordered Tanzania to stay the judgments in all fourteen cases, pending the Court's own decision on the cases.[259] Tanzania refused to comply with the Court's order because, among other things, the order sought to reverse the Court of Appeals of Tanzania,[260] even though that court had determined the pertinent capital punishment statutes to be constitutional.[261] In the end, Tanzania withdrew

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256. Id.

257. Recently, Sierra Leone took a bold step by approving The Prohibition of Child Marriage Bill 2024, rectifying a discrepancy between the country's Child Right Act 2007 (which set the minimum legal age of marriage at 18) and the Registration of Customary Marriage and Divorce Act 2009 (which left marriage of underaged girls to the consent of their families). Prohibition of Child Marriage Act 2024, CLXV Sierra Leone Gazette No. 40 (May 17, 2024) (on file with the *Columbia Law Review*); The Child Right Act, 2007, CXXXVIII Sierra Leone Gazette No. 43 (Sept. 3, 2007) (on file with the *Columbia Law Review*); The Registration of Customary Marriage and Divorce Act 2009, CXL Sierra Leone Gazette No. 5 (Jan. 22, 2009) (on file with the *Columbia Law Review*); Sierra Leone Passes Historic Bill to End Child Marriage, Girls Not Brides (June 26, 2024), https://www.girlsnotbrides.org/articles/sierra-leone-passes-historic-bill-to-end-child-marriage/ [https://perma.cc/9CU5-MNFB]. This progressive policy comes at the heel of the country's Free Quality School Education program, which, as of April 24, 2023, guarantees 13 years of free schooling for all children in the country. Jo Becker, Legal Right to Free Education Grows Globally, Hum. Rts. Watch (May 9, 2023), https://www.hrw.org/news/2023/05/09/legal-right-free-education-grows-globally [https://perma.cc/P63T-P2XP]. The guarantee likely will improve the country's human capital and will be important in the country's fight against harmful practices like child marriage and FGM—there is a strong correlation between low educational attainment and harmful practices against women. See generally UNICEF, Ending Child Marriage: Progress and Prospects (2014), https://data.unicef.org/wp-content/uploads/2015/12/Child-Marriage-Brochure-HR_164.pdf (on file with the *Columbia Law Review*) ("Child brides tend to have low levels of education."); Int'l Ctr. for Rsch. on Women, Leveraging Education to End Female Genital Mutilation/Cutting Worldwide (2016), https://www.icrw.org/wp-content/uploads/2016/12/ICRW-WGF-Leveraging-Education-to-End-FGMC-Worldwide-November-2016-FINAL.pdf (on file with the *Columbia Law Review*) ("[S]tudies have shown a lower prevalence of FGM/C and greater support for the discontinuation of FGM/C among highly educated women compared to those of lower levels of education . . . .").

258. See 2022 Report, supra note 10, annex 2, at 4–8 (listing the names of the pertinent cases, the African Court's orders, and the cases' implementation status).

259. See id. (showing the Court's order to "[r]efrain from executing the death penalty . . . .").

260. See id. (cataloguing Tanzania's response that it could not comply with the Court's orders, in part, because the orders would have overturned the Court of Appeal of Tanzania).

261. The two crimes punishable by death in Tanzania are murder and treason. See Written Laws Act, §§ 39, 40, 197 (Act No. 2/1970) (Tanz.) (on file with the *Columbia Law Review*).

its Optional Declaration.[262] Considering how differently things turned out in Sierra Leone, Tanzania's withdrawal illustrates that requesting the African Court's grandstanding in matters beyond its jurisdiction is less promising than engaging domestic legal and political fora for human rights protections.

### B. *Making National Courts More Accessible: African Languages*

This Note argues that litigation is an insufficient means of safeguarding human rights in Africa. Benjamin F. Soares notes that, in the Malian context, many private conflicts are resolved by village heads and religious leaders, very rarely by secular courts.[263] The primary reason for this is that people have preferences for their cultural practices. For example, when asked to denounce FGM in 2019, Fatima Bio, the First Lady of Sierra Leone, responded: "I am a circumcised woman."[264] Saho's argument in the Gambia Parliament, like Ms. Bio's statement, shows that even heads of secular states in Africa can have greater affinity for their cultural and religious practices than for the secular principles undergirding the states they lead.[265]

Furthermore, African courts, national and international, predominantly operate in colonial languages—such as Arabic, English, French, and Portuguese.[266] These languages can be exclusionary, tending, by their effect, to favor members of the community who have had the privilege to go far in school and learned to read and write in those colonial languages.[267] South Africa's Deputy Chief Justice, Mandisa Maya, has been

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262. See Adjolohoun, Crisis, supra note 37, at 9 ("Tanzania's withdrawal came as the conclusion to an incremental contestation process . . . to the African Court exercising both first instance and appellate jurisdiction, and overstepping the authority of apex municipal courts on issues such as nationality and the death penalty . . . ." (footnotes omitted)).

263. See Benjamin F. Soares, The Attempt to Reform Family Law in Mali, 49 Die Welt des Islams 398, 400 (2009) ("Many Malians regularly seek out local leaders such as village heads (*chefs*) and/or religious leaders (Muslim, Christian, 'traditional,' or 'animist') to assist in conflict resolution.").

264. Swahili Buzz, Sierra Leone Interview of the First Lady Fatima Maada Bio With BBC's Zuhura Yunus, YouTube, at 00:36 ( June 17, 2019), https://www.youtube.com/watch?v=o98ylWETCno (on file with the *Columbia Law Review*).

265. See supra notes 231–236 and accompanying text. Following the most recent coup in Mali, the new leadership there expelled French nationals from the country and demoted the French language in place of traditional Malian languages. See Shera Avi-Yonah, Mali Demotes French, Language of Its Former Colonizer, in Symbolic Move, Wash. Post (Aug. 3, 2023), https://www.washingtonpost.com/world/2023/08/03/mali-french-new-constitution/ [https://perma.cc/DAN6-PXTT].

266. See 2022 Report, supra note 10, at 12 (showing that the African Court's procedural forms are administered in: Arabic, English, French, and Portuguese).

267. See Salikoko S. Mufwene & Cécile B. Vigouroux, Colonization, Globalization and Language Vitality in Africa: An Introduction, *in* Globalization and Language Vitality: Perspectives From Africa 1, 23 (Cécile B. Vigouroux & Salikoko S. Mufwene eds., 2008) ("The linguistic Westernization of Africa has remained very much contained by its current socioeconomic structure, limited to a small elite socioeconomic class.").

vocal about incorporating more African languages in South African judicial proceedings.[268] Despite the fact that South Africa has eleven official languages, and less than ten percent of its population speak English as their mother tongue, its court proceedings are conducted in English only.[269] Justice Maya has been putting her advocacy into practice by writing multi-lingual opinions.[270] Such efforts should extend to other national courts and legislative bodies, especially in those countries where literacy rates in colonial languages are low. The adage that ignorance of the law is not an excuse becomes a cruel statement when the lawbreaker cannot understand the law.

### C. *Broadening Rights Adjudication: Traditional Procedures*

Besides incorporating African languages into existing colonial legal structures, African states should support customary procedures of rights adjudication. This Note insists on customary procedural, and not substantive, law because, often, the latter is the subtext for many of the horizontal violations of rights, especially the rights of children and women.[271] Traditional procedures have many advantages for rights adjudication. Because the adjudication takes place within the community where the plaintiff resides, the proceedings are likely to be less costly (disbanding with filing fees, travel costs, motion writing, and discovery reviews)[272] and there are less likely to be language barriers.[273] Importantly, despite the many scholarly debates about customary law in Africa,[274] its

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268. See Joel Abrams, Justice Maya's Support for African Languages in South Africa's Courts Is a Positive Sign, The Conversation (July 5, 2022), https://theconversation.com/justice-mayas-support-for-african-languages-in-south-africas-courts-is-a-positive-sign-186226 [https://perma.cc/FW6V-9KFD] (discussing Deputy Chief Justice Maya's unprecedented decision to provide her rulings in multiple South African languages).

269. See id.

270. See id.

271. See Maputo Protocol, supra note 44, art. 2, ¶ 2 ("States Parties shall commit themselves to modify . . . traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes . . . ."); Charter on the Welfare of the Child, supra note 45, art. 21, ¶ 1 ("States . . . shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child . . . .").

272. See Handbook, supra note 244, at 12 ("[A]ccess to legal aid by criminal justice claimants is further hindered by cost, distance and technicalities.").

273. Such proceedings are led by heads of communities, who provide guidance to the plaintiff and the rest of their community in their spiritual and political lives. See Soares, supra note 263, at 400.

274. Compare Josiah A.M. Cobbah, African Values and the Human Rights Debate: An African Perspective, 9 Hum. Rts. Q. 309, 328–29 (1987) (advocating for a greater assertion of African notions of human rights), and Terence Ranger, The Invention of Tradition in Colonial Africa, *in* The Invention of Tradition 211, 250 (Eric Hobsbawm & Terence Ranger eds., 2014) ("What were called customary law, customary land-rights . . . were in fact *all* invented by colonial codification."), with Ndulo, supra note 237, at 93 (arguing that the traditionalists' grounds for supporting African "customary legal norms" no longer exist).

identifying feature is its ability to situate a person's rights within the context of the community in which the person resides and the welfare of which the person is responsible.[275] Traditional proceedings, thus, consistent with normative African dispute settlement, tend to be more restorative than retributive.[276]

This was the case in Rwanda. Between 2002 and 2012, twelve thousand community-based courts—Gacaca (Ga-cha-cha) courts—adjudicated 1.2 million cases that arose from the Rwandan Genocide.[277] The judges—"*inyangamgayo*" ('those who detest dishonesty' in Kinyarwanda)[278]—were men and women who were reputed for their integrity in their communities.[279] They established records,[280] tried suspects,[281] and issued sentences.[282] The objective of the Gacaca proceedings was reconciliation: "to restore social harmony by integrating those who had transgressed back into the community."[283] The proceedings were opportunities for families and relatives of victims to learn about their loved ones' deaths.[284] Defendants who "confess[ed] their crimes, show[ed] remorse and ask[ed] for forgiveness in front of their community," received community service orders instead of criminal penalties.[285]

In comparison, the International Criminal Tribunal for Rwanda (ITCR), founded in 1994, issued fifty-five judgments involving seventy-five individuals in eighteen years.[286] The Rwandan domestic state courts tried approximately ten thousand genocide suspects.[287] The great disparity between the Gacaca court's results and those of state courts and ITCR suggests that, had the cases been left entirely in the hands of ITCR and the

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275. See Ndulo, supra note 237, at 90 (asserting that "African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities").

276. See supra text accompanying note 118.

277. See The Justice and Reconciliation Process in Rwanda, UN (2014), https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Justice%202014.pdf [https://perma.cc/WR77-ZNKE] [hereinafter Justice and Reconciliation] (providing background on the adjudication process of the Rwandan genocide).

278. See Max Rettig, Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?, Afr. Stud. Rev., Dec. 2008, at 25, 25.

279. See id. at 31.

280. See id.

281. See id. at 32.

282. See id. at 31.

283. See Penal Reform Int'l, Eight Years On . . . A Record of Gacaca Monitoring in Rwanda 16 (2010).

284. See Rettig, supra note 278, at 39.

285. See Justice and Reconciliation, supra note 277.

286. Rep. of the Int'l Crim. Tribunal for Rwanda (2015), transmitted by Letter dated 17 November 2015 from the President of the Int'l Crim. Tribunal for Rwanda Addressed to the President of the Security Council, ¶ 6, U.N. Doc S/2015/884 (Nov. 17, 2015) ("The Tribunal completed its substantive work at the trial level in 2012, which includes 55 first-instance judgements involving 75 individuals . . . .").

287. See Justice and Reconciliation, supra note 277.

national courts, it is unlikely that they would have handled them all in a timely manner. Of course, the facts of the Rwandan Genocide are extraordinary, and the Gacaca courts have not escaped criticism.[288] The episode, however, illustrates the roles that traditional processes can play in supplementing the adjudicatory bodies of African states in horizontal violations of human rights.

### D. *African States Holding African States Accountable*

African states should do a better job of holding one another accountable. Articles 47, 48, and 49 of the Banjul Charter provide for African states to bring complaints against one another for violations of the Charter.[289] To date, only three such cases—*Democratic Republic of the Congo v. Burundi,*[290] *Sudan v. South Sudan,*[291] and *Djibouti v. Eritrea*[292]—have been brought before the African Commission.[293] All three cases were about international violence. Specifically, one country invading another's territory and harming its citizens.[294] There is neither textual nor jurisprudential evidence to show that the pertinent articles could not be invoked for intrastate human rights violations. Moreover, African states have great stakes in the protection of human rights within other member states. The ramifications of human rights violations, like viruses, do not recognize national boundaries; one country's civil war, for example, can

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288. Susan Thomson, Rwanda's Gacaca Courts, 121 Témoigner 377, 377–78 (2015) (Fr.), ("More critical observers understand the courts to be part and parcel of a top-down Rwandan government-led system of justice and reconciliation that favours retributive over restorative justice.").

289. See Banjul Charter, supra note 4, art. 47–49 (detailing the procedure for states' complaints against one another).

290. No. 227/99, Decision, Afr. Comm'n H.P.R. (May 29, 2003), https://caselaw.ihrda.org/entity/7jmx4b1kun9?file=15555000801018t56n1gujgg.pdf&page=1 [https://perma.cc/4R2E-SZ34].

291. It is speculated that this case was not made public by the Commission because, at the time of its submission, South Sudan had not ratified the Banjul Charter. See Frans Viljoen, A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System, Völkerrechtsblog (Apr. 27, 2021), https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/ [https://perma.cc/G5D5-X82S] [hereinafter Viljoen, Inter-State Communications].

292. No. 478/14, Withdrawn Application, Afr. Comm'n H.P.R. (2022), https://caselaw.ihrda.org/en/entity/aryela69kng?page=1 [https://perma.cc/Q98J-KRTB].

293. Inter-State Cases Under the European Convention on Human Rights Experiences and Current Challenges 27 (2022), https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c [https://perma.cc/XR9R-DA9V] (listing the cases).

294. *Eritrea,* No. 478/14, Afr. Comm'n H.P.R., ¶ 4 ("Eritrean troops entered into Djiboutian territory without warning and seized Ras Doumeira and Doumeira Island."); *Burundi*, No. 227/99, Afr. Comm'n H.P.R., ¶ 2 ("[The complaint] alleges grave and massive violations of human and peoples' rights committed by the armed forces . . . in the Congolese provinces where there have been rebel activities since 2nd August 1998 . . . .").

become another's refugee crisis.[295] To this end, the decision of any African State to ignore the human rights violations in a neighboring country does not get it off the hook for the ensuing consequences.

Furthermore, African states are better positioned than NGOs and individual victims—given their comparatively vast resources—to quell direct violations of human rights. Following the recent coups in Mali, Burkina Faso, and Guinea, the Economic Community of West African states (ECOWAS) imposed stiff economic sanctions on the three countries.[296] The AU followed suit, suspending Mali and Guinea "from all AU activities and decision-making bodies."[297] While the AU and sub-regional organizations have been diligent about imposing sanctions on defiant states, these measures have struggled to meet their objectives.[298] "[C]omprehensive economic sanctions" against African states adversely affect their citizens as well.[299] Furthermore, Russia's growing interest in African states that have been denouncing ties with their old colonial rulers—to "fight against neo-colonialism"[300]—is likely to further reduce the efficacy of sanctions in the future.[301] Russia is becoming an alternative source of funds to African leaders that was unavailable previously.[302]

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295. See supra notes 103–104 and accompanying text.

296. See ECOWAS Sanctions Guinea, Condemns Mali Over Ivorian Troops, Al Jazeera (Sept. 23, 2022), https://www.aljazeera.com/news/2022/9/23/ecowas-sanctions-guinea-condemns-mali-over-ivorian-troops [https://perma.cc/LY75-PPEG] ("[L]eaders from West Africa's main political and economic bloc agreed to freeze military government members' financial assets and bar them from travelling to other countries in the region.").

297. African Union Suspends Guinea After Coup, As Envoys Arrive for Talks, France 24 (Sept. 10, 2021), https://www.france24.com/en/africa/20210910-african-union-suspends-guinea-after-coup-ousting-cond%C3%A9 [https://perma.cc/8MYV-U4BF] (quoting African Union Political Affairs Peace and Security (@AUC_PAPS), X (Sept. 10, 2021), https://x.com/AUC_PAPS/status/1436278648076636162 [https://perma.cc/T93U-SS6R]).

298. See Moussa Soumahoro, Why Aren't Sanctions Preventing Coups in Africa?, Inst. Sec. Stud. (Nov. 20, 2023), https://issafrica.org/iss-today/why-arent-sanctions-preventing-coups-in-africa [https://perma.cc/2F67-W968] (attempting to ascertain why sanctions have not been successful at preventing coups in Africa).

299. Id.

300. See Vadim Balytnikov, The Fight Against Neo-Colonialism in the Political Discourse of South Africa, Valdai ( June 4, 2024), https://valdaiclub.com/a/highlights/the-fight-against-neo-colonialism/ [https://perma.cc/B699-8LNB].

301. Burç Eruygur, Russia 'Pleased' With Restoration, Development of Ties with Africa: Putin, Anadolu Agency (Nov. 2, 2023), https://www.aa.com.tr/en/world/russia-pleased-with-restoration-development-of-ties-with-africa-putin/3041701 [https://perma.cc/4F8J-45G2] (last updated Nov. 3, 2023) (discussing Russia's growing ties with African leaders). Since Burkina Faso's coup in 2022, Russia has reopened its embassy in the country, which had been closed since 1992. Russia Reopens Embassy in Burkina Faso, BBC (Dec. 28, 2023), https://www.bbc.com/news/world-africa-67833215 [https://perma.cc/VD8X-GPHR].

302. Russia in Africa, Afr. Ctr. Strategic Stud., https://africacenter.org/in-focus/russia-in-africa/ [https://perma.cc/RS3Z-ATTJ] (last visited Jan. 13, 2024) (detailing Russia's strategic political and economic investments in Africa).

Some scholars have pointed to the nonintervention principle in Article 4, Section g of the Constitutif Act of the African Union[303] as a barrier for the proposal above.[304] But there is precedent of intervention. For example, in 1978, Tanzania's military intervened in Uganda to quell then-President Idi Amin's murderous spree.[305] In addition, Article 4, Section h of the Act permits the AU to intervene, sua sponte, in its Member States' internal affairs to prevent "war crimes, genocide and crimes against humanity."[306] Article 4, Section j also allows Member States to call on the AU to intervene in their internal affairs when they are unable to "restore peace and security" within their borders.[307] It was under these provisions that the AU created task forces and positively contributed to the peace endeavors in Comoros in 2008, Somalia in 2007, Darfur in 2004, and Burundi in 2003.[308]

### E. *The Role of the African Court as the African Human Rights System Develops*

The proposal for African states to hold one another accountable, along with those about broadening human rights legislations, education, and advocacy, necessitate an equally efficient and reliable African Court. Viljoen posited that the prolonged delay in the African Commission's decision in *Burundi* is likely to dissuade African states from bringing future cases under Articles 47, 48, and 49 of the Banjul Charter.[309] The African Court cannot afford to repeat a similar course of action in the future. African states, through the African Charter on Democracy, Elections, and Governance (ACDEG), have been setting community standards for democratic governance among themselves.[310] The African Court can be an

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303. See Constitutif Act, supra note 48, art. 4, § g (requiring "non-interference by any Member State in the internal affairs of another" as a cornerstone of African states' sovereignties).

304. See, e.g., Udombana, Toward the African Court, supra note 60, at 56 (arguing that nonintervention is "regarded as sacrosanct, to which States have rigidly adhered"); see also John Mukum Mbaku, Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities, 16 S.C. J. Int'l. L. & Bus. 1, 12 (2019) ("The OAU's failure to act to prevent genocide in Rwanda was due to its decision to adhere strictly to its operating principles, particularly that of non-intervention in the internal affairs of Member States.").

305. See U.D. Umozurike & U.O. Umozurike, Tanzania's Intervention in Uganda, 3 Archiv des Völkerrechts 301, 312 (1982) (Ger.) ("The flagrant violation of the rights of Ugandans . . . provided the justification for humanitarian intervention . . . .").

306. See Constitutif Act, supra note 48, art. 4, § h.

307. Id. art. 4, § j (providing "right of Member States to request intervention from the Union in order to restore peace and security").

308. See Christian Wyse, Comment, The African Union's Right of Humanitarian Intervention as Collective Self-Defense, 19 Chi. J. Int'l L. 295, 315–17 (2018) (demonstrating the ways in which the AU was involved in the peacekeeping missions in Somalia, Darfur, and Burundi).

309. See Viljoen, Inter-State Communications, supra note 291.

310. See Charter on Democracy, supra note 49, art. 23. Following the recent coups, the AU adopted a "zero tolerance" stance against unconstitutional change of government. See

important forum for similar norm-setting endeavors in the realm of human rights.

Nicole De Silva has remarked that international courts' socialization practices can be a viable means to gain acceptance and urge compliance (through amicable relations and educational programs) from the states that are sued before them.[311] To its credit, the Court has made socialization—or "sensitization," as it calls it—an important function of its work.[312] The Court's judges travel across the continent encouraging stakeholders within African states to ratify the Protocol on the African Court and deposit their Optional Declarations, meeting with human rights specialists who bring cases before them, and organizing symposia with subregional adjudicatory bodies on the continent.[313] Following Benin's withdrawal, for example, the Court's judges traveled to the country, urging it to reconsider its decision.[314] Human rights practitioners recommend this diplomatic approach as well. Désiré Bigirimana, a human rights advocate at the IHRDA, recommends that the African Court "continue the sensitization activities," despite his frustrations with the inadequacies of the African human rights system.[315]

The African Court's sensitization work is imperative because twenty-two African states have yet to ratify the Protocol on the African Court.[316] Beyond the African states that have ratified the Protocol on the African Court, the African Court is still not as known as it should be, being *the* human rights court in Africa. In 2022, the Court "undertook several activities, aimed at, among other things, raising awareness among stakeholders, about its existence and activities."[317] The Court should prioritize such endeavors to be better known on the continent.[318] To be the African human rights court, the Court will need to be known in Africa.

Finally, the African Court should resist the impulse to get involved in political questions, operate as an appellate court to domestic courts, or

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African Union Vows 'Zero Tolerance' to Undemocratic Change, Voice Am. English News (Feb. 19, 2023), https://www.voanews.com/a/west-african-bloc-maintains-sanctions-on-junta-regimes/6969654.html [https://perma.cc/W38P-KW8T].

311. See Nicole De Silva, International Courts' Socialization Strategies for Actual and Perceived Performance, *in* The Performance of International Courts and Tribunals 288, 288–98 (Theresa Squatrito, Oran Young, Geir Ulfstein & Andreas Føllesdal eds., 2018).

312. See 2021 Report, supra note 7, ¶ 31 (discussing the Court's "capacity building and promotional activities").

313. Id. ¶¶ 40–44.

314. Id. ¶ 37.

315. See Désiré Bigirimana, Restrictions in the Human Rights Protection System in Africa 15 (unpublished manuscript) (on file with the *Columbia Law Review*). Désiré's recommendation is borne of the fact that the African Court needs "to be known and to mobilize more ratifications," in order for it to reach its full potential. Id.

316. See supra note 20.

317. See 2022 Report, supra note 10, at 15, ¶ 40.

318. See 2021–2025 Strategic Plan, supra note 186, at 34–37 (detailing the ways in which the African Court hopes to become more visible on the continent).

serve as a quasi-legislative body (insofar as its willingness to nullify national laws). How can the Court make African states abide by their treaty obligations if the Court does not abide by its own jurisdictional limitations? Two wrongs do not make a right. Furthermore, the Court should make pronouncements only on cases that draw their causes of action from the Banjul Charter and other pertinent African human rights instruments. Otherwise, as Professor Christof Heyns notes, the Court risks creating a "jurisprudential chaos" for itself and undermining the "unique nature of the African Charter."[319] Worse, as the withdrawals demonstrate, insisting on this course will cause the Court to foreclose its vital role in the grand scheme of the African human rights system. That outcome hurts the Court, African states, and victims of human rights violations on the continent.

* * *

The call for an African Court of a more defined jurisdiction is not a consequence of this Note's lack of appreciation for the threats posed to human rights in Africa. On the contrary, the suggestion is grounded on two premises born of necessity. One, the Court cannot compel African states to follow any of its decisions. Kept on the road outlined by the opportunity structure theorists and neoliberals, the Court will "continue[] to face . . . challenges that threaten not only the effective discharge of its mandate, but its very existence."[320] This Note maintains that an African Court that manages to implement only ten percent of its decisions is far better for the growing African human rights system than a nonexistent African Court.[321] Second, there can be no effective human rights litigation in Africa without the collaboration of African states—for human rights violations, no matter where they are litigated, are resolved at home. The Court can only make pronouncements on the merits, or the lack thereof, of plaintiffs' claims against their governments; the remedies plaintiffs seek—legal or equitable—are granted by their governments. Defendant African states, therefore, are always involved in the justice process for their citizens, even when it starts beyond their borders.

## CONCLUSION

The African Court is under threat. The very states that fund, staff, and maintain it are walking away from it. The Court's jurisdictional expansion, encroaching on the sovereignties of African states, is a cause of this predicament. The justifications provided by the proponents of its

319. See Christof Heyns, The African Regional Human Rights System: The African Charter, 108 Penn St. L. Rev. 679, 700 (2004).

320. See 2022 Report, supra note 10, at 24, ¶ 84.

321. See 2022 Report, supra note 10, at 24–25, ¶ 85 ("Of the over 200 decisions rendered by the Court, less than 10% have been fully complied with, 18% partially implemented and 75% not implemented at all.").

behavior, ostensibly grand, are not advisable. It is precisely because African states can ignore the Court's judgments and foreclose important avenues for victims to seek redress to the violations of their rights that the Court should tread lightly, resorting to its defined jurisdiction as it strives to hold African states accountable. Litigants want a court that can persuade African states, not one that simply fights with them—especially when the Court is in the wrong. This requires the Court to appreciate and abide by the normative considerations that inspired its creation. The Court, like the African human rights system generally, is still young and, in many respects, vulnerable. The Court's success will hinge on its ability to coexist with, and not against, African states.

# ESSAY

## FATHERHOOD, FAMILY LAW, AND THE CRISIS OF BOYS AND MEN

*June Carbone* & Clare Huntington***

*Boys and men in all racial and ethnic groups and across most socioeconomic groups are struggling on many fronts, including education, employment, physical and mental health, and social integration. In these areas and more, boys and men are much worse off than they were only a few decades ago. The crisis—which is concentrated among men without college degrees—is rooted in large-scale structural changes to the economy that have decimated jobs for this group and policy choices that emphasize incarceration while doing little to address economic inequality.*

*The decline in male well-being is not just a problem for boys and men. It is a problem for families. Men's economic prospects have a profound impact on whether couples will commit to each other. Men without steady work—and with behaviors that often accompany unemployment, including a higher frequency of intimate partner violence—have trouble sustaining long-term relationships, and many do not marry. They often have children, but once romantic relationships end, unmarried men tend to drift away from the family. Many fathers want a larger role in their children's lives, but this is possible only if they can strengthen their relationship with mothers. Many mothers also want fathers to be more involved, but they are concerned about issues fathers bring to the family. And children want a relationship with both parents.*

*Family law is part of the problem, contributing to the familial isolation of men without college degrees. In recent decades, family law has undergone a significant transformation, but this transformation primarily benefits married couples. The legal system now seeks to create "postdivorce families"—that is, families in which both parents are cooperative, active caregivers, notwithstanding the end of the parents'*

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* Robina Chair in Law, Science and Technology, University of Minnesota Law School.

** Barbara Aronstein Black Professor of Law, Columbia Law School. For helpful feedback, we thank Sania Anwar, Michal Buchhandler-Raphael, Naomi Cahn, Nestor Davidson, Elizabeth Emens, Josh Gupta-Kagan, Daniel Hatcher, Jane Murphy, Kerrel Murray, David Pozen, Charles Sabel, Elizabeth Scott, Jane Spinak, Shanta Trivedi, Lisa Washington, and the participants in workshops at Columbia Law School, Family Law Scholars and Teachers, the Nonmarriage Roundtable, and the Poverty Law Scholars Conference. For excellent research assistance, we thank Sophia Brusco, Nell Fitzgerald, Aria Hejazi, Shane Haley, Melody Lin, Macario Manicad, Andre Perez, and Sarah Yeoh-Wang.

*romantic relationship. To this end, custody laws encourage shared parenting, and family courts offer alternative dispute resolution processes, counseling, and other assistance that strengthen fathers' active membership in the family. But men facing economic precarity are unlikely to be married and thus need not go to court when a romantic relationship ends. Accordingly, these men do not benefit from this transformation in custody rules and processes, and they are unlikely to access the supportive services. The child support system makes things worse by imposing unrealistic orders on low-income fathers that alienate men from their families. And the family regulation system, also known as the child welfare system, treats these fathers as incompetent caregivers or, even worse, as threats.*

*Family law may relegate men in crisis to the periphery of family life, but it can also help bring them back. The goal is not to restore men's patriarchal authority but rather to extend the model of cooperative parenting to more families. To this end, this Essay proposes far-reaching reforms to custody rules and processes, child support, and family regulation. In each of these problematic areas of family law, the proposed reforms give families greater autonomy in shaping agreements about family relationships, support to make these bargains workable, and opportunities for men to be active fathers.*

## INTRODUCTION

Scholars and think-tank researchers, as well as mainstream media and social media, increasingly focus on the "trouble with men."[1] This attention is well deserved. Wholesale economic shifts have hollowed out the secure, well-paying jobs in the middle of the economy that once provided a source of security and status for many men without college degrees.[2] Men at the top of the socioeconomic ladder, who are disproportionately white and Asian, have adjusted, snaring the rewards of a new, more unequal society.[3] The majority of men, however, have not. Across multiple fronts, including

1. For a small sampling, see Richard V. Reeves, Of Boys and Men: Why the Modern Male Is Struggling, Why It Matters, and What to Do About It, at xv (2022) (exploring the systemic roots of the social, educational, and economic challenges facing boys and men); David Shields, The Trouble with Men: Reflections on Sex, Love, Marriage, Porn, and Power 3 (2019) (discussing masculinity issues from a personal perspective); Christine Emba, Opinion, Men Are Lost. Here's a Map out of the Wilderness., Wash. Post (July 10, 2023), https://www.washingtonpost.com/opinions/2023/07/10/christine-emba-masculinity-new-model/ (on file with the *Columbia Law Review*) (describing the disorientation of many men in light of changing norms of masculinity and the political right's efforts to engage men); Katelyn Fossett, Introducing the Masculinity Issue, Politico (July 14, 2023), https://www.politico.com/newsletters/politico-weekend/2023/07/14/the-masculinity-issue-00106295 [https://perma.cc/VQV2-CUNH] (noting the contemporary cultural significance of the politicization of masculinity); Brenda Hafera, Our Lost Boys, Heritage Found. (Apr. 5, 2023), https://www.heritage.org/marriage-and-family/commentary/our-lost-boys [https://perma.cc/HZG2-63TB] ("[W]e cannot overlook the fact that our boys are floundering and bereft of purpose.").

2. See infra note 125 and accompanying text. As described in section I.B.1, white men without college degrees were far more likely than Black men without college degrees to hold these jobs, although Black men did make some gains, especially in the middle of the twentieth century. See infra note 132 and accompanying text.

3. See PINC-11. Income Distribution to $250,000 or More for Males and Females., U.S. Census Bureau, https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-11.html [https://perma.cc/8HED-KAY3] [hereinafter U.S. Census Bureau, Income Distribution] (last updated Aug. 16, 2024) (showing that of the men who earned at least $250,000 in 2023 and did not report being more than one race or ethnicity, approximately 74.7% were white, 12.6% were Asian, 6.9% were Hispanic, and 4.8% were Black); Quick Facts: United States, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/RHI125222#RHI125222 [https://perma.cc/FP3Y-8ZX4] (last visited Aug. 8, 2024) (showing that in 2023, the population in the United States was 58.4% white, 19.5% Hispanic, 13.7% Black, and 6.4% Asian).

educational attainment, employment, physical and mental health, and social integration, men and boys are struggling. A few statistics illustrate the scope of the problem: Men without bachelor's degrees are 64% of the adult male population,[4] but since the 1970s, the labor-force participation of these men has decreased dramatically,[5] and their median wages have declined precipitously.[6] The overdose rate for men is rising sharply,[7] as is the rate of death by suicide;[8] overdoses and suicides are concentrated among men without a college degree.[9]

Scholars agree that this crisis is rooted in structural economic changes,[10] but policy choices have exacerbated the declining economic prospects of men without college degrees. A heavy emphasis on incarceration makes it even harder for men—especially Black, Hispanic, and Native American men, who are overrepresented in prison and jail populations—to obtain jobs and integrate into society.[11] And the policy

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4. See Table 104.20. Percentage of Persons 25 to 29 Years Old With Selected Levels of Educational Attainment, by Race/Ethnicity and Sex: Selected Years, 1920 Through 2023, Nat'l Ctr. for Educ. Stat. (Oct. 2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_104.20.asp [https://perma.cc/3DE8-WV8S] [hereinafter Nat'l Ctr. for Educ. Stat., Table 104.20] (showing that in 2023, of men between ages twenty-five and twenty-nine, 35.9% had earned a bachelor's degree or higher level of education).

5. In 1970, the labor-force participation of men with a four-year college degree was 96.1%, and it was even higher for men with only a high school diploma, at 96.3%. See Labor Force, Employment, and Earnings, *in* The Statistical Abstract of the United States: 1996, at 389, 395 tbl.617 (116th ed. 1996), https://www2.census.gov/library/publications/1996/compendia/statab/116ed/tables/labor.pdf [https://perma.cc/A8XA-YKXU]. In 2019, men with a college degree continued to participate in the labor force at a high rate—91.1%—but the labor-force participation of men with only a high school diploma dropped to 80.8%. See Women in the Labor Force: A Databook, at tbl.8, U.S. Bureau Lab. Stat. (Apr. 2021), https://www.bls.gov/opub/reports/womens-databook/2020/home.htm [https://perma.cc/KZM8-T5P6] [hereinafter U.S. Bureau of Lab. Stat., Women in the Labor Force].

6. See Steven Ruggles, Patriarchy, Power, and Pay: The Transformation of American Families, 1800–2015, 52 Demography 1797, 1811 (2015) [hereinafter Ruggles, Patriarchy, Power, and Pay] ("In 1961, young men were making four times what their fathers had made at about the same age. For the past three decades, the younger generation has consistently done *worse* than their fathers. Overall, generational relative income dropped a stunning 80 % since its peak in 1958.").

7. See Nat'l Acads. of Scis., Eng'g & Med., High and Rising Mortality Rates Among Working-Age Adults 222 fig.7-1, 223 (Kathleen Mullan Harris, Malay K. Majmundar & Tara Becker eds., 2021) (on file with the *Columbia Law Review*) (documenting the increase for both men and women but the higher overall rates for men); see also infra text accompanying notes 104–107. This trend has grown since 2010.

8. See Nat'l Acads. of Scis., Eng'g & Med., supra note 7, at 284–86 (discussing the increase in suicide mortality for men).

9. See id. at 284–86; see also infra text accompanying notes 102–110.

10. See infra section I.B.1.

11. See infra text accompanying notes 141–148.

choice to tolerate a high level of child poverty has had profound impacts.[12] Childhood disadvantage affects educational and employment outcomes for all children, but the impact is more pronounced for boys than girls.[13] Moreover, these factors are compounding. Boys who struggle in school are unlikely to continue to college, but the pathways into the secure, well-paying jobs in the current economy often require a college degree. Thus, the disproportionate impact of childhood disadvantage on boys' educational performance derails their life chances before they finish high school.[14]

The decline in male well-being is not just a problem for boys and men. It is a problem for families. Men without college degrees have a hard time earning money to contribute to a family, and they have high rates of substance use and intimate partner violence.[15] These challenges make it difficult for men to sustain long-term relationships.[16] Indeed, 78% of women say they will not marry a man who does not have a steady job.[17] Instead, men without college degrees typically enter into short-term, less committed relationships and have children in the context of such relationships.[18] When the parents' relationship ends, men tend to move to the periphery of family life, becoming less engaged with their children over time.[19] The number of affected men is substantial: One in four fathers in the United States lives apart from at least one child, and one in five fathers does not live with any of his children.[20]

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12. See infra text accompanying notes 150–155. As discussed below, a fourth factor in the decline of male wellbeing is technology, which has lured boys and men to move much of their social lives online and retreat from the analog world. See infra section I.B.

13. See infra text accompanying notes 152–155.

14. See infra text accompanying notes 152–155.

15. See infra text accompanying notes 184–187; see also Kesha Baptiste-Roberts & Mian Hossain, Socioeconomic Disparities and Self-Reported Substance Abuse-Related Problems, 10 Addict Health 112, 116 tbl.2 (2018) (finding that among those who reported using alcohol and drugs, individuals without any college education were more likely to have substance-use-related problems).

16. See June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 73–74 (2014) [hereinafter Carbone & Cahn, Marriage Markets] (explaining that greater economic inequality has changed the ways that men and women match up, undermining relationship stability).

17. Wendy Wang & Kim Parker, Pew Rsch. Ctr., Record Share of Americans Have Never Married 6 (2014), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2014/09/2014-09-24_Never-Married-Americans.pdf [https://perma.cc/C2C4-VYV8] (providing this statistic and noting that 46% of men say the same).

18. See infra text accompanying notes 184–195.

19. See infra text accompanying notes 192–204.

20. See Lindsay M. Monte, The Two Extremes of Fatherhood, U.S. Census Bureau (Nov. 5, 2019), https://www.census.gov/library/stories/2019/11/the-two-extremes-of-fatherhood.html [https://perma.cc/ZG9S-M8JF]. Nearly three out of four fathers (72.6%) live with all of their children. Id. These statistics are for all nonresidential fathers, not only nonresidential fathers without a college degree. Nonetheless, for the reasons this Essay describes, men without college degrees are more likely to live apart from their children than men with college degrees.

These family patterns stand in sharp contrast to the families of men with college degrees. Such men are usually able to secure well-paying jobs that can help support a family.[21] They generally find and sustain long-term partnerships, and they overwhelmingly have children within marriage.[22] College-educated men not only contribute significantly to family income, but they also increasingly share caregiving responsibilities with their spouse, albeit typically doing less than the spouse.[23] These couples tend to stay married, but if couples do divorce, fathers remain engaged in the lives of their children.[24]

This divergence in family patterns—men with college degrees typically get married and stay married; men without college degrees are much less likely to get married and instead have short-term relationships—is a sea change in family life. In 1960, people with only a high school diploma married at nearly the same rate as college graduates.[25] Sixty years later, there is a gaping divide.[26]

The challenges facing boys and men can be summed up in a word: isolation. Men are increasingly isolated from secure, status-enhancing jobs, family membership, and relationships with their children.[27] The isolation of fathers is a problem for everyone in the family. Many fathers want a larger role in their children's lives, but they face barriers that can be surmounted only by strengthening their relationship with the mother.[28] Many mothers want fathers to play a larger role as well, but they are concerned about some of the issues fathers bring to the family.[29] And

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21. See Katherine Schaeffer, 10 Facts About Today's College Graduates, Pew Rsch. Ctr. (Apr. 12, 2022), https://www.pewresearch.org/short-reads/2022/04/12/10-facts-about-todays-college-graduates/ [https://perma.cc/H35J-C59Z] ("College graduates generally out-earn those who have not attended college, and they are more likely to be employed in the first place.").

22. See infra text accompanying notes 177–183.

23. See infra text accompanying notes 219–223 (describing these patterns and noting that unequal caregiving is typical for different-sex married couples but not same-sex couples, who tend to have a more equal split of caregiving responsibilities).

24. See infra text accompanying note 181.

25. See D'Vera Cohen, Jeffrey S. Passel, Wendy Wang & Gretchen Livingston, Pew Rsch. Ctr., Barely Half of U.S. Adults Are Married—A Record Low 8 (2011), https://www.pewresearch.org/wp-content/uploads/sites/20/2011/12/Marriage-Decline.pdf [https://perma.cc/6CHC-CTGL] (explaining that in 1960, 72% of individuals aged 18 and older with only a high school diploma or less were married, as compared with 76% of individuals with a college degree).

26. See Lisa Carlson, Marriage in the U.S.: Twenty-Five Years of Change, 1995–2020, at 2 fig.3 (2020), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/carlson-marriage-25-years-change-fp-20-29.pdf [https://perma.cc/MP4Q-QKGM] (finding that for women aged eighteen to forty-nine, 66% of college graduates in 2020 had ever married, as compared with 52% of women with only a high school diploma).

27. See infra note 123 and accompanying text.

28. See infra section II.A.2.

29. See infra section II.A.2.

children want to get to know their parents and, ideally, have a relationship with both.[30]

Family law is part of the problem. To begin—and this is the primary focus of this Essay—family law makes it harder for unmarried men without college degrees to maintain a relationship with their children. Over the last several decades, reforms to the substance and process of family law have increasingly sought to create and support "postdivorce families."[31] This approach values ongoing involvement and cooperation of both parents. Shared parenting is the central custody principle, with rules and processes encouraging both parents to have substantial time with children. The transformation of family law also prioritizes parental autonomy, with states redesigning statutes, procedures, and personnel to encourage couples to reach their own settlements.[32] To these ends, family courts offer alternative dispute resolution mechanisms, counseling, and other support, recognizing that cooperation is essential to constructive two-parent involvement and that couples need help with co-parenting long after their romantic relationship is over.[33] At its core, this transformation recognizes and encourages the norm that fathers are both breadwinners *and* caregivers.[34] For married men and other fathers with the resources to access the family court system, the result has been a substantial increase in custodial awards and assistance in realizing the new paternal role.[35]

For men facing economic precarity, however, the legal system does not help fathers realize the new norm of engaged fatherhood. The problem for these men is less the content of family law (although there is room for reform) than isolation from a formal legal system that encourages fathers to be hands-on parents. Unmarried parents have no legal tie to each other, so when they end their relationship, they do not need to go to court. As a practical matter, this means that unmarried couples typically are not channeled into the supportive parts of family law: the alternative dispute resolution processes, counseling, and other

30. See infra section II.A.2.

31. See Jana B. Singer, Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift, 47 Fam. Ct. Rev. 363, 363 (2009) ("[A]cademics and courts reformers have argued that family courts should abandon the adversary paradigm, in favor of approaches that help parents manage their conflict[s] and encourage them to develop positive postdivorce co-parenting relationships."). There is still room for improvement. See Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships 81–108 (2014) [hereinafter Huntington, Failure to Flourish] (describing the ongoing problems with this area of family law).

32. See infra text accompanying notes 252–268.

33. See infra text accompanying notes 252–268.

34. See infra section III.B.1; see also Joseph H. Pleck, American Fathering in Historical Perspective, *in* Changing Men: New Directions in Research on Men and Masculinity 83, 93 (Michael S. Kimmel ed., 1987) (describing the emergence of a new model of fatherhood in the last quarter of the twentieth century that embraced men as both breadwinners and active caregivers).

35. See infra text accompanying notes 253–257.

assistance that can strengthen fathers' active membership in the family.[36] Instead, the ability of unmarried fathers to see their children is more likely to depend on the mother's cooperation, which is not always forthcoming, and parents must figure out for themselves how to weather the conflicts, financial exigencies, and emotional crises that undermine family relationships.[37] In short, unmarried fathers do not benefit from the transformation in family law that has helped divorcing fathers maintain a relationship with their children.

The second way family law contributes to the isolation of men in their own families is the punitive enforcement of child support laws, a system that views lower-income men as breadwinners, not caregivers, and failed breadwinners at that. Married, college-educated fathers can afford to pay child support, and most do.[38] The legal system recognizes these men as caregivers by granting divorcing parents wide latitude in reaching their own bargain between custody and child support, with many men obtaining more custody and paying less support.[39] By contrast, the state often initiates child support proceedings on behalf of lower-income children, whether the custodial parent wants this or not.[40] And once in a proceeding, courts and administrative agencies insist that low-income men pay unrealistic amounts of child support, even if the men are unemployed or incarcerated.[41] Low-income parents rarely have legal representation, which hampers their ability to tailor custody and support orders to meet their individual circumstances and balance caregiving with economic support.[42] Even more troubling, the state often imposes punitive measures—including imprisonment for nonpayment—that drive fathers away from their families.[43] The result is a counterproductive system that deters the involvement of unmarried fathers and gives the greatest autonomy to couples who can afford lawyer-negotiated settlements.

Finally, family law isolates men from their families through the family regulation system (also known as the child welfare system).[44] Mothers are more likely than fathers to be subject to coercive state intervention, but the system undermines fathers who are involved, or wish to be more

36. See infra section III.B.2.

37. See infra section III.B.2.

38. See infra text accompanying note 296.

39. See infra text accompanying note 261.

40. See infra text accompanying note 303.

41. See infra text accompanying notes 295–298.

42. See infra text accompanying notes 295–298.

43. See infra text accompanying notes 302–311.

44. Professor Dorothy Roberts and other critics call what has traditionally been known as the child welfare system the "family-policing system" or the "family regulation system" to argue that it does not promote child welfare and instead polices or regulates families. See Dorothy Roberts, Torn Apart 3 (2022); Dorothy Roberts, Opinion, Abolishing Policing Also Means Abolishing Family Regulation, The Imprint (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/ [https://perma.cc/5P72-X79H]. This Essay adopts that nomenclature.

involved, with their children.[45] The state penalizes fathers who have not paid child support, sometimes by terminating fathers' parental rights and sometimes by withholding family reunification services from the father.[46] In this way, the family regulation system makes paternal breadwinning a precondition for paternal caregiving. The system also treats fathers as threats. When the state investigates allegations of child abuse and neglect, it often resolves complaints by coercing mothers to separate from partners the state may regard as a threat, even when mothers have good reason for wanting fathers' continued involvement with children.[47]

This Essay offers solutions to each of these problems.[48] It argues that family law should bring men in from the periphery and make them less isolated in their own families. But it should do so on terms that work for both parents, rather than legally reimposing men on women. To these ends, this Essay proposes reforms to three areas of family law: custody rules and processes, child support, and family regulation. Across all three areas, the goal is to give families greater autonomy in shaping agreements, support to make these bargains workable, and opportunities for men to be active fathers. The proposals assume heterogeneity among families and preferences, and they recognize that shared parenting must be embraced rather than imposed. The reforms also reject the punitive approaches that often treat men as problems to be solved. More generally, the proposals seek to increase the role of men without college degrees as breadwinners *and* caregivers. In other words, the Essay argues that family law should help families—regardless of marital status—realize the new mainstream norm of shared parenting.

To address custody rules and processes, the Essay proposes adding an institutional alternative to family courts: community-based centers that are state-funded but operate wholly apart from the judicial system.[49] Drawing on an existing model,[50] these centers would encourage fathers, ideally together with the mothers of their children, to access dispute-resolution processes and needed services. The first step is to help parents devise an agreement about shared parenting. This includes legal advice about custody and child support options and assistance in making a detailed parenting plan. The next step is providing services that support shared parenting and spur the involvement of otherwise socially isolated fathers.

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45. See infra section III.D.

46. See infra section III.D.

47. See infra section III.D.

48. The starting point for this Essay's solutions is an insight from Jacobus tenBroek, who identified a dual system of family law: a private system for the well-off, and a public-system for lower-income families. Section III.A describes his work, and Part IV explains that the goal is to bring the benefits of the private system to the families stuck in the public system.

49. See infra section IV.A.

50. See infra notes 364–371 and accompanying text (describing Family Relationship Centres in Australia and pilot programs in the United States).

These services will be varied and depend on the needs of the family, but they should include the following: employment assistance (preferably tied to employment subsidies or other financial incentives); counseling; supervised visitation, if needed for the safety of family members; and services to address intimate partner violence, mental health, and other behavioral issues.[51] In these ways, community-based centers would provide assistance in overcoming the obstacles to greater paternal engagement—involvement that many parents and their children desire. The centers would also aim to give couples greater ability to manage parenting on their own terms, and the centers would operate in the context of community norms, respectful of couples' values and sensitive to the challenges facing lower-income families.

To address the problems with child support, this Essay proposes giving lower-income families the autonomy currently enjoyed by higher-income parents to negotiate their own support terms. The same community-based centers would help parents with these negotiations. With assistance, parents could decide and formalize an agreement about whether to have a support order, and, if so, the balance between cash and in-kind support and any offset for active caregiving. Further, this Essay argues in favor of radically rethinking state-initiated child support actions, which too often produce little money for families at a high cost to paternal engagement.

Finally, the Essay proposes reforms to the family regulation system that would promote family autonomy and paternal engagement. A critical reform is decoupling child support enforcement from the family regulation system. More broadly, the goal is to move decisionmaking authority out of courts and into the hands of families and communities—at least for the majority of cases.[52] A screening system would divert many if not most cases into community-based centers, where families could ask for and receive services that are better tailored to individual circumstances, more consistent with community-based values, and better designed to empower constructive parental decisionmaking. These centers would not be part of the surveillance apparatus of the family regulation system. To fund this work, states could channel at least some of the resources currently spent on the family regulation system into the centers.

Critically, the proposals do not replicate the results nor principles sometimes associated with the fathers' rights movement. In that movement, advocates seek greater rights for fathers, often on the basis of biology or legal parental status alone, with presumptive fifty-fifty custody

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51. See infra notes 364–371 and accompanying text.

52. See Clare Huntington, Rights Myopia in Child Welfare, 53 UCLA L. Rev. 637, 640 (2006) [hereinafter Huntington, Rights Myopia] (arguing in favor of a similar approach—replacing family courts with family group conferences—for the majority of cases in the family regulation system); see also Jane Spinak, The End of Family Court: How Abolishing the Court Brings Justice to Children and Families 274–93 (2023) (arguing for the abolition of family court involvement in family regulation cases).

awards.[53] By contrast, this Essay's approach acknowledges that unmarried lower-income women are more likely to have assumed primary responsibility for children since birth and to have substantial concerns about men's behavior, such as substance use or violence.[54] Accordingly, the proposals promote paternal engagement on terms both parents can embrace. This requires both building parenting capacity through the provision of greater financial, counseling, and administrative support and ending the punitive approaches at the heart of the child support and family regulation systems. Most fundamentally, however, it requires increasing the respect and status associated with lower-income fathers assuming caretaking roles and giving lower-income families the ability to negotiate their own arrangements.

By addressing the family law aspects of the decline in male well-being, this Essay fills a significant gap in the literature. A few legal scholars have explored the challenges facing boys and men.[55] And family law scholars, including the authors of this Essay, have analyzed the problems facing

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53. See The Fathers' Rights Movement, https://tfrm.org [https://perma.cc/GP9E-JP4E] (last visited Aug. 9, 2024) ("The Fathers' Rights Movement's primary goal is to educate society on the importance of the rebuttable presumption of 50-50 Shared Parenting by raising awareness about the imbalances and injustices within the system of Family Law, which will empower fathers to exercise their full rights and responsibilities . . . ."). For a description of the historical and ongoing basis for the fathers' rights movement, see Deborah Dinner, The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities, 102 Va. L. Rev. 79, 89 (2016) ("[Advocates] affirmed a set of entitlements regarding the sexual division of labor, husbands' sexual control over wives, and patriarchy that had long defined the socioeconomic status of middle-class white men.").

54. See infra section II.A.2.

55. See, e.g., Nancy E. Dowd, The Man Question: Male Subordination and Privilege 25, 63 (2010) [hereinafter Dowd, The Man Question] (arguing that feminism too often forgets that male privilege varies by race and class and contending that true equality for everyone requires a deeper understanding of how masculinity both privileges and subordinates); Nancy E. Dowd, Reimagining Equality: A New Deal for Children of Color 1–3 (2018) [hereinafter Dowd, Reimagining Equality] (identifying the multiple disadvantages facing Black boys to argue for greater investment in all children); Symposium, Evaluating Claims About the "End of Men": Legal and Other Perspectives, 93 B.U. L. Rev. 663, 663–64 (2013) ("The Conference examined how the data supporting claims about the 'end of men'—and the progress of women—appear when differentiated by class, race, religion, and other categories. It provided historical perspectives on current anxieties about imbalances between the relative power, opportunities, and status of men and women."); Ann C. McGinley & Frank Rudy Cooper, Masculinities, Multidimensionality, and Law: Why They Need One Another, *in* Masculinities and the Law: A Multidimensional Approach 2, 10–11 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (illustrating how masculinity is socially constructed and varied); Barbara Stark, Anti-Stereotyping and "The End of Men", 92 B.U. L. Rev. Annex 1, 10–11 (2012), https://www.bu.edu/law/journals-archive/bulr/volume92n4/documents/STARK.pdf%20 [https://perma.cc/9SXV-WBWK] (examining some of the ways in which many men are "victims of outmoded gender stereotypes"). These scholars generally do not explore the family law implications of the decline in male wellbeing.

nonmarital families.[56] But scholars largely have not brought these conversations together, using the research on the decline in male well-being to highlight the role of family law in male isolation and the impact on the entire family.[57]

Before proceeding, three clarifying notes are in order. First, in focusing on men, this Essay does not intend to minimize the continuing difficulties facing women. Today's society produces disproportionately male winners at the expense of most of the rest of the population, including women and nonbinary individuals.[58] This Essay is also cognizant of the growing calls to affirm traditional gender roles, including claims to restore male authority within the family.[59] In focusing on the

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56. June Carbone has argued that the changing family reflects the way men and women match up with each other in the new economy (described in greater detail below, see infra section II.A.3). In a society in which relative male and female incomes still predict relationship quality, this produces vibrant two-parent families at the top of the income scale and a shift toward more contingent relationships further down the income scale. See Carbone & Cahn, Marriage Markets, supra note 16, at 124–25 (highlighting the impact of financial differences on marital outcomes). Clare Huntington has explored the legal response to nonmarital families, arguing that family law is designed for married couples but needs to address the distinct needs of nonmarital families. See Clare Huntington, Postmarital Family Law: A Legal Structure for Nonmarital Families, 67 Stan. L. Rev. 167, 171–72 (2015) [hereinafter Huntington, Postmarital Family Law] (explaining the shortcomings of family law for nonmarital families). But no family law scholar has directly engaged the crisis facing boys and men and laid out possible family law responses to this sociological development.

57. The closest work is a chapter in Nancy Dowd's book, *The Man Question*. See Dowd, The Man Question, supra note 55, at 105. Dowd contends that there is a tension between masculinity norms and caring, involved fatherhood. She suggests that masculinities analysis may contribute to feminist analysis of parenthood by exposing gendered cultural assumptions embedded in public policies and assist in reimagining policies that facilitate a more equal balance between mothers and fathers. Id. at 119–21. This Essay draws on Dowd's proposals below, but proposing institutional, doctrinal, and procedural solutions, as this Essay does, is not Dowd's project.

58. For an assessment of how men disproportionately continue to occupy the top rungs of the economy, see Naomi Cahn, June Carbone & Nancy Levit, Fair Shake: Women's Fight for a Just Economy 4 (2024) (discussing how female college graduates have been losing ground economically to male college graduates since the 1990s).

59. See, e.g., Shanti Das, Inside the Violent, Misogynistic World of TikTok's New Star, Andrew Tate, The Observer (Aug. 6, 2022), https://www.theguardian.com/technology/2022/aug/06/andrew-tate-violent-misogynistic-world-of-tiktok-new-star [https://perma.cc/J6KD-86HE] (describing the misogynistic views of Andrew Tate, who says women should stay at home, not drive, and so on). In addition, the marriage movement has long maintained that marriage is a necessary institution to integrate "men into the care of their children." Don S. Browning, Linda McClain's *The Place of Families* and Contemporary Family Law: A Critique from Critical Familism, 56 Emory L.J. 1388, 1395 (2007) (emphasis omitted); see also Linda C. McClain, The "Male Problematic" and the Problems of Family Law: A Response to Don Browning's "Critical Familialism", 56 Emory L.J. 1407, 1413–14 (2007) (critiquing the parts of the marriage movement that maintain that a masculine head of household role is necessary to the centrality of marriage and that marriage itself is necessary to fathers' assumptions of responsible roles in their children's lives).

disproportionate impact of social and economic changes on men without college degrees, the proposals do not seek to restore men to the *head* of the table but rather to give them a *place* at the table.

Second, although the Essay often uses marriage as a dividing line between family structures, the intention is not to valorize marriage.[60] Instead, the Essay uses this divide in family form for its descriptive power. As elaborated in this Essay, marriage has become a class marker that correlates with the ability to achieve a measure of economic security, relationship quality, family stability, and greater capacity to invest in the next generation. Marriage also correlates with greater paternal involvement, including maintaining a two-parent household throughout children's minority and remaining involved in children's lives when parental relationships end.[61] And the legal consequences of dissolving a marital relationship, as discussed below, are different from the dissolutions of nonmarital relationships in ways that affect the prospects of continuing two-parent involvement. The Essay nonetheless recognizes that families vary. For some families, cohabitation is indistinguishable from marriage, and patterns for many groups are different from the dominant divide. Black parents, for example, are less likely to be married but are more likely than other nonmarital families to maintain strong ties, at least while children are young.[62] This Essay assumes this heterogeneity of family forms and functioning and argues that family law needs to address the full range of family patterns.

Finally, the Essay focuses on men in different-sex relationships, in part because gay boys and men are faring better on the educational and

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60. For critiques of marriage, see, e.g., Katherine Franke, Wedlocked: The Perils of Marriage Equality 2–3 (2015) (arguing that the "'freedom to marry' . . . inaugurates a new set of hard questions about what it means to be liberated into a social institution that has its own complicated and durable values and preferences"); R.A. Lenhardt, Marriage as Black Citizenship?, 66 Hastings L.J. 1317, 1322 (2015) ("[T]he true story of legal marriage in this country involves racial caste and subordination."). For work by the authors of this Essay arguing that the decline in marriage rates is a symptom, not a cause, of inequality, see Naomi Cahn & June Carbone, Nonmarriage, 76 Md. L. Rev. 55, 93–94 (2016); Huntington, Postmarital Family Law, supra note 56, at 219–20. But see Brad Wilcox, Get Married: Why Americans Must Defy the Elites, Forge Strong Families, and Save Civilization, at xix (2024) (offering a traditional defense of the links between marriage, two-parent families, and male well-being).

For all the valorization of two-parent families, see, e.g., Melissa S. Kearney, The Two-Parent Privilege 21–41 (2023) (documenting the educational and economic disadvantages of children who grow up in a single-parent household), there is evidence that having two low-income parents does not confer the same benefit, at least for Black families. See Christina J. Cross, Beyond the Binary: Intraracial Diversity in Family Organization and Black Adolescents' Educational Performance, 70 Soc. Probs. 511, 528 (2023) (finding that in low-income Black households, having two parents in the home did not affect the children's grades, likelihood of repeating a grade, or rates of suspension).

61. See infra text accompanying notes 177–183.

62. See infra text accompanying notes 196–204.

economic measures of well-being than straight boys and men.[63] Additionally, although gay and bisexual boys and men face challenges on other measures of well-being,[64] there appears to be no research connecting these challenges to the formation of relationships between men. If researchers produce empirical work on that connection, it will be possible to extend the analysis in this Essay. Similarly, the available research on the decline in male well-being and family formation does not disaggregate the population by sex assigned at birth and gender identity. Although it is not possible to provide a comprehensive or distinctive analysis of how trans men and nonbinary individuals are faring, the solutions the Essay offers to strengthen family relationships, particularly the ties between nonresidential parents and children, should be available to everyone.

* * *

This Essay proceeds in four parts. Part I offers a statistical portrait of the decline in male well-being before identifying the factors contributing to this decline. Part II describes and explains the impact on families. Part III analyzes how family law contributes to male isolation in the family, focusing on custody rules and processes, child support, and the family regulation system. Finally, Part IV provides solutions in each of these three areas as well as initial thoughts about a broader agenda for addressing the decline in male well-being. The structural macroeconomic forces that have isolated men in their own families may well deepen—whether through the expanded use of artificial intelligence or other means[65]—and now is the time for family law to respond.

## I. THE CRISIS OF BOYS AND MEN

In some ways, boys and men have always faced challenges.[66] Masculinities theory teaches that male social status is hierarchical and

63. See infra text accompanying notes 86, 100–101.

64. See infra text accompanying note 112.

65. See Jan Hatzius, Joseph Briggs, Devesh Kodnani & Giovanni Pierdomenico, The Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani) 1 (2023), https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf [https://perma.cc/AGY9-RSLW] ("If generative AI delivers on its promised capabilities, the labor market could face significant disruption."); Jack Kelly, Goldman Sachs Predicts 300 Million Jobs Will Be Lost or Degraded By Artificial Intelligence, Forbes (Mar. 31, 2023), https://www.forbes.com/sites/jackkelly/2023/03/31/goldman-sachs-predicts-300-million-jobs-will-be-lost-or-degraded-by-artificial-intelligence/?sh=2c28aa60782b (on file with the *Columbia Law Review*) ("If generative AI lives up to its hype, the workforce in the United States and Europe will be upended . . . .").

66. For descriptions of the perennial concern about men, see Michael S. Kimmel, The Contemporary "Crisis" of Masculinity in Historical Perspective, *in* The Making of Masculinities: The New Men's Studies 121, 143–53 (Harry Brod ed., 1987) (discussing how men have historically responded to the crisis of masculinity with a "hypermasculine

must be earned, inevitably producing winners and losers, especially in unequal societies.[67] Striving for social status therefore can create a perpetual sense of angst for boys and men uncertain about their place in steeply banked social and economic hierarchies. Boys and men, however, have suffered a distinctive decline over the last half century in relative (and in some cases absolute) well-being. The decline varies significantly by race and socioeconomic status.[68] Accordingly, this Part uses an intersectional analysis to highlight the differences among men.[69] Unlike some commentary,[70] this Essay's argument is not that girls and women are necessarily excelling.[71] Instead, the point is that many boys and men face

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subordination of women"); Michael Kimmel, Manhood in America: A Cultural History 5 (1st ed. 1996) (explaining that manhood is a social construct in which men who do not live up to a certain model are considered incomplete and inferior); Serena Mayeri, Historicizing "The End of Men": The Politics of Reaction(s), 93 B.U. L. Rev. 729, 730 (2013) (describing the political reaction to the 1965 Moynihan Report and noting that "concerns about the growing number of 'female-headed households' and the concomitant 'emasculation' of African American men reflected a long-lived consensus . . . that a male-breadwinner/female-homemaker model of household political economy was integral to racial progress"); Kara Swanson, The End of Men, Again, 93 B.U. L. Rev. Annex 27, 28 (2013), https://www.bu.edu/bulawreview/files/2013/04/SWANSON.pdf (on file with the *Columbia Law Review*) ("Historians . . . have documented recurring crises of masculinity throughout the nineteenth and twentieth centuries. . . . Men, it seems, are always ending."). And for examples from past eras, see Washington Irving, A Tour on the Prairies 56 (1835) (decrying the practice of "send[ing] our youth abroad to grow luxurious and effeminate in Europe," and arguing that instead a "tour on the prairies would be more likely to produce that manliness . . . most in unison with our political institutions"); Arthur Schlesinger Jr., The Crisis of American Masculinity, Esquire, Nov. 1, 1958, at 63, 63 ("The way by which American men affirm their masculinity are uncertain and obscure. There are multiplying signs, indeed, that something has gone badly wrong with the American male's conception of himself.").

67. See infra section I.B.2.

68. See infra notes 137–138, 140–142 and accompanying text.

69. This Part also notes where the seemingly better outcomes for girls and women on some measures also vary by race and class. See Julie Yixia Cai, Emma Curchin, Tori Coan & Shawn Fremstad, Are Young Men Falling Behind Young Women? The NEET Rate Helps Shed Light on the Matter, Ctr. for Econ. & Pol'y Rsch. (Mar. 30, 2023), https://cepr.net/report/are-young-men-falling-behind-young-women-the-neet-rate-helps-shed-light-on-the-matter/ [https://perma.cc/4BLJ-VHY2] ("Narratives that imply young men as a whole are falling behind young women are misleading . . . . It would be more accurate to say that most groups of young men and women are falling behind white men by their late 20s, particularly Black men, women overall, Black women, and Latinas."); see also id. ("But white men are not a monolith either—many white men are falling behind other white men, largely due to class background, disability, and other categorical inequalities.").

70. See, e.g., Hanna Rosin, The End of Men 92 (2012) (describing low-income communities as "matriarchies," with "women making all the decisions and dictating what the men should and should not do"); cf. June Carbone & Naomi Cahn, The End of Men or the Rebirth of Class?, 93 B.U. L. Rev. 871, 888 (2013) (observing that while women's greater independence and societal power gives women greater ability to refuse to enter into or stay in relationships, it does not necessarily "translate into the ability to dictate 'what the men should and should not do' within relationships").

71. See Philip N. Cohen, The "End Of Men" Is Not True: What Is Not and What Might Be on the Road Toward Gender Equality, 93 B.U. L. Rev. 1159, 1160–70 (2013) (challenging

significant challenges that undermine their ability to play a meaningful role in their families and in American society, and that these challenges merit consideration apart from those facing many girls and women.

After describing the decline in male well-being, this Part turns to unpacking explanations for this decline, emphasizing structural changes to the economy as well as affirmative policy choices, such as the central place of incarceration in the criminal legal system and the high tolerance for inequality in the United States. This Part also notes the growing connection between technology use and the social isolation of boys and men.

### A. *Tracking Declines in Male Well-Being*

Perhaps the most striking change in measures of well-being for boys and men involves education, an important marker of societal standing that correlates with greater economic opportunities, physical and mental health, and social connections.[72] Young men today are more likely to graduate from high school and earn a college degree than young men forty years ago,[73] but their levels of educational attainment are increasingly lagging behind levels for young women.[74] Apart from low-income families,[75] boys and girls start kindergarten with roughly the same skills.[76]

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a reductionist story about the decline of men and the rise of women, noting, for example, that men continue to dominate the top of economic and political ladders and that a decades-long increase in women's labor-force participation has stalled); see also Cahn et al., supra note 58, at 3–4 (arguing that since the 1990s, women's overall progress has stalled and that women have lost ground in the ranks of the economy enjoying the greatest income gains).

72. See infra notes 87–93, 103–110, 119 and accompanying text.

73. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (noting that in 1980, 85.4% of men aged twenty-five to twenty-nine had earned a high school diploma as compared with 93.5% in 2023, and that in 1980, 24.0% of men aged twenty-five to twenty-nine had earned a college degree as compared with 35.9% in 2023).

74. In 1980, the gender gap in earning a college degree for individuals aged twenty-five to twenty-nine was three points in favor of men; in 1990, it was one point in favor of men; and in 1995, it was roughly equal. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4. By 2000, it was two points in favor of women; in 2010, it was eight points in favor of women; and in 2023, nine points in favor of women. See id.

75. See David Autor, David Figlio, Krzysztof Karbownik, Jeffrey Roth & Melanie Wasserman, Family Disadvantage and the Gender Gap in Behavioral and Educational Outcomes, 11 Am. Econ. J.: Applied Econ. 338, 359 (2019) [hereinafter Autor et al., Family Disadvantage and the Gender Gap] (noting that in low-income families, girls tend to be more prepared for kindergarten than boys).

76. See Emma Garcia, Econ. Pol'y Inst., Inequalities at the Starting Gate: Cognitive and Noncognitive Skills Gaps Between 2010–2011 Kindergarten Classmates 24–25 (2015), https://files.epi.org/pdf/85032c.pdf [https://perma.cc/6C2R-A7SL] (finding that if there is a preexisting cognitive gap between boys and girls when they enter school, it is very small); P. Gail Williams & Marc Alan Lerner, School Readiness, Pediatrics, Aug. 2019, e20191766, at 1, 7 (noting that the sex gap in readiness skills upon starting kindergarten, which was more apparent in 1999, had disappeared by 2012). When looking at low-income families, however, girls tend to be more prepared for kindergarten than boys. See Autor et al., Family

But girls quickly outpace boys,[77] and by the end of twelfth grade, there is a six-point gender gap in high school graduation rates.[78] The gender gap continues into higher education. Of those who have completed high school, young men are considerably less likely than young women to enroll in college (a nine-point gap).[79] Men are also less likely to complete their degree in four years and more likely to drop out entirely.[80] Unsurprisingly, these differences mean fewer men have a bachelor's degree than women (a nine-point difference).[81] And more women earn advanced degrees than

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Disadvantage and the Gender Gap, supra note 75, at 359 (noting the correlation between socioeconomic status and the readiness of boys relative to girls).

77. See Laura LoGerfo, Austin Nichols & Duncan Chaplin, Gender Gaps in Math and Reading Gains During Elementary and High School by Race and Ethnicity 6–10 (2006), https://webarchive.urban.org/UploadedPDF/411428_Gender_Gaps.pdf [https://perma.cc/RL8C-93KL] (finding that while boys generally do better in math, girls "gain reading skills at a faster rate than males for all races and ethnic groups considered").

78. See Richard V. Reeves, Eliana Buckner & Ember Smith, The Unreported Gender Gap in High School Graduation Rates, Brookings Inst. (Jan. 12, 2021), https://www.brookings.edu/blog/up-front/2021/01/12/the-unreported-gender-gap-in-high-school-graduation-rates/ [https://perma.cc/MHL8-NRTF] (reporting that 88% of girls graduated on time compared to 82% of boys in 2018). These statistics are for students graduating high school on time. Among the boys who do not graduate on time, many ultimately earn a high school diploma or an equivalency. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (finding a less pronounced gender gap in high school graduation rates for young people aged twenty-five to twenty-nine in 2022, with 93.9% of men and 95.2% of women completing high school).

79. See Table 302.10. Number of Recent High School Completers and Percent Enrolled in College, by Sex and Level of Institution: 1960 Through 2022, Nat'l Ctr. for Educ. Stat. (July 2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_302.10.asp [https://perma.cc/NLV4-M4AB] (showing that in 2022, 57.2% of male high school graduates enrolled in a two- or four-year program as compared with 66.0% of female graduates).

80. See Table 326.10. Graduation Rate From First Institution Attended for First-Time, Full-Time Bachelor's Degree-Seeking Students at 4-Year Postsecondary Institutions, by Race/Ethnicity, Time to Completion, Sex, Control of Institution, and Percentage of Applications Accepted: Selected Cohort Entry Years, 1996 Through 2016, Nat'l Ctr. for. Educ. Stat. (Jan. 2024), https://nces.ed.gov/programs/digest/d23/tables/dt23_326.10.asp [https://perma.cc/P854-Y4Y7] (showing that of the men who started a four-year degree program in 2014, 41.0% finished in four years as compared with 51.3% of women and only 60.5% finished within six years as compared with 67.0% of women); see also Table 326.15. Percentage Distribution of First-Time, Full-Time Bachelor's Degree-Seeking Students at 4-Year Postsecondary Institutions 6 Years After Entry, by Completion and Enrollment Status at First Institution Attended, Sex, Race/Ethnicity, Control of Institution, and Percentage of Applications Accepted: Cohort Entry Years 2011 and 2016, Nat'l Ctr. for. Educ. Stat. (Oct. 2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_326.15.asp [https://perma.cc/XKL8-TF7V] (showing that of the men who started a four-year degree program in 2016, 23.7% of them were either "no longer enrolled" or had an unknown status within six years as compared to 18.3% of women).

81. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (showing that in 2023, of all individuals aged twenty-five to twenty-nine, 35.9% of men and 45.2% of women had earned a bachelor's degree).

The gender differences in college completion rates may reflect the fact that the highest-paying occupations that do not require college degrees, such as construction, sales,

men (a five-point difference).[82] These gender differences persist within racial and ethnic groups.[83]

Educational attainment among boys and men varies by race and ethnicity. High school graduation rates are the highest among Asian American and Pacific Islander (AAPI) and white men,[84] but the biggest racial and ethnic gap is the rate of earning a college degree, with AAPI and white men far outpacing Black and Hispanic men.[85] Another point of

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and various technician and repair positions, attract more men than women. See 80 Highest Paying Jobs Without a Degree (Over $50K), U.S. Career Inst. (Sept. 2019), https://www.uscareerinstitute.edu/blog/80-Jobs-that-pay-over-50k-without-a-degree [https://perma.cc/4BFG-C8ZT]; see also Labor Force Statistics From the Current Population Survey, U.S. Bureau Lab. Stat., https://www.bls.gov/cps/cpsaat18.htm [https://perma.cc/MA85-WUJR] (last updated Jan. 26, 2024) (showing that more men worked in construction, wholesale and retail trade, and repair and maintenance than women in 2023). These jobs, however, are often less secure than the positions open to those with college degrees, with more income volatility and more cyclical employment opportunities. See Evgeniya A. Duzhak, Fed. Rsrv. Bank of S.F., How Do Business Cycles Affect Worker Groups Differently? 3–4 (Sept. 7, 2021), https://www.frbsf.org/wp-content/uploads/el2021-25.pdf [https://perma.cc/KLD9-EQ8D] (showing that male-dominated fields such as agriculture, construction, and mining are more sensitive to cycle variations, particularly for Black and Hispanic men).

82. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (showing that in 2023, of all individuals aged twenty-five to twenty-nine, 8.3% of men and 13.0% of women had earned at least a master's degree).

83. The biggest within-race gender gap in earning a bachelor's degree is for Hispanic men and women (a twelve-point difference), and the smallest gap is for Asian and Pacific Islander men and women (a three-point difference) and Black men and women (a three-point difference); white men and women have an eleven-point difference. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (reporting college graduation rates for individuals aged twenty-five to twenty-nine in 2023).

It is a more complicated picture by income. See Sarah Reber & Ember Smith, Ctr. on Child. & Fams. at Brookings, College Enrollment Disparities: Understanding the Role of Academic Preparation 11 tbl.1 (2023), https://www.brookings.edu/wp-content/uploads/2023/02/20230123_CCF_CollegeEnrollment_FINAL2.pdf [https://perma.cc/8P35-VWGF] (reporting the correlation between household income and college enrollment and completion and finding no gender differences in the highest quintile of families by income, a small advantage for boys in the next quintile, but a significant gender advantage for girls in the third and fourth (but not bottom) quintiles). For statistics combining race and income, see Jacqueline E. King, Gender Equity in Higher Education: 2010, at 11 tbl.2 (2010) (finding that in the lowest income quartile in 2007, sons in Black families constitute 42% of those going to college, and sons in white families constitute 44% of those going to college).

84. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4 (reporting that in 2023, among those aged twenty-five to twenty-nine, 98.5% of AAPI men, 95.6% of white men, 95.5% of Black men, 93.0% of American Indian/Alaska Native men, and 85.6% of Hispanic men had a high school diploma or the equivalent).

85. In 2023, among men aged twenty-five to twenty-nine, 73.9% of AAPI men had earned a college degree, compared with 40.2% of white men, 30.2% of Black men, and 18.8% of Hispanic men. See Nat'l Ctr. for Educ. Stat., Table 104.20, supra note 4. The likelihood of a young man aged twenty-five to twenty-nine having a college degree has increased for all racial groups, but historically there were also significant racial and ethnic gaps. See id. (reporting that in 1990, of the young men aged twenty-five to twenty-nine,

difference among boys and men is sexual orientation. Gay men are significantly more likely than straight men to graduate from college (an eighteen-point difference).[86]

In light of changes to the economy described below,[87] it is unsurprising that these patterns of educational attainment influence paid labor.[88] The labor-force participation rate for men with a college degree

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47.6% of AAPI men had a college degree, as compared with 26.6% of white men, 15.1% of Black men, and 7.3% of Hispanic men).

86. See Joel Mittleman, Intersecting the Academic Gender Gap: The Education of Lesbian, Gay, and Bisexual America, 87 Amer. Socio. Rev. 303, 315 tbl.2 (2022) [hereinafter Mittleman, Intersecting the Academic Gender Gap] (reporting results of the National Health Interview Survey, which show that of all men aged twenty-five and older, 52.7% of gay men have earned college degrees, as compared with 33.9% of straight men); id. at 314 ("[I]f U.S. gay men were considered on their own, they would have, by far, the highest college completion rate in the world: easily surpassing the current leader, Luxemburg, at 46.6 percent."); see also id. at 315 tbl.2 (reporting results from the National Crime Victimization Survey that 5.8% of gay men aged twenty-five and older have earned an advanced degree as compared with 4.2% of straight men). Gay boys and men are also more likely than straight boys and men to earn high grade point averages in high school and college, enroll in harder classes, take school seriously, and have academically minded friends. See id. at 320 tbl.3. Scholars contend that gay boys do well in school because they are excluded from the male social hierarchy and thus are free to excel in school. See id. at 308 (explaining the literature making this finding and noting that "[f]or gay/bisexual boys, precisely those aspects of gender that are *socially* costly could also be *academically* beneficial").

The educational attainment of gay men holds across racial and ethnic groups, see id. at 316 ("[G]ay men's sizable bachelor's degree advantage extends across the four largest racial/ethnic groups. Among White (non-Hispanic) men, Black men, Hispanic men, and Asian men, gay men consistently surpass straight men by double digit margins."), and across birth cohorts and family socioeconomic status, see id. at 317, 321 ("Across all birth cohorts, in every dataset, gay men maintain a large and statistically significant bachelor's degree advantage . . . ."); see also Joel Mittleman, Intersecting the Academic Gender Gap: The Education of Lesbian, Gay and Bisexual America, 87 Amer. Socio. Rev. Online Supplement 1, 15 fig.S8 (2022), https://journals.sagepub.com/doi/suppl/10.1177/00031224221075776/suppl_file/sj-pdf-1-asr-10.1177_00031224221075776.pdf (on file with the *Columbia Law Review*) (presenting significantly higher bachelor degree attainment rates across birth cohorts for men attracted to mostly or only men as compared to men attracted to mostly or only women). For a discussion of possible selection bias, see id. at 16 (explaining that the educational-attainment gap exists even among young men who did not enroll in college and thus the gap cannot be explained by a concern that men who earn a college degree are more willing to self-identify as gay). Men who identify as bisexual do not earn college degrees and advanced degrees at a rate that is statistically significant from straight men. See Mittleman, Intersecting the Academic Gender Gap, supra, at 316 ("Bisexual–straight disparities [in college completion] remain small and are generally not significantly different from zero."). The data sets underlying these statistics do not track gender identity, and thus there are no measures of educational attainment by gender identity. See id. at 331 (detailing the unavailability of such data).

87. See infra section I.B.1.

88. The text cites statistics about both employment and labor-force participation. For a description of the difference, see Labor Force Statistics From the Current Population Survey: Concepts and Definitions (CPS), Bureau of Lab. Stat., https://www.bls.gov/cps/definitions.htm [https://perma.cc/TY8N-2K2W] (defining "employed" as working at least one hour in the previous week; "unemployed" as not working

has remained high and steady over the past several decades, but for men without a college degree, it has decreased dramatically since the 1970s.[89] Men in all racial and ethnic groups have experienced this decline,[90] but Black men are much more likely to be unemployed (seeking but not finding work) than white men,[91] and they are more likely than men in other racial and ethnic groups to be out of the labor force.[92] Black men with a college degree generally have a lower unemployment rate than Black men with less education, but the unemployment rate is higher than for white men with a college degree.[93]

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but making efforts in the previous four weeks to find work; and "labor-force participation rate" as "the percentage of the [civilian noninstitutionalized] population that is either working or actively looking for work").

89. See supra note 5; see also Didem Tüzemen, Why Are Prime-Age Men Vanishing From the Labor Force? 12 (2018), https://www.kansascityfed.org/Economic%20Review/documents/653/2018-Why%20Are%20Prime-Age%20Men%20Vanishing%20from%20the%20Labor%20Force%3F.pdf [https://perma.cc/Z35T-EUBM] (finding that between 1996 and 2016, the decrease in non-labor-force participation for men in the prime ages of twenty-five to thirty-four occurred in the middle educational groups: men with only a high-school degree, some college, or an associate's degree); U.S. Bureau of Lab. Stat., Women in the Labor Force, supra note 5, at tbl.2 (showing steady declines in male labor-force participation beginning in the 1960s, accelerating with the Great Recession in 2008, and not fully recovering despite some improvement with the tighter labor markets following the Great Recession).

As a group, men are still more likely than women to be in the paid labor market, see id. (showing that from 1948 to 2019, the percentage of men in the labor force was higher than the percentage of women in the labor force), but the percentage of men in the labor force is decreasing. By contrast, the labor-force participation rate for women has increased substantially during the same period. See id. (reporting that the labor-force participation rate steadily increased from 32.7% in 1948 to 57.4% in 2019 for women, while it decreased from 86.6% to 69.2% in the same time period for men).

90. See Labor Force Characteristics by Race and Ethnicity, 2021, at tbl.4, U.S. Bureau Lab. Stat. (Jan. 2023), https://www.bls.gov/opub/reports/race-and-ethnicity/2021/ [https://perma.cc/PNE2-SSLP] [hereinafter U.S. Bureau of Lab. Stat., Labor Force Characteristics by Race] (reporting decreased participation in the labor force across all races and ethnicities).

91. See Valerie Wilson & William Darity Jr., Econ. Pol'y Inst., Understanding Black-White Disparities in Labor Market Outcomes Requires Models that Account for Persistent Discrimination and Unequal Bargaining Power 5 (2022), https://files.epi.org/uploads/215219.pdf [https://perma.cc/582G-ZCW7] (showing the unemployment rate for Black men across four decades as consistently twice as high as for white men). Black women are more likely than white women to be unemployed, U.S. Bureau of Lab. Stat., Women in the Labor Force, supra note 5, at tbl.6, but Black women experience lower rates of unemployment than Black men. See Wilson & Darity, supra, at 9 fig.F (showing that from 1978 to 2019, the unemployment rate of Black men was consistently higher than that of Black women).

92. See U.S. Bureau of Lab. Stat., Labor Force Characteristics by Race, supra note 90, at tbl.4 (finding that in 2021, 63.5% of Black men were in the labor force as compared with 67.9% of white men, 71.8% of Asian men, and 75.4% of Hispanic men).

93. See Wilson & Darity, supra note 91, at 7, 8 fig.D ("[B]lack workers are not just twice as likely to be unemployed as similarly educated white workers, but they are often more likely to be unemployed than less-educated whites."); see also id. at 7 (showing

With regard to earnings, men as a group still earn more than women,[94] but men have also experienced the biggest relative gains *and* losses over the last several decades.[95] At the top of the income spectrum, the earnings of men with an advanced degree increased by 43% between 1979 and 2017, and by 12% for men with only a college degree.[96] Highly educated white and AAPI men made especially striking gains.[97] By contrast, median wages for men without college degrees have declined by nearly half since the 1970s.[98] The longstanding pay gap between Black men and white men has steadily increased over the last several decades.[99] Gay

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unemployment rates by education and noting that "only black workers with advanced degrees have approached anything near parity with their white counterparts").

94. The gender wage gap persists across all levels of educational attainment. See Wendy Chun-Hoon, 5 Fast Facts: The Gender Wage Gap, DOL Blog (Mar. 14, 2023), https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap [https://perma.cc/EXC9-KTKF] ("Overall, women must complete one additional degree in order to be paid the same wages as a man with less education."). The wage gap is somewhat smaller for men and women aged twenty-five to thirty-four. See Carolina Aragão, Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades, Pew Rsch. Ctr. (Mar. 1, 2023), https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/ [https://perma.cc/XA36-9CD5] ("In 2022, women ages 25 to 34 earned an average of 92 cents for every dollar earned by a man in the same age group—an 8-cent gap."). The biggest earnings gap is between white men and Black and Hispanic women. See Rakesh Kochhar, The Enduring Grip of the Gender Pay Gap, Pew Rsch. Ctr. (Mar. 1, 2023), https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/ [https://perma.cc/9GJG-7BVF] ("In 2022, Black women earned 70% as much as White men and Hispanic women earned only 65% as much.").

95. See David H. Autor, The Labor Market Impacts of Technological Change: From Unbridled Enthusiasm to Qualified Optimism to Vast Uncertainty 5, 6 fig.2 (Nat'l Bureau of Econ. Rsch., Working Paper No. w30074, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4122803 (on file with the *Columbia Law Review*) ("Between 1979 and 2017, the real weekly earnings of full-time, full-year working men with a post-baccalaureate degree rose . . . . Conversely, real earnings *fell* substantially among men without a four-year degree . . . .").

96. Id. at 5.

97. See, e.g., Eileen Patten, Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress, Pew Rsch. Ctr. (July 1, 2016), https://www.pewresearch.org/short-reads/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/ [https://perma.cc/B3CD-L8VT] (showing that Asian men have outpaced other groups since the 1990s); see also Cahn et al., supra note 58, at 4 (describing how men have gained at the top of the income ladder since the early nineties).

98. See Ruggles, Patriarchy, Power, and Pay, supra note 6, at 1809, 1810 fig.12(b) (marking a 44% decline in median wages from a peak of $41,000 in 1973 to $23,000 in 2013). Median wages for women have not dropped nearly as much. See id. (noting a 24% decline in median wages for women since their peak in 2001); see also Autor, supra note 95, at 5 ("[R]eal earnings fell . . . by 10 percent among men with some-college; by 21 percent among men with exactly a high school diploma; and by 25 percent among men without a high school diploma." (emphasis omitted)). By contrast, women's earnings rose during the same period at all educational levels, although the gains for the least educated women were modest. Id.

99. See Wilson & Darity, supra note 91, at 11 fig.H (showing that the gap between Black and white male hourly wages increased from 14.9% in 1979 to 22.2% in 2019).

men earn more than straight men,[100] in large part because of their higher levels of educational attainment.[101]

The physical and mental health of boys and men is another area of challenges in well-being. Perhaps the starkest marker is the increased mortality rate for working age adults (aged twenty-five to sixty-four). Mortality rates have been rising sharply for all adults in this group,[102] but two main drivers are concentrated among men, especially those without a college degree[103]: an increase in overdose and alcohol-related deaths and an increase in deaths by suicide.[104] Rates of overdose deaths have been rising for all demographic groups, with a 538% increase between 1990 and 2017,[105] but the largest increase is for white men aged twenty-five to forty-four with only a high school diploma or less.[106] Alcohol-related deaths are a more complex story, but, again, deaths are concentrated among white men with only a high school diploma or less.[107] Finally, suicide mortality has increased, especially since the early 2000s.[108] American Indian/Alaska

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100. Kitt Carpenter, Gay Men Used to Earn Less Than Straight Men; Now They Earn More, Harv. Bus. Rev. (Dec. 4, 2017), https://hbr.org/2017/12/gay-men-used-to-earn-less-than-straight-men-now-they-earn-more [https://perma.cc/WW46-V54E].

101. See supra note 86 and accompanying text.

102. See Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 1 (attributing an increase in mortality for working-age adults to specific causes, including drugs, alcohol, and suicide).

103. See id. at 238 ("Mortality due to substance use generally (drug and alcohol use) explains most of the growth in the socioeconomic gap in mortality among men and about half of the growth in the gap among women.").

104. See id. at 8 (noting suicide as substantially higher among men than women and as a primary driver of working-age mortality); see also id. at 1 ("[W]hy mortality has been rising among working-age adults is not straightforward. Mortality is the final result of both acute events and cumulative, long-term processes involving the interaction of social, behavioral, economic, environmental, and biological factors that develop and unfold over the life course."); id. at 222 fig.7-1 (documenting the significantly higher mortality rates due to drug poisoning for men).

105. Id. at 220–22 (describing this increase and noting the especially sharp increase since 2010).

106. See id. at 221–23, 222 fig.7-1. There is also a geographic component to overdose deaths, with concentrations in some rural areas, especially parts of Appalachia, New England, and the deindustrialized Midwest. See id. at 223–32.

107. See id. at 232–38 ("[T]he research collectively suggests that among working-age Whites, particularly men, increased mortality from [alcohol] was greater among those with a high school degree or less than among those with a college degree."); see also Merianne Rose Spencer, Sally C. Curtin & Matthew F. Garnett, CDC, Alcohol-Induced Death Rates in the United States, 2019–2020, at 2 (2022), https://www.cdc.gov/nchs/data/databriefs/db448.pdf [https://perma.cc/S8T6-996Y] (noting that in 2020, the alcohol-induced death rate was 19.2 per 100,000 men and 7.5 per 100,000 women).

108. Men are four times more likely to die by suicide than women. See Sally C. Curtin, Matthew F. Garnett & Farida B. Ahmad, HHS, Provisional Numbers and Rates of Suicide by Month and Demographic Characteristics: United States, 2021, at 3 (2022), https://stacks.cdc.gov/view/cdc/120830 [https://perma.cc/DLL7-TW8K] (reporting that in 2021, men died by suicide at a rate nearly four times that of women); see also Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 283–85 (setting forth suicide mortality rates and

Native men have the highest absolute rate of suicide mortality and the sharpest increase between 2011 and 2021.[109] White working-age men with only a high school diploma or less also experienced a sharp increase in suicide mortality from the early 2000s to 2017.[110] Most major studies tracking measures of well-being do not contain information about sexual orientation, and thus it is hard to compare, for example, overdose rates among men by sexual orientation,[111] but there is evidence that LGBTQ+ individuals face significant health and safety challenges.[112]

A fourth measure of the crisis in well-being for boys and men involves social integration.[113] In 1990, more than half of all men reported that they

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explaining that suicide rates in this source do not include deaths related to drugs because of the difficulty of determining intentionality). There is also a gender gap between boys and girls. See Sally C. Curtin, Melonie Heron, Arialdi M. Miniño & Margaret Warner, HHS, Recent Increases in Injury Mortality Among Children and Adolescents Aged 10–19 Years in the United States: 1999–2016, at 12 tbl.1 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_04.pdf [https://perma.cc/JF4M-KY8P] (finding that in 2016, the suicide rate per 100,000 minors ages ten to nineteen was 8.8 for boys and 3.4 for girls).

109. See Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 283 n.1 (reporting that suicide mortality is highest among American Indians/Alaska Natives as compared to all racial/ethnic groups); Heather Saunders & Nirmita Panchal, A Look at the Latest Suicide Data and Change Over the Last Decade, KFF (Aug. 4, 2023), https://www.kff.org/mental-health/issue-brief/a-look-at-the-latest-suicide-data-and-change-over-the-last-decade/ [https://perma.cc/XR9Q-HFPZ] (reporting a 70.3% increase in suicide mortality of American Indians and Alaska Natives between 2011 and 2021).

110. See Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 284–86 (documenting this increase and noting that suicide mortality remained roughly the same or declined during the same period for Black and Hispanic men, although with a small increase for most age groups beginning around 2010); id. at 294–95 (documenting the increase for men with only a high school diploma and further discussing the correlation between economic conditions, especially unemployment, and suicide). More recent statistics show an increase in suicide mortality for Black, Hispanic, and AAPI people between 2011 and 2021, although the absolute rate is still considerably lower than for white people. See Saunders & Panchal, supra note 109 (indicating a 15.5% absolute rate for white people as compared to 5.5%, 5.7%, and 6.0% respective rates for Black, Hispanic, and AAPI people; further reporting a 58.2%, 38.6%, and 16.7% respective increases in suicide rates for Black, Hispanic, and AAPI people). The suicide mortality for men is about four times higher than that of women. See id. (indicating a 22.8% suicide mortality rate for men and 5.7% rate for women in 2021).

For a discussion of the risk of suicide among adolescent boys, see Laura Kann et al., CDC, Youth Risk Behavior Surveillance—United States, 2017, at 24–28, 188 tbl.44, 191 tbl.46, 194 tbl.48, 197 tbl.50 (2018), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf [https://perma.cc/2GYP-RBDS] (reporting survey results showing that boys in grades nine through twelve report high rates of serious consideration of suicide, having a suicide plan, attempting suicide, and suicide attempts resulting in injury, poisoning, or overdose that required medical treatment).

111. See Mittleman, Intersecting the Academic Gender Gap, supra note 86, at 308–09 (lamenting "severe data limitations" in research on sexual orientation).

112. See id. at 321 (describing how gay boys and men continue to experience more discrimination and greater fear for their safety than straight men); see also Kann et al., supra note 110, at 42, 46 (describing the correlation between health risk factors, such as tobacco and alcohol use, and adolescents who identify as gay or bisexual).

113. This is part of a larger trend. Although the patterns are complex and there is considerable nuance and differences among subgroups, men and women from all racial

had six or more close friends; in 2021, only a quarter of all men could say the same.[114] The percentage of men who report having no friends whatsoever has increased 500% since 1990 and now stands at 15%.[115] In one survey, two-thirds of younger men said that "no one really knows me well";[116] almost one-third of younger men reported not spending time with someone outside their household in the past week;[117] and nearly half of all men reported that their "online lives are more engaging and rewarding than their offline lives."[118] Social integration is correlated with educational attainment: Men without college degrees are much more likely to be socially isolated.[119]

Men are also less connected to religious groups and less likely to be in intimate relationships than women. More men than women (an eight-point gap) never attend religious services.[120] Younger men are less likely

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and ethnic groups and across socioeconomic statuses have experienced an increase in social isolation since the early 2000s. See Viji Diane Kannan & Peter J. Veazie, US Trends in Social Isolation, Social Engagement, and Companionship—Nationally and by Age, Sex, Race/Ethnicity, Family Income, and Work Hours, 2003–2020, Soc. Sci. & Med.—Population Health, Mar. 2023, at 1, 5–7 ("We find Americans' social connectedness declined over almost two decades—social isolation increased, social engagement decreased across all roles, and companionship decreased."). For a discussion of social integration that focuses on boys and men, see Niobe Way, Rebels With a Cause: Reimagining Boys, Ourselves, and Our Culture 27–28 (2024) (describing the author's decades of research with boys and men that finds that boys and men crave connection but struggle in a culture that devalues relationships for boys and men).

114. Daniel A. Cox, Men's Social Circles Are Shrinking, Surv. Ctr. on Am. Life (June 29, 2021), https://www.americansurveycenter.org/why-mens-social-circles-are-shrinking/ [https://perma.cc/GBS3-Y7KY] [hereinafter Cox, Men's Social Circles]. This is part of a larger problem, see, e.g., Vivek H. Murthy, Together: The Healing Power of Human Connection in a Sometimes Lonely World 10 (2020) ("According to a 2018 report by the Henry J. Kaiser Family Foundation, 22% of all adults in the US say they often or always feel lonely or socially isolated. That's well over fifty-five million people . . . ." (footnote omitted)), but boys and men face a sharper decline than girls and women.

115. Cox, Men's Social Circles, supra note 114.

116. Gary Barker, Caroline Hayes, Brian Heilman & Michael Reichert, Equimundo, State of American Men: From Crisis and Confusion to Hope 3 (2023), https://www.equimundo.org/wp-content/uploads/2023/05/STATE-OF-AMERICAN-MEN-2023.pdf [https://perma.cc/5V2S-46EG] (internal quotation marks omitted).

117. Id. at 4.

118. Id.

119. Cf. Daniel A. Cox, The College Connection: The Education Divide in American Social and Community Life, Surv. Ctr. on Am. Life (Dec. 13, 2021), https://www.americansurveycenter.org/research/the-college-connection-the-education-divide-in-american-social-and-community-life/ [https://perma.cc/6YU8-2R9Y] (documenting this correlation for men and women and explaining that although all groups are more socially isolated than thirty years ago, there has been a steeper decline for non-college-graduates).

120. See Tom W. Smith, Michael Davern, Jeremy Freese & Stephen L. Morgan, General Social Surveys (GSS), 1972–2022, NORC Univ. Chi. https://gssdataexplorer.norc.org/trends (on file with the *Columbia Law Review*). Of the men and women who do participate in religious services, there is not much of a gender gap in the levels of participation. See id. Although older men are more likely than older women to

than younger women to be in an intimate relationship,[121] and a majority of men say they are not in a satisfying, stable relationship.[122] Moreover, social isolation and marriage are correlated: Never-married men and men with disrupted relationships have fewer social contacts, including partners, friends, relatives, and children.[123]

### B. *Understanding the Crisis*

Scholars and policymakers are engaged in an active debate about the causes of the decline in male well-being. Although disagreements persist, there is a growing consensus that the crisis is rooted in large-scale structural changes to the economy over the last forty years, which have had profound material and psychological effects on boys and men.[124] Policy choices in the United States exacerbate the declining economic prospects of men. And the growth of technology has lured many boys and men online, leading them to retreat from in-person social engagement. This section describes these compounding forces before turning to masculinities studies, a field that provides deeper sociological and psychological context for how and why structural changes impact boys and men.

1. *Economic Changes, Policy Choices, and Technology.* — The single biggest factor in the changing economic position of men without college

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have left their childhood religion, among young adults, the pattern is reversed. See Daniel A. Cox & Kelsey Eyre Hammond, Young Women Are Leaving Church in Unprecedented Numbers, Surv. on Am. Life (Apr. 4, 2024), https://www.americansurveycenter.org/newsletter/young-women-are-leaving-church-in-unprecedented-numbers/ [https://perma.cc/GX37-GFR6] (reporting the results of a study and finding that of the adults in the Baby Boom generation who left their childhood religion, 57% were men and 43% were women; of the adults in the Gen Z generation who left their religion, only 46% were men and 54% were women).

121. See Anna Brown, Pew Rsch. Ctr., Nearly Half of U.S. Adults Say Dating Has Gotten Harder for Most People in the Last 10 Years 17 (2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/08/PSDT_08.20.20.dating-relationships.full_.report.pdf [https://perma.cc/7V6V-LUD5] (finding that 51% of men aged eighteen to twenty-nine are single, compared to 32% of women).

122. See Barker et al., supra note 116, at 4 (reporting only 38% of all men in the study as being in a stable relationship and mostly satisfied; 22% of men as mostly either not looking for a relationship or unable to find sexual partners; 13% of men as in occasional relationships but looking for something more committed).

123. See Debra Umberson, Zhiyong Lin & Hyungmin Cha, Gender and Social Isolation Across the Life Course, 63 J. Health Soc. Behav. 319, 322, 328–29 (2022) (summarizing studies finding that boys and men are more isolated than girls and women through most of the life course and that this gender difference is much greater for the never-married and those with disrupted relationship histories).

124. See Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 11 (explaining that a primary cause of the increased mortality, especially among white working-age men without college degrees, is "adverse economic trends"); Pamela J. Smock & Christine R. Schwartz, The Demography of Families: A Review of Patterns and Change, 82 J. Marriage & Fam. 9, 11–12 (2020) (summarizing the literature documenting the structural changes to the economy and a decline in marriage).

degrees is the decimation of manufacturing jobs and the marginalization of the jobs that remain for these men.[125] Throughout the 1950s and continuing for nearly three decades, blue-collar workers in unionized workplaces—overwhelmingly white men[126]—reaped considerable economic gains, enjoying decent wages,[127] job security,[128] and social status.[129] This enhanced income, security, and social standing provided a foundation for the families of the postwar era and the enhanced importance of the male head-of-household role.[130] Black men were not in the same privileged position as white men, but they did have some access to stable manufacturing jobs.[131]

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125. See, e.g., Anthony P. Carnevale, Nicole Smith & Jeff Strohl, Recovery: Job Growth and Education Requirements Through 2020 Executive Summary 10 (2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.ES_.Web_.pdf [https://perma.cc/PP4P-6G3G] (discussing continuing decline in demand for physical skills); Daron Acemoglu & Pascual Restrepo, Tasks, Automation, and the Rise in US Wage Inequality 37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28920, 2021), www.nber.org/system/files/working_papers/w28920/w28920.pdf [https://perma.cc/8TLG-TD3R] ("[W]e documented that between 50% and 70% of the changes in US wage structure between 1980 and 2016 are accounted for by the relative wage declines of worker groups specialized in routine tasks in industries experiencing rapid automation.").

126. See Andrew J. Cherlin, Labor's Love Lost: The Rise and Fall of the Working-Class Family in America 53 (2014) [hereinafter Cherlin, Labor's Love Lost] (describing the "white panethnic" makeup of unions).

127. See id. at 93 (observing that male working-class income almost doubled between the early 1950s and the 1970s); Ruggles, Patriarchy, Power, and Pay, supra note 6, at 1808 (describing the post-World-War-II era as "a golden age of wage labor for young men").

128. See Alfred W. Blumrosen, Seniority Rights and Industrial Change: *Zdanok v. Glidden Co.*, 47 Minn. L. Rev. 505, 505 (1963) (describing the benefits of seniority rights systems created by collective bargaining agreements).

129. See, e.g., Katherine V.W. Stone, Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers, 27 Berkeley J. Emp. & Lab. L. 251, 281 (2006) (describing the "social insurance" provided by the twentieth-century union model).

130. See Cherlin, Labor's Love Lost, supra note 126, at 90–119 ("[The postwar era] was also the only time when many working-class families could attain the culturally potent ideal of the breadwinner husband and the homemaker wife . . . .").

131. In the 1940s, Black men benefitted from jobs in the defense industry, see Thomas N. Maloney, Wage Compression and Wage Inequality Between Black and White Males in the United States, 1940–1960, 54 J. Econ. Hist. 358, 364–65 (1994), and labor shortages, see Andreas Ferrara, World War II and Black Economic Progress, 40 J. Labor Econ. 1053, 1087–88 (2022), but they were often subject to racial discrimination in factories, see William J. Collins, African-American Economic Mobility in the 1940s: A Portrait From the Palmer Survey, 60 J. Econ. Hist. 756, 776–78 (2000), paid less than their white counterparts, see Maloney, supra, at 379–80, and excluded from unions, see Philip Dray, There Is Power in a Union: The Epic Story of Labor in America 482–83 (2010). Further, Black veterans of World War II were often denied the benefits promised by the G.I. Bill, contributing to a racial wealth gap that continues to expand. See Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 121 (2005) ("[T]here was no greater instrument for widening an already huge racial gap in postwar America than the GI Bill.").

Today, manufacturing jobs are much more scarce.[132] As the economy has deindustrialized, better jobs and worse jobs have grown in number, producing employment polarization.[133] Better jobs tend to require higher levels of education and experience,[134] pay well, and offer opportunities for career growth.[135] There is a demand for workers at the other end of the education and income spectrum—jobs in the service economy that do not require a college degree—but these jobs pay poorly, offer little security, and provide limited opportunity for advancement.[136] There are a few sectors of the economy that do not fall into these poles, notably in healthcare, which requires workers with some skill and offers stable, relatively well-paid jobs.[137]

Men with college degrees have done disproportionately well in obtaining the highest-paying jobs in the new economy,[138] but for men who

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132. See Katelynn Harris, Forty Years of Falling Manufacturing Employment, U.S. Bureau Lab. Stat. (Nov. 20, 2020), https://www.bls.gov/opub/btn/volume-9/forty-years-of-falling-manufacturing-employment.htm [https://perma.cc/38RJ-U8AL] (detailing that in 1979, manufacturing jobs reached an all-time high of 19.6 million jobs, and in 2019, it was 12.8 million jobs). The deindustrialization underlying this loss in manufacturing jobs hit Black men first. See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 125–26 (1993) ("[The elimination of] many high-paying jobs in manufacturing . . . took a heavy toll on the distribution of black income, especially among families in the industrial cities of the northeast and midwest."). Many of the men who lost manufacturing jobs left the workforce entirely. See David Autor, David Dorn & Gordon H. Hanson, On the Persistence of the China Shock 17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29401, 2021), https://www.nber.org/system/files/working_papers/w29401/w29401.pdf [https://perma.cc/S7VQ-88DF] (finding no evidence that nonmanufacturing sectors absorbed workers who lost manufacturing jobs).

133. See Arne L. Kalleberg, Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States: 1970s to 2000s, at 2 (2011) ("[There] has been a polarization of jobs and employment relations with regard to aspects of job quality, such as security and stability, economic compensation, control over work activities, and time spent on the job.").

134. See Carnevale et al., supra note 125, at 6 ("Three of the fastest-growing occupations . . . also have the highest demand for postsecondary education and training.").

135. See Autor, supra note 95, at 9 ("[A]t the high end of the labor market, a growing cadre of high-education, high-wage occupations offer strong career prospects, rising lifetime earnings, and significant employment security.").

136. See id. at 9 ("At the other end [of the labor market], low-education, low-wage occupations, often in personal services, provide little economic security and limited career earnings growth."); see also Carnevale et al., supra note 125, at 3 (showing that the percentage of jobs that require no more than a high school degree has declined from 72% in 1973 to 44% in 1992 to 36% in 2020, while the percentage of jobs requiring a bachelor's degree or higher has increased from 16% in 1973 to 35% in 2020).

137. See News Release, U.S. Bureau of Lab. Stat., Employment Projections: 2023–2033 Summary 2 (Aug. 29, 2024), https://www.bls.gov/news.release/pdf/ecopro.pdf [https://perma.cc/5TTK-NCQ5] (projecting rapid growth for the healthcare sector); see also Carnevale et al., supra note 125, at 6 ("Though healthcare support is . . . fast growing, it does not require the same amount of training.").

138. See Elise Gould, Econ. Pol'y Inst., State of Working America Wages 2019, at 15 (2020), https://files.epi.org/pdf/183498.pdf [https://perma.cc/L8NB-92JC] ("Over the entire period from 2000 to 2019, wage growth among those with a college degree rose faster

do not have a college degree, wages and opportunities have dropped precipitously.[139] And men are less likely to be employed in growth sectors such as healthcare and other personal services—jobs traditionally filled by women.[140]

Changes to the economy and labor market are not the only explanations for the decline in male well-being. Policy choices also have a negative impact. A heavy reliance on incarceration makes it even harder for men to obtain jobs and integrate into society. This impact is concentrated among Black men, who were disproportionately affected by the concentrated unemployment in urban areas that followed deindustrialization beginning in the 1960s and who were disproportionately incarcerated as a result of the punitive carceral policies that followed, especially in the period beginning in the 1980s.[141] Hispanic and Native American men are also overrepresented in prisons and jails.[142]

Formerly incarcerated men face significant barriers if they try to pursue higher education, including ineligibility for Pell Grants and federal student loans, and inquiries by college admissions officers into applicants'

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than among those with a high school diploma (8.8% vs. 4.0%)."). For older data, see Elise Gould, Econ. Pol'y Inst., State of Working America Wages (2019), https://files.epi.org/pdf/161043.pdf [https://perma.cc/4KD2-VYT5] (observing that "[a]s inequality among men has continued to increase, it is not surprising that the gender wage gap at the top grew significantly"); see also Cahn et al., supra note 58, at 4 (indicating that gender disparities have grown most for college graduates); cf. U.S. Census Bureau, Income Distribution, supra note 3 (finding that in 2023, 4,271,000 men and 1,777,000 women earned at least $250,000).

139. See supra text accompanying notes 89–98.

140. See Domingo Angeles, Share of Women in Occupations with Many Projected Openings, 2016–26, U.S. Bureau Lab. Stat. (Mar. 2018), https://www.bls.gov/careeroutlook/2018/data-on-display/dod-women-in-labor-force.htm [https://perma.cc/X3AQ-WUZV] (showing that thirteen out of the twenty occupations projected to have the most openings each year are employing more women than men); Fastest Growing Occupations, U.S. Bureau Lab. Stat., https://www.bls.gov/ooh/fastest-growing.htm [https://perma.cc/L7LH-4PWD] (last updated Apr. 17, 2024) (reporting that traditionally female occupations—such as nurse practitioners, physician assistants, occupational therapy assistants, and personal care aides—are among the occupations with the highest projected growth).

141. See E. Ann Carson, DOJ, Prisoners in 2021—Statistical Tables 25 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/J9J6-4GCT] (finding that Black men have the highest rate of incarceration in the United States and that the largest Black–white gap in imprisonment is in men aged eighteen to nineteen, with Black men incarcerated at 11.6 times the rate for white men in the same age group); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1819–20 (2020) (tracing California's twentieth-century prison boom to "crises in capitalism rather than to rising crime rates" and observing that the "state invested in prisons to absorb 'the labor and land rendered surplus by deindustrialization and globalization of capital'" (quoting Ruth Wilson Gilmore, Golden Gulag 54–55, 64 (2007))).

142. See Carson, supra note 141, at 25 (finding that Hispanic men are imprisoned at twice the rate of white men and that Native American men are also overrepresented).

criminal histories.[143] Incarceration also denies individuals the opportunity to develop employable skills,[144] and formerly incarcerated people who seek an occupational license face restrictions based on criminal history.[145] Given these obstacles, it is unsurprising that formerly incarcerated men are far less likely to be employed than men without a history of incarceration.[146] This is especially true for Black men.[147] Moreover, even arrests for relatively minor offenses that do not result in imprisonment have negative effects on high school completion, college attendance, and employment rates.[148]

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143. See Press Release, Lucius Couloute, Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People, Prison Pol'y Initiative (Oct. 2018), https://www.prisonpolicy.org/reports/education.html# [https://perma.cc/P3SS-QCCF] ("While those in the general public have a 1 in 3 chance of attaining a college degree, a formerly incarcerated person's chances are less than 1 in 20." (emphasis omitted)).

144. See Kelly Parker, Employment After Prison: The Importance of Supporting Workers Who Are Seeking Work After Incarcerations, Nat'l Career Dev. Assoc. (Dec. 1, 2022), https://www.ncda.org/aws/NCDA/page_template/show_detail/476831?model_name=news_article [https://perma.cc/6Y87-P9R8] ("Lack of employability skills is a major issue for many individuals released from the prison system due to a lack of educational attainment.").

145. See Couloute, supra note 143 (discussing license restrictions as a barrier to employment after incarceration).

146. See Employment of Young Men After Arrest or Incarceration, U.S. Bureau Lab. Stat. (May 20, 2019), https://www.bls.gov/opub/ted/2019/employment-of-young-men-after-arrest-or-incarceration.htm [https://perma.cc/4888-WLH3] [hereinafter U.S. Bureau of Lab. Stat., Employment of Young Men] (finding that in the eighteen months after incarceration, employment rates ranged from 34–58% for men who were incarcerated for at least six months, compared with employment rates of 82–87% for men never arrested or incarcerated).

147. See Expanding Economic Opportunity for Formerly Incarcerated Persons, The White House (May 9, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/ [https://perma.cc/GD9E-DQPT] (showing that formerly incarcerated Black men face an unemployment rate of 35.2% compared with 18.4% for formerly incarcerated white men).

148. See U.S. Bureau of Lab. Stat., Employment of Young Men, supra note 146 (describing the employment rate for men who were arrested but not incarcerated as ranging from 69–77%, compared to 82–86% for men never arrested or incarcerated); see also Randi Hjalmarsson, Criminal Justice Involvement and High School Completion, 63 J. Urb. Econ. 613, 621–22 (2008) (finding arrested individuals are approximately 11% less likely to graduate high school than nonarrested individuals); Alex O. Widdowson, Sonja E. Siennick & Carter Hay, The Implications of Arrest for College Enrollment: An Analysis of Long-Term Effects and Mediating Mechanisms, 54 Criminology 621, 622 (2016) (explaining that being arrested is associated with "poor academic performance, disciplinary infractions, and low curricular involvement," which makes it more difficult to advance to college). And the problems are compounding. See, e.g., Frank W. Munger & Carroll Seron, Law and the Persistence of Racial Inequality in America, 66 N.Y.L. Sch. L. Rev. 175, 196 (2021–2022) ("Incarceration of Black American fathers significantly increases the odds that their offspring have serious mental health and behavioral problems, infant mortality, and homelessness.").

Another factor in the decline in male well-being is the high rate of child poverty in the United States.[149] The policy choice to tolerate a high level of inequality[150] means that a child's life chances turn on the parents' socioeconomic status and the child's gender.[151] Poverty has a well-established impact on educational and employment outcomes for all children,[152] but disadvantage during childhood impacts boys more than girls.[153] Comparing different-sex siblings who share the same mother and

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149. See Dana Thomson, Renee Ryberg, Kristen Harper, James Fuller, Katherine Paschall, Jody Franklin & Lina Guzman, Lessons From a Historic Decline in Child Poverty 10 fig.1.1, 78 (2022), https://cms.childtrends.org/wp-content/uploads/2022/09/Poverty-PDF-report.pdf [https://perma.cc/98HS-GUDH] (showing a child poverty rate, as measured by the supplemental poverty measure, of 11.4% in 2019, with the poverty rate for Black children at 18%).

150. For a discussion of the choice to allow high levels of poverty and inequality, see Matthew Desmond, Poverty, by America 40 (2023) (arguing that the United States has not combatted poverty because many portions of the population profit from it); Paul Krugman, Opinion, America Betrays Its Children Again, N.Y. Times (Sept. 14, 2023), https://www.nytimes.com/2023/09/14/opinion/child-poverty-america.html (on file with the *Columbia Law Review*) (identifying the policies that could alleviate much child poverty—such as the continuation of the COVID-19-era child tax credit—and the political choice not to pursue these policies). The United States is an outlier among other wealthy countries in its meager support of families. See OECD Fam. Database, CO2.2: Child Poverty 1 (2021), https://www.oecd.org/els/CO_2_2_Child_Poverty.pdf [https://perma.cc/5NTB-SKKZ] (explaining that the United States has a higher child poverty rate than most of its peer countries).

151. See Caroline Ratcliffe, Urb. Inst., Child Poverty and Adult Success 9 (2015), https://www.urban.org/sites/default/files/publication/65766/2000369-Child-Poverty-and-Adult-Success.pdf [https://perma.cc/PJ7L-NMKW] ("[A]lthough 93 percent of never-poor children complete high school . . . only 64 percent of persistently poor children do so."); Marianne Bertrand & Jessica Pan, The Trouble With Boys: Social Influences and the Gender Gap in Disruptive Behavior, 5 Am. Econ. J.: Applied Econ. 32, 61 (2013) (describing how boys from disadvantaged families do worse in school than their female counterparts).

152. For a summary of this research, see How Can We Amplify Education as an Engine of Mobility?, Opportunity Insights, https://opportunityinsights.org/education/ [https://perma.cc/AQX4-2ULH] (last visited Aug. 8, 2024) ("Children with parents in the top 1% of the income distribution are 77 times more likely to attend . . . elite colleges and universities than children with parents in the bottom 20% of the income distribution."); see also Patrice L. Engle & Maureen M. Black, The Effect of Poverty on Child Development and Educational Outcomes, 1136 Annals N.Y. Acad. Scis. 243, 244 (2008) ("The association between poverty and children's development and academic performance has been well documented, beginning as early as the second year of life . . . . Low-income children are at increased risk of leaving school without graduating, resulting in inflation-adjusted earnings in the United States that declined 16% from 1979 to 2005 . . . ."); Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, The Fading American Dream: Trends in Absolute Income Mobility Since 1940, at 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22910, 2016), https://opportunityinsights.org/wp-content/uploads/2018/03/abs_mobility_paper.pdf [https://perma.cc/EB4W-5MLM] (finding that rates of upward income mobility in the United States have sharply declined, especially for children of middle-class parents).

153. See Autor et al., Family Disadvantage and the Gender Gap, supra note 75, at 339 (defining childhood disadvantage as "low availability of household resources, child-rearing inputs (e.g., nutrition, safety in the home, stimuli), and parental attention"); id. at 340–41

grew up in the same home, boys have lower educational achievement scores and lower rates of high school completion.[154] These differences are correlated with disadvantage both within the family, such as limited material resources, and outside the family, such as low-quality schools.[155]

Finally, there is increasing evidence that the rising use of technology—gaming, smartphones, and the like—has contributed to the social isolation of boys and men and adversely affected their mental health.[156] Researchers posit that the digital world is especially enticing to boys and men and that boys and men have increasingly migrated their social and sexual lives online since the introduction of the personal computer in the 1970s.[157] This may be satisfying in the moment, but it comes at the cost of developing in-person relationships, especially with women.[158]

2. *Insights From Masculinities Theory.* — Masculinities theory provides some context for understanding why structural changes in the economy and policy choices have had such a profound impact on the well-being of boys and men.[159] Masculinities theory emphasizes that although men

("[B]oys born to low-[socioeconomic status] families perform worse on standardized tests . . . , have higher rates of absences and behavioral problems, and are less likely to graduate high school than are girls. . . . [This] reflects the differential effect of . . . non-family environment."). There are many theories about why childhood disadvantage has a greater impact on boys than girls, see, e.g., Bertrand & Pan, supra note 151, at 53 (finding that in single-mother households, mothers spend more time with their daughters and that in single-mother and two-parent households, parents are more likely to read to and enroll daughters in extracurricular activities), but there is no consensus on the causal mechanism, see Melanie Wasserman, The Disparate Effects of Family Structure, 30 Future Fam. 55, 70–76 (2020) (describing the literature and concluding that there is no consensus).

154. The gender gap between boys and girls from low-income families is apparent as early as the beginning of kindergarten and increases with each year of schooling. See Autor et al., Family Disadvantage and the Gender Gap, supra note 75, at 359 ("The cumulative adverse effect of family disadvantage on the boy–girl gap in behavioral and academic outcomes in kindergarten through middle school may contribute to gender gaps in downstream market outcomes, including educational attainment and earnings.").

155. See id. at 341, 373 (explaining that factors such as school and neighborhood quality can mitigate or worsen the gap between boys and girls).

156. See Jonathan Haidt, The Anxious Generation: How the Great Rewiring of Childhood Is Causing an Epidemic of Mental Illness 196 (2024) (reporting that the rise of technology correlates with a decline in physical and mental health for boys and young men, who have withdrawn their time from the physical world and relationships to invest in virtual spaces).

157. See id. at 195–96.

158. See id. at 196.

159. For a definition of masculinities theory, see Michael Kimmel, Foreword, *in* Masculinities and the Law, at xiii–xvi (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (explaining that masculinities theory, which assumes there are multiple masculinities, analyzes the social construction of both the feminine and masculine and explores how gender norms imposed on men and women are "policed by both men and women"). For a description of the history of masculinities theory, explaining that it began in the social sciences, see Ann C. McGinley & Frank Rudy Cooper, Identities Cubed: Perspectives on Multidimensional Masculinities Theory, 13 Nev. L.J. 326, 330–33 (2013) (describing the

should not be essentialized,[160] there is a dominant construction of masculinity. Theorists call this construct hegemonic masculinity and posit that men are held—and hold each other—to this dominant standard.[161] The content of hegemonic masculinity varies with context and time, but an enduring core feature is that men tend to devote attention to how they rank among other men as measured against the dominant standard.[162] Given the jockeying for a position in the hierarchy, theorists emphasize that masculinity is precarious, and, accordingly, men need to prove themselves repeatedly.[163] Indeed, precisely because being a "real man" is a subjective, social condition, it depends on how men see themselves in relation to other men.[164]

The dynamic of boys and men needing to establish themselves in the male hierarchy plays out in multiple contexts. In K–12 education, for example, a norm has taken hold that trying hard in school is a feminine trait, and thus boys must choose between doing well in school and being popular.[165] Norms of masculinity on the playground (and often in the C-

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history of masculinities theory as a response to feminism in the late 1960s and early 1970s, and noting that early masculinities theorists recognized male power while underscoring its socially constructed nature).

160. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990) (criticizing feminist legal theory for relying upon "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience").

161. See Dowd, The Man Question, supra note 55, at 27 ("Hegemonic masculinity identifies the most empowered, those at the top of the male hierarchy."); Athena D. Mutua, The Multidimensional Turn: Revisiting Progressive Black Masculinities, *in* Masculinities and the Law, supra note 55, at 78, 86–88 ("[M]en are not a monolithic group, as antiessentialism theory provides and empirical evidence suggests. Rather, they are differentiated in a multitude of ways and these ways are also ranked such that a hierarchy of men and masculinities exists."). For the original articulation of hegemonic masculinity, see R.W. Connell, Men's Bodies, *in* Which Way Is Up? Essays on Sex, Class and Culture 17, 17–32 (R.W. Connell ed., 1983) (linking the "construction of masculinity with the social power structure of patriarchy" in outlining hegemonic masculinity).

162. See Dowd, The Man Question, supra note 55, at 28 (noting that men feel their masculinity is "constantly evaluated and tested," particularly in homosocial settings); see also Allan G. Johnson, The Gender Knot: Unraveling Our Patriarchal Legacy 22–23 (3d ed. 2014) (arguing that manhood is part of a system that "both benefits [men] and exacts a price in return").

163. See Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, Work as a Masculinity Contest, 74 J. Soc. Issues 422, 428 (2018) (arguing manhood is "conditional and tenuous," making men feel the "need to repeatedly prove [their] masculinity"); cf. Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 277 (1979) (arguing that relative economic position matters more than absolute position, and thus, the loss of relative position resonates strongly).

164. See Berdahl et al., supra note 163, at 428 ("[B]ecause manhood is socially attained . . . , it depends on others' views and deference . . . .").

165. See Mittleman, Intersecting the Academic Gender Gap, supra note 86, at 305 (reviewing the literature making this finding).

suite) reward dominant behaviors, including a defiance of authority, and celebrate men who can get away with such behavior.[166] In school, such defiance may be a high-risk enterprise, with teachers meting out punishment disproportionately to Black boys and other boys who they view as threats to school order.[167] Parents with greater economic and social power often insulate their sons from the impact of their troublemaking behavior, but boys in lower-income families and families of color often do not have this protective layer.[168]

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166. See, e.g., Maggie Haberman, Confidence Man: The Making of Donald Trump and the Breaking of America 4–5 (2022) (describing the lifelong rule-breaking of Donald Trump); Walter Isaacson, Elon Musk 7–9 (2023) (describing the lifelong rule-breaking of Elon Musk); Malcolm Gladwell, Was Jack Welch the Greatest C.E.O. Of His Day—Or The Worst?, New Yorker (Oct. 31, 2022), https://www.newyorker.com/magazine/2022/11/07/was-jack-welch-the-greatest-ceo-of-his-day-or-the-worst (on file with the *Columbia Law Review*) (describing the lifelong rule-breaking of Jack Welch). Other studies show that the twelve-year-olds likely to earn most as adults are rule breakers, who often treat middle school high achievers as sissies. See Marion Spengler, Martin Brunner, Rodica I. Damian, Oliver Lüdtke, Romain Martin & Brent W. Roberts, Student Characteristics and Behaviors at Age 12 Predict Occupational Success 40 Years Later Over and Above Childhood IQ and Parental Socioeconomic Status, 51 Dev. Psych. 1329, 1337 (2015) ("One surprising finding was that rule breaking and defiance of parental authority was the best noncognitive predictor of higher income after accounting for the influence of IQ, parental SES, and educational attainment."); Amy Morin, Why Kids Who Break the Rules Are More Likely to Become Rich, Psych. Today (Mar. 29, 2018), https://www.psychologytoday.com/us/blog/what-mentally-strong-people-dont-do/201803/why-kids-who-break-the-rules-are-more-likely-to [https://perma.cc/S583-CBZE] (noting that the highest-income earners are the "naughty kids").

167. See Jayanti Owens, Double Jeopardy: Teacher Biases, Racialized Organizations, and the Production of Racial/Ethnic Disparities in School Discipline, 87 Am. Socio. Rev. 1007, 1008 (2022) (discussing research "revealing that Black and Latino boys are typified as 'dangerous,' 'threatening,' 'less childlike,' and 'more criminally inclined' than their White peers, leading to disproportionately harsh punishment" (quoting Sinikka Elliot & Megan Reid, Low-Income Black Mothers Parenting Adolescents in the Mass Incarceration Era: The Long Reach of Criminalization, 84 Am. Socio. Rev. 197, 205 (2019))); id. at 1041 (estimating that 27% of the racial differences in punishment can be attributed to differences in perceived "blameworthiness" for the same behavior); id. at 1028 (addressing the possibility that racial differences in referrals for the same misconduct may derive from teacher perceptions that "Black parents are less likely to intervene with the school or the child to correct the behavior" and that the teacher is less likely to be reprimanded for referring Black children).

168. See Matthew L. Mizel, Jeremy N.V. Miles, Eric R. Pedersen, Joan S. Tucker, Bret A. Ewing & Elizabeth J. D'Amico, To Educate or to Incarcerate: Factors in Disproportionality in School Discipline, 70 Child Youth Servs. Rev. 102, 102 (2016) (discussing how suspensions and expulsions result in a "school-to-prison pipeline" that disproportionately impacts low-income students and students of color (quoting Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary, 112th Cong. (2012) (written statement of Laura Murphy, Director, ACLU Washington Legislative Office & Deborah J. Vagins, Senior Legislative Counsel, ACLU Washington Legislative Office))).

The contingency of male hierarchies means that diminishing economic opportunities are especially harmful for men.[169] Men often use work to establish their self-worth; they demonstrate their value by being a breadwinner, and unemployment means a loss in this sense of self-worth.[170] Indeed, researchers have found that male insecurities increase when men are simply primed to think about job loss.[171]

Broader social conditions also influence the felt precarity of male status.[172] Scholars have documented ways that unequal societies value stereotypically masculine characteristics, including competitiveness, independence, and aggression, and devalue stereotypically feminine characteristics, such as care and compassion.[173] In these ways, more competitive and unequal environments emphasize hierarchy, creating greater insecurity and the felt need for men to prove their worth. Cross-country and cross-state comparisons suggest that more equal societies produce less individual status anxiety; conversely, more unequal societies produce more of this anxiety.[174] In a more unequal society, greater insecurity thus may carry more weight than lower wages or the increased status of women in explaining much of what is described above—that is, higher rates of disaffection, substance abuse, mental illness, and isolation.[175]

Regardless of its source, the decline in male well-being profoundly affects families, as the next Part explores.

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169. See Berdahl et al., supra note 163, at 427 (discussing the precariousness of male hierarchies).

170. See id. at 428 ("[B]ecause manhood is socially attained (e.g., being dominant over others, being a breadwinner), it depends on others' views and deference, which makes manhood conditional and tenuous. Therefore, masculinity can be easily lost . . . and readily undone (e.g., by becoming unemployed).").

171. See id. ("Numerous studies have demonstrated the ease with which one can make a man feel like 'less of a man,' for example, by having him think about job loss . . . ." (quoting Kenneth S. Michniewicz, Joseph A. Vandello & Jennifer K. Bosson, Men's (Mis)Perceptions of the Gender Threatening Consequences of Unemployment, 70 Sex Roles 88, 92 (2014))).

172. See id. at 428–29 ("Social movements (e.g., women's rights) and economic changes (e.g., declines in working-class men's wages) can threaten (some) men's hold on power and legitimacy.").

173. See Eva Moreno-Bella, Guillermo B. Willis & Miguel Moya, Economic Inequality and Masculinity–Femininity: The Prevailing Perceived Traits in Higher Unequal Contexts Are Masculine, Frontiers Psych., July 2019, at 1, 1 (arguing that economic equality in society is inversely correlated with male stereotypes of individuals).

174. See Richard Wilkinson & Kate Pickett, The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-Being 41–68 (2018) ("Among the countries in this study, status anxiety was highest in more unequal countries . . . and lowest in more equal countries . . . ."); Richard Wilkinson & Kate Pickett, The Spirit Level: Why Greater Equality Makes Societies Stronger 44 (2011) ("Greater inequality is likely to be accompanied by increased status competition and increased status anxiety.").

175. See Nat'l Acads. Scis., Eng'g & Med., supra note 7, at 284 (explaining that the loss of economic opportunities for white men, particularly in the form of "wage stagnation, weak safety nets, and increasing foreclosure rates," is driving overdoses and suicides).

## II. IMPLICATIONS FOR FAMILIES

The crisis facing boys and men is also a crisis of the family, affecting both partnering and parenting.[176] The empirical literature on the crisis facing boys and men generally focuses on socioeconomic status (SES)—that is, men's income and educational attainment. Family law scholars are interested in how SES maps onto family patterns, especially the strong correlation with marriage and engaged fatherhood. As this Part explains, men with college degrees, who are well positioned to secure the "good jobs" of the new economy, tend to enter longer-term, committed relationships, usually based on marriage. They also tend to be involved fathers. By contrast, men without college degrees are usually in shorter-term and more contingent relationships, in large part because women are wary of committing to men in positions of economic precarity and are cognizant of the troubling behaviors that often accompany a loss of income, especially high rates of intimate partner violence. Men without college degrees still have children with their short-term partners, but when the relationship ends, these men tend to live on the periphery of family life.

Notwithstanding the accuracy of this broad portrait, this Part explains that the family patterns of men without college degrees vary. When it comes to an engaged-father norm, there are important differences by race, with unmarried Black fathers historically more engaged than unmarried fathers in other racial groups. Today, unmarried white fathers are embracing similar norms. Perhaps most critically, most unmarried fathers say they want more time with their children, and most unmarried mothers want their children to have relationships with the children's fathers, as do children themselves. This Part describes these patterns and differences, and Part III turns to the role of family law.

### A. *Diverging Family Patterns*

1. *The Families of Men With and Without College Degrees.* — Men with college degrees almost always have children within marriage,[177] and they

176. Sociologists refer to polarized family structures as "diverging destinies," with family structure tracking socioeconomic status. See, e.g., Sara McLanahan, Diverging Destinies: How Children Are Faring Under the Second Demographic Transition, 41 Demography 607, 614 (2004) ("[T]he demographic changes associated with *increases* in children's resources . . . are happening the fastest among children in the top socioeconomic strata, whereas the changes associated with *decreases* in resources . . . are happening the fastest among children in the bottom strata.").

177. See Smock & Schwartz, supra note 124, at 22 ("Among parents with a bachelor's degree or more, 88% are married."). Of the relatively few college-educated women who give birth to children outside of marriage, about half are in cohabiting relationships and the other half are single. Andrew Cherlin, More College-Educated Women Putting the Baby Carriage Before Marriage, Inst. for Fam. Stud. (Sept. 13, 2021), https://ifstudies.org/blog/more-college-educated-women-putting-the-baby-carriage-before-marriage [https://perma.cc/SSU9-WR6A]. Single-parent families headed by a

tend to stay married,[178] with overall divorce rates for college graduates falling steadily over the last twenty years.[179] This means that the vast majority of children born to college-graduate parents grow up in two-parent households.[180] If parents do divorce when children are young, both parents generally remain involved in the children's lives.[181] Additionally, although intimate partner violence occurs in relationships across all demographic groups,[182] it is less common in households with higher incomes.[183]

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college-educated parent typically manage without severe economic hardship, thanks to relatively stable employment and sufficient income. See Ruggles, Patriarchy, Power, and Pay, supra note 6, at 1818 ("Among the college- educated with good jobs . . . cohabitation and single parenthood can be managed without hardship.").

178. See Casey E. Copen, Kimberly Daniels, Jonathan Vespa & William D. Mosher, HHS, First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth 8 fig.5 (2012), https://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf [https://perma.cc/93QU-NWXH] (estimating the probability of divorce for men twenty-two to forty-four years of age after twenty years of marriage: 35% for college graduates, 46% for those with some college, 53% for high school graduates, and 46% for those without a high school diploma).

179. See Kim McErlean, The Growth of Education Differentials in Marital Dissolution in the United States, 45 Demographic Rsch. 841, 845–46 (2021) ("Dissolution rates [for divorce] are declining only for college graduates.").

180. See Kearney, supra note 60, at 24 (describing this gap and noting that only 12% of children born to a mother with a four-year degree live in a single-mother household and that the correlation between household structure and maternal educational attainment exists for white, Black, and Hispanic families); I-Fen Lin, Susan L. Brown & Kagan A. Mellencamp, The Roles of Gray Divorce and Subsequent Repartnering for Parent–Adult Child Relationships, 77 J. Gerontology: Soc. Scis. 212, 212 (2022) (noting the stability of marriages while children are young and describing the growth in "gray divorce": divorce among adults aged fifty and older, often after their children age into adulthood).

181. See Wendy Wang, American Dads Are More Involved Than Ever—Especially College-Educated or Married Dads, Inst. for Fam. Stud. (Oct. 24, 2023), https://ifstudies.org/blog/american-dads-are-more-involved-than-everespecially-college-educated-or-married-dads [https://perma.cc/2VY5-4DDT] (noting that 56% of nonresidential fathers who have a college degree see their children regularly as compared with 42% of fathers without a college degree).

182. See Ruth W. Leemis, Norah Friar, Srijana Khatiwada, May S. Chen, Marcie-jo Kresnow, Sharon G. Smith, Sharon Caslin & Kathleen C. Basile, CDC, The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence 7 (2022), https://stacks.cdc.gov/view/cdc/124646/cdc_124646_DS1.pdf?download-document-submit=Download [https://perma.cc/LM6B-45HD] (describing the high rates of intimate partner violence (IPV) among both men and women and in all races and ethnicities); Jennifer L. Truman & Rachel E. Morgan, DOJ, Violent Victimization by Sexual Orientation and Gender Identity, 2017–2020, at 1 (2022), https://bjs.ojp.gov/library/publications/violent-victimization-sexual-orientation-and-gender-identity-2017-2020 [https://perma.cc/76AM-4ND4] (describing high rates of IPV in same-sex relationships).

183. See Erika Harrell, Lynn Langton, Marcus Berzofsky, Lance Couzens & Hope Smiley-McDonald, DOJ, Household Poverty and Nonfatal Violent Victimization, 2008–2012, at 3 (2014), https://bjs.ojp.gov/content/pub/pdf/hpnvv0812.pdf [https://perma.cc/8PWY-6JBF] (finding that IPV rates for individuals in households at or below the federal poverty level were almost double the rates for those in households 101–

The families of men without college degrees look very different. These men are far less likely to get married,[184] although they often live with their partners, at least for a short period.[185] In explaining why they did not marry the father of a shared child, women cite issues such as financial instability (78% of women say that they will not marry a partner without a steady job[186]), low levels of trust, and high levels of intimate partner violence.[187] Most men provide support while the woman is pregnant and

200% above the federal poverty level and almost four times the rates of those in households 200% above the federal poverty level).

184. See Sara S. McLanahan & Irwin Garfinkel, Fragile Families: Debates, Facts, and Solutions, *in* Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 147 tbl.8.1 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (finding that in a landmark study of nonmarital families, 3.8% of the unmarried fathers had a college degree); Mark Regnerus & Jeremy Uecker, Premarital Sex in America 49, 105 (2011) (providing statistics on the nature of sexual relationships of young men without college degrees, noting that most are short-lived but often result in children); Kim Parker & Renee Stepler, As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens, Pew Rsch. Ctr. (Sept. 14, 2017), https://www.pewresearch.org/short-reads/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/ [https://perma.cc/RNB8-GHB9] (reporting that among college-educated adults aged twenty-five and older, 65% were married as of 2015, and for adults in the same age range without any college education, 50% were married).

185. See McLanahan & Garfinkel, supra note 184, at 145 fig.8.2 (reporting that of the children born to nonmarital parents in the Future of Families and Child Wellbeing Study, more than 80% were born to parents in a romantic relationship: 50% of the unmarried parents were cohabiting and 32% were in a "[v]isiting" union); Smock & Schwartz, supra note 124, at 16 (noting that between 2006 and 2013, "[r]oughly 62% of nonmarital births were to cohabiting couples"). Many of the dating and cohabiting relationships that end in pregnancy are not exclusive. See Jennifer S. Barber, Yasamin Kusunoki, Heather Gatny & Robert Melendez, The Relationship Context of Young Pregnancies, 35 Law & Ineq. 175, 189 tbl.3, 192 (2017) (finding that 27% of couples with a nonmarital pregnancy had sex with another partner during the relationship, which lasted, on average, 22.4 months). Couples report that they did not intend to get pregnant, but that they also did not try to avoid pregnancy. See Kathryn Edin & Maria Kefalas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage 37 (2005) ("Typically, young women describe their pregnancies as 'not exactly planned' yet 'not exactly avoided' either—as only a few were using any form of contraception at all when their 'unplanned' child was conceived.").

186. Wang & Parker, supra note 17.

187. See Kathryn Edin & Timothy Jon Nelson, Doing the Best I Can: Fatherhood in the Inner City 95–96 (2013) (describing fathers' "generalized mistrust of women" developed through their personal experiences); Edin & Kefalas, supra note 185, at 81 (noting that, for women, financial instability is a factor in the decision not to marry and that "[i]t is the drug and alcohol abuse, the criminal behavior and consequent incarceration, the repeated infidelity, and the patterns of intimate violence that . . . loom[] largest in poor mothers' accounts of relational failure"); Christina Gibson-Davis, Anna Gassman-Pines & Rebecca Lehrman, "His" and "Hers": Meeting the Economic Bar to Marriage, 55 Demography 2321, 2329–35 (2018) (describing how couples have an "economic bar"—a multifactor index of elements such as health insurance, income, earnings growth, and more—for marrying, and that the economic bar predicted marriage entry for low-income couples); Smock & Schwartz, supra note 124, at 11–12 (summarizing the robust literature finding that economic prospects influence the decision to marry and that lower-income couples view marriage as something that happens only after a couple has become financially stable, not before). For a discussion of the high level of intimate partner violence among unmarried

visit her and the child in the hospital.[188] New fathers typically sign a voluntary acknowledgment of parentage at the hospital, which establishes the man as the legal father.[189]

But relationships between unmarried parents tend to be more contingent, with women reporting wariness about committing to men they may need to "evict."[190] The end of a relationship—which usually occurs after two or three years, if not sooner[191]—typically involves women telling partners to leave and the children staying with her.[192] By the time children in nonmarital families reach age five, two out of three are not living with their father.[193] After parents break up, a significant portion of unmarried, nonresidential fathers have *no* contact with their children. In the landmark Future of Families and Child Wellbeing Study (FFCWS), when the focal child was one year old, 19% of the nonresidential, unmarried fathers had had no contact with their child in the previous month.[194] By the time the

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couples during a pregnancy, see Barber et al., supra note 185, at 189 tbl.3 (examining 2,499 relationships during a thirty-month period and finding that 5% of the relationships that did not lead to pregnancy included physical assault as compared with 21% of the relationships that did lead to pregnancy (216 pregnancies total)). The women who reported violence during a pregnancy also reported much lower levels of violence in their relationships that did not result in a pregnancy, id. at 192, although those relationships were considerably shorter. See id. at 189 tbl.3 (finding that relationships that did not produce a pregnancy lasted, on average, 4.5 months, as compared to 22.4 months for relationships that did produce a pregnancy).

188. See Sara S. McLanahan, Fragile Families and the Marriage Agenda, *in* Fragile Families and the Marriage Agenda 1, 8 & tbl.1-2 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006) ("Over 80 percent provided financial support during the pregnancy and a similar percentage helped out in other ways.").

189. See Fragile Families and Child Wellbeing Study Fact Sheet tbl.1, https://ffcws.princeton.edu/sites/g/files/toruqf4356/files/ff_fact_sheet.pdf [https://perma.cc/HST9-E9MA] (noting that 96% of the cohabiting fathers claimed paternity at the hospital, 80% of the "[v]isiting" fathers claimed paternity at the hospital, and 52% of the non-romantically involved fathers claimed paternity at the hospital).

190. Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J.L. & Fam. Stud. 1, 12 (2007) (finding that lower-income women report reluctance to marry men they may have to "evict").

191. Smock & Schwartz, supra note 124, at 15; see also Sharon H. Bzostek, Sara S. McLanahan & Marcia J. Carlson, Mothers' Repartnering After a Nonmarital Birth, 90 Soc. Forces 817, 827 tbl.1, 833 (2012) (reporting that of the 82% of the unmarried parents in the Future of Families and Child Wellbeing Study who were romantically involved at the time of the birth, 69% ended their relationship within five years of the child's birth). The relationships in the Barber et al. study, discussed supra, were much shorter, lasting an average of seven months after the child was born. See Barber et al., supra note 185, at 193–94.

192. See, e.g., Sara McLanahan & Audrey N. Beck, Parental Relationships in Fragile Families, 20 Future Child. 17, 22–23 (2010) (describing father involvement after a relationship ends and not mentioning any father-headed households).

193. See Bzostek et al., supra note 191, at 827 tbl.1, 833.

194. See Jay Fagan & Rob Palkovitz, Unmarried, Nonresident Fathers' Involvement With Their Infants: A Risk and Resilience Perspective, 21 J. Fam. Psych. 479, 482 (2007) (indicating nonresident fathers in the FFCWS data who had no contact with their one-year-old child in the previous month).

children reached age five, 37% of the nonresidential fathers had not seen their child once in the previous two years.[195]

Nonmarital fathers are not monolithic, however, and some fathers are more involved than others. Race is a strong predictor of paternal involvement. Both quantitative and qualitative research has shown that unmarried Black fathers are more likely than unmarried white and Hispanic fathers to spend time with their nonresidential child (at least while the child is young), share responsibilities with the mother, and develop a better co-parenting relationship with the mother.[196]

The FFCWS found that when children were one year old, nonresidential Black fathers saw their child far more often than nonresidential white and Hispanic fathers.[197] By age three, all fathers were spending less time with the child, but Black fathers still spent more time with the child than white and Hispanic fathers.[198] As the children grew older, again all fathers spent less and less time with their children, but the patterns between Black and white fathers converged, and Hispanic fathers trailed behind.[199]

Sharing responsibilities is another measure of involvement. FFCWS researchers asked the mothers how often the father cared for the child, ran errands for the mother, and took the child places, such as to the doctor or childcare.[200] In interviews conducted when the child was one, Black fathers were more likely to share responsibilities with the mother than white and Hispanic fathers, but by the time the child was three, the differences among the fathers shrank, and by age nine, most fathers were doing very little to share responsibilities with the mother.[201]

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195. Marcia J. Carlson, Sara S. McLanahan, & Jeanne Brooks-Gunn, Coparenting and Nonresident Fathers' Involvement With Young Children After a Nonmarital Birth, 45 Demography 461, 479 (2008) [hereinafter Carlson et al., Nonresident Fathers' Involvement].

196. See Edin & Nelson, supra note 187, at 215 (recounting Black fathers' "more richly articulated and uniform" descriptions of ideal fatherhood as compared to white fathers); Calvina Z. Ellerbe, Jerrett B. Jones & Marcia J. Carlson, Race/Ethnic Differences in Nonresident Fathers' Involvement After a Nonmarital Birth, 99 Soc. Sci. Q. 1158, 1159 (2018) ("[T]here is some evidence that once nonresident, black fathers are actually more likely to remain involved with their children." (citation omitted)).

197. See Ellerbe et al., supra note 196, at 1169 tbl.3 (reporting that the average for nonresidential Black fathers was thirteen days a month as compared with nine days for nonresidential Hispanic fathers, and seven days for nonresidential white fathers).

198. See id. (revealing that the average for nonresidential Black fathers was nine days a month, as compared with seven days for white fathers and five days for Hispanic fathers).

199. See id. (describing that when the child was five, the average for nonresidential Black and white fathers was seven days a month, and four days for Hispanic fathers, but when the child was nine, the median for Black and white fathers was six days a month, and three days for Hispanic fathers).

200. Id. at 1162.

201. See id. at 1169 tbl.3 (reporting that when the child was one, Black fathers scored an average of 2.37—on a scale of one to four, with one indicating that the father "never"

Finally, FFCWS researchers asked mothers about the quality of their co-parenting relationship with the fathers.[202] In interviews conducted when the child was one, three, five, and nine, mothers consistently reported a more positive co-parenting relationship with Black fathers than with white and Hispanic fathers, although the differences diminished as the child aged, with most co-parenting relationships declining in quality.[203] This is particularly important because studies have found that the quality of the relationship between mothers and fathers—whether parents are able to work together as co-parents—is a strong predictor of paternal engagement.[204]

These patterns in fatherhood are playing out against another significant shift in family patterns: an increasingly hands-on parenting role for fathers who live with their children. Since the 1960s, fathers with children in the home have nearly tripled the time they spend on childcare.[205] College-graduate fathers spend more time with their children than men without college degrees, but they all have increased the time investment they make in their children when they live together.[206] The issue is what happens after parents divorce or separate. As described above, unmarried fathers have a harder time remaining involved in their children's lives.[207]

2. *Family Views About the Involvement of Fathers.* — Most unmarried, nonresidential fathers express deep frustration with the current state of affairs.[208] These fathers have internalized the growing norm that fathers

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did any of the three activities—white fathers 1.63, and Hispanic fathers 2.01, and when the child was nine, the averages were 1.04, 1.11, and 1.01, respectively).

202. See id. at 1162 (noting that this was scored by looking at mothers' responses to six items, including whether the mother trusted the father to take good care of the child and respect the rules the mother had established, and whether the parents could discuss problems that came up in raising the child).

203. See id. at 1169 tbl.3 (finding mothers' scores of Black fathers in co-parenting relationships decreasing from 2.48 when the child was one to 2.25 when the child was nine on a scale of one to three, of white fathers increasing from 1.93 to 2.02, and Hispanic fathers decreasing from 2.24 to 2.10).

204. See Carlson et al., Nonresident Fathers' Involvement, supra note 195, at 473–78 (noting that a positive co-parenting relationship is associated with greater paternal involvement).

205. See Kim Parker & Wendy Wang, Pew Rsch. Ctr., Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family 27 (2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/03/FINAL_modern_parenthood_03-2013.pdf [https://perma.cc/2KVX-ZCB9] (tracking this increase and noting that the data reflect parents who live together).

206. See Giulia M. Dotti Sani & Judith Treas, Educational Gradients in Parents' Child-Care Time Across Countries, 1965–2012, 78 J. Marriage & Fam. 1083, 1092 fig.2 (2016) (depicting this trajectory for all fathers).

207. See supra note 194 and accompanying text; Wang, supra note 181 (reporting that 56% of nonresidential fathers who have a college degree see their children regularly as compared with 42% of fathers without a college degree).

208. See Edin & Nelson, supra note 187, at 103–29 (describing this frustration and fathers' attempts to be involved in a child's life, notwithstanding the fathers' lack of

are both breadwinners and caregivers, but low-income fathers struggle to meet the breadwinning part of this norm, making them feel like failures.[209] Many of these fathers would like to see their children more often, but they do not for a number of reasons. Mothers sometimes thwart fathers' access, especially when the mother has a new partner.[210] Mothers sometimes keep fathers away because of concerns about intimate partner violence and other misconduct or behavioral issues.[211] Fathers are sometimes absent themselves, often because they feel bad about their inability to provide economically for the child and resent being seen as only "a paycheck" and not a caregiver.[212] And unmarried parents often do not trust each other or have a functional co-parenting relationship.[213] Notwithstanding these

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economic resources); Nat'l Responsible Fatherhood Clearinghouse, Data Snapshot 2018: Father Involvement 12 fig.10 (2018), https://www.fatherhood.gov/sites/default/files/resource_files/approved_data_snapshot_father_involvement_092018_508.pdf [https://perma.cc/NF5T-PPLB] (reporting that 60% of nonresidential fathers of a child aged zero to four, and 56% of nonresidential fathers of a child aged five to eighteen, were "dissatisfied" or "very dissatisfied" with the contact they had with their child); Jennifer M. Randles, Essential Dads 61–74, 82–83, 187 (2020) (describing fathers' frustration with not being active parents and having limited contact with their children); see also Aasha Abdill, Fathering From the Margins: An Intimate Examination of Black Fatherhood 81–95 (2018) (reporting results of interviews with low-income Black fathers in a New York City neighborhood, in which many men were frustrated that their attempts to be an active caregiver were thwarted or not recognized).

209. See Randles, supra note 208, at 61 (describing how the men in the fatherhood program "struggled to realize their definitions of responsible fathering that combined expectations of breadwinning, caregiving, and providing opportunities for their children" and that this made the fathers feel like failures).

210. See Edin & Nelson, supra note 187, at 169, 208 ("Another common precursor to gatekeeping [access to the child] is when the child's mother forges a relationship with a new partner . . . ."); McLanahan & Garfinkel, supra note 184, at 154 ("When a mother forms a new partnership, the nonresident father's involvement declines . . . .").

211. See Edin & Nelson, supra note 187, at 169, 208–09 (explaining that mothers keep fathers at bay for multiple reasons, including the belief that the father is not a competent caregiver and concerns about drug use and violence); Randles, supra note 208, at 62 (describing similar reasons); see also Laurie S. Kohn, Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families, 35 Cardozo L. Rev. 511, 521 (2013) (summarizing studies showing that fathers' lack of a mutually supportive relationship with mothers is a major factor preventing greater paternal involvement). Another relationship factor that can lead mothers to keep nonresidential fathers away from their children is the stress of managing a relationship with a new partner. See Huntington, Postmarital Family Law, supra note 56, at 195 (describing evidence showing that when a mother begins seeing someone new, the new man can be jealous of the father, leading the mother to keep the father at bay, and further describing evidence showing that Black families are often better able to negotiate the postbreakup family than white families).

212. See Edin & Nelson, supra note 187, at 208–09, 215–16, 221–23 ("Virtually every legal and institutional arrangement governing these father's lives tells them that they are a paycheck and nothing more. . . . At every turn an unmarried man who seeks to be a father . . . is rebuffed by a system that pushes him aside . . . while reaching into his pocket . . . ."); see also Randles, supra note 208, at 14–15, 61, 98 (describing the feelings of inadequacy low-income fathers experience).

213. See supra text accompanying notes 187, 202–203; see also Randles, supra note 208, at 99–101 (describing the co-parenting challenges that low-income fathers report).

challenges, many unmarried fathers say they want a greater role in their children's lives as an active parent.[214]

Many mothers are not happy with the status quo, either. They would like fathers to be more involved, if the men can address issues such as drug use and violence, and they are frustrated with men who are providing neither financial nor caregiving support.[215]

Finally, children want a relationship with both parents.[216] That said, children are also close to social fathers—men who are not legal fathers but act as fathers. Social fathers are important figures in the lives of many children, especially in Black families.[217] These findings cohere with studies that have shown that fatherhood is increasingly an "achieved status" in the eyes of both children and mothers—one that focuses more on what a man does rather than his biological ties to a child.[218]

3. *Family Norms and Family Power.* — Modern marriages are typically built on reciprocity and commitment,[219] and they usually follow one of two

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214. See Randles, supra note 208, at 15, 31–57 (detailing interviews with fathers who report this desire and noting that "fathers already possess the motivation to be involved, but lack the means and support to do so").

215. See Edin & Nelson, supra note 187, at 215 (expressing mothers' frustration at fathers who fail to provide financial or other support); Edin & Kefalas, supra note 185, at 100–03 (describing mothers' desires to have more involved fathers, despite fathers often "resum[ing] the heavy drinking and drug use, casual drug dealing . . . or other delinquent behavior"); Randles, supra note 208, at 95–98 (explaining that unmarried mothers point to "substance abuse, incarceration, cheating, and intimate violence as reasons why relationships with the fathers of their children do not last").

216. Edin & Nelson, supra note 187, at 62–69, 203–04 (describing the regret unmarried fathers have about not having grown up with a father in their lives); Randles, supra note 208, at 46–49 (same).

217. See Christina J. Cross & Xing Zhang, Nonresident Social Fathering in African American Single-Mother Families, 84 J. Marriage & Fam. 1250, 1252–53 (2022) (noting that social fathering is a "distinct feature of Black family life," which often has "a broader conceptualization of family that reflects [Black families'] distinct social, economic, and political realities in the United States"); see also id. at 1252 (noting that nonresident social fathers are father figures to children who are not their biological children; further noting that social fathers may include a child's stepfather, other male relatives, or mentor figures); id. at 1259 (stating that 25% of children in a study of social fathering in Black families had a nonresident social father, with which a majority felt "very or quite close" to during young adulthood—more so than respondents who reported a nonresident biological father as their primary father figure).

218. See Rachel Brown-Weinstock, Sarah Gold, Kathryn Edin & Timothy Nelson, Earning the Role: Father Role Institutionalization and the Achievement of Contemporary Fatherhood, Soc. Probs., 2023, at 1, 2, 8–10, 12–13 (noting that stepfathers are more often successful at achieving fatherhood than nonresident biological fathers, but also noting that children's expectations for biological fathers tend to exceed those for social fathers).

219. See Eleanor Brown, Naomi Cahn & June Carbone, The Price of Exit, 99 Wash. U. L. Rev. 1897, 1901 (2022) (explaining that married parents "intermingle their lives, based on principles of interdependence, reciprocity, and equal respect"); see also Carbone & Cahn, Marriage Markets, supra note 16, at 118 (emphasizing that the new marital script involves "interdependence," "comparable, if not always equal, investments in the relationship," and "unqualified trust"); Shelly Lundberg, Robert A. Pollak & Jenna Stearns,

patterns. The first pattern, more common in households with incomes above $250,000,[220] could be termed neopatriarchal. It pairs a higher-earning spouse (typically, but not inevitably, a man) with a lower-earning or nonworking spouse who assumes primary responsibility for the family's nonmarket activities.[221] The second pattern—which could be termed egalitarian—involves two-earner households in which both spouses are employed and share domestic responsibilities.[222] In egalitarian relationships, women in different-sex couples usually assume more domestic responsibilities than men, but increasingly men are doing more on the home front, especially in the realm of caregiving.[223]

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Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing, 30 J. Econ. Persps. 79, 94 (2016) ("Increased returns to human capital and, hence, to intense child investments, may have kept marital surplus high for college graduates, who are more likely to make these investments.").

220. See Robert VerBruggen & Wendy Wang, The Real Housewives of America: Dad's Income and Mom's Work, Inst. for Fam. Stud. (Jan. 23, 2019), https://ifstudies.org/blog/the-real-housewives-of-america-dads-income-and-moms-work [https://perma.cc/SM23-N7HL] (finding that close to half of mothers whose husbands earn $250,000 or more a year are stay-at-home mothers).

221. See Sarah Jane Glynn, Ctr. for Am. Progress, The New Breadwinners: 2010 Update 3 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf [https://perma.cc/H7VH-FYSX] (indicating that in high-income families, husbands are more likely to earn more than their spouses than in families with less overall income). For the gender breakdown of individuals earning more than $250,000, see U.S. Census Bureau, Income Distribution, supra note 3.

222. See News Release, Bureau of Lab. Stat., Employment Characteristics of Families—2023 (Apr. 24, 2024), https://www.bls.gov/news.release/pdf/famee.pdf [https://perma.cc/ME9V-GXWZ] ("Among married-couple families with children, 97.6 percent had at least one employed parent in 2023, and in 67.0 percent of these families both parents were employed."); see also Steven Ruggles, Marriage, Family Systems, and Economic Opportunity in the USA Since 1850, *in* Gender and Couple Relationships 3, 14 fig.10 (Susan McHale, Valarie King, Jennifer Van Hook & Alan Booth eds., 2016) (showing the rise of dual-earner families).

223. See Pew Rsch. Ctr., Raising Kids and Running a Household: How Working Parents Share the Load 3 (2015), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2015/11/2015-11-04_working-parents_FINAL.pdf [https://perma.cc/H2Z7-T4S2] (finding that although women continue to perform a disproportionate share of domestic labor in different-sex couples, over time, women have reduced their share of housework responsibilities and men have increased their share); Daniel L. Carlson, Amanda J. Miller, Sharon Sassler & Sarah Hanson, The Gendered Division of Housework and Couples' Sexual Relationships: A Reexamination, 78 J. Marriage & Fam. 975, 976 (2016) (same).

The norm of sharing domestic responsibilities is much stronger for same-sex married couples. See Kenneth Matos, Modern Families: Same- and Different-Sex Couples Negotiating at Home 4 (2015), https://cdn.sanity.io/files/ow8usu72/production/60c48ce374802f4fbfb5ff84b692d244a324d024.pdf [https://perma.cc/VX9V-45KM] (finding that for same-sex, dual-earner married couples, 74% share routine responsibilities, 62% share the responsibility of caring for a sick child, 44% share laundry responsibilities, and 33% share household repair responsibilities, while different-sex married couples shared these responsibilities at lower rates: 38%, 32%, 31%, and 15%, respectively).

Most couples report a preference for egalitarianism. See Amanda Jayne Miller & Sharon Sassler, "Don't Force My Hand": Gender and Social Class Variation in Relationship

Nonmarital relationships do not follow the patterns of marital relationships and reflect a different allocation of power. The neopatriarchal pattern is an impossibility because the "male family wage"—a wage sufficient to support a family on a single income—has largely disappeared for blue-collar workers.[224] And the egalitarian pattern is out of reach because men without college degrees have a hard time securing steady work and earning an income that makes them an appealing partner. Instead, women are much more likely to outearn men in households in the lowest income quintile.[225] Yet, women assume most of the family's domestic responsibilities at all income levels.[226] And when nonmarital relationships with men end, children stay with the mothers and, as elaborated below, mothers control fathers' access to children.[227]

### B. *Understanding the Divergence*

Economic changes, the nature of masculinity, and the interaction between them present a multifaceted explanation of not just what has happened to men but of the nature of family change. These changes involve the declining economic position of men as an independent factor, including both relative shifts in the economic position of these men vis-à-vis both women and other men and the greater volatility in male income, employment, and workforce participation. Greater economic insecurity and loss of status correlate in turn with behavioral factors, such as substance use and intimate partner violence, that affect the dynamics of intimate partnerships and parenting.

Beginning with the economic position of men, the evidence starts with the experience of Black families. Throughout the first half of the twentieth century, Black and white adults had approximately the same marriage rates, but beginning in the 1960s, as deindustrialization hit Black communities, marriage became less common among Black adults.[228] As

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Negotiation, 51 Ariz. St. L.J. 1369, 1371 (2019) ("Today's adults desire egalitarian relationships . . . .").

224. See Naomi Cahn & June Carbone, Uncoupling, 51 Ariz. St. L.J. 1, 7 (2021) [hereinafter, Cahn & Carbone, Uncoupling] ("That [neo-patriarchal] system depended on the forces producing a male family wage, a gendered division of family labor, and a social insurance system tied to the notions of desert associated with marriage and employment."); supra text accompanying notes 95–99 (discussing the dramatic drop in income for men without college degrees).

225. See Glynn, supra note 221, at 3 (finding that 70% of women earn more than their husbands in the bottom quintile).

226. See Katie Newkirk, Maureen Perry-Jenkins & Aline G. Sayer, Division of Household and Childcare Labor and Relationship Conflict Among Low-Income New Parents, 76 Sex Roles 319, 319 (2017) ("Even when both spouses are employed full-time, wives still do the majority of household work . . . .").

227. See supra text accompanying notes 192–195; see also infra text accompanying notes 274–276.

228. The Moynihan Report infamously investigated this phenomenon, describing Black families as a "tangle of pathology." Off. of Pol'y Plan. & Rsch., DOL, The Negro Family: The

deindustrialization spread to white communities in the following decades, this, too, correlated with the decline in marriages for white adults without college degrees.[229] Moreover, there is also evidence that lower marriage rates may reflect not just low wages but declining wages.[230]

Masculinities theory then explains how income insecurity and declining male status destabilizes relationships.[231] Today, even successful men experience more competition, insecurity, and stress, all of which reinforce traditional masculine norms.[232] Men on the losing end of these steeply hierarchical competitions face even more challenges, unable to secure jobs that provide status and security.

Finally, behavioral factors that both stem from and contribute to unemployment and a felt loss of status have a profound impact on partnering and parenting. Men on the losing end of the economic and social hierarchies are more susceptible to mental illness, substance use disorder, and social isolation, and they are more likely to engage in intimate partner violence.[233] These patterns destabilize intimate relationships, which means that more children born into families of men

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Case for National Action 30 (1965). The report deservedly continues to draw condemnation as sexist and racist. See, e.g., Linda M. Burton & M. Belinda Tucker, Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage, 621 Annals Am. Acad. Pol. & Soc. Sci. 132, 143–44 (2009) (rejecting the "distorted lens and constraints of Moynihan's sense of 'matriarchy'"); Sabrina Sojourner, The Perpetuation of Myths, 10 Black Scholar 31, 31 (1979) (asserting that stereotypes about Black men and women have been perpetuated by the Moynihan Report). But modern sociologists argue that what Moynihan had really discovered was the beginning of how deindustrialization impacted marriage rates. A 2009 retrospective concluded that "Moynihan's core argument was really rather simple: whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase." Douglas S. Massey & Robert J. Sampson, Introduction: Moynihan Redux: Legacies and Lessons, 621 Annals Am. Acad. Pol. & Soc. Sci. 6, 13 (2009); see also Steven Ruggles, Race, Class and Marriage: Components of Race Differences in Men's First Marriage Rates, United States, 1960–2019, 46 Demographic Rsch. 1163, 1180–81 (2022) (concluding that controlling for the economic factors associated with plant closings and declining job opportunities explains most of the racial differences in marriage rates).

229. See Carbone & Cahn, Marriage Markets, supra note 16, at 75 ("For blue-collar men, pathways into the labor market have become constricted and the availability and stability of work have declined, which, in turn, has affected the number of men who are seen as good marriage prospects.").

230. Sociologist Steven Ruggles found that "the decline of marriage since 1960 can be largely accounted for by the deteriorating circumstances of young men compared with the previous generation." Ruggles, Patriarchy, Power, and Pay, supra note 6, at 1814.

231. See supra section I.B.2.

232. See Berdahl et al., supra note 163, at 429–30 ("Because work is a site where men can acquire valued resources that enable dominance over others, it is primary site in which men attempt to prove and negotiate their manhood.").

233. See supra text accompanying notes 102–112, 183, 187.

without college degrees experience fatherlessness, family violence, and economic, residential, and personal insecurity.[234]

Taken together, these shifts may have reinforcing effects. The decline in marriage—and the rise of short-term cohabitation—disproportionately affects lower-income families. As noted above, boys who grow up in disadvantaged homes and neighborhoods are adversely affected and, as compared with girls who grew up in the same circumstances, more likely to engage in behavior that harms themselves and others; they are also less likely to have parents who cushion them from the punitive consequences of their actions.[235] This, in turn, can contribute to intimate partner violence. Studies have found that men who feel they are at the bottom of social and economic hierarchies are more likely to feel threatened and turn to violence as a way to reassert their dominance.[236]

It is tempting to say the differences in families represent the adaptive norms of an increasingly unequal society. Parents with college degrees have shifted to a marriage-oriented family strategy, dependent on a delay in family formation, careful selection of a partner, and accumulation of a financial cushion. That model is simply beyond the reach of the working class.[237] Such a conclusion, however, misses the ways family law exacerbates the isolation of men without college degrees—the subject of the next Part.

## III. FAMILY LAW'S ROLE IN ISOLATING MEN

For college-educated, married men, family law facilitates private ordering and autonomy, and it encourages fathers to be both

234. See David Autor & Melanie Wasserman, Wayward Sons: The Emerging Gender Gap in Labor Markets and Education 8 (2013), https://blueprintcdn.com/wp-content/uploads/2013/03/Wayward-Sons-The-Emerging-Gender-Gap-in-Labor-Markets-and-Education.pdf [https://perma.cc/P9QV-6893] ("[C]hildren of less-educated males face comparatively low odds of living in economically secure households with two parents present. In general, children born into such households . . . appear to fare particularly poorly on numerous social and educational outcomes.").

235. See supra text accompanying notes 153–155, 168.

236. Indeed, most of the risk factors for perpetration of intimate partner violence listed by the CDC reflect the factors identified in this Essay. See Risk and Protective Factors, CDC (Feb. 8, 2024), https://www.cdc.gov/intimate-partner-violence/risk-factors/?CDC_AAref_Val=https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html [https://perma.cc/YE8E-JP7T] (including unemployment, low education or income, social isolation, and low self-esteem as individual risk factors; living in a family with economic stress as a relationship factor; living in a high-poverty community as a community factor; and traditional gender norms, gender inequality, and income inequality as social and economic factors); see also Paul J. Fleming, Sofia Gruskin, Florencia Rojo & Shari L. Dworkin, Men's Violence Against Women and Men Are Inter-Related: Recommendations for Simultaneous Intervention, 146 Soc. Sci. & Med. 249, 251 (2015) ("[M]en's violence . . . establish[es] hierarchies among men.").

237. See Carbone & Cahn, Marriage Markets, supra note 16, at 47 (explaining that much of the new middle-class family strategy, including investing in both partner's earning capacity, avoiding early marriage and childbirth, achieving economic independence, and finding the right partner, is "increasingly beyond the reach of the working class").

breadwinners and active caregivers. But for most men without college degrees, family law is punitive and moralistic, exacerbating the isolation of men in their families and undermining their place as caregivers. This Part describes this problematic role of family law in three contexts: custody rules and processes, child support, and the family regulation system.

### A. *The Dual Nature of Family Law*

The work of Professor Jacobus tenBroek—a scholar of social welfare, family law, and disability rights—helps explain how family law contributes to male isolation. As tenBroek argued, family law appears to have one set of rules, but in practice, there is a dual system.[238] In the private system, which governs relatively wealthy families, the law gives families wide latitude to develop their own bargains, with judges rubber-stamping private arrangements that are often negotiated by lawyers.[239] There is little political or legal oversight of this system: The law assumes families can function well and are meeting the needs of their members, and the law strives to affirm mainstream norms.[240]

By contrast, the public system of family law, which governs lower-income families, is decidedly punitive and suspicious of families, assuming they need strict monitoring.[241] In the public system, extensive political and legal oversight of families is the norm, with the state limiting family autonomy through state-initiated actions and legal rules and processes that reflect moral opprobrium.[242] State-initiated child support enforcement and the family regulation system are examples of the public system.

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238. See Jacobus tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status (pt. 1), 16 Stan. L. Rev. 257, 257–58 (1964) [hereinafter tenBroek, Part I] ("One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.").

239. See Jacobus tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status (pt. 3), 17 Stan. L. Rev. 614, 675–82 (1965) [hereinafter tenBroek, Part III] (describing the ability of couples with lawyers to effect their own bargains); see also tenBroek, Part I, supra note 238, at 262 ("[T]he family law of the poor came to be dominantly legislative, [and] the family law of the rest of the community dominantly judicial."); Jacobus tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status (pt. 2), 16 Stan. L. Rev. 900, 970–78 (1964) ("[Family law] is dual and distinguishes among families on the basis of poverty . . . [with separate] rules applicable to families in comfortable circumstances.").

240. See supra note 239.

241. See tenBroek, Part I, supra note 238, at 257–59, 278 (identifying the "paternal, custodial, coercive, and punitive attitudes" underlying systems governing lower-income families).

242. See tenBroek, Part III, supra note 239, at 676 ("Parental right is not necessarily paramount, parental fitness is examined rather than presumed, and the management, morality, and other conditions of the home are subject to the active interest of public officials.")

The private system has always benefited better-off families, but reforms in the last sixty years have consolidated this advantage. As this Part explains, legislatures, courts, and advocates have transformed the law of divorce—a quintessential private-system area of family law. Today, divorce law is less adversarial, aims to promote cooperation between parents and further parental autonomy, and views fathers as both breadwinners and caregivers.[243] By contrast, the public system of family law remains largely unchanged.[244] As was true sixty years ago, lower-income families have limited autonomy, and they are subject to strict monitoring and state-initiated actions that reflect moral judgment that condemns men who fail to provide economically.[245] Men with college degrees benefit from the private system.[246] Men without college degrees are stuck in the public system, contributing to their isolation.[247]

Herein exists a pervasive irony. State monitoring in the public system is designed to police behavior perceived to be at odds with mainstream norms.[248] For lower-income, unmarried fathers, this means the failure of these men to provide economic support for their children.[249] But as described above, these fathers want a different mainstream norm: the new norm of shared, cooperative parenting. As Part IV argues, the fight ahead is to help lower-income unmarried men gain access to the private-system mechanisms that promote this norm of cooperative parenting and engaged fatherhood.

### B. *Custody Rules and Processes*

1. *Relative Successes for College-Educated Men.* — When men marry, as tends to be the norm for college-educated men, family law protects their relationship with their children and encourages them to be active parents. During marriage, men benefit from the marital presumption, which makes

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243. See Jane C. Murphy & Jana B. Singer, Divorced From Reality: Rethinking Family Dispute Resolution 23 (2015) [hereinafter Murphy & Singer, Divorced From Reality] ("Under a post-divorce co-parenting regime, the court's job is . . . to supervise the ongoing reorganization of a family.").

244. See June Carbone & Naomi Cahn, The Triple System of Family Law, 2013 Mich. St. L. Rev. 1185, 1228 [hereinafter Carbone & Cahn, Triple System] ("[Family] law effectively [gives] the elite . . . room to negotiate arrangements that adapt the laws to their needs. . . . [Public family law] continues to proceed from the premise that poor men have 'abandoned' their children . . . .")

245. See id. at 1227 ("Couples caught in the state aid/child-support enforcement system that denigrates absent fathers remain subject to societal disapproval at odds with their own understandings of the terms of the relationships.").

246. See id. at 1228 (arguing that the private family law system rewards the family norms of elite families).

247. See supra notes 119, 241 and accompanying text.

248. See Carbone & Cahn, Triple System, supra note 244, at 1228 ("Public welfare law insists on upholding mainstream norms as a condition of public benefits, even when the effort is counterproductive.").

249. See infra text accompanying notes 298–301.

a husband the legal father of any child born during the marriage without the need to take any action.[250] And if men divorce, they must go through a legal process—typically with assistance from hired professionals and court personnel—that helps couples transition from co-parenting within marriage to co-parenting outside marriage.[251]

College-educated men thus tend to benefit from a paradigm shift in divorce law that embraces and encourages cooperative parenting, protects the investment both parents have made in relationships with children, and gives parents wide latitude in shaping a postdivorce family that works for them.[252] Both the substance and process of family law reflect this paradigm shift. Substantively, legislatures and courts have moved away over the last several decades from "the rule of one"—the idea that sharing custody inevitably leads to conflict and thus custodial rights should rest with a single parent following a divorce (which usually meant the mother).[253] Instead, all states now allow parents to share either legal or physical

250. This section uses gendered language, partly because this is an Essay about men but also because the current extension of the marital presumption to same-sex couples varies by state, notwithstanding Supreme Court precedent. See generally June Carbone, Same-Sex and Different-Sex Relationships: Is It Time for Convergence?, *in* International Survey of Family Law 2019, at 329, 332–33 (Margaret Brinig ed., 2019) ("In the process of extending the marital presumption to same-sex couples, [some state] courts have accordingly acknowledged directly that the extension of parentage, particularly in accordance with the marital presumption, does not depend on recognition of biology.").

251. For a description of the process, see Jane C. Murphy, Rethinking the Role of Courts in Resolving Family Conflicts, 21 Cardozo J. Conflict Resol. 625, 626–30 (2020) (describing how family courts provide a variety of both traditional adversarial and alternative dispute resolution services to families). Patrick Parkinson, the architect of Australia's Family Relationship Centres, discussed infra in Part IV, refers to this as "the transition from parenting together to parenting apart." Patrick Parkinson, Family Law and the Indissolubility of Parenthood 187–94 (2011). For a comparison of the differences in the dissolution of marital and nonmarital relationships, see Brown et al., supra note 219, at 1925–29 (explaining that while getting a legal divorce is costly, ending a nonmarital relationship presents its own set of logistical challenges).

252. See Dinner, supra note 53, at 145 (observing that "[f]athers' rights activists helped to make caregiving and not only breadwinning central to the definition of middle-class fatherhood"). For a description of the critiques of the paradigm shift, see Murphy & Singer, Divorced From Reality, supra note 243, at 51–59 ("To the extent that society has a legitimate role in determining how parenting disputes are resolved, the reliance on private, nonlegal decisionmaking may not be entirely a good thing. This is a particular concern when vulnerable parties waive important financial or safety protections . . . .").

253. See McCann v. McCann, 173 A. 7, 9 (Md. 1934) ("[D]ivid[ing] the control of the child . . . is to be avoided . . . as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child. A . . . father should acquiesce in a good mother having the . . . custody of an infant . . . ."); Joseph Goldstein, Anna Freud & Albert J. Solnit, Beyond the Best Interests of the Child 38 (1973) (arguing that the child's psychological needs should translate into sole custody in one parent).

custody,[254] and many divorced couples do.[255] State legislatures have reinforced this norm of shared parenting by replacing the labels of "primary custody" and "visitation," which suggest winners and losers,[256] with terms like "shared custody" or "parental responsibilities," which imply that both parents are equally important to the child.[257]

The introduction of parenting plans is another substantive change that could encourage cooperative co-parenting and engaged fatherhood following a divorce. Many states now require or encourage parents to complete detailed parenting plans, which give each parent specified rights and responsibilities, tailored to that family's needs and interests.[258] Parenting plans are intended to help parents design their own co-parenting relationship and ensure both parents are involved in the child's life.[259] The plan can, for example, build in provisions that allow one parent to care for the child while the other is working, saving on childcare expenses. The plan also specifies how the co-parenting relationship will

254. J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 Fam. Ct. Rev. 213, 217 (2014).

255. See Daniel R. Meyer, Marcia J. Carlson & Md Moshi Ul Alam, Increases in Shared Custody After Divorce in the United States, 46 Demographic Rsch. 1137, 1147–50 (2022) (documenting a rise in shared physical custody in the United States from 13% before 1985 to 34% in 2010–2014; further finding that an award of shared physical custody was more likely for couples with higher levels of education, especially a college degree); id. at 1146 (noting that there was not a clear definition of "shared" physical custody and instead the study looked at answers to whether a court or judge ever gave both parents joint shared physical custody).

256. See DiFonzo, supra note 254, at 216 ("The terminology of custody law changed to incorporate notions of 'shared parenting' and 'parenting plans' in place of the more rigid and proprietary 'custody' and 'visitation.'").

257. Colorado, for example, uses the term "allocation of parental responsibilities," which is split into "parenting time" and "decision-making responsibilities." Colo. Rev. Stat. § 14-10-124 (2024) ("The court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child . . . ."). Montana and Washington refer to child custody and visitation collectively as the "parenting plan." Mont. Code Ann. § 40-4-212 (2023) ("The court shall determine the parenting plan in accordance with the best interest of the child."); Wash. Rev. Code § 26.09.181 (2023) ("[E]ach party shall file and serve a proposed permanent parenting plan . . . ."). Vermont Family Court refers to child custody as "parental rights and responsibilities" and visitation as "parent-child contact." Parental Rights and Responsibilities and Parent-Child Contact, Vt. Judiciary, https://www.vermontjudiciary.org/family/parental-rights-and-responsibilities-and-parent-child-contact [https://perma.cc/9FX8-9QNM] (last visited Aug. 11, 2024).

258. See, e.g., Parenting Plan Form, N.Y. Unified Ct. Sys., https://www.nycourts.gov/forms/matrimonial/parenting-plan-form.pdf [https://perma.cc/GRZ7-D7WF] [hereinafter Parenting Plan Form] (providing an eleven-page template for parents, with numerous issues pre-identified). These specifics are especially important in families with a history of intimate partner violence. See Leigh Goodmark, Achieving Batterer Accountability in the Child Protection System, 93 Ky. L.J. 613, 650 (2005) (describing how "most supervised visitation programs that handle domestic violence cases have specific requirements for pick-up, drop-off, and interactions with children").

259. See supra note 258.

work, detailing, for example, which parent will pick up the child from school or take a child to an activity, with exact times for exchanging the child between the parents.[260] In short, parenting plans assume both parents will be involved in a child's life, facilitate this involvement, and allow parents to anticipate points of contention by setting rules beforehand.

A final substantive change is that, in private settlements, parents can find their own balance between custody and child support. In many jurisdictions, the more time a child spends with a parent, the less that parent owes in child support.[261] Parents can thus trade time for money, as suits their preferences.

Beyond these substantive rules, family law has adopted processes that reorient divorce from an adversarial model to a conciliation model.[262] These reinforce two-parent norms and make decoupling less contentious. For example, family courts increasingly incorporate alternative dispute resolution into family law, with nearly every state either requiring mediation before parents can proceed to court, requiring mediation at the judge's discretion, or making it available on a voluntary basis.[263] Additionally, many states offer state-sponsored education programs to help parents learn how to work together after divorce.[264] Studies show that these programs increase co-parenting and decrease conflict between parents.[265]

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260. See Parenting Plan Form, supra note 258.

261. Michigan, for example, requires child support to be calculated based on the "Michigan Child Support Formula" developed by the Friend of the Court Bureau, which includes a "Parental Time Offset." Mich. Comp. Laws § 552.605 (2023); Friend of the Ct. Bureau, 2021 Michigan Child Support Formula Manual 17 (2021), https://www.courts.michigan.gov/4a64c9/siteassets/publications/manuals/foc/2021mcsf.pdf [https://perma.cc/6HJH-C4X6]. Other jurisdictions have adopted similar formulas. See Ariz. Jud. Branch, Arizona Child Support Guidelines 16–22 (2022), https://superiorcourt.maricopa.gov/media/0zqj3ip2/child-support-guidelines-2022.pdf [https://perma.cc/9N8F-JMS7] (allowing an offset for time with the parent); see also Fla. Stat. Ann. § 61.30 (West 2024) (same); 750 Ill. Comp. Stat. Ann. 5 / 510 (West 2024) (same).

262. See Singer, supra note 31, at 363 (describing the paradigm shift designed to support a postdivorce family, with reforms that "replaced the law-oriented and judge-focused adversary model with a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime" and "fundamentally altered the way in which disputing families interact with the legal system").

263. See Connie J.A. Beck, Michele E. Walsh, Mindy B. Mechanic, Aurelio Jose Figueredo & Mei-Kuang Chen, Intimate Partner Abuse in Divorce Mediation: Outcomes From a Long-Term Multi-Cultural Study 11 (2011), https://www.ojp.gov/pdffiles1/nij/grants/236868.pdf [https://perma.cc/CN2J-43CD] (noting mediation's popularity and that it "now exists in some form (legally mandated, at judicial discretion, or voluntary) in nearly every state in the United States").

264. In addition to voluntary classes, some states authorize courts to mandate participation. See, e.g., Colo. Rev. Stat. § 14-10-123.7 (2024).

265. See Jeffrey T. Cookston, Sanford L. Braver, William A. Griffin, Stephanie R. De Lusé & Jonathan C. Miles, Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce, 46 Fam. Process 123, 132–35 (2007) (finding

Finally, when divorced parents continue to have trouble co-parenting, parents can choose, or courts can require, parents to use parenting coordinators—typically mental health professionals who can resolve disputes without court involvement.[266]

Together, these substantive and procedural reforms amount to a paradigm shift in divorce law.[267] As a practical matter, the reforms promote both parents playing an active role in a child's life, and the reforms allow parents to determine these roles. And as an expressive matter, the reforms inscribe co-parenting principles. Popular culture reflects this shift, with self-help books addressed to "parenting apart."[268]

Still, these changes are not without controversy. These measures have substantially increased the number of fathers with shared custody following divorce, but divorcing fathers do not uniformly receive such orders, inspiring calls for stronger presumptions of equally shared parenting time.[269] In addition, some advocates argue that revamped family court processes impose shared parenting in inappropriate cases, including those involving high levels of parental conflict and parents who cannot work together,[270] and cases involving intimate partner violence, substance

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success in noncustodial father-targeted group sessions in improving the interparental relationship).

266. Ass'n of Fam. & Conciliation Cts. Task Force on Parenting Coordination, Guidelines for Parenting Coordination, 44 Fam. Ct. Rev. 164, 165 (2006); see also Christine A. Coates, The Parenting Coordinator as Peacemaker and Peacebuilder, 53 Fam. Ct. Rev. 398, 399 (2018) (defining parenting coordination as a "child focused alternative dispute resolution process in which a mental health or legal professional . . . assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, [and] educating parents about children's needs" (quoting Ass'n of Fam. & Conciliation Cts., supra, at 165)); Sophie B. Mashburn, "Throwing the Baby Out with the Bathwater": Parenting Coordination and Pennsylvania's Decision to Eliminate Its Use, 2015 J. Disp. Resol. 191, 201 (2015) (describing the function of the coordinator and the critical view that some courts are delegating judicial determinations to the coordinator); Guidelines for the Practice of Parenting Coordination, Am. Psych. Ass'n, https://www.apa.org/practice/guidelines/parenting-coordination [https://perma.cc/C66R-SC5S] (last visited Aug. 8, 2024) (describing the role of parenting coordinators, which can be ordered by the judge or used voluntarily by the parties).

267. See Singer, supra note 31, at 363 ("This paradigm shift has replaced the law-oriented and judge-focused adversary model with a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime."); see also Milfred Dale, "Still the One": Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions, 34 J. Am. Acad. Matrim. Law. 307, 316–17 (2022) (describing how in cases that fail to settle courts often adopt "progressively more intrusive and coercive interventions that wed mental health and psycholegal interventions . . . to the social control mechanisms of the court").

268. See, e.g., Christina McGhee, Parenting Apart: How Separated and Divorced Parents Can Raise Happy and Secure Kids 7–9 (2010).

269. See Dale, supra note 267, at 308 (describing the demands to legislatures and courts for presumptions of equal parenting time).

270. See id. at 341 (describing shared parenting agreements between parents who cannot work together as "counterintuitive").

abuse, or other factors.[271] The transformation in family law has been most effective when it encourages voluntary settlements that allow parents to reach their preferred resolution of custody disputes.[272]

Although many of these rules and processes are theoretically available to unmarried parents, as the next section describes, nonmarital parents generally do not go to court when the romantic relationship ends and thus do not benefit from the reforms.[273]

2. *Relative Failures for Non-College-Educated Men.* — If an unmarried man has a child, he must take affirmative steps to become a legal father.[274] And if the relationship with the mother ends, as most nonmarital relationships do, the couple simply separates, the father moves out of the home, and the couple typically has no contact with the legal system and little access to institutional or professional assistance in making the transition.[275] This leaves custodial mothers as the "gatekeepers" to fathers' continuing access to children.[276] These arrangements do not necessarily address fathers' desire for continuing relationships with their children, but they do reflect the implicit balance of power in the relationship and the legal differences between married and unmarried relationships.

Unmarried fathers could go to court to secure a custody order, but most do not.[277] Consistent with tenBroek's public system of family law, for

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271. See, e.g., Joan S. Meier, Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law, 110 Geo. L.J. 835, 861–65 (2022) (documenting courts' punitive responses to parental allegations of intimate partner violence).

272. See Dale, supra note 267, at 316 ("The advantages of the settlement culture that emphasizes parental agreement, within which mediation is the dominant approach, are well documented. Most parents find ways of managing the dissolution of their relationship and appropriately raising their children without having to litigate.").

273. See, e.g., Andrew Schepard, Marsha Kline Pruett & Rebecca Love Kourlis, If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families, 24 Harv. Negot. L. Rev. 25, 30 (2018) (noting that supportive and conciliatory processes are relatively successful for families who go to family court but are unavailable for those who do not go to court or are not in a position to access court services).

274. See Huntington, Postmarital Family Law, supra note 56, at 203 ("[Unmarried fathers] are not automatically granted parental rights at birth. Instead, family law insists that an unmarried father prove his fatherhood . . . ." (footnote omitted)).

275. See Lundberg et al., supra note 219, at 89 ("Unlike marriages, cohabiting unions can be ended simply and quickly outside of the legal system.").

276. See Edin & Nelson, supra note 187, at 169, 208–09 (explaining that because unmarried parents typically do not have a formal custody order, and because children almost always live with the mother, the mother usually has the sole ability and authority to control fathers' access to their children); supra notes 210–211 and accompanying text (noting the reasons mothers keep fathers away from children, including the belief that the father is not a competent caregiver, concern about drug use and violence, and the desire to appease a new partner, who may be jealous of the father).

277. See Off. of Child Support Enf't, HHS, Child Support and Parenting Time: Improving Coordination to Benefit Children 1–2 (2013), https://www.acf.hhs.gov/sites/default/files/documents/ocse/13_child_support_and_parenting_time_final.pdf [https://perma.cc/FLF8-ZMY9] (describing how unmarried parents

many lower-income families, courts are a place of oppression, not assistance.[278] Many potential litigants, particularly lower-income men, may fear that if they initiate legal proceedings, they will be faced with outstanding warrants for unrelated violations or outstanding child support orders, sometimes for children unrelated to the current dispute.[279] Similarly, court-administered processes can seem daunting to those who believe that they will not receive a fair hearing in the courts. As a result, unmarried parents rarely have a custodial order,[280] and if a court has issued an order, the order typically awards the mother sole physical custody.[281]

Cost is also a significant obstacle. Filing any judicial proceeding involves fees; courts generally allow indigent litigants to waive fees, but completing the necessary paperwork can be discouraging or time-consuming. In addition, court personnel, such as those undertaking custody evaluations, mediation, or parent coordination, can be expensive, unless courts provide these services directly—and many do not.[282]

Finally, court appearances are intrusive and time-consuming, often involving multiple appearances.[283] Pro se litigants have a particularly difficult time.[284] Parents may not understand the background

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are required to overcome various barriers, like legal proceedings, to resolve child support and custody matters).

278. See Tonya L. Brito, Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives, 99 Wash. U. L. Rev. 1869, 1895 (2022) [hereinafter Brito, Nonmarital Fathers in Family Court] ("[C]ourt proceedings are a contested space for poor nonmarital fathers who are often unable to consistently pay their support order. They are shamed and penalized for their failure to live up to the classed and raced traditional ideals of economic fatherhood."); Murphy, supra note 251, at 629 ("Court appearances are inconvenient, intrusive, and may even be traumatic, especially for a person that is poor and vulnerable.").

279. See Murphy, supra note 251, at 634–35 (describing the risks that parents face when initiating proceedings in family court, including incarceration and a loss of privacy).

280. See Laura Tach, Ronald Mincy & Kathryn Edin, Parenting as a "Package Deal": Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents, 47 Demography 181, 200 (2010) ("Divorcing fathers' custody, financial obligations, and visitation rights are all adjudicated together at the time of the divorce. Conversely, in the nonmarital context, fathers are less frequently involved in the legal process by which child support orders are made and visitation is assigned.").

281. See Patricia Brown & Steven T. Cook, Children's Placement Arrangements in Divorce and Paternity Cases in Wisconsin 10 tbl.2a, 11 tbl.2b, 12 tbl.2c (2012), https://www.irp.wisc.edu/research1/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf [https://perma.cc/U8DC-BP9D] (finding that, of the cases involving unmarried parents in Wisconsin in 2007, mothers had sole physical custody in 90.9% of adjudicated paternity cases and 80.9% of the voluntary acknowledgment of paternity cases, while divorced mothers had sole physical custody in 45.7% of cases).

282. Cf. Christine Coates, Robin Deutsch, Hugh Starnes, Matthew J. Sullivan & BeaLisa Sydlik, Parenting Coordination for High-Conflict Families, 42 Fam. Ct. Rev. 246, 256 (2004) (discussing parenting coordination as a "less expensive, faster, and more satisfactory" avenue than litigation and other court-managed processes).

283. See Murphy, supra note 251, at 629 (describing court appearances as "inconvenient" and "intrusive" for low-income parents).

284. See Susannah Camic Tahk, Distributive Precedent and the Pro Se Crisis, 108 Iowa L. Rev. 745, 759–66 (2023) (describing the legal and social impediments facing pro se

presumptions that operate in formal proceedings, leading them to agree to disadvantageous settlements or alienate court personnel involved in their cases.[285]

The upshot is that the institutionalized processes that recognize fathers as active caregivers and help men remain involved with their children—custody orders, parenting plans, access to mediation, co-parenting education, and parenting coordinators—largely do not exist for men outside marriage. Instead, men without college degrees end up at the periphery of family life.

### C. *Child Support*

Family law scholars have written at length about the problems with the child support system for economically precarious men,[286] who are disproportionately men of color.[287] Professor Solangel Maldonado, for example, describes at length the failure of the child support system "to distinguish between fathers who can pay child support but refuse (the true deadbeats), and those who are unemployed or severely underemployed (those who are deadbroke)."[288] And Professor Tonya Brito has conducted in-depth qualitative research, documenting the many punitive aspects of the child support system, which especially disadvantages low-income men of color.[289] This Essay's contribution is to highlight how child support enforcement fails men who wish to realize mainstream norms of involved parenthood.

The core of tenBroek's dual system involved the different treatment of families perceived as financially self-sufficient and families in need of public assistance.[290] tenBroek contended that the public system sought to

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litigants, including procedural hurdles, a lack of legal and strategic expertise, and judges' biases against pro se litigants).

285. See Stacy Brustin & Lisa Martin, Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents, 67 Hastings L.J. 1265, 1267 (2016) (describing what parents may not understand in legal proceedings in family courts without counsel, such as the scope of their legal rights and legal presumptions).

286. See infra text accompanying notes 291–312.

287. See Tonya L. Brito, David J. Pate Jr. & Jia-Hui Stefanie Wong, Negotiating Race and Racial Inequality in Family Court, 36 Inst. Rsch. Poverty Focus 3, 3 (2020) (observing that "[t]he majority of child support debt is owed by low-income fathers, many of whom are Black").

288. Solangel Maldonado, Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers, 39 U.C. Davis L. Rev. 991, 1003 n.70 (2006) (observing that "[d]eadbroke" fathers are those who are "too poor to pay even minimum child support awards" (internal quotation marks omitted) (quoting Ronald Pincy & Hillard Pouncy, The Responsible Fatherhood Field, *in* Handbook of Father Involvement 555, 563 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002))).

289. See, e.g., Tonya L. Brito, The Child Support Debt Bubble, 9 U.C. Irvine L. Rev. 953, 954–55 (2019) [hereinafter Brito, Child Support Debt] (describing this research).

290. See tenBroek, Part III, supra note 239, at 676 ("[T]he family law of the poor derives its particular content and special nature from the central concept of the poor law system:

limit government spending and affirm mainstream values, without regard for the interests of the specific families.[291] Child support enforcement has long served the punitive, state-driven purposes tenBroek described: punishing fathers who were seen to have abandoned their children by failing to marry the mothers and were thus responsible for the mothers' economic dependence on the state.[292]

Today, the mainstream values of fatherhood have expanded to include not only breadwinning but also active caregiving and shared parenting. And yet child support enforcement, with twenty percent of American children involved in state enforcement efforts,[293] is a principal component of the continuing dual system of family law, makes it harder for low-income fathers to be involved parents, and, indeed, is often counterproductive to mainstream values.[294]

The counterproductive effects start with differences in ability to pay. It is not an overstatement to characterize the child support system as a trap for low-income men.[295] Men with stable incomes typically pay the amount they are obligated to provide.[296] By contrast, courts impose unrealistic child support orders on men with very limited income, who often cannot

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public provision for the care and support of the poor. He who pays the bill can attach conditions . . . and almost always does.").

291. See id. at 675–82 (describing the basic motive of the public system as one "emanat[ing] from the public assumption of responsibility and the need to keep the bill down"); see also Serena Mayeri, Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality, 125 Yale L.J. 2292, 2297–98 (2016) (observing that efforts to hold nonmarital fathers liable for support intensified as "poor women of color gained access to public assistance benefits").

292. See Mayeri, supra note 291, at 2305 ("Unmarried fathers [were] long typecast as sexual exploiters of vulnerable, young women who abandoned their children . . . .").

293. See Daniel L. Hatcher, Injustice, Inc.: How America's Justice System Commodifies Children and the Poor 157 (2023) [hereinafter Hatcher, Injustice, Inc.] (observing further that "Black parents are pulled into the system at more than twice the percentage of Black individuals in the overall population").

294. See id. at 54–55 (concluding that child support enforcement policies push fathers out of legitimate jobs, tear fragile families apart, and increase economic instability and crime rates by driving debtor parents into the underground economy).

295. See Brito, Child Support Debt, supra note 289, at 954 ("The poorest parents have disproportionately high (relative to income) monthly child support obligations. As compared to other parents, the poorest parents . . . owe a disproportionately larger share of the national child support debt. For the poorest parents, the debt is insurmountable and unsustainable.").

296. See Ascend: Aspen Inst., Setting Realistic and Accurate Child Support Orders: Child Support Policy Fact Sheet 2 (2022), https://ascend.aspeninstitute.org/wp-content/uploads/2023/11/3_ChildSupport_Right_Sizing_Orders.pdf [https://perma.cc/B6HT-5SMX] ("The best predictor of compliance with a child support order is the noncustodial father's monthly income."); see also Leslie Hodges, Daniel R. Meyer & Maria Cancian, What Happens When the Amount of Child Support Due Is a Burden? Revisiting the Relationship Between Child Support Orders and Child Support Payments, 94 Soc. Serv. Rev. 238, 243 (2020) ("The child support system typically works well for families in which the noncustodial parent has regular and adequate earnings from formal employment and is supporting children from a single relationship.").

pay the amount ordered.[297] Judges and lawyers routinely pathologize these fathers, fixating on their inability to pay child support on a reliable schedule, and suggesting that the failure involves a deliberate shirking of family responsibilities.[298]

The myopic focus on fathers as breadwinners ignores and often undercuts the role of fathers as caregivers.[299] Unpaid child support orders create significant friction between parents because mothers are resentful that fathers are not paying, and fathers are resentful that the court has imposed an unrealistic order.[300] This, in turn, leads fathers to withdraw from the family.[301]

But perhaps the most fundamental problem is that unlike relatively wealthy parents, low-income parents are not in control of child support obligations. For the reasons described above, unmarried fathers typically do not have custody orders, so they do not qualify for offsets in the child support calculation, even if the child spends time with the father.[302] And for low-income parents, child support enforcement proceedings are often

297. Approximately 70% of the outstanding child support debt is owed by men with annual incomes below $10,000. Brito, Child Support Debt, supra note 289, at 954. There are a few innovations on the margins. See, e.g., N.Y.C. Hum. Res. Admin., Dep't of Soc. Servs., Child Support Handbook for Noncustodial Parents 9 (2016), https://www.nyc.gov/assets/hra/downloads/pdf/services/child_support/noncustodial_parents.pdf [https://perma.cc/J8U7-9D85] (explaining that in New York State, the maximum child support order is $25 a month for a noncustodial parent whose earnings are below the federal poverty level and that arrearages are capped at $500). The system has particularly harsh effects for the incarcerated. Imprisonment makes it impossible to hold a job, but in most states, incarceration does not automatically suspend child support obligations. See Lynne Haney, Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment, 124 Am. J. Socio., July 2018, at 1, 21–23 (explaining that even in the minority of states that consider incarceration as possible grounds to modify a child support order, incarcerated persons must initiate the judicial process by petitioning the court upon entering prison).

298. See Brito, Nonmarital Fathers in Family Court, supra note 278, at 1883–84 (observing that legal actors "assume fathers are not committed to their parenting responsibilities" as a baseline).

299. See id. at 1881–82 ("In child support court, fathers' primary responsibility was linked to financially providing for the children, and there was considerably less value placed on fathers' contributions to caretaking or emotional bonding.").

300. See Edin & Nelson, supra note 187, at 215 ("Virtually every legal and institutional arrangement governing these father's lives tells them that they are a paycheck and nothing more.").

301. See Daniel L. Hatcher, The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens 144 (2016) ("[P]oor children often lose contact with their fathers as the insurmountable child support mechanisms drive the fathers away."); Brito, Child Support Debt, supra note 289, at 986 (describing how fathers may "feel so trapped and discouraged that they stop paying support altogether and even withdraw from their children's lives").

302. To make matters worse, in many states the child support proceeding is disconnected from a custody proceeding, so the father cannot assert a claim to custody even if he wanted to do so. Instead, he must go to a different court and file a new claim. Huntington, Postmarital Family Law, supra note 56, at 183.

initiated by the state, not the custodial parent.[303] When a parent applies for cash welfare, Medicaid, and, in many states, food stamps or a childcare subsidy, the parent must cooperate with the state in a child support proceeding.[304] The state then brings a child support action against the other parent to reimburse the state and to increase private support for the family, reducing the family's need for supportive programs.[305] In these proceedings, noncustodial parents rarely have legal representation, and courts often make default judgments against them and inaccurate determinations about a parent's ability to pay.[306]

These state-initiated proceedings—which form the core of the public system of family law—are not cost effective,[307] and they do not reflect the preferences of many low-income families. Left to their own devices, a majority of low-income custodial parents do not have a child support order in place, with many custodial parents explaining that they do not want an order because the other parent has no money or is already providing informal support.[308] Moreover, both mothers and fathers report a

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303. See Jessica Tollestrup, Cong. Rsch. Serv., Child Support Enforcement: Program Basics, 3 tbl.1 (2024), https://crsreports.congress.gov/product/pdf/RS/RS22380 (on file with the *Columbia Law Review*) (noting that in fiscal year 2023, the Child Support Enforcement program—which oversees state-initiated proceedings—served 12.1 million child support cases, established new support orders for 595,498 cases, and made collections for 7.3 million cases).

304. Id. at 2.

305. See id. at 1 ("The primary purpose of [the child support enforcement] program was to reduce public expenditures for recipients of cash assistance by obtaining ongoing support from noncustodial parents that could be used to reimburse the state and federal governments for part of that assistance."); see also Hatcher, Injustice, Inc., supra note 293, at 54 (observing that in California, 40% of child support debt is owed to the state).

306. See Brito, Child Support Debt, supra note 289, at 955 (noting lack of representation); id. at 963 (observing frequency of default judgments); Elizabeth G. Patterson, *Turner* in the Trenches: A Study of How *Turner v. Rogers* Affected Child Support Contempt Proceedings, 25 Geo. J. Poverty L. & Pol'y 75, 100–13 (2017) (reporting the results of two studies finding that courts often make inaccurate determinations of a parent's ability to pay).

307. See Cortney E. Lollar, Criminalizing (Poor) Fatherhood, 70 Ala. L. Rev. 125, 159 (2018) ("[R]equiring men who make little or no income to subsidize the government's child support program—and face criminal charges and incarceration if they cannot do so—does not provide a cost-efficient or effective method for minimizing the government's costs."). Professor Cortney Lollar observes that cost estimates of child support enforcement programs do not take into account the costs of imprisonment, skewing the accounting of cost effectiveness. See id. at 158.

308. See Brito, Child Support Debt, supra note 289, at 962 ("60% of poor custodial parents do not even have a child support order in place."); see also Timothy Grall, U.S. Census Bureau, Custodial Mothers and Fathers and Their Child Support: 2017, at 8 fig.4 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf [https://perma.cc/CL4W-24EQ] (listing the reasons a custodial parent lacked grounds to seek a child support order, including the top two reasons: 39% of custodial parents reported that they "[d]id not feel need to make legal"; 38% reported "[o]ther parent provides what he or she can").

preference for informal support—either cash or in-kind contributions.[309] Mothers prefer this informal support because it keeps the state at bay and it encourages the involvement of fathers, at least if the father is willing to contribute.[310] And fathers prefer informal support because it allows them to negotiate the terms of their contributions as circumstances change, and it gives them bargaining power if mothers are blocking access to the children.[311]

In all these ways, child support enforcement is counterproductive for lower-income fathers who have—or want—a continuing relationship with their children.[312]

### D. *The Family Regulation System*

The family regulation system is a third way that family law isolates men from their families. In the name of protecting children, the family regulation system authorizes the state to intervene in the life of families, often leading to the removal of children from the care of a parent.[313] In 2021, the state removed more than 200,000 children from their homes,[314]

309. Lenna Nepomnyaschy & Irwin Garfinkel, Child Support Enforcement and Fathers' Contributions to Their Nonmarital Children, 84 Soc. Serv. Rev. 341, 344 (2010). Despite this, informal contributions are often disregarded. See Brito, Nonmarital Fathers in Family Court, supra note 278, at 1887 (critiquing how legal actors consistently discourage fathers from providing in-kind support).

310. Nepomnyaschy & Garfinkel, supra note 309, at 344.

311. Id.; see also Randles, supra note 208, at 37, 80, 82–84 (describing how a fatherhood program provided participants with diapers, wipes, formula, and clothes, which the fathers liked because they could use these items to negotiate with mothers access to shared children); Brito, Nonmarital Fathers in Family Court, supra note 278, at 1890–91 (describing fathers' frustration when mothers obstruct visitation). Informal support is also correlated with greater closeness between children and fathers. See id. at 1886–87 (describing research that found a strong correlation between fathers' contribution of in-kind support and father–child closeness).

312. See Hatcher, Injustice Inc., supra note 293, at 54–55 (detailing the negative impacts of child support orders and enforcement on fathers); Leslie Joan Harris, Questioning Child Support Enforcement Policy for Poor Families, 45 Fam. L.Q. 157, 171 (2011) (discussing studies showing that "routine vigorous child-support-enforcement efforts applied to poor, absent fathers is not very effective at reducing childhood poverty, and it harms some children by reducing the amount of in-kind support they receive and by undermining their relationships with their fathers").

313. See Child.'s Bureau, HHS, How the Child Welfare System Works 5–6 (2020), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cpswork.pdf [https://perma.cc/X5FJ-GWDS] [hereinafter Child.'s Bureau, The Child Welfare System] (summarizing the steps of a family regulation case, including the removal of children from their homes).

314. See Child.'s Bureau, HHS, The AFCARS Report 1 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf [https://perma.cc/7MGV-R497] (reporting the placement of 206,812 children in foster care in fiscal year 2021).

and the children were disproportionately Black and Native American.[315] Married middle-class families enjoy considerable autonomy in how they raise their children.[316] Lower-income families and families of color do not.[317] Most investigations of abuse and neglect do not result in substantiated findings,[318] but the investigations and any ensuing interventions, to an even greater degree than state-initiated child support enforcement actions, deprive families of autonomy in managing their own affairs and often undermine a father's participation in the family.[319]

To begin, the state prioritizes child support payment over paternal caregiving. Both parents usually prefer that their children live with a parent rather than be in foster care.[320] And if children do enter foster care, the state is required to make efforts to reunify the child with a parent, including a parent who did not have custody of the child prior to the removal.[321]

But policies around child support too often thwart this goal of family integrity. Under federal law, after placing a child in foster care, a state agency is required—"where appropriate" and when doing so is in the child's best interests—to refer the case for child support enforcement

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315. See id. at 2 (showing 20% of the children entering foster care in 2021 were Black, and 2% were American Indian/Alaska Native); Youth (0 to 17) Population Profile Detailed by Age, Sex, and Race/Ethnicity, DOJ (Oct. 13, 2021), https://ojjdp.ojp.gov/statistical-briefing-book/population/faqs/qa01104 [https://perma.cc/WND3-7QZ6] (reporting that of the children under age 18, 15% are Black and 0.97% are American Indian).

316. See Samantha Bei-wen Lee, The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents, 41 N.Y.U. Rev. L. & Soc. Change 631, 649–50 (2017) (describing the challenges faced by poor families of color in the family regulation system as compared with the relative autonomy of wealthier, white families).

317. More than half of Black children are investigated by the child protective services before they turn eighteen. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, Lifetime Prevalence of Investigating Child Maltreatment Among US Children, 107 Am. J. Pub. Health 274, 278 (2017); see also Katharine K. Baker, Equality and Family Autonomy, 24 U. Pa. J. Const. L. 412, 443 (2022) (observing that "[s]tate agents tend to define the norm as something that resembles a white, middle-class life, and anything that deviates from that can be monitored because there is potential for harm" (emphasis omitted)).

318. See Child.'s Bureau, HHS, Child Maltreatment 2018, at 16–19 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf [https://perma.cc/S7R7-FM9A] (reporting findings that, in 2018, only 16.1% of investigations found substantiated maltreatment).

319. See S. Lisa Washington, Survived & Coerced: Epistemic Injustice in the Family Regulation System, 122 Colum. L. Rev. 1097, 1120 (2022) (concluding that in practice, Child Protective Services "is a punitive, intrusive, and disempowering surveillance system").

320. See Chris Gottlieb & Martin Guggenheim, New York's Unconstitutional Treatment of Unwed Fathers of Children in Foster Care, 46 N.Y.U. Rev. L. & Soc. Change 309, 361 (2022) (stating that the "interests [of mothers and fathers] are likely to be aligned against the state on issues of family integrity").

321. Restatement of Child. & the L. § 2.50 cmt. s (Am. L. Inst., Tentative Draft No. 4, 2022) ("The state must make reasonable efforts with both parents, regardless of whether the parent had custody of the child before the removal.").

against the parents, with the goal of the parents paying for the cost of foster care.[322] The law leaves considerable discretion to states, and there are exemptions to the referral requirement, but most states have not provided guidance on which cases to refer.[323] Often, the father already has a child support order in place, and thus the referral only changes the recipient from the other parent to the state.[324] But some states penalize fathers in other ways. In New York, for example, a court may terminate the parental rights of a parent who has not paid child support, freeing the child for adoption.[325] The court may do so even if the parent has been engaged and wants custody of the child.[326] In practice, these child support collection efforts are directed only at unmarried fathers.[327] In these ways, the family regulation system treats fathers as only breadwinners, not capable caregivers, and the failure to provide economically can mean the end of the father–child relationship.

Even worse than treating a father as an incompetent caregiver, the family regulation system often treats fathers as a threat. When the state investigates allegations of child abuse and neglect, it often resolves complaints by coercing mothers to separate from partners the state may regard as a safety risk and obtain an order of protection; this keeps the father away from the family, even when mothers have good reason for

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322. 42 U.S.C. § 671(a)(17) (2018); see also Child.'s Bureau, Child Welfare Policy Manual: 8.4C Title IV-E, General Title IV-E Requirements, Child Support, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170 [https://perma.cc/8EPW-J9NA] (last visited Aug. 8, 2024) (noting that Title IV-E agencies are also required to take steps to secure child support for children placed in foster care); John Sciamanna, Less Than 2 in 5 Children Now Covered by Federal Foster Care Funding, https://www.cwla.org/less-than-2-in-5-children-now-covered-by-federal-foster-care-funding/ [https://perma.cc/UNC7-AZM4] (last visited Aug. 8, 2024) (noting that in 2020, approximately 40% of children in foster care were Title IV-E eligible). For a detailed discussion of this practice, see Hatcher, Injustice, Inc., supra note 293, at ch. 3.

323. See Jill Duerr Berrick, Imagining a New Future: Elimination of Child Support Obligations for Child Welfare-Involved Families, 16 J. Pub. Child Welfare 295, 297 (2022) (noting that "fewer than five states" provide "explicit criteria" for offering child support exemptions to parents with children in foster care).

324. Id. at 296 ("[A] large proportion of non-custodial parents already have child support orders established; in these cases, child support obligations normally distributed to the custodial parent are re-directed to the state to offset the cost of care." (citation omitted)).

325. See Gottlieb & Guggenheim, supra note 320, at 313 (citing N.Y. Dom. Rel. Law § 111(1)(d) (McKinney 2021)) (explaining that the state may terminate parental rights and place a child for adoption over the objection of an unmarried father who has failed to pay child support).

326. See id. ("[T]hough they are the biological parents and have been understood and treated as such by all parties involved in the cases, they do not count as 'parents' for legal purposes.").

327. See id. at 317–18, 356, 358 (describing how social services agencies in New York require child support payments from unmarried fathers, but not from mothers or married fathers of children, in foster care).

wanting fathers' continued involvement with children.[328] Domestic violence investigations, for example, serve as a double-edged sword. Women and girls, especially Black women and girls, who face threats of violence and abuse have historically been underprotected.[329] Mandatory reporting, arrest, and prosecution laws, often enacted in response to complaints of underprotection, however, may override the survivor's preferences about appropriate responses.[330] Survivors may face threats of child removal when they do not comply with child-protective demands, which often include insistence that the mother leave an abusive partner, obtain a protective order, and cooperate with law enforcement.[331] Failure to comply may result in charges that the survivor lacks "insight" into their circumstances, posing a danger to children.[332] The system thus puts unproductive and potentially harmful pressure on women to leave men, even when the mother believes that it would be better for her and the children for the family to stay together or for the children to have ongoing contact with the father if the parents separate.[333]

The state's overresponse is especially problematic given the circumstances of lower-income families. An increased incidence of violence correlates with lower socioeconomic status.[334] This violence, which includes a greater incidence of intimate partner violence and more frequent use of corporal punishment,[335] can vary considerably in severity,

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328. See Kelley Fong, Investigating Families 119–23 (2023) (describing a case in which a mother was told to stop seeing an abusive man or lose her children); Washington, supra note 319, at 1138 (describing a family regulation case in which the mother had good reasons for wanting the continued involvement of her partner with the children and observing the coercive efforts made by the agency to break up the relationship).

329. See Washington, supra note 319, at 1117 (highlighting the "legacy of underprotection and targeting of Black women and girls by the criminal legal system").

330. Id. at 1118–19.

331. See Fong, supra note 328, at 119–21 ("[Child Protective Services (CPS)] had [a mother] sign a 'safety plan' stating that she would not allow [her male partner] . . . to have contact with her children."); Shanta Trivedi, Mandating Support for Survivors, 30 Va. J. Soc. Pol'y & L. 85, 92–93 (2023) ("CPS, rather than recognizing [the reason a survivor may not want to leave their partner] and trying to assist, tries to force survivors to leave by threatening to or actually removing . . . their children if they fail to comply.").

332. Fong, supra note 328, at 123–31; Trivedi, supra note 331, at 93.

333. See Washington, supra note 319, at 1120 ("[C]ourts do not interrogate the cycle of coercion and its impact on a survivor's progress or reliance on state actors.").

334. See Deborah M. Weissman, Gender Violence, the Carceral State, and the Politics of Solidarity, 55 U.C. Davis L. Rev. 801, 846–47 (2021) ("[D]ecades of research demonstrate the causal relationship between economic inequality and instability, and domestic violence."); supra text accompanying note 183.

335. For sources describing the use of corporal punishment, including by lower-income parents and parents of color, see Pew Rsch. Ctr., Parenting in America: Outlook, Worries, Aspirations Are Strongly Linked to Financial Situation 45–48 (2015), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf [https://perma.cc/Q79Q-M24J]; Regina A. Corso, Four in Five Americans Believe Parents Spanking Their Children Is Sometimes Appropriate, PR Newswire (Sept. 26, 2013), https://www.prnewswire.com/news-releases/four-in-five-

frequency, and dangerousness.[336] Mainstream norms, which are less tolerant of any violence, and stereotypes of lower-income men and men of color as dangerous, contribute to the dismissal of survivors' preferences,[337] reinforcing beliefs that the survivors favor the men over their children.[338] The law thus discounts the many reasons a survivor may prefer not to leave a partner, including partners who have engaged in violence.[339] Judgments about the appropriate responses to intimate partner violence have been difficult and contentious, and it is well-documented why many victims fail to support mandatory prosecution approaches.[340] Threatening to take children away from a victim as a way of coercing the breakup of family relationships further undermines family autonomy and increases the fragility of father involvement.

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americans-believe-parents-spanking-their-children-is-sometimes-appropriate-225314281.html [https://perma.cc/8NGK-VASC].

336. See, e.g., Peter G. Jaffee, Janet R. Johnston, Claire V. Crooks & Nicholas Bala, Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans, 46 Fam. Ct. Rev. 500, 500–01 (2008) (describing variations in types of domestic violence and potential responses); Joan B. Kelly & Michael P. Johnson, Differentiation Among Type of Intimate Partner Violence: Research Update and Implications for Intervention, 46 Fam. Ct. Rev. 476, 490–93 (2008) (describing negative effects of intimate partner violence on children and potential responses). But see Joan Meier, Differentiating Domestic Violence Types: Profound Paradigm Shift or Old Wine in New Bottles?, Fam. & Intimate Partner Violence Q., Summer 2018, at 7, 12 (advising courts and practitioners to avoid the differentiation typology due to its scientific uncertainty and ability to minimize domestic violence).

337. See, e.g., Nicholson v. Williams, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002) (reviewing challenges to the practice of summarily removing children from abused parents and observing that "[t]he pitiless double abuse of these mothers is not malicious, but is due to benign indifference, bureaucratic inefficiency, and outmoded institutional biases"); Weissman, supra note 334, at 856 (discussing the practice of removing children from non-abusive parents when a parent was thought to have engaged in domestic violence).

338. See Fong, supra note 328, at 119–31 (discussing cases in which CPS punished women for allegedly prioritizing their intimate relationships over their children); Washington, supra note 319, at 1121, 1141 ("The overarching narrative about those who have experienced domestic violence is that they are weak, that they are 'bad mothers,' and that they favor their partner over their children.").

339. See Trivedi, supra note 331, at 93 (listing such reasons, including that the woman loves the partner, the partner is a good parent, and the woman cannot afford to leave or has nowhere else to go).

340. See, e.g., Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katafiasz & David Martin, "Meet Me at the Hill Where We Used to Park": Interpersonal Processes Associated With Victim Recantation, 73 Soc. Sci. & Med. 1054, 1054 (2011) (suggesting that as many as 80% of IPV victims recant or refuse to cooperate with criminal prosecutions); Leigh Goodmark, Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like, 27 Violence Against Women 84, 85–92 (2021) (arguing that criminalization of domestic violence has been ineffective and arguing for alternative approaches); G. Kristian Miccio, A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement, 42 Hous. L. Rev. 237, 295 (2005) ("Criminalization does not address battered women's need for housing and economic or emotional support."); id. at 245–46 (discussing mandatory arrest and prosecution policies).

Finally, the family regulation system does not provide the support that many families need. The system mandates services for most families,[341] but these services are often unwanted, unhelpful, and not matched to the family's needs.[342] In this way, the family regulation system does not help strengthen families.

## IV. ADAPTING FAMILY LAW: FROM ISOLATION TO INCLUSION

If family law, which often involves heavy-handed state interventions insensitive to community norms, contributes to the isolation of fathers without college degrees, why might family law offer a way to greater inclusion? The answer lies with the reinvention of family law institutions. As described in the previous Part, this reinvention is already underway for relatively well-off couples.[343] The goal is to extend the more successful parts of family law to fathers on the periphery of family life. This requires new institutions built on the principles that represent the best of the transformations to tenBroek's private system of family law: parent-driven decisionmaking that allows parents to reach their own decisions, the identification of family needs and a connection to services, respect for community values, and personnel in tune with parents' values and circumstances and community norms.[344]

To be clear, there should also be a much more ambitious structural response to the social and economic isolation of boys and men. A comprehensive response should rebuild the pathways from childhood to an adulthood with secure employment and stable families.[345] It would

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341. See Restatement of Child. & the L. § 3.20 (Am. L. Inst. Tentative Draft No. 5, 2023) (describing various services a family court may order).

342. See Fong, supra note 328, at 132–61 (describing the coercive and ineffective "help" offered by state agencies). This is also true in cases involving intimate partner violence. See Miccio, supra note 340, at 295 ("Criminalization does not address battered women's need for housing and economic or emotional support."); Washington, supra note 319, at 1102 (describing unwanted domestic violence victim counseling).

343. See supra section III.B.1.

344. See Mary S. Marczak, Emily H. Becher, Alisha M. Hardman, Dylan L. Galos & Ebony Ruhland, Strengthening the Role of Unmarried Fathers: Findings From the Co-Parent Court Project, 54 Fam. Process 630, 637 (2015) (arguing that this kind of approach "attend[s] to some of the intersecting societal and structural barriers that parents, and particularly fathers, contend with that may hamper their ability to successfully co-parent together and be meaningfully involved in their children's lives").

345. For examples of book-length explorations of the problems and needed reforms, see, e.g., Dowd, Reimagining Equality, supra note 55, at 66–78 (explaining the role developmental inequality in creating disparate economic outcomes); Maxine Eichner, The Free-Market Family 142–46 (2020) (arguing that, across economic classes, market forces have negatively affected American families); Isabel Sawhill, The Forgotten Americans 67–69 (2018) (arguing that a focus on family stability would, in part, positively affect income growth in middle-class households). The broader context is also important because it frames family court adjudications. See generally Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, The Institutional Mismatch of State Civil Courts, 122 Colum. L. Rev. 1471 (2022) (maintaining that although state civil courts are designed for dispute

address the need for greater material support for moderate- and low-income families with young children, school policies and practices that disadvantage boys, the lack of stable employment opportunities for men without college degrees, and mass incarceration.[346] And it would reduce unplanned pregnancies.[347] We have both written about this broader agenda,[348] but this Part focused on the particulars of family law, proposing reforms that encourage active fatherhood and are rooted in family law's

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resolution, the courts "have become emergency rooms because people's social needs remain unmet").

346. To elaborate on one of these points—employment prospects—there is no dearth of proposals to improve employment and stabilize income. The most effective approaches would address these issues in a comprehensive way. A public jobs program, for example, would guarantee employment to anyone who seeks it. See Stephanie Kelton, The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy 63–64 (2020) (arguing for a federal job guarantee that establishes a "public option in the labor market" that would provide a job for anyone seeking employment). Universal basic income—that is, cash grants that would provide a cushion for all families—would ensure income stability for families. See Anne L. Alstott, Work vs. Freedom: A Liberal Challenge to Employment Subsidies, 108 Yale L.J. 967, 971–72 (1999) ("A program of unconditional cash grants would enhance the freedom and economic security of the least advantaged."). Programs such as the Earned Income Tax Credit (EITC) could be redesigned so lower-income nonresidential parents could earn a sizeable cash award for working, just as the program currently does for lower-income residential parents. See Huntington, supra note 56, at 234–35 (proposing an EITC for noncustodial parents and describing promising pilot programs that do so). And other approaches might embrace family allowances or tax credits tailored to support the ability of both residential and nonresidential parents to provide economic support for children. See, e.g., Jacob Goldin & Ariel Jurow Kleiman, Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs, 131 Yale L.J. 1719, 1757–62 (2022) (discussing the trade-offs in designing such a program).

347. A significant difference between the relatively stable relationships of college-educated families and the more unstable relationships of lower-income couples is the dramatically higher rates of unintended pregnancy among the latter group. See Unintended Pregnancy in the United States, Guttmacher Inst. (Jan. 2019), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states [https://perma.cc/P7PF-QTQZ] (finding unintended pregnancy rates to be highest among low-income women and lowest among college graduates and married women). Couples who "drift into" parenthood are less likely to stay together. Isabel V. Sawhill, Generation Unbound: Drifting Into Sex and Parenthood Without Marriage 105–06 (2014). When lower-income women delay childbearing into their mid- to late twenties, they are more likely to find a stable partner with greater economic prospects. Cf. Bzostek et al., supra note 191, at 829 tbl.3 (finding that, of the mothers in the FFCWS, 31.8% of the unmarried mothers found subsequent partners with higher levels of education and income than the biological father).

348. See Carbone & Cahn, Marriage Markets, supra note 16, at 141–82 (presenting solutions to economic challenges, noting that "either we need a greater societal commitment to greater employment security . . . or we need greater societal provision for children whose parents cycle into and out of increasingly unstable relationships"); Huntington, Failure to Flourish, supra note 31, at 145–202 ("[T]he state should actively encourage the development of strong, stable, positive relationships within the family . . . [by] recognizing a broader range of families, encouraging a long-term commitment between parents, altering the physical context for family life, and supporting parents in their critical child-development work . . . .").

shift toward nonadversarial procedures and supportive services. The proposals will not solve the crisis facing men and boys, or end the impact of that crisis on families, but they do offer a way to mitigate the isolation of fathers in their families.

### A. *Reconnecting Fathers and Children*

Unmarried parents would benefit from the same approach that married parents currently enjoy: a move away from an adversarial, zero-sum model to a more holistic, supportive system that helps divorcing couples transition into a postdivorce family with two engaged parents.[349] Given the challenges facing lower-income families, including the greater incidence of intimate partner violence,[350] mental health issues,[351] and problems related to substance use,[352] the reforms need to incorporate a broad array of services and practices designed to ensure safety and diffuse conflict. The services should also contribute to remaking the images of unmarried fathers, who have been dismissed as "deadbeats" because of outmoded stereotypes tied to the role of marriage and fathers' breadwinning roles.[353]

The most important needed change is a new institution. A principal advantage of nonmarriage is the ability of couples to stay out of court.[354] Rather than bringing these families into court,[355] the solution instead is to

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349. See supra section III.B.1.

350. See supra note 183 and accompanying text.

351. See Young-Mee Kim & Sung-il Cho, Socioeconomic Status, Work–Life Conflict, and Mental Health, 63 Am. J. Indus. Med. 703, 703 (2020) (reporting that people of the lowest socioeconomic status are two to three times more likely to experience a mental illness than those of the highest socioeconomic status).

352. See Baptiste-Roberts & Hossain, supra note 15, at 120 (finding that among those who reported using alcohol and drugs, low-income users were more likely to have problems due to substance use disorder).

353. See Brito, supra note 278, at 1871, 1878 (describing the many ways low-income fathers, and especially low-income fathers of color, are portrayed as irresponsible fathers willfully shirking economic responsibility for their children—encapsulated in the common derogatory term "deadbeat"); Marczak et al., supra note 344, at 637 (emphasizing the importance of messaging that "affirms the value of the father above and beyond monetary contribution and emphasizes the inherent worth in the relationship between father and child").

354. See Carbone & Cahn, Triple System, supra note 244, at 1211 ("[T]oday's working-class families enjoy their greatest autonomy by staying out of court.").

355. See Spinak, supra note 52, at 278–80 (describing the problematic history of family court trying to solve problems for children and families rather than resolve only factual and legal disputes, and arguing that courts should do only the latter). Scholars who examine the judicial role in an era of inequality add further that state civil courts generally "are institutions where people bring their social needs more than their disputes." Shanahan et al., supra note 345, at 1474. Given the failure of the executive and legislative branches to create more support for families, courts have to address social needs when "they cannot decline the cases presented to them," but courts are ill-equipped to do so. Id.

The problems with family court are one reason this Essay does not propose a program providing counsel for indigent fathers. Not only would such a program be

create state-funded, community-based centers that provide a range of services that include support for parenting partnerships.[356] These centers would operate apart from the legal system, and participation would be voluntary.

1. *Guiding Principles.* — We propose several principles to guide an approach to bring men in from the periphery of family life. Each draws on the revolution within divorce processes that accelerate the move away from adversarial family law processes to supportive ones, and each is designed to address the isolation of men from their families.

The first principle is gender equality. As noted at the outset, the goal is not to recreate patriarchy, and this Essay opposes legal rules and processes that impose men on women without women's ongoing consent.[357] This Essay's approach is to draw men back into family life while also promoting gender equality and relationships premised on equal respect. To this end, it is essential to build a relationship foundation between parents that supports a cooperative parenting relationship. The proposals are designed to help couples find a way to work together and to embrace shared parenting norms, where feasible and safe for all parties.[358] As discussed below, this means addressing the reasons why women often find men to be unreliable partners.

A second and related principle is parental autonomy. The goal is for parents to work out their own settlements, including settlements a court could not order. This would bring the benefits of tenBroek's private system—with upper-income families enjoying a lawyer-directed system that gives litigants considerable autonomy in reaching resolutions that meet their needs—to the families historically in the public system or excluded from the family law system altogether.[359] It would also help support

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expensive, but it would also bring men into an institution that is unlikely to address the issues this Essay identifies.

356. See, e.g., Merle H. Weiner, A Parent-Partner Status for American Family Law 116–17 (2015) (discussing the legal treatment of "parent-partners").

357. Indeed, conservatives such as William Kristol have historically argued that women and men must be taught to "grasp the following three points: the necessity of marriage, the importance of good morals and the necessity of inequality within marriage," treating gender inequality within marriage as essential to family stability. Linda R. Hirshman, Against the Possibility of Equality, L.A. Times (Sept. 25, 1996), https://www.latimes.com/archives/la-xpm-1996-09-25-me-47370-story.html (on file with the *Columbia Law Review*).

358. See infra note 398 and accompanying text (discussing the importance of screening potential participants for intimate partner violence and making referrals to appropriate services).

359. See supra notes 238–239 and accompanying text. For an example of a proposal to do something similar in another area of family law, see Naomi Cahn, Clare Huntington & Elizabeth Scott, The 100-Year Life and the New Family Law, *in* Law and the One-Hundred-Year Life (Anne Alstott & Abbe Gluck, eds., forthcoming 2025) (manuscript at 19 n.35) (on file with the *Columbia Law Review*) (arguing that a family system that allowed older adults to tailor marriage or a registered relationship to their needs would help "break down the boundary between tenBroek's two systems of family law and give low-income families access to the benefits of the [private] system").

broader access to the terms of the new egalitarian relationships model: the dismantling of gendered roles of breadwinner and homemaker in favor of shared parenting, the shared assumption of responsibility for children, and flexible and reciprocal adult relationships.[360] In short, promoting parental autonomy for families shut out of family courts requires institutions that help the parties reach their own solutions.

The next principle is a focus on positive-sum outcomes. Allowing parents to realize the benefits of parent-directed agreements requires greater assistance for these parents to work through their disagreements. That, in turn, requires resources for addressing obstacles such as intimate partner violence, mental health challenges, substance use, and the trauma associated with economic precarity and discrimination. Family courts increasingly incorporate counseling services and alternative dispute resolution processes such as mediation, and so, too, should new institutions.[361]

The final principle is context-specific decisionmaking. This means that interventions must be community-based, with respect for differing community values and customs.[362] Community-based personnel are likely to be more sensitive to individual needs and less judgmental about failures to correspond to dominant expectations about family constitution and behavior.[363]

2. *The Principles in Action.* — To realize these principles, this section proposes the introduction of community-based multidisciplinary centers.[364] One model is the Australian family relationship centers:

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360. See supra notes 204, 252, 257, 344 and accompanying text.

361. See supra notes 263, 266 and accompanying text.

362. For a discussion of the advantages of a community-based approach, see Brustin & Martin, supra note 285, at 1291–92.

363. See Stacy Brustin & Lisa Vollendorf Martin, Paved With Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time, 48 Ind. L. Rev. 803, 846 (2015) (discussing the trust and understanding community mediators acquire through their work); Jane C. Murphy & Jana B. Singer, Moving Family Dispute Resolution From the Court System to the Community, 75 Md. L. Rev. Endnotes 9, 12 (2016), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1041&context=endnotes%20 [https://perma.cc/A2UA-EN4Y] ("Locating [family dispute] efforts in the community, rather than the court system, helps to normalize this reorganization process—recharacterizing it as a life-cycle challenge, rather than a quasi-criminal event that requires the full machinery of the state.").

364. As with other successful policy reforms, a useful approach begins with securing philanthropic funding for pilot programs and rigorous evaluation; if studies find the pilot programs effectively achieve the articulated goals at a reasonable cost, this evidence lays the groundwork for broader adoption using governmental funds. See, e.g., David L. Kirp, The Sandbox Investment 152, 157–58, 160–65, 174–78 (2007) (describing a similar trajectory for universal prekindergarten). In addition, various proposals to defund the police or abolish the family regulation system have considered alternative systems designed to address mental health crises and family support. The proposed family centers should be seen as alternatives to the public funding currently spent on ineffective and punitive social services. See, e.g., Casey Fam. Programs, Do Place-Based Programs, Such as Family Resource Centers, Reduce

community-based centers wholly outside the court system that combine family dispute resolution services with employment, counseling, and other assistance that meets families where they are.[365] There are also promising pilot programs in the United States, with smaller scale programs tailored to meet the needs of lower-income fathers and change the trajectories of their family involvement.[366] And other countries are beginning to realize the need for integrated job centers that combine wide-ranging services with employment assistance and wage subsidies.[367] The description in this section draws on these models.

The critical first step is encouraging unmarried fathers to walk through the door into the community-based centers. For lower-income couples, in particular, paying people for their time is an effective incentive, and subsidized employment opportunities or desired assistance in

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Risk of Child Maltreatment and Entry Into Foster Care? 4 (2019), https://www.casey.org/media/SComm_Family-Resource-Centers.pdf [https://perma.cc/XTH4-D2NV] (summarizing research on family centers and finding, for example, "that for every $1 invested in the Alabama Network of Family Resource Centers, the state of Alabama receives $4.70 of immediate and long-term financial benefits").

365. See Patrick Parkinson, Family Law and the Indissolubility of Parenthood 187–94 (2011) (describing the centers, including the goal of helping separating parents reach an agreement on parenting and further explaining the role of supportive services in helping separating couples address the barriers to parenting). Research demonstrates the successes of the centers. See Dale Bagshaw et al., Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006, at 51, 58–59, 120 (2010), https://www.researchgate.net/publication/277841058_Family_violence_and_family_law_in_Australia_the_experiences_and_views_of_children_and_adults_from_families_who_separated_post-1995_and_post-2006 [https://perma.cc/P2R5-KHAG] (describing the widespread use of Family Relationship Centres and that participants, especially men, find them helpful); Ctr. for Int'l Econ., Family and Relationship Services Economic Evaluation: Using Cost-Benefit Analysis to Assess the Value of Services 84 tbl.7.3, 94 tbl.8.2 (2023), https://frsa.org.au/wp-content/uploads/2023/09/CIE-Final-Report_FRSA_Family-and-Relationship-Services-Evaluation-11092023.pdf [https://perma.cc/9UTS-LYQT] (finding that Family Relationship Centres are cost effective and show high levels of satisfaction among participants, including a high level of agreement among participants that the centers helped the participants with the issues they brought); Lawrie Moloney, Lixia Qu, Ruth Weston & Kelly Hand, Evaluating the Work of Australia's Family Relationship Centres: Evidence From the First 5 Years, 51 Fam. Ct. Rev. 234, 235–36, 243–44 (2013) (finding that the introduction of centers increased families' access to counselling and mediation services; most separating families who used the centers' family dispute resolution services came to a parenting agreement that worked for both parents and children; and such agreements "tend to hold up in the medium term").

366. See Marczak et al., supra note 344, at 631, 634–35 (describing a pilot program that offered a full range of services and reporting results: an increase in co-parenting quality and time fathers spent with children).

367. See Barnsley Council & Pathways to Work Comm'n, Pathways to Work Commission Report 7–12 (2024), https://www.barnsley.gov.uk/media/opbpxxkz/bmbc-pathways-to-work-commission-report.pdf [https://perma.cc/D6D3-LZ8Y] (describing the success of a model in the United Kingdom that tailors services to individuals who could work but are not; emphasizing the need for a broad range of services, including physical and mental health services; and noting the importance of wage subsidies).

navigating family relationships can encourage participation ideally before a relationship ends.[368] These services can be varied, but in looking at the services that both support involved fatherhood and are attractive enough to encourage socially isolated fathers to come,[369] the services should include those described below.

*Employment services.* Employment enhances fathers' status, contributes to their self-esteem, and increases their ability to contribute to their children's lives.[370] Australia, which has developed comprehensive family services both in and outside of court, makes employment assistance, including referrals and coaching, integral to their family supportive services.[371] Most American states also provide employment assistance, whether as part of the child support services discussed above, or as part of other state-subsidized services.[372] These services cannot change the underlying economic shifts that have marginalized men without college degrees, but integrating employment assistance into family-focused centers would be a step in the right direction and may encourage fathers to come to the centers.[373]

*Dispute resolution.* Marriage has become, culturally and legally, a system that promotes two-parent involvement and enforces expectations that both parents will share parenting following dissolution of the adult relationship. The very strength of these expectations may contribute to decisions not to marry, particularly for women who view the fathers of their children as unlikely to assume a coequal parental role or, worse, having the potential to engage in behavior that threatens family well-being.[374] The

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368. See, e.g., Randles, supra note 208, at 84, 100, 102–03 (describing payment as an incentive for attending marriage education classes). The centers may complement or replace existing government activities, which would provide a potential source of funding.

369. See, e.g., Murphy & Singer, Divorced From Reality, supra note 243, at 131–32 (observing that the public has little awareness of existing community-based programs); see also Workforce Australia, Fam. Servs. Austl., https://familyservices.org.au/workforce-australia/ [https://perma.cc/HL82-E97J] (describing the "mutli-disciplined" Australian model of employment coaching coupled with tech literacy trainings).

370. Moreover, male unemployment is the "most important demographic risk factor" for intimate partner violence. Leigh Goodmark, Why Centering the Family Court System Won't Decrease Criminalization of Intimate Partner Violence—And Why That's a Problem, 30 Va. J. Soc. Pol'y & L. 56, 65 (2023) (quoting Jacquelyn C. Campbell et al., Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study, 93 Am. J. Pub. Health 1089, 1092 (2003)).

371. See Fam. Servs. Austl., supra note 369.

372. See, e.g., infra notes 422–424 and accompanying text.

373. See, e.g., Randles, supra note 208, at 74–75, 80–86, 187–88 ("[F]atherhood policies and programs should focus as much on supporting men's nurturance of their children as they do on promoting fathers' abilities to provide financially. . . . [F]inancial and emotional support are deeply interwoven in marginalized fathers' understandings of paternal provision."). Nonetheless, employment assistance should not be designed to undercut initiatives that emphasize fathers' caretaking roles.

374. See Carbone & Cahn, Triple System, supra note 244, at 1190–91, 1201–04 (describing the shift from "breadwinner husband and homemaker wife to a more complex

fact that cultural expectations with respect to shared parenting differ within and outside of marriage, however, does not mean unmarried parenthood should be seen as a single-parent model, culturally or legally. Indeed, unmarried relationships have shifted significantly from a model that assumed that men who failed to marry the mothers of their children forfeited a right to *any* parental role, to a new norm that assumes fathers should find ways to contribute to their children and remain part of their lives.[375] Unmarried parents do not necessarily expect equal involvement by both parents, but there is a growing norm and desire for some involvement.[376] Thus, the goal is not to impose the marital norm of shared parenting on unmarried parents but instead to help unmarried parents achieve the contact that they want. Unmarried couples, after all, differ most from married couples not in their desire to encourage two-parent involvement in their children's lives but in their ability to overcome the obstacles to that involvement.[377]

A major impediment to fathers' greater involvement with their children is the opposition of mothers. As described above, sometimes this opposition is because the mother has a new partner, and her relationship with him is easier if she keeps the father at bay; but often mothers are opposed because of concerns about the fathers' behavior, including substance use and violence, or because the father does not assist the mother in caring for the child.[378] More generally, a fraught relationship between the parents is a barrier to co-parenting.[379] Community-based centers can help parents identify these issues and decide how to

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partnership, in which both men and women seek partners likely to make comparable (if not identical) contributions" and how contingent, nonmarital relationships have proliferated for those who see their partners as "unreliable").

375. See supra text accompanying notes 292–294 (describing the expectations of child support regardless of marital status as well as the right—even if often unrealized—of unmarried fathers to see their children).

376. See supra text accompanying notes 196–203 (describing the paternal engagement of some unmarried fathers, especially unmarried Black fathers, when children are young); supra text accompanying notes 208–215 (describing the desire of both unmarried fathers and unmarried mothers for more paternal engagement in the family).

377. See Carbone & Cahn, Triple System, supra note 244, at 1222 (observing that "unmarried men have greater difficulty gaining access to formal custody orders, both because of the obstacles to establishing paternity and of using the legal system more generally").

378. See supra text accompanying notes 210–211.

379. See Randles, supra note 208, at 99–101 (describing how most participants in a fatherhood program say that their couple relationship with their children's mother is "nonexistent" and that they want help establishing a functional co-parenting relationship); see also Dale, supra note 267, at 339–40 (indicating that it is the "quality of family relationships that accounts for the positive association between joint physical custody and children's well-being" and that high levels of parental conflict require judicial interventions to protect children from the negative consequences).

proceed.[380] As described below, the centers will provide resources—including counseling and referrals to mental health and substance use treatment—that help parents address underlying issues.[381] The centers will also provide alternative dispute resolution (ADR) mechanisms that help parents find an arrangement that is acceptable to both parties.[382] Legal adjudication sets up a zero-sum enterprise in which one parent prevails over the opposition of the other.[383] By contrast, ADR allows the parties to retain greater control over the outcomes, assisting the parties in reaching their own settlements. Additionally, moving ADR out of the courts and into the community would allow parents to enlist the services of trained personnel who share their values.[384]

More specifically, to help parents decide custody and child support issues, the community-based centers could provide couples with a menu of options,[385] illustrating possible resolutions but not limiting parents to these options. These menus could build off the parenting plan templates that many states offer in family court.[386] Similarly, the centers could help parents access free technological tools that help parents co-parent.[387]

Managing the co-parenting relationship is an ongoing process, and the resolution of custody issues may require not only an initial agreement

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380. See Parkinson, supra note 251, at 187–88 (describing how relationship counseling in Australian family relationship centers allows parents to navigate conflict throughout a separation or an ongoing romantic relationship).

381. See infra text accompanying notes 389–395.

382. Providing ADR might also help couples in ongoing relationships. Australian family centers, which were created with a mandate to help strengthen families and prevent separation, nonetheless found that the most frequent use of their services was by separating parents. Moloney et al., supra note 365, at 236; cf. Merle H. Weiner, Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody, 2016 U. Ill. L. Rev. 1535, 1561 (arguing that "society should use other laws to create supportive parental relationships from the moment of a child's birth").

383. Access to greater resources also increases the ability to reach settlements. See, e.g., Shanahan et al., supra note 345, at 1488 ("People who can afford counsel are nearly four times more likely to settle divorce-related matters without involving the court in more than a ministerial fashion.").

384. See, e.g., Clare Huntington, The Institutions of Family Law, 102 B.U. L. Rev. 393, 441–42 (2022) ("Courts, formal dispute-resolution mechanisms such as court-based mediation, informal dispute-resolution processes such as community- and faith-based processes, and state and local agencies will each apply the same rules at times in significantly different ways.").

385. Cf. Naomi Cahn, Clare Huntington & Elizabeth Scott, Family Law for the One-Hundred Year Life, 132 Yale L.J. 1691, 1745–54 (2023) (describing a similar menu of options for older adults seeking relationship recognition outside of marriage or who wish to tailor marriage to their preferences).

386. See supra text accompanying notes 258–260.

387. See, e.g., Why Use FREE AppClose Over Paid Alternatives?, AppClose, https://appclose.com/why-use-appclose.html [https://perma.cc/5Q48-6YV8] (last visited Aug. 10, 2024) (describing a free app that offers tools such as secure communications, parenting schedules, expense tracking and reimbursement systems, pick up/drop off/swap days requesting, storage of important documents related to the child, and so on).

but also addressing subsequent disputes.[388] Accordingly, community-based family centers would provide parenting coordinators, currently available to divorcing parents, to help parents resolve subsequent disputes.[389]

*Counseling and referral services.* The best family court processes involve a form of triage: assessing a family's needs and then referring the family to the most appropriate form of dispute resolution and, if necessary, supplementary services.[390] Within divorce proceedings, supplementary tools include psychological evaluations, assessments of the capacity of parents, co-parenting counseling, individual counseling, and supervised visitation.[391] Even then, family law attorneys have commented that "[n]early every family appearing before family court could benefit from some of these services" and that "in some families, there is a dire need of significant educational and psychological resources in order to move in the direction of a functional relationship that will serve the best interests of the children."[392] Parents also need assistance addressing issues such as violence and substance use. Families at all income levels need these services, but the resources have historically been more limited for lower-income families.[393]

Accordingly, counseling services in community-based centers should emphasize the services needed to establish and maintain co-parenting relationships, including co-parenting education, relationship counseling, and mental health services.[394] Community-based counseling is more than a dispute resolution system; it is a complement to proactive efforts designed to reform or replace other forms of state intervention.[395]

*Adjudication.* Formal adjudication is unlikely to play a major role in creating more robust roles for fathers. Still, the ability to claim greater

388. See, e.g., Murphy & Singer, Divorced From Reality, supra note 243, at 37 (describing the change in family courts toward treating family disputes not as "discrete legal events" but as "ongoing social and emotional processes").

389. See supra note 266 and accompanying text (describing parenting coordinators).

390. See, e.g., Richard Altman & Jacqueline C. Hagerott, Court Triage System Is Redefining Success, One Family at a Time, Disp. Resol. Mag., Spring 2019, at 6, 7 (defining these elements of a family court triage system).

391. Susan J.S. Abramowich, Socioeconomic Bias in Family Court, Fam. Advoc., Winter 2022, at 38, 39; see also Schepard et. al., supra note 273, at 29 (describing how alternatives to litigation may maximize "families' collective emotional and economic welfare").

392. Abramowich, supra note 391, at 38, 39.

393. See, e.g., Murphy & Singer, Divorced From Reality, supra note 243, at 62–64.

394. Evaluations of Australian family relationship centers have found "that complex cases (involving issues such as domestic violence, drug and alcohol abuse and mental health) represented the bulk of the work in most" centers. Moloney et al., supra note 365, at 236; see also Marczak et al., supra note 344, at 637 (observing that "[i]t is often more difficult to coparent together when one is experiencing major stressors such as joblessness, homelessness, domestic violence, and substance abuse issues" and arguing that community-based centers need to tailor services to the needs of parents).

395. See Raymond C. O'Brien, Child Welfare Requires Adequate Remedial Services, 92 Miss. L.J. 107, 147 (2022) (proposing greater use of community-based prevention programs promoting intervention strategies for issues including intimate partner violence).

custody rights is important to resetting the norms of paternal involvement and addressing cases of one parent obstructing the involvement of the other after an agreement is reached. Ninety percent of unmarried fathers who are present at the time of a child's birth sign a voluntary acknowledgment of paternity that establishes legal parentage.[396] This means that the father has standing to seek custody and enjoy whatever presumptions state law confers on legal parents.

Community-based centers would make these rights more meaningful by helping fathers reach voluntary resolutions, formalizing the parents' agreement in writing, and helping the parents obtain services designed to make the co-parenting relationship functional. If fathers then choose to proceed to court, they would do so with this groundwork in place.

*Addressing intimate partner violence (IPV).* Given the high rate of IPV in all families and especially lower-income families,[397] it is critical that the community-based centers address family violence. Family courts have developed tools to address IPV, but like other dispute-resolution tools, they are significantly less available to lower-income couples. The tools include a screening system to distinguish couples with a history of IPV and for whom any form of contact is clearly inappropriate[398] from those couples who, with the right supports, could safely manage mediation or shared custody.[399] Supervised visitation is one such tool, providing a mechanism

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396. Cynthia Osborne & Daniel Dillon, Dads on the Dotted Line: A Look at the In-Hospital Paternity Establishment Process, 5 J. Applied Rsch. on Child., no.2, 2014, at 1, 8.

397. See supra notes 182–183 and accompanying text.

398. See, e.g., Linda Nielsen, Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements, 23 Psych. Pub. Pol'y & L. 211, 217 (2017) (maintaining that minor or isolated instances of domestic violence should not affect custody decisions and that the most damaging types of parental conflict involve "repeated incidents of violence between parents who have substantial psychiatric problems and personality disorders" (quoting Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Han, Lixia Qu & the Fam. L. Evaluation Team, Austl. Inst. of Fam. Stud., Evaluation of the 2006 Family Law Reforms 185 (2009))).

The Family Relationship Centres in Australia have been criticized for a failure to adequately screen for intimate partner violence. See, e.g., Bagshaw et al., supra note 365, at 5–6, 15–16 (finding that only 10% of the participants with a history of family violence had been screened out by the Family Relationship Centres and that participants reported problems, including an inability of staff to understand the nature and effects of family violence and an inability to respond to violent ex-partners); see also id. at 5–6 (noting that 40% of participants with a history of family violence did not disclose that violence, with some participants still satisfied with the outcome, while other participants were not and thought there should have been better screening measures in place).

399. For a discussion of how to tailor mediation screening and procedures to provide more appropriate treatment of cases involving domestic violence, see Mary Adkins, Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases, 22 Yale J.L. & Feminism 97, 99 (2010); see also Claudia Lanzetta, Mediation/Collaborative Law: Exploring A New Combination in Alternative Dispute Resolution in Cases of Divorce and Domestic Violence, 20 Cardozo J. Conflict Resol. 329, 342–43 (2019) (describing effective procedures for encouraging mediation in cases of domestic violence, including the elements described in the text); Nancy Ver Steegh, Yes,

for nonresident parents and their children to see each other while still addressing safety concerns.[400] Parenting plans are another tool, permitting paternal involvement in ways that minimize contact between parents and ensure contact is on terms acceptable to both parents.[401] These tools are already in use in court-administered family law cases.[402] Incorporating the tools into community-based settings would increase confidence in the processes, because unlike judicial adjudications, the community-based resolution would require the cooperation of both parents.

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In sum, community-based family centers would reinforce the norms of two-parent involvement that have remade the family-court based system. These centers would incorporate the best of the new procedures and empower parents to reach their own resolutions. Such practices would simultaneously eschew an approach that assumes that all families need to fit within a single model, recognize that shared parenting must be embraced rather than imposed to be effective, and reject the punitive approaches that often treat men as problems to be solved.

The effectiveness of these proposals requires reconsideration of how they fit together with the most oppressive parts of the existing system: the child support enforcement and family regulation systems. The next section turns to these issues.

### B. *Child Support*

Child support presents a conundrum. On the one hand, children need financial support. On the other hand, imposing formulaic child support obligations on low-income fathers with variable and limited income is often, as discussed above, mindlessly punitive and counterproductive, driving fathers away from their children and failing to generate meaningful economic support.[403] The solution is the same

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No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence, 9 Wm. & Mary J. Women & L. 145, 190 (2003) (reporting that "[v]iolent and nonviolent couples express equal levels of satisfaction with the mediation process").

400. See Leigh Goodmark, Achieving Batterer Accountability in the Child Protection System, 93 Ky. L.J. 613, 650 (2005) (recommending supervised visitation to maintain fathers' contacts with their children while parents complete counseling and other mandated interventions).

401. See Debra Pogrund Stark, Jessica M. Choplin & Sarah Elizabeth Wellard, Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform, 26 Mich. J. Gender & L. 1, 60 (2019) ("[T]he parenting plan should provide for clear boundaries and separation between the parents, and a time-sharing schedule that requires minimal communication between the parents and seeks to avoid direct parent–parent contact, but still provide stability and continuity in the child's life.").

402. See id. (detailing how court orders can delineate and enforce such parenting agreements).

403. See supra section III.C.

approach higher-income parents enjoy: greater ability to negotiate support terms.

For the last half century, the family law literature has acknowledged that parents who "bargain in the shadow of the law" engage in a variety of tradeoffs that balance custody and support.[404] Empirical evidence indicates that lower-income couples do the same thing.[405] The vast majority of custodial parents who do not have formal child support orders did not seek them because the other parent had no money or was already contributing; that is, the parties had worked out their own arrangements for custody and support.[406] In addition, much like the couples who bargain in the shadow of the law using lawyers, some custodial parents did not seek support because they did not want the involvement of the other parent—although this was a much smaller group.[407] By contrast, state-initiated child support actions, as discussed above, often impose child support obligations that fathers cannot pay and mothers do not necessarily want.[408]

A less formal, community-based system would allow parents to negotiate their own resolutions of child support disputes. These agreements would reflect a wide range of choices. For example, as many lower-income couples prefer,[409] the agreement could count in-kind contributions rather than only cash. The agreement could also give credit to the noncustodial parent for co-parenting work, including efforts short of overnight visits. If the noncustodial parent helped care for a child after school, for example, this could offset that parent's monetary obligations.[410] To be clear, both parents must agree to the child support arrangement.

Cases considering arbitration awards and mediated settlement of custody disputes provide a model for judicial deference to parent-determined outcomes on child support. In *Fawzy v. Fawzy*,[411] for example, the New Jersey Supreme Court held that arbitration decrees, including those resolving child custody disputes, could be set aside only upon a

404. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 964–66, 968 (1979) (explaining that parents may privately trade custody for support in ways that the legal system may not approve).

405. See supra text accompanying notes 307–312.

406. See supra text accompanying note 308.

407. See Grall, supra note 308, at 8 fig.4 (indicating that 16.9% of custodial parents did not have a child support order because they did not want contact with the other parent)

408. See supra text accompanying notes 307–312.

409. See supra text accompanying notes 308–311.

410. For a discussion of a similar proposal, albeit within the formal child support system, see Laura Lane-Steele, Working it Off: Introducing a Service-Based Child Support Model, 17 U. Pa. J L. & Soc. Change 163, 175 (2016) (proposing a "service-based support program" in which "low-income noncustodial fathers" can meet their child support obligations by assisting in ways the custodial parent determines is needed, earning hourly credits towards a target number of hours, rather than through cash payments).

411. 973 A.2d 347 (N.J. 2009).

showing of "adverse impact or harm to the child."[412] Similarly, in *In re Lee*,[413] the Texas Supreme Court held that where a couple reached a mediation resolution of their child custody dispute, the trial court could not conduct an open-ended best interest inquiry in deciding whether to accept the settlement but instead required evidence that "a child's welfare [was] in jeopardy" in to order to reject the agreement.[414]

Courts generally must justify departures from child support guidelines in writing but in fact tend to approve agreements in which both parties are represented by lawyers and reach their own settlements.[415] The same consideration should be extended to lower-income families who reach an agreement through community-based mediation. That is, couples who use services to reach agreements about custody and support should enjoy the same presumption in favor of their agreements.

This raises the question of the relationship between community-based resolutions and court orders. In addition to helping parents reach agreements, centers should help the parties resolve subsequent disputes. The couples should be able to formalize their agreements the same way other parents formalize parenting plans—and the parties ought to be able to specify a dispute resolution mechanism. For example, parenting plans today often include a provision for a parenting coordinator;[416] a comparable provision would specify that the parents must use community-center dispute resolution processes before going to court. And if the parties go to court, these agreements should have the same status as any other mediated settlements.[417]

Finally, family law should sharply curtail state-initiated child support actions. It is important to acknowledge that "welfare as we knew it," that is, the Aid to Families with Dependent Children (AFDC) program that supported low-income families, *has* been abolished and replaced with short-term awards, administered by states, designed to push parents off the

412. Id. at 361. But see Kelm v. Kelm, 749 N.E.2d 299, 301 (Ohio 2001) (holding that child custody disputes "cannot be resolved through arbitration," and noting that "[o]nly the courts are empowered to resolve disputes relating to child custody and visitation").

413. 411 S.W.3d 445 (Tex. 2013).

414. Id. at 458.

415. See, e.g., Raymond C. O'Brien, Child Support and Joint Physical Custody, 70 Cath. U. L. Rev. 229, 260 (2021) (discussing approval of parenting plans that involve deviation from state sanctioned child support guidelines, even where the parents agree to eliminate child support payments entirely to a parent with lesser income).

416. See supra note 266.

417. Resorting to the courts for enforcement, however, will still involve many of the same issues that discourage low-income couples from going to court under the existing system. For one thing, so long as the parental agreements remain informal, compliance with formal child support guidelines will not matter. Parties who wish to enforce such agreements, however, may encounter judges skeptical of deviations from child support guidelines or unwilling to enforce agreements that address exchanges between custodial contributions and monetary support that changes with the parents' circumstances, a factor particularly important for low-income couples with unstable income or employment hours.

welfare role entirely.[418] Given the effective disappearance of state support specifically designed to substitute for missing breadwinners, the original rationale for the AFDC program,[419] the justification for the use of the child support system to offset state expenditures has become almost entirely punitive. In the Medicaid context, for example, lower-income noncustodial parents are often required to offset state subsidies.[420] But a noncustodial parent whose co-parent has employer-provided health insurance, which the government subsidizes through tax deductions, has no obligation to repay the government for that subsidy.[421] In short, it is time to abolish the use of child support payments to extract money for state coffers altogether.

Consistent with this Essay's proposals, nascent reforms in this arena have begun to show promise. California, for example, amended its child support statutes in 2022 to suspend the accrual of obligations while a parent is incarcerated[422] and to give courts greater flexibility in determining ability to pay.[423] Some states now require that child support payments must pass through to a custodial parent who receives state support.[424] And at the federal level, in June 2023, the Biden Administration

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418. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (abolishing AFDC); Andrew Hammond, Welfare and Federalism's Peril, 92 Wash. L. Rev. 1721, 1732 (2017) (describing elimination of family assistance programs as "entitlement[s]" and the limited number of families who receive the modern iteration: Temporary Assistance to Needy Families).

419. See Cahn & Carbone, Uncoupling, supra note 224, at 42 (describing a change in the basis for assistance as the position of mothers changed from intrinsically dependent to capable of self-support).

420. See Vicki Turetsky & Diana Azevedo-McCaffrey, Understanding TANF Cost Recovery in the Child Support Program 20 n.12 (2024), https://www.cbpp.org/sites/default/files/1-3-24tanf.pdf [https://perma.cc/K8HX-8YE6] (noting that "[f]ederal law requires child support cooperation by custodial parents receiving . . . Medicaid"; further noting that "child support assignment to reimburse Medicaid costs is limited to medical support payments designated in a support order and does not apply to regular child support payments").

421. See How Does the Tax Exclusion for Employer-Sponsored Health Insurance Work?, Tax Pol'y Ctr., https://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work [https://perma.cc/Y2WW-Z4BB] (last visited Aug. 9, 2024).

422. See Cal. Fam. Code §§ 4007.5, 4054, 4058(b)(3) (2024).

423. See id. § 4058(b)(1).

424. See Child Support Pass-Through and Disregard Policies for Public Assistance Recipients, Nat'l Conf. State Legislatures (May 30, 2023), https://www.ncsl.org/human-services/child-support-pass-through-and-disregard-policies-for-public-assistance-recipients [https://perma.cc/N2EQ-LZUM] (describing the pass-through legislation in roughly half of the states but also noting that many states allow only a limited pass-through amount, such as $50, and that Colorado is the only state that allows 100% of the child support payment to go to a TANF recipient). While not perfect, bipartisan legislation was introduced into Congress in 2023, proposing greater pass-through of child support to families rather than the state. See House Approves Child Support Reform and Fatherhood Package, Women's Cong. Pol'y Inst., https://www.wcpinst.org/source/house-approves-child-support-reform-and-fatherhood-package/ [https://perma.cc/U5K9-46MW] (last visited Aug. 9, 2024).

renamed the federal Office of Child Support Enforcement to the Office of Child Support Services.[425] Rather than focusing on recouping welfare funds spent on a family, the office offers a range of services that support families so that both parents can help pay for children, including employment services and a focus on parental engagement.[426] These reforms are moving the law of child support in the right direction, even if they still fall far short of needed reforms.

### C. *The Family Regulation System*

Professor Dorothy Roberts and other scholars and advocates have led a movement to abolish the family regulation system.[427] The proposals described below would not dismantle the current system, but they would be a sea change, moving power out of courts and into the hands of families and communities for the majority of cases.[428] Given this Essay's focus on fathers, this section describes the proposals in terms of paternal engagement, but the proposals would also radically limit the family regulation system, to the benefit of the entire family.

An obvious reform is to decouple child support enforcement from the family regulation system. Fathers who have not paid child support should not lose parental rights simply for nonpayment.[429] And the state must work to reunite fathers with their children even if the father has not paid child support.[430] The harder reform is ensuring that fathers are engaged more broadly.

Consistent with this Essay's focus on increasing parental autonomy while also providing support to families, cases should be moved out of court and into the community. The community-based centers outlined above would play a central role in this new approach. The starting point is creating a screening system to identify the small minority of cases that

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425. Information Memorandum From Tanguler Gray, Comm'r, Off. of Child Support Servs., to State and Tribal IV-D Agencies (June 5, 2023), https://www.acf.hhs.gov/css/policy-guidance/name-change-office-child-support-services-ocss [https://perma.cc/LT9G-4VAW].

426. Id. ("[T]he child support program['s] . . . focus has shifted from recovering state public assistance costs to meeting the needs of the entire family. . . . The program recognizes that the family structure has changed, and it must serve the entire family to improve the financial and emotional support of children.").

427. See generally Roberts, supra note 44, at 289–303 ("We should be on a common mission to bring down all the regime's damaging extensions and to create a common vision for meeting human needs, preventing violence, and caring for children, families, and communities."); JMacForFamilies: Just Making a Change for Families, https://jmacforfamilies.org/ [https://perma.cc/CP9E-5UNH] (last visited Aug. 10, 2024) ("Just Making a Change for Families is a non-profit organization working to dismantle the family policing system while simultaneously investing in community support that keeps families together.").

428. See supra note 52.

429. See supra text accompanying notes 325–327 (describing this problem).

430. See supra text accompanying notes 322–327 (describing this problem).

involve serious allegations that threaten child well-being.[431] If substantiated, these cases may well require state intervention that removes children from the care of their parents.[432] Accordingly, these cases should stay in the court system. The family regulation system, however, tends to treat all allegations as potentially serious. It unnecessarily intervenes in families, either when no maltreatment has occurred or when interventions short of removal are likely to be effective.[433] Among the cases that deserve a different approach are situations that involve fathers: when the mother agrees that separation from her partner is unnecessary, when the mother wants to separate from the father but agrees that the children should have ongoing contact with the father, and when a nonresident father is overlooked as a potential custodian for a child.[434]

If the initial screening determines that family preservation is possible—as it should be in most cases—then the next step is to close the case, ending state surveillance of the family.[435] Families would receive a referral to the community-based centers for appropriate, voluntary

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431. Many states use a "differential response" model, which seeks to divert cases from the courts by identifying low-risk cases and referring these cases for voluntary services. See Differential Response, Child Welfare Info. Gateway, https://www.childwelfare.gov/topics/casework-practice/differential-response/ [https://perma.cc/AFS8-2BLS] (last visited Aug. 15, 2024). For a critique of this response, including its coercive elements, see Josh Gupta-Kagan, Toward A Public Health Legal Structure for Child Welfare, 92 Neb. L. Rev. 897, 937–41 (2014).

432. See Jane Waldfogel, The Future of Child Protection: How to Break the Cycle of Abuse and Neglect 124 (1998) (noting that about 10% of all family regulation cases involve child abuse or neglect severe enough to warrant criminal legal intervention).

433. See Lee, supra note 316, at 652 (discussing studies finding that one-third of children removed from their parents for alleged abuse were found not to have been maltreated at all and that the standards for maltreatment are so broad they can justify removal even when other responses are appropriate); see also Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004) (holding that in deciding whether to authorize state intervention in cases alleging neglect, the family court should "focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior").

434. See supra text accompanying notes 320–340. If the petition alleging child abuse or neglect does not name the father, the state must consider the father as a potential custodian for the child if the child is removed from the care of the mother. See Restatement of Child. & the L. § 2.45(a) (Am. L. Inst. Tentative Draft No. 6, 2024) ("If a court orders the removal of a child from the physical custody of a parent . . . , the court must order . . . (1) [the] temporary placement of the child in the care of a parent not named in the petition, if that parent is fit, available, and willing . . . .").

435. This response would be appropriate for at least two kinds of cases: cases diverted from agency investigation and slated for a differential response, and cases that are investigated and substantiated but not referred for court oversight. See Child.'s Bureau, The Child Welfare System, supra note 313, at 4 (describing the different paths for a case after it is "screened in"). It could also be appropriate for cases investigated and substantiated and which lead to court supervision but not the removal of children. For this latter set of cases, the community-based approach would replace court supervision. It is beyond the scope of this Essay to identify the specific cases and circumstances that would lead to a community-based response versus a judicial response.

services *for both parents*.[436] The centers would work with families to tailor support to the needs of the family.[437]

A new program in New York City—Family Enrichment Centers—provides a useful model for the community-based approach. Launched in 2017, these centers are based on a "primary prevention model," designed to create a welcoming space where families can obtain resources such as clothing and food donations, meet and develop relationships with other families and community members, and share knowledge with each other through programs such as "Parent Cafés," where parents come together in small, informal groups to discuss topics related to parenting and child-rearing.[438] These programs are run by community members rather than

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436. The centers would assist in designing plans that promote reunification. If two parents have been involved in caring for a child, the center would include both parents in the design of any resolution, taking seriously each parent's views on including the other parent in the child's life and any safety concerns each parent may have about the other. And if only one parent has been involved, the centers would work to find the other parent—likely the father—and engage him, too.

437. Cf. Huntington, Rights Myopia, supra note 52, at 681–82 (describing the role of family group conferencing in helping parents identify needed services).

438. NYC Admin. for Child.'s Servs., Family Enrichment Centers 1, https://www.nyc.gov/assets/acs/pdf/ocep/2024/feconepager.pdf [https://perma.cc/M9KM-8XB9] [hereinafter NYC Admin for Child.'s Servs., FEC One Pager] (last visited Aug. 10, 2024); Family Enrichment Centers (FEC), NYC Admin. for Child.'s Servs., https://www.nyc.gov/site/acs/about/fec.page [https://perma.cc/2KU4-FV7X] [hereinafter NYC Admin for Child.'s Servs., About FEC] (last visited Aug. 10, 2024). For other examples, see Family Resource Centers, S.F. Dep't Early Childhood, https://sfdec.org/family-resource-centers/ [https://perma.cc/3XU3-JZG9] (last visited Aug. 15, 2024) (describing San Francisco's community-based centers, which offer free assistance with child development and parenting skills, family wellness support, playgroups for parent-child bonding, support groups for parents and caregivers to develop strong peer relationships, and case management assistance for employment, housing, and health); Family Success Centers, N.J. Dep't of Child. & Fams., https://www.nj.gov/dcf/families/support/success/ [https://perma.cc/AFZ6-ZXF2] (last visited Aug. 15, 2024) (mapping New Jersey's free family centers that offer "child abuse prevention services to families" by providing information on child, maternal, and family health, economic self-sufficiency, housing services, parent-child activities, parental education, and so on); Texas Family Support Network, Tex. All. Child & Fam. Servs., https://tacfs.org/wp-content/uploads/2022/08/Texas-Family-Support-Network-2022.pdf [https://perma.cc/L6HW-AGFT] (last visited Aug. 10, 2024) (describing similar community-based family resource centers in Texas, created by the Texas Department of Family Protective Services, that offer parenting support, family development services, health and wellness activities, child development activities, and other services related to family wellness). Many of the centers and services offered by these cities take place in community organizations, such as the YMCA in the case of San Francisco, and involve programming led by and consisting of community members rather than professionals or government employees.

The Strong Communities model is another, even broader approach to strengthening families. See Gary B. Melton & Jill D. McLeigh, The Nature, Logic, and Significance of Strong Communities for Children, 3 Int'l J. Child Maltreatment: Rsch., Pol'y & Prac. 125, 126, 130–34 (2020) (describing the Strong Communities model of addressing the root causes of child maltreatment (high levels of parental stress and limited financial

professionals or government officials, and thus foster trust and bonding among community members.[439] And while the programs, which are relatively new, have yet to be studied on a comprehensive basis, preliminary indications are that they have positive effects, particularly in reducing rates of child abuse and neglect.[440] For many families, the immediate needs are financial support that allows the family to obtain stable housing, transportation to jobs and schools, and the ability to meet children's basic needs.[441] Reunification services that address mental health issues, substance use, parenting support, and domestic violence can then follow but are less likely to be effective in the face of homelessness or lack of basic resources.

Community members would staff the centers because these individuals can better help the parents determine needed services and appropriate resolutions than professionals removed from the family and the community.[442] Center staff could, for example, work with a parent who is experiencing intimate partner violence to determine what kinds of supports and protections that parent needs.[443] In this way, staff would help parents tailor interventions to individual circumstances in accordance with parental wishes and community values.[444]

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and social resources at the family and neighborhood level) by changing these conditions for all families in a neighborhood).

439. See NYC Admin. for Child.'s Servs., FEC One Pager, supra note 438, at 1. It is not clear whether social workers in the Family Enrichment Centers must report suspected child abuse, but the website does say the following: "There is no case management offered and participation is not tracked . . . by [the city child welfare agency]. Providing names, address and other identifying information is optional and not needed in order to participate in or visit an FEC. FEC participation is voluntary and open to all community members." See NYC Admin for Child.'s Servs., About FEC, supra note 438.

440. See Casey Fam. Programs, supra note 364, at 4 (summarizing research on family centers and finding that the results are consistently positive and cost-effective). One of the most dramatic studies reported a 45% reduction in cases of child abuse and neglect in Alachua County, Florida. Id.

441. See Marczak et al., supra note 344, at 637 ("It is often more difficult to co-parent together when one is experiencing major stressors such as joblessness, homelessness, domestic violence, and substance abuse issues.").

442. See Casey Fam. Programs, supra note 364, at 3 (describing the welcoming nature of centers staffed by community members that can help identify and support diverse family needs).

443. For a discussion of a different approach to intimate partner violence, which prioritizes therapeutic interventions and batterer prevention programs, see Michal Buchhandler-Raphael, Overmedicalization of Domestic Violence in the Noncarceral State, 94 Temp. L. Rev. 589, 612–14 (2022).

444. Cf. Shanta Trivedi & Matthew Fraidin, A Role for Communities in Reasonable Efforts to Prevent Removal, 12 Colum. J. Race & L. Forum 29, 40 (2022), https://journals.library.columbia.edu/index.php/cjrl/article/view/9470/4837%20 [https://perma.cc/KS2C-WCEW] (describing a prevention initiative that used community facilities to work with families and arranged direct support for families); Rise Identifies Policy Priorities: Child Care, Mandated Reporting and Mental Health Supports, Rise Mag. (Feb. 15, 2022), https://www.risemagazine.org/2022/02/rise-identifies-policy-priorities/

Given the history of unhelpful services forced on families, it is critical that the services are both desired and effective. In all this work, fathers—including fathers accused of misconduct[445]—should have access to supportive services to promote their success.[446] Although this Essay proposes that this community-based work replace coercive state intervention in most cases, if cases are not closed, the centers could play a complementary role to the family regulation system, ideally mitigating some of its harm. For example, if there is an ongoing court case, the centers could provide a mechanism for determining when conditions have been met, such as the completion of mandated therapy, and could provide supervised visitation while the reunification process is underway.

It is also critical that the community-based centers not further the surveillance efforts of the family regulation system. One essential issue to address, then, is the conditioning of federal foster care funds on states enacting mandated reporting laws, which requires specified professionals, including social workers, to report suspected cases of child abuse or neglect.[447] To ensure that staff members in the centers are there only for support and not to play the dual role of also reporting parents,[448] it may be necessary for states to develop exceptions to mandated reporting laws for staff working in the community-based centers.

Community-based centers are not a cure-all for the significant problems of the family regulation system, which overwhelmingly polices and punishes mothers. But consideration of the often-pernicious effect of state intervention on family integrity, including the involvement of fathers, is an important step in protecting the parent-child relationship and

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[https://perma.cc/988Z-GFYK] (describing the kinds of services families in the family regulation system identify as needed, including childcare and mental health supports).

445. Misconduct should not include the failure to provide support. See, e.g., In re Amanda N., 112 N.Y.S.3d 490, 490 (App. Div. 2019) (addressing rights of fathers who have an established relationship with a child in foster care but who have not paid support); Gottlieb & Guggenheim, supra note 320, at 357 (recommending that a New York law remove the failure to provide child support as a basis for terminating parental rights).

446. See generally Gottlieb & Guggenheim, supra note 320, at 358–60 (indicating that social services agencies routinely discriminate against fathers in foster care arrangements and suggesting reforms). There should be no presumption against fathers simply because of lack of an existing relationship with the child, and thus the needed services might include assistance with paternity establishment and services that prepare the father to be a caregiver, as is done for third-party foster caregivers. See id. at 357 (describing how fathers whose children are in foster care can meet the standard for assuming custody).

447. See Child.'s Bureau, HHS, Mandatory Reporting of Child Abuse and Neglect 2 (May 2023), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/manda.pdf?VersionId=Gm9t7CW5XdPolnEMHHR3wCnsw782WZQ1 [https://perma.cc/DGB6-3N9G].

448. See Mandated Supporting, JMACForFamilies, https://jmacforfamilies.org/mandated-supporting [https://perma.cc/2SWK-RAP6] (last visited Aug. 11, 2024) (advocating for "mandated supporting," not mandated reporting, as the "mandated supporting framework seeks to center families through equitable, harm reductionist, and anti-racist practices, while divesting from systems of surveillance and punishment").

helping families to navigate preventable difficulties. Channeling at least some of the resources currently spent on the family regulation system to the community-based centers would further these goals.

## CONCLUSION

Since Jacobus tenBroek posited the dual system of family law in the mid-1960s, there has been both radical change and considerable stasis. Extensive legal reforms to the private system, which governs disputes in relatively well-off families, reflect and encourage the new norm of parents sharing financial and caregiving responsibility for children.[449] Dispute-resolution processes help create a foundation for an ongoing family that survives the dissolution of the adult union. Family courts encourage parents to create such a foundation together and give them considerable autonomy in doing so. By contrast, the public system of family law, which governs state-initiated actions that affect lower-income families, still treats the family as it did in the 1960s: It assumes that fathers should take responsibility for their families' financial needs and judges them in accordance with their success in doing so. And as it did in the 1960s, the public system continues to rob families of autonomy and place counterproductive and anachronistic emphasis on the financial contributions of lower-income men.

The problem is that the changes to the private system of family law are legally and practically beyond the reach of the men increasingly on the losing end of the new economy. And the inability of these men to access the private system contributes to the marginalization of fathers and their exclusion from supportive family life. The public system of family law is not only ineffective and unjust, but it also exacerbates the challenges lower-income men face if they try to embrace the new mainstream norms of cooperative parenting.

The proposed solutions bring the advantages of the private family law system to a much broader range of families. These solutions seek to increase the capacity of families to reach cooperative solutions that make shared parenting possible after dissolution of an adult relationship. They also seek to eliminate the punitive components of the public system, which are tied to outdated notions that treat financial contributions as a prerequisite for assumption of the paternal role and view child poverty as a consequence of fathers' failings. This Essay foresees a new family law

449. See supra text accompanying notes 250–268. These changes reach further than what this Essay addresses. As June Carbone and Naomi Cahn have argued elsewhere, the new values include investment in the capacity of girls and boys to generate income and the systematization of reproductive autonomy in ways that make emotional maturity and financial security a precondition for childrearing. See Carbone & Cahn, Marriage Markets, supra note 16, at 111 (describing the new upper-middle-class model as one that defers marriage and childbearing until after couples "achieve emotional maturity and financial independence" and have either "established earnings or high measures of the trust and the flexibility [necessary] to manage changing financial fortunes").

model, rooted in supportive community centers, that empowers parents to reach and enforce agreements that commit both partners to their children's futures—on terms both parents can accept.

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